

STATE OF NEW HAMPSHIRE

To: New Hampshire Election Officials

From: William M. Gardner, Secretary of State
Gordon J. MacDonald, Attorney General

Re: New Hampshire Supreme Court Orders SB 3 to Remain in Effect for the November 6, 2018
General Election

Date: October 26, 2018

Pursuant to the attached Order issued by the New Hampshire Supreme Court today, the injunction on Senate Bill 3 that was issued earlier this week has been lifted. Senate Bill 3 will remain in effect through the November 6, 2018 General Election. Local election officials must conduct the General Election consistent with prior elections held under Senate Bill 3 and the training you have received from the Secretary of State's Office.

Local election officials must continue to use the current Senate Bill 3 registration forms for voters seeking to register prior to Election Day and on Election Day.

Any questions should be directed to Deputy Secretary of State, David Scanlan, (603) 271-3242 or Assistant Attorney General Matthew T. Broadhead (603) 271-3650.

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2018-0208, Petition of New Hampshire Secretary of State & a., the court on October 26, 2018, issued the following order:

Upon consideration of the Emergency Motion to Stay filed by the defendants, William M. Gardner, in his official capacity as the New Hampshire Secretary of State, and Gordon MacDonald, in his official capacity as the New Hampshire Attorney General, and the objection filed by the plaintiffs, the League of Women Voters of New Hampshire, Douglas Marino, Garrett Muscatel, Adriana Lopera, Phillip Dragone, Spencer Anderson, Seysha Mehta, and the New Hampshire Democratic Party, the court hereby grants the motion.

In granting this stay, the court expresses no opinion on the merits of the plaintiffs' underlying challenge to Laws 2017, Chapter 205 (also known as "SB 3"). However, the court is persuaded that, regardless of the merits, the timing of the preliminary injunction, entered by the trial court a mere two weeks before the November 6 election, creates both a substantial risk of confusion and disruption of the orderly conduct of the election, and the prospect that similarly situated voters may be subjected to differing voter registration and voting procedures in the same election cycle. For example, under the trial court's orders, the provisions of SB 3, which have been in effect since September 2017 and which the plaintiffs assert are confusing and intimidating, will remain in effect until election day. Yet persons who seek to register on election day will not be subjected to these same procedures. "These inconsistencies will impair the public interest." Veasey v. Perry, 769 F.3d 890, 896 (5th Cir.), motion to vacate stay denied, 135 S. Ct. 9 (2014).

We are not alone in declining to interfere with a fast-approaching election. See id. at 892 (granting emergency motion to stay trial court order enjoining voter photo identification law on ground that it was unconstitutional); Colón-Marrero v. Conty-Pérez, 703 F.3d 134, 139 (1st Cir. 2012) (declining to issue a preliminary injunction requiring the plaintiff and 300,000 other voters to be reinstated, even though the plaintiff had demonstrated likelihood of success on the merits, because doing so, "on the eve of a major election" would "disrupt long-standing election procedures"). Indeed, in Williams v. Rhodes, 393 U.S. 23, 34-35 (1968), "[t]he Supreme Court . . . declined to interfere . . . , even after finding that . . . ballots unconstitutionally excluded certain candidates." Veasey, 769 F.3d at 893. More recently, the Court has "stayed injunctions issued based on findings that changes in an election law were discriminatory." Id. at 896 (Costa, J., concurring in the judgment) (citing

cases). “[T]he Supreme Court’s recent decisions in this area” evidence that “its concern about confusion resulting from court changes to election laws close in time to the election should carry the day in the stay analysis.” *Id.* at 897.

As the Court has cautioned, “Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls.” *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). In the apportionment context, the Supreme Court has instructed that, “[i]n awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles.” *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). Accordingly, “under certain circumstances, such as where an impending election is imminent and a State’s election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid.” *Id.*; cf. *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) (deciding that, even if the plaintiffs were likely to succeed on their claim that Maryland’s congressional redistricting map was an unconstitutional political gerrymander, “the balance of equities and the public interest tilt[] against their request for a preliminary injunction”).

For all of the above reasons, therefore, we grant the defendants’ emergency motion for a stay. The orders of the Superior Court (*Brown*, J.) dated October 22, 2018, and October 25, 2018, granting a preliminary injunction in favor of the plaintiffs are hereby stayed and shall not take effect until after the conclusion of the election on November 6, 2018. Until this stay expires, the temporary restraining order entered by the Trial Court (*Temple*, J.) on September 12, 2017, enjoining the enforcement of the civil and criminal penalty provisions of SB 3, remains in full force and effect.

Lynn, C.J., and Hicks, Bassett, Hantz Marconi, and Donovan, JJ., concurred.

**Eileen Fox,
Clerk**

Distribution:

Hillsborough County Superior Court South, 226-2017-CV-00432, 00433

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