

THE STATE OF NEW HAMPSHIRE
SUPREME COURT
CASE NO. 2018-0267

Request for an Opinion of the Justices (Amending Definition of Resident and Residency)

**MEMORANDUM OF LAW OF
THE AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE AND
THE FAIR ELECTIONS CENTER**

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NOW COME the American Civil Liberties Union of New Hampshire¹ and the Fair Elections Center², by and through their counsel, filing their Memorandum of Law addressing the unconstitutionality of House Bill 1264 (“HB 1264”). If this Court is inclined to reach the merits of the questions submitted by the Governor and Executive Council—which it must not under this Court’s decision in *Opinion of the Justices*, 167 N.H. 539 (2015)—then the undersigned organizations respectfully request oral argument on these important constitutional questions.

INTRODUCTION AND SUMMARY OF ARGUMENT

On May 16, 2018, the Governor and Executive Council requested an opinion of the justices pursuant to Part II, Article 74 of the New Hampshire Constitution regarding HB 1264. HB 1264 would amend New Hampshire’s residency statute in RSA 21:6 by deleting the phrase “for the indefinite future.” Both the New Hampshire House of Representatives and Senate passed HB 1264 on party-line votes. The Governor has accurately stated that there are constitutional concerns with HB 1264. On May 15, 2018, he explained: “I remain concerned about the bill’s constitutionality, and as such, I am asking the Supreme Court to weigh in on this

¹ The American Civil Liberties Union of New Hampshire (“ACLU-NH”) is the New Hampshire affiliate of the American Civil Liberties Union—a nationwide, non-partisan, public interest organization with approximately 1.75 million members (including approximately 9,000 New Hampshire members and supporters). The ACLU-NH engages in litigation, by direct representation and as *amicus curiae*, to encourage the protection of rights guaranteed by the federal and state constitutions, including the fundamental right to vote. The ACLU-NH has litigated voting rights cases throughout the country and in New Hampshire. Most recently, the ACLU-NH litigated the case *Guare v. New Hampshire*, 167 N.H. 658 (2015). In *Guare*, this Court struck down voter registration form language that would impose a chilling effect on the right to vote of those domiciled in New Hampshire.

² Fair Elections Center is a national, nonpartisan voting rights and election reform organization which works to remove barriers to registration and voting for traditionally underrepresented constituencies. Formed in 2017 to continue the work of the Fair Elections Legal Network (itself founded in 2006), the Center works to improve election administration through legislative, legal and administrative reform, to protect access to the ballot through litigation, and to provide election law expertise, voter information and technical assistance to voter mobilization organizations. The Center’s Campus Vote Project (CVP) focuses on and expands the organization’s work around student voting issues. CVP helps colleges and universities institutionalize reforms that empower students with the information they need to register and vote. CVP provides resources and information administrators, students, and election officials can use to work together to overcome challenges student often face when voting.

issue to put this matter to rest once and for all.”³ The questions from the Governor and Executive Council are, as memorialized in this Court’s May 17, 2018 order, the following, which specifically address the bill’s impact on “students attending a postsecondary institution”:

I. By subjecting those who are domiciled in New Hampshire for voting purposes to the same legal requirements as those who are residents of New Hampshire, including but not limited to the requirements to take actions required by RSAs 261:45 and 263:35 and to pay any fees or taxes associated therewith, would House Bill 1264, on its face, violate any of the following provisions of the New Hampshire or United States Constitutions?

- (a) The Equal Protection Clause of Part I, Article 2 of the New Hampshire Constitution.
- (b) Part I, Article 11 of the New Hampshire Constitution.
- (c) The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

II. By subjecting those who are domiciled in New Hampshire for voting purposes to the same legal requirements as those who are residents of New Hampshire, including but not limited to the requirements to take actions required by RSAs 261:45 and 263:35 and to pay any fees or taxes associated therewith, would House Bill 1264, as applied to students attending a postsecondary institution within the State of New Hampshire who currently claim New Hampshire as their domicile for voting purposes but who do not claim New Hampshire as their residence, violate any of the following provisions of the New Hampshire or United States Constitutions?

- (a) The Equal Protection Clause of Part I, Article 2 of the New Hampshire Constitution.
- (b) Part I, Article 11 of the New Hampshire Constitution.
- (c) The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

HB 1264 discriminates against and imposes onerous motor vehicle fees on current non-resident domiciliaries simply because they exercise their fundamental right to vote. In so doing, this bill is specifically targeted at college students. This is not only arbitrary and irrational, but it would also have the obvious effect of deterring these individuals—who are constitutionally entitled to vote in New Hampshire—from actually voting. HB 1264 is unconstitutional.

The ACLU-NH has tracked HB 1264 since its inception and testified in opposition to its provisions in both the House of Representatives and the Senate. Fair Elections Center has also

³ N.H. Office of the Governor, “Governor Chris Sununu To Bring Late Item at Tomorrow’s Executive Council Meeting,” May 15, 2018, available at <https://www.governor.nh.gov/news-media/press-2018/20180515-hb-1264.htm>.

tracked this bill and submitted testimony as well as a veto letter. The intent and the effect of HB 1264 in striking the words “for the indefinite future” is to have the residency standard under RSA 21:6 align with the domicile standard that exists for voting purposes under RSA 654:1, I. This bill is not a simple terminology change⁴; rather, this change is definitional and designed to impact individuals who are likely to vote in New Hampshire elections.

The goal and effect of HB 1264 is to deem a voter who is domiciled in New Hampshire under RSA 654:1, I—but who does not have plans to stay New Hampshire “for the indefinite future”—a legal “resident” under RSA 21:6 upon the act of registering to vote. Put another way, such a voter would now be declaring his or her “residency” under RSA 21:6 when registering to vote. The result is that, under HB 1264, these constitutionally-eligible voters would now need to, within 60 days of registering to vote, pay moneys to the State through car registration and driver’s license fees. This is because, within 60 days of becoming a “resident” under RSA 21:6/RSA 259:88, a person must register their car in New Hampshire and, if they drive, obtain a New Hampshire driver’s license. *See* RSA 259:88 (stating that the term “resident” for motor vehicle purposes is defined under RSA 21:6); RSA 261:45, I (a person has 60 days to register a car in New Hampshire after becoming a legal resident); RSA 263:35 (a person has 60 days to obtain a New Hampshire driver’s license after becoming a legal resident). These financial burdens conditioned on exercising the right to vote are not optional. Under HB 1264, for these voters, if these fees are not paid within 60 days of declaring residency through the act of registering to vote, that voter will have committed a misdemeanor punishable by up to one year in jail. *See* RSA 263:48.

⁴ New Hampshire’s definition of “domicile” for voting purposes in RSA 654:1, I is not meaningfully different from the definition of the term “resident” in those states that use “residency” to define voter eligibility. Rather than use the term “resident,” New Hampshire uses the term “domicile” because that is in Part I, Article 11 of the New Hampshire Constitution.

Despite HB 1264's obvious and intentional chilling effect on voting rights, this Court should excuse itself from answering the Governor and Executive Council's legal inquiries because these inquiries involve the resolution of questions of fact. *See Opinion of the Justices*, 123 N.H. 510, 511 (1983) ("Nor are we empowered to give advisory opinions on legal questions involving resolution of questions of fact."). The legal standard applied to HB 1264 under Part I, Article 11 is, as this Court and analogous federal courts have explained, inherently fact specific. *See, e.g., Opinion of the Justices*, 167 N.H. 539, 542 (2015) (noting that "[t]his analysis is inherently fact-specific"); *Anderson v. Celebrezze*, 460 U.S. 780, 788-789 (1983); *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992); *Atkins v. Sec. of State*, 154 N.H. 67, 71 (2006). Here, the precise interests asserted by the State in justifying HB 1264 have not been vetted through the discovery process, the legislative history has not been presented to this Court, and there is no record of whether the State has attempted to address whatever concern is motivating HB 1264 using lesser restrictive alternatives. As the United States Supreme Court itself explained in *Anderson*, "only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional." 460 U.S. at 789. The same fact-intensive inquiry is required here and it cannot be adequately done in the absence of a full discovery record.

Three years ago, this Court unanimously declined to issue an advisory opinion on the constitutionality of a voting bill for this very reason. *See, e.g., Opinion of the Justices*, 167 N.H. at 543 (declining to address a voting rights advisory opinion where the question "*would place us in the position of giving advice on issues without a developed factual record*") (emphasis added). To decide these questions regarding HB 1264 would require this Court to overrule this 2015 decision. *See Jacobs v. Dir., N.H. DMV*, 149 N.H. 502, 504 (2003) ("The doctrine of stare

decisis demands respect in a society governed by the rule of law, for when governing legal standards are open to revision in every case, deciding cases becomes a mere exercise of judicial will with arbitrary and unpredictable results.”) (quotations and citations omitted). This Court has also repeatedly stressed the importance of only deciding constitutional questions where there is an actual case and controversy litigated by parties that can demonstrate injury through a full record. *See, e.g., Duncan v. State*, 166 N.H. 630, 642 (2014) (adopting federal Article III “case or controversy” principles and, in so doing, rejecting taxpayer standing in case concerning the constitutionality of New Hampshire’s education tax credit program).

Alternatively, if the Court does consider the questions presented—and it should not—it should answer all the questions presented in the affirmative. HB 1264 is unconstitutional for the following independent reasons:

- HB 1264 violates Part I, Article 11 and the Fourteenth Amendment to the United States Constitution because it would create a severe burden on the fundamental right to vote, thus requiring strict scrutiny review or, at the very least, intermediate scrutiny review. *Atkins v. Sec. of State*, 154 N.H. 67, 71 (2006); *Newburger v. Peterson*, 344 F. Supp. 559, 563 (1972); *see also Anderson v. Celebrezze*, 460 U.S. 780, 788-789 (1983). Based on the available information concerning HB 1264, this strict or intermediate scrutiny standard—where the burden would be on the State to justify the law—cannot possibly be satisfied. Moreover, HB 1264 also violates Part 1, Article 11 because it would create a poll tax, *see Harman v. Forssenius*, 380 U.S. 528, 540-41 (1965), and because it discriminates on the basis of age; and
- HB 1264 violates the Equal Protection Clauses of both the Fourteenth Amendment and Part I, Articles 1 and 2 of the New Hampshire Constitutions by imposing discriminatory financial requirements on those current non-resident domiciliaries who exercise their fundamental right to vote, while not imposing such financial requirements on those current non-resident domiciliaries who do not exercise their fundamental right to vote. This classification regime—which is conditioned solely on whether one decides to register to vote with the obvious intent to deter current non-resident domiciliaries from voting—is arbitrary and also fails strict or intermediate scrutiny review.

It is important to note that, because HB 1264 has not been enacted, this bill is not entitled to the normal presumption of constitutionality that would be afforded an enacted law.

ARGUMENT

I. The Supreme Court Cannot Issue an Advisory Opinion on a Legal Issue That Involves Resolution of Questions of Fact

Part II, Article 74 of the New Hampshire Constitution provides: “Each branch of the legislature as well as the governor and council shall have authority to require the opinions of the justices of supreme court upon important questions of law and upon solemn occasions.” N.H. CONST. pt. II art. 74. However, this constitutional duty to give advisory opinions “is limited to questions of law pending before the inquiring body and *does not include legal questions which involve resolution of questions of fact.*” *Opinion of the Justices*, 116 N.H. 358, 360 (1976) (emphasis added); *see also Opinion of the Justices*, 167 N.H. 539, 542 (2015); *Opinion of the Justices*, 123 N.H. 510, 511 (1983).

In *Opinion of the Justices*, 167 N.H. 539 (2015), this Court declined to issue an advisory opinion in a case that presented nearly identical legal and factual issues as the case at bar. In that case, the New Hampshire House of Representatives sought an advisory opinion on whether a piece of pending legislation that would change the definition of domicile for voting purposes violated the New Hampshire Constitution. *Id.* at 540. There, this Court, in a unanimous opinion, excused itself from issuing an advisory opinion because even determining what level of scrutiny to apply to the proposed legislation is an “inherently fact-specific” inquiry. *Id.* at 542. Choosing the level of scrutiny requires the Court to necessarily determine the degree of burden imposed by the legislation and then weigh that burden against the State’s actual interests in the legislation, which necessarily precludes this Court from issuing an advisory opinion. *Id.* at 542-43. Because the issues are sufficiently identical in this case, this Court must similarly excuse itself from issuing the instant requested advisory opinion. To hold otherwise would overrule this 2015 decision.

The right to vote is fundamental under both the Federal and State Constitutions. *Newburger v. Peterson*, 344 F. Supp. 559, 560 (D.N.H. 1972) (three-judge court); *Atkins v. Sec. of State*, 154 N.H. 67, 71 (2006); *Guare v. State*, 167 N.H. 658, 663 (2015); N.H. CONST. pt. I art. 11. When an election law imposes “‘severe’ restrictions on voters’ rights, the regulation must withstand strict scrutiny to be constitutional.” *Atkins*, 154 N.H. at 72 (quotation omitted) (applying *Anderson/Burdick* framework); *see also Guare*, 167 N.H. at 663; *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Such regulations (i) must “be justified by a compelling governmental interest and [ii] must be necessary to the accomplishment of its legitimate purpose.” *Atkins*, 154 N.H. at 73 (quotation omitted); *see also Guare*, 167 N.H. at 663. The State’s justification must be “neither unduly restrictive nor unreasonable.” *In re Christopher K*, 155 N.H. 219, 226 (2007). The second prong of this test “is similar to the federal narrowly tailored requirement.” *Id.* at 226. Under strict scrutiny, the State cannot defend the law based upon merely “conceivable” post-hoc rationalizations set forth in a legal brief; rather, the State must rely on the actual purpose espoused by the legislature when the bill was under consideration. *Community Resources for Justice, Inc. v. City of Manchester*, 154 N.H. 748, 762 (2007) (in applying intermediate scrutiny, “the government may not rely upon justifications that are hypothesized or invented post hoc in response to litigation, nor upon overbroad generalizations”) (internal quotations omitted).

In *Guare*, this Court held that when challenged legislation imposes a burden “in between” a “severe” burden and a “reasonable” burden, the standard that this Court adopted in *Atkins*—which “includes a test that is similar to intermediate scrutiny”—applies. *Guare*, 167 N.H. at 663, 667. Like under strict scrutiny, under the test adopted in *Guare*, “the State must articulate specific, rather than abstract state interests, and explain why the particular restriction imposed is

actually necessary, meaning it actually addresses[] the interest set forth.” *Id.* at 667 (quotation marks and citation omitted). Similarly, under intermediate scrutiny, the “State may not rely upon justifications that are hypothesized or invented post hoc in response to litigation, nor upon overbroad generalizations.” *Id.* at 665, 667. As this Court recognized in *Opinion of the Justices*, 167 N.H. at 542, the *Anderson/Burdick/Atkins/Guare* standard “is inherently fact-specific.”

Because strict, or at least intermediate, scrutiny applies to HB 1264 given its severe—or at least unreasonable—burden on voting rights,⁵ the legal questions presented by the Governor and Executive Council involve resolution of unresolved questions of fact that require a full record, depositions, and the production of a full legislative history. For example, this Court would first have to consider the burdens imposed by HB 1264 in order to determine which level of scrutiny applies. Only after the Court determines the burden imposed and the appropriate level of scrutiny involved can the Court then turn to the legislative history of HB 1264 and the legislature’s actual purpose in proposing the law. Thus, the Court is simply unable to fully conduct the constitutional analysis required by law. *See Barr v. Galvin*, 626 F.3d 99, 109 (1st Cir. 2010) (noting that the constitutional issues involved mandate a weighing of the “precise interests put forward by the State as justifications for the burden imposed”).

Just as problematic—and even assuming the State has an important or even compelling interest in passing HB 1264 (which it does not)—this Court would have to rigorously test

⁵ Simply because the right to vote is enshrined in Part I, Article 11 as “fundamental does not mean that any impingement upon that right triggers strict scrutiny.” *Atkins*, 154 N.H. at 71; *Guare*, 167 N.H. at 663. As stated in Section II.A, *infra*, “when the election law at issue subjects plaintiff’s rights to ‘severe’ restrictions, the regulation must withstand strict scrutiny to be constitutional.” *Atkins*, 154 N.H. at 72. “When the election law imposes only ‘reasonable, nondiscriminatory restrictions’ on plaintiff’s rights, then ‘the State’s important regulatory interest are generally sufficient to justify the restrictions.’” *Id.* at 72; *see also Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). As explained in more detail below, consistent with *Atkins*, *Newburger*, and *Guare*, HB 1264’s restrictions on voting are severely burdensome, thus requiring strict scrutiny review. However, to even consider the question of whether strict scrutiny or some other standard applies to HB 1264 by analyzing its burden on voting rights, the Court must have before it a factual record. There is no factual record here, and thus the Court cannot issue an advisory opinion.

whether HB 1264 is narrowly tailored, or necessary, to effectuate the State’s actual purpose in enacting the legislation. *Atkins*, 154 N.H. at 72; *Guare*, 167 N.H. at 667. In the absence of a fully-developed adversarial record testing whether less restrictive alternatives exist to address any purported state interests, the Court simply does not have the necessary information before it to apply strict or intermediate scrutiny review under Article 11. *See Cruz v. Melecio*, 204 F.3d 14, 22 (1st Cir. 2000) (“The fact-specific nature of the relevant inquiry [under *Anderson*] obviates a resolution of this case on the basis of the complaint alone.”); *see also Opinion of the Justices*, 167 N.H. at 542. These critical questions require a vigorous adversarial proceeding, review of documents, and the examination of witnesses, including the Secretary of State and voters. Thus, the Court cannot opine on these questions.

Several New Hampshire court decisions demonstrate how the resolution of factual issues is necessary to resolve the constitutionality of laws burdening the fundamental right to vote. For example, in *Atkins*, the plaintiffs challenged a law regulating the order of candidates for elective office on the ballot. 154 N.H. at 68. Under the law as it then existed, candidates of the party that received the highest vote totals combined in the prior election were listed first within each box as it appeared on the ballot. *Id.* Candidates were then arranged alphabetically by surname within each party. *Id.* Citing evidence regarding the advantage the so-called primacy effect can give candidates listed higher on the ballot over candidates listed lower on the ballot, this Court applied strict scrutiny and struck down the law because it “discriminate[d] against candidates running in minority parties and against candidates whose surnames do not begin with letters located near the beginning of the alphabet.” *Id.* at 73.

Similarly, in *Guare v. State of Hampshire*, this Court established and applied the *Anderson/Burdick/Atkins/Guare* test to SB 318—a 2012 law that amended the language of the

standard voter registration form to require any person, including individuals domiciled in New Hampshire who are not legal New Hampshire residents under RSA 21:6, to execute a declaration stating, in relevant part:

In declaring New Hampshire my domicile, I am subject to the laws of the state of New Hampshire which apply to all residents, including laws requiring a driver to register a motor vehicle and apply for a New Hampshire driver's license within 60 days of becoming a resident.

RSA 654:7, IV (as amended by 2012 Session Law ch. 285). In affirming the Superior Court's determination that the law was unconstitutional in violation of Part I, Article 11 on a robust factual record created over two years (including the petitioners' depositions), this Court first determined which level of scrutiny to apply (itself a factual inquiry) before applying that scrutiny (also an inherently factual inquiry). *Guare*, 167 N.H. at 663-69; *see also Opinion of the Justices*, 167 N.H. at 542. The Court in *Guare* then balanced the burden it found that SB 318 imposed (an "unreasonable" burden) against the interest the State put forth, which the Court determined based on the well-developed factual record was *not* the State's actual interest in adopting the legislation as articulated in the legislative history. The Court then declared the law unconstitutional. *Guare*, 167 N.H. at 667-69.

Similarly, in *Newburger v. Peterson*, 344 F. Supp. 559 (D.N.H. 1972), a three-judge panel of the federal district court considered, upon a stipulated record, a state law that required a residency "permanent or indefinite intention to stay" standard in order to register to vote. After reviewing the stated purpose of the statute and its impact on voters, the Court held: "[W]e cannot see that a requirement of permanent or indefinite intention to stay in one place is relevant to responsible citizenship [T]he state has not shown that the indefinite intention requirement is necessary to serve a compelling interest." *Id.* at 563. The Court explained that this requirement "forces persons ... who are in every meaningful sense members of New Hampshire political

communities to vote in communities elsewhere which they have long departed and with whose affairs they are no longer concerned, if ... the former community still recognizes the right.” *Id.*⁶

Finally, *League of Women Voters of New Hampshire v. Gardner*, No. 226-2017-CV-00433, et al., a case challenging the constitutionality of Senate Bill 3 (“SB 3”) under the New Hampshire Constitution, filed in August 2017 in Hillsborough South Superior Court and scheduled for trial in August 2018, provides an ongoing example of the sort of intense fact-based inquiry required under the *Anderson/Burdick/Atkins/Guare* analysis. In *League of Women Voters*, the parties are presently engaging in a robust discovery process, including not only document requests and deposition subpoenas, but also extensive motion practice on the propriety of certain discovery requests, which includes a Rule 11 Petition to this very Court. Only upon completion of this process and after the opportunity to put the facts to the test through a trial scheduled to last two weeks will the Superior Court be prepared to issue a final ruling on the constitutionality of SB 3. Indeed, the Senate linked the SB 3 litigation to HB 1264 when the Senate, on the floor on May 2, 2018, changed the effective date of HB 1264 to July 1, 2019 (as opposed to 60 days after passage) to await the outcome of the SB 3 litigation.⁷

In each of these cases, the Supreme Court, the Superior Court, and the Federal District Court reviewed, or will review, a fully developed factual record establishing the actual purpose behind the law, the burden on voting rights, and evidence testing the law’s rationale. Under both federal and state law, this same factual analysis is required to correctly apply strict or intermediate scrutiny to HB 1264. Accordingly, because analysis of the legal questions

⁶ See also *Libertarian Party of New Hampshire v. Gardner*, 126 F. Supp. 3d 194 (D.N.H. 2015), *affirmed by* 843 F.3d 20 (1st Cir. 2016) (applying the *Anderson/Burdick* test on a fully developed factual record to uphold a state ballot access law).

⁷ See May 2, 2018 Senate floor amendment to HB 1264, *available at* https://gencourt.state.nh.us/bill_status/billtext.aspx?sy=2018&txtFormat=amend&id=2018-1890S; May 2, 2018 Senate floor debate (3:39:25), *available at* <http://sg001-harmony.sliq.net/00286/Harmony/en/PowerBrowser/PowerBrowserV2/20180502/-1/16288#agenda>.

presented by the Governor and Executive Council involves resolution of questions of fact, the Court cannot issue an advisory opinion in this matter. *See Opinion of the Justices*, 167 N.H. at 542-43; *Opinion of the Justices*, 116 N.H. at 360.

II. Alternatively, If the Court Reaches the Constitutional Question—Which It Should Not—HB 1264 Violates Part I, Article 11 of the New Hampshire Constitution

As to question (b) in Section I and Section II of this Court’s May 17, 2018 order, HB 1264 violates Part I, Article 11 of the New Hampshire Constitution. This is for the three independent reasons below: (i) HB 1264 places an unjustifiable burden on the right to vote; (ii) HB 1264 is an impermissible poll tax; and (iii) HB 1264 discriminates on the basis of age.

A. HB 1264 Would Place an Unjustifiable Burden on the Right to Vote

The right to vote is fundamental under both the Federal and State Constitutions. *E.g.*, *Newburger*, 344 F. Supp. at 560 (three-judge court); *Akins*, 154 N.H. at 71 (“[T]he right to vote is fundamental.”). Part I, Article 11 of the New Hampshire Constitution states, in relevant part, that “[a]ll elections are to be free, and every inhabitant of the state of 18 years of age and upwards shall have an equal right to vote in any election.” N.H. CONST. pt. I art. 11. “Every person shall be considered an inhabitant for the purposes of voting in the town, ward, or unincorporated place where he has his *domicile*.” *Id.* (emphasis added). Again, as explained above in Section I, this Court has noted:

[W]e apply a balancing test to determine the level of scrutiny that we must apply. Under that test, we weigh the character and magnitude of the asserted injury to the [voting] rights sought to be vindicated against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff’s rights. Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens the fundamental right to vote. When those rights are subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance.

Guare, 167 N.H. at 663 (citing *Burdick*, 504 U.S. at 434 and *Akins*, 154 N.H. at 71) (quotations omitted).

1. The Burden on Voting Rights is Severe, Thereby Triggering Strict Scrutiny

The fundamental right to vote under Part I, Article 11 is incorporated into the laws describing who is eligible to vote in New Hampshire. For example, RSA 654:1, I, in defining “domicile,” states:

Every inhabitant of the state, having a single established domicile for voting purposes, being a citizen of the United States, of the age provided for in Article 11 of Part First of the Constitution of New Hampshire, shall have a right at any meeting or election, to vote in the town, ward or unincorporated place in which he or she is domiciled. *An inhabitant’s domicile for voting purposes is that one place where a person, more than any other place, has established a physical presence and manifest an intent to maintain a single continuous presence for domestic, social and civil purposes relevant to participating in democratic self-government.* A person has the right to change domicile at any time, however a mere intention to change domicile in the future does not, of itself, terminate an established domicile before the person actually moves.

RSA 654:1, I (emphasis added). New Hampshire law explicitly permits students attending school here to choose New Hampshire as their voting domicile. RSA 654:1, I-a.⁸ The definition of legal “resident” under RSA 21:6 that applies in various contexts is currently different than the definition of “domicile” for voting purposes. RSA 21:6 states:

A resident or inhabitant or both of this state and of any city, town or other political subdivision of this state shall be a person *who is domiciled or has a place of abode or both* in this state and in any city, town or other political subdivision of this state, *and who has, through all of his actions, demonstrated a current intent to designate that place or abode as his principal place of physical presence for the indefinite future to the exclusion of all others.*

RSA 21:6 (emphasis added).

⁸ In New Hampshire, a college student in New Hampshire may choose as his/her voting domicile either the domicile he/she held before entering college or the domicile he/she has established while attending college. See N.H. Secretary of State, “Voting as a College Student,” at <http://sos.nh.gov/CollegeStudent.aspx>.

Thus, currently, the law governing eligibility to vote does not require voters to be legal “residents” of the state as defined in RSA 21:6. Unlike a legal “resident,” a New Hampshire voter need not have an intention to live in New Hampshire “for the indefinite future” in order to be considered “domiciled” in New Hampshire. *See* RSA 654:1, I. This is for good reason. As courts have held, an “indefinite intention to remain” cannot be a requirement to vote because it would disenfranchise large groups of people—including, for example, college students who have uncertain plans, hospital interns and residents, and contract employees. As the *Newburger* Court explained:

[Under an “indefinite intention to remain” requirement], New Hampshire excludes from the franchise a student candid enough to say that he intends to move on after graduation, a newly-arrived executive with a firm intention to retire to his Florida cottage at age 65, a hospital intern or resident with a career plan that gives him two or three years in New Hampshire, a construction worker on a long but time-limited job, an industrial or government trainee working up a precise career ladder, a research contractor on a project with a deadline, a city manager hired for a term, a military person on a term of duty, a hospital patient with a hoped-for goal of discharge.

344 F. Supp. at 563.

With this backdrop, the effect of HB 1264’s deletion of the phrase “for the indefinite future” from RSA 21:6 is to burden voting rights by having the residency standard under RSA 21:6 align with the domicile standard that exists for voting purposes under RSA 654:1, I. In so doing, a current legal non-resident who does not have an indefinite intention to remain in New Hampshire, but who is domiciled in New Hampshire under RSA 654:1, I—and thus has a constitutional right to vote here under Part I, Article 11—would be deemed under HB 1264 a legal “resident” if and when that person registers to vote. Put another way, if these voters register to vote, that registration would be tantamount to a declaration of New Hampshire residency under RSA 21:6, thereby triggering residency obligations. If the voter drives and owns a car, some of these residency obligations include paying fees to obtain a New Hampshire

driver's license and vehicle registration. As the House Election Law Committee majority report on HB 1264 states in recommending that the House pass this bill, "[u]nder this legislation, someone who is domiciled in our state will be considered a resident and must follow the laws of our state," *which include residency fees and obligations*.⁹ Even worse, if this voter does not obtain a New Hampshire license or vehicle registration and pay these fees within sixty (60) days of registering to vote, that voter has now committed a crime. *See* RSA 263:35; RSA 263:1; *see also* RSA 260:10, 263:5-a, 263:12, 261:45, 263:35; RSA 263:42, I (requiring payment of fees for issuance of a driver's license); 261:19, 261:20, 261:52, 261:141, 261:148, 261:153 (requiring payment of motor vehicle title fees, registration fees, and municipal permit fees). These motor vehicle fees are substantial. A New Hampshire driver's license costs \$50, and registration fees can be in the hundreds of dollars.¹⁰ However, pursuant to HB 1264, if that person *does not* exercise his or her constitutional right to vote, that person would not be declaring "residency" under RSA 21:6 and, thus, no motor vehicle residency fees will be imposed.

The intended effect of HB 1264 to tie residency fees to voting could not be clearer; after all, this bill was considered by the *Election Law* Committees of both the House of Representatives and Senate. And one of HB 1264's chief advocates was the New Hampshire Secretary of State's Office—the New Hampshire agency in charge of *election law* administration. New Hampshire's Division of Motor Vehicles did not propose this legislation. The Secretary of State's Office has repeatedly acknowledged the impact HB 1264 would have on current non-resident domiciliaries who decide to register to vote, including those who are college

⁹ *See* House Election Law Majority Committee Report on HB 1264, House of Representatives Journal No. 6, pp. 132-36, available at http://www.gencourt.state.nh.us/house/caljournals/journals/2018/HJ_6.pdf.

¹⁰ For an explanation of fees, please see RSA 261:141 for state fees, and RSA 261:153 for town/city fees. In addition to the registration fees, there is an \$8.00 plate fee for the first time one orders license plates. *See* <http://www.nh.gov/safety/divisions/dmv/registration/vehicle.htm#fees>; <http://www.nh.gov/safety/divisions/dmv/driver-licensing/apply/fees.htm>.

students. As Deputy Secretary of State David Scanlan explained during the January 26, 2018 House Election Law Committee hearing on HB 1264 in which he testified in support of this bill, if a college student registers to vote under HB 1264, then that student will have to pay motor vehicle fees if they drive. He testified: “You should be a resident to have your domicile in the locality where you are going to vote A student would have to decide whether they want to claim if they’re a resident of the state of New Hampshire ... and if they do, they’re subject to whatever else would be required of any other resident of the state of New Hampshire,” *which would include motor vehicle residency fees*.¹¹ It is also worth noting that, when a nearly identical bill was considered in 2017 (HB 372), the Attorney General’s Office warned on February 7, 2017 that “changing the definition of residency could have unanticipated consequences when applied to all the situations in which residency requirements come into play, such as in-state tuition, Fish and Game licenses and the Department of Motor Vehicles.”¹²

While HB 1264 would also impact hospital residents and contract employees, the specific intent behind the bill is to, as a condition of registering to vote, impose residency motor vehicle fees on college students who moved to New Hampshire and who are uncertain about their future. These voters currently have the option to choose New Hampshire as their voting domicile given that they live here. *See* RSA 654:1, I-a. Senator William Gannon—a supporter of HB 1264—was transparent about this intent, stating on the Senate floor that a University of New Hampshire student who graduated from high school in another state does not “really have skin in the game.”¹³ Similarly, Senator Dan Innis—also a supporter of HB 1264—stated immediately

¹¹ Casey McDermott, “N.H. Election Chief: Voters Should Have to Claim Residency to Participate,” *NHPR*, Jan. 26, 2008, available at <http://nhpr.org/post/nh-election-chief-voters-should-have-claim-residency-participate#stream/0>.

¹² *See* Dave Solomon, “Proposed Election Law Changes Called Unfair to Students,” *Union Leader*, Feb. 7, 2017, available at <http://www.unionleader.com/state-government/proposed-election-law-changes-called-unfair-to-students--20170208>.

¹³ *See* May 2, 2018 Senate floor debate (3:58:35), available at <http://sg001-harmony.sliq.net/00286/Harmony/en/PowerBrowser/PowerBrowserV2/20180502/-1/16288#agenda>.

following the 2016 election: “If you’re from Boston and you’re up here eight months out of the year and you’re registered to vote there, you shouldn’t be able to vote here.”¹⁴ When HB 1264 was passed by the House and Senate, Senator Sharon Carson—a supporter of HB 1264—put out a Facebook advertisement acknowledging that the bill was targeted at students: “STOP DRIVE-BY VOTING IN NH !!! The student being interviewed actually makes the case for the legislation; he wants to keep his out-of-state drivers license and drive his out-of-state registered case (because he doesn’t live in NH) but wants to VOTE IN OUR STATE ELECTIONS! Call Gov. Sununu’s office ... and demand he sign HB 1264; only NH residents should vote in state and local elections.” See Sen. S. Carson Advertisement, Appendix *Exhibit 1*, at 001-2. Senator Carson further explained on the Senate floor that the intent of HB 1264 was to impose motor vehicle fees on these voters: “[W]e have a group of people who say this is where I live, but don’t have to register my car here. I don’t have to get my license like everyone else in this room has to. And yet we allow them to vote here. And I think that is the one sticking point.”¹⁵

Similarly, on NHPR’s *The Exchange*, Senator Regina Birdsell—the Chairwoman of the Senate Election Law and Internal Affairs Committee that recommended HB 1264’s passage and one of the bill’s chief legislative advocates—acknowledged that current non-resident domiciliary college students would have pay to obtain New Hampshire driver’s licenses and car registration if they registered to vote in New Hampshire under the functionally identical HB 372:

Laura Knoy: So they would incur, in this instance, the driver’s license issue and the DMV issue? That’s what I’m trying to clarify, is, if somebody—I’ll turn to you Senator Birdsell, I know you guys want to jump in, too—um, if I went to UNH and I’m from Vermont but I go to UNH, and I register to vote in Durham because that’s where I am, do I have to, as [Deputy Secretary of State David Scanlan] says, within 60 days, um, abide

¹⁴ Jeff McMenemy, “College Towns Have Big Impact on NH Election,” *Foster’s Daily Democrat*, Nov. 13, 2016, available at <http://www.fosters.com/news/20161113/college-towns-have-big-impact-on-nh-election>.

¹⁵ See May 2, 2018 Senate floor debate (4:12:21), available at <http://sg001-harmony.sliq.net/00286/Harmony/en/PowerBrowser/PowerBrowserV2/20180502/-1/16288#agenda>.

by the laws of New Hampshire, including getting a driver's license, including registering my car in New Hampshire?

Senator Birdsell: *You may have to.*

Laura Knoy (30:41): So that would be, the expense and, um, effort that would Senator [Donna] Soucy talked about.

Senator Birdsell: *If they—if they have a driver's license.* If they don't, absolutely not.¹⁶

Senator Andy Sanborn—another proponent of HB 1264 and a member of the Senate Election Law and Internal Affairs Committee—further explained during that Committee's April 24, 2018 executive session on HB 1264 that the bill was designed to ensure that, “if you're going to participate in [New Hampshire elections], that you have some long-term vested interest in our state”¹⁷ Senator James Gray—also a member of the Senate Election Law and Internal Affairs Committee and proponent of HB 1264—similarly stated, when discussing an identical bill (HB 372), the following: “If you're a resident, if this is the place you choose to live abandoning all others, I want you to vote in New Hampshire. But if that place you choose to interact with is in Massachusetts, in Vermont, in Maine, in Kalamazoo, New Mexico, then I want you vote there.”¹⁸

The chilling effect on voting under HB 1264 is obvious. A driver's license costs \$50, and registration fees can range in the hundreds of dollars. To avoid the risk of paying these New Hampshire fees, these impacted domiciliaries are likely to not register to vote altogether in New Hampshire, where they live. Voters who do not have the ability or resources to, within 60 days

¹⁶ NHPR's *The Exchange*, “Amendment Renews Debate over N.H. Voting Laws,” Dec. 18, 2017, at 30:48-33:44 (emphasis added), available at <http://nhpr.org/post/amendment-renews-debate-over-nh-voting-laws#stream/0>.

¹⁷ See HB 1264 April 24, 2018 Senate Election Law Committee Executive Session (audio available upon request).

¹⁸ Ethan Dewitt, “Amendment would raise bar for voting eligibility in New Hampshire,” *Concord Monitor*, Nov. 29, 2017, available at <http://www.concordmonitor.com/Senate-committee-approves-bill-to-require-residency-for-voting-14020394>.

of registering to vote, travel to a Department of Motor Vehicles Office¹⁹ and pay money to the State in the form of licensing and registration fees will simply not exercise their right to vote in New Hampshire. And in the context of college students who live in New Hampshire but graduated from high school in another state, these voters would, upon registering, receive all the financial obligations of residency under HB 1264, while receiving none of the financial benefits—namely, in-state tuition.

Indeed, the burdens on voting under HB 1264 are far greater than the burdens that were found in *Guare*. In *Guare*, this Court found that certain language on New Hampshire’s voter registration form was inaccurate and confusing in suggesting that voters had to comply with residency obligations, which included paying money to the State through car licensing and registration fees. The Court held that this burden was “unreasonable,” and struck down the form’s language after applying intermediate scrutiny. *See Guare*, 167 N.H. at 668. While the burdens in *Guare* addressed a confusing and inaccurate registration form, the burdens under HB 1264 are even more direct. Its intent and effect are to, by law, directly and unambiguously impose motor vehicle fees on qualified voters who elect to exercise their fundamental right to vote.

For these reasons, HB 1264’s burdens on voting are severe and strict scrutiny applies.

2. HB 1264 Fails Both Strict and Intermediate Scrutiny

Because HB 1264 imposes a severe restriction on the rights of certain citizens to vote in New Hampshire—and is not necessary to achieve any legitimate State interest (let alone a compelling one)—HB 1264, if enacted, cannot withstand any form of scrutiny, let alone strict scrutiny. There can be absolutely no legitimate justification for the proposed law, and HB 1264

¹⁹ Most DMV offices are in the southern tier of New Hampshire and, thus, the closest DMV for a Granite Stater in the northern portion of the state can be well over an hour’s drive away. *See* <https://www.nh.gov/safety/divisions/dmv/locations/map.htm>.

includes no findings that even attempt to provide any such justification. As this burden is severe, the bill’s proponents bear the burden of proof and they cannot rely “upon justifications that are hypothesized or invented post hoc in response to litigation, nor upon overbroad generalizations.” *Guare*, 167 N.H. at 665 (rejecting post hoc justifications even when applying intermediate scrutiny to a voting regulation creating an “unreasonable” burden). Rather, under *Guare*, this Court must focus on the true justifications for HB 1264 evident at passage of the bill, though the legislative record has not been produced to this Court, nor have depositions been conducted probing the veracity of any governmental interests asserted. The May 30, 2018 memorandum of the Secretary of State’s Office—which was one of HB 1264’s proponents—also does not cite any explanation for why HB 1264 is necessary. In any event, this Court must reject various possible interests.

First, we anticipate that proponents will identify the avoidance of voter fraud as the motivation for HB 1264. HB 1264 is not tailored to address this interest because it would deter from voting people who are domiciled in New Hampshire under RSA 654:1 and, thus, have a constitutional right to vote here. HB 1264, and the financial obligations it imposes, bears no nexus to voter qualifications. The bill does not amend New Hampshire’s voter eligibility laws, but rather amends separate and unrelated “residency” laws that exist in RSA 21:6/RSA 259:88 and that trigger motor vehicle obligations to those who meet the definition of “resident.” In so doing, HB 1264 imposes motor vehicle residency fees on current non-resident domiciliaries who do not have an indefinite intention to stay in New Hampshire. There is no justification to impose these fees to deter fraud because these voters are, by definition, constitutionally entitled to vote here and are not fraudulent.

Rather than deterring fraud, the intent and design of this bill is to deter certain qualified voters—particularly college students—from voting by requiring them to pay fees when they elect to register to vote. Of course, deterring qualified voters from registering is not a legitimate governmental interest. Deterring qualified voters will only risk the loss of confidence in state elections. *See Dunn v. Blumstein*, 405 U.S. 330, 345 (1972) (holding that deterring voter fraud is not a permissible rationale for a one-year durational residency requirement because it would “bar[] newly arrived residents from the franchise along with nonresidents”). Of course, depriving even a single qualified voter of the right to vote can impact an election and undermine an election’s integrity. *See Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (“No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.”).

Moreover, even if HB 1264 has any connection to voter fraud—which it does not—there is no widespread voter fraud in New Hampshire that would possibly justify its burdens. A recent presentation by the Secretary of State’s Office—HB 1264’s chief proponent—and the Attorney General’s Office before the Ballot Law Commission on May 29, 2018 revealed little evidence of voter fraud in New Hampshire. As the Attorney General’s Office explained at the presentation, “There doesn’t appear to be any widespread pattern of voter fraud in New Hampshire.”²⁰ The Secretary of State’s Office has also repeatedly said—correctly—that there is no widespread voter fraud in New Hampshire.²¹ That Office has further acknowledged that it has found no proof

²⁰ John Distaso, “Exhaustive Investigation Reveals Little Evidence of Possible Voter Fraud in NH,” *WMUR*, May 29, 2018, available at <http://www.wmur.com/article/exhaustive-investigation-reveals-little-evidence-of-possible-voter-fraud-in-nh/20955267?src%3Dapp&source=gmail&ust=1527724071612000&usg=AFQjCNFHIUcQdOJghpu7yK7uvyhYOd7a5Q>.

²¹ Deputy Secretary of State David Scanlan has stated that “[t]here’s no indication of anything that widespread taking place in New Hampshire.” *See* Dave Solomon and Dan Tuohy, “NH Election Officials Dispute Trump Tweet

supporting the President's allegation that thousands of Massachusetts residents were bused to New Hampshire to cast ballots against him during the 2016 general election.²²

In recognition of the fact that no widespread voter fraud exists in New Hampshire, proponents of HB 1264 have often instead invoked national polls where responders have expressed a lack of confidence in election integrity. But any public lack of confidence in New Hampshire elections is being stoked by the very individuals who wish to use this perceived lack of public confidence to justify enacting more restrictive voting laws. Most recently, we saw false statements from the President claiming that “bus loads” of Massachusetts residents were sent to New Hampshire to vote during the 2016 general election.²³ The false public perception created by these baseless inventions are now being used as a justification for laws like HB 1264. The more narrowly tailored response to any perceived lack of public confidence in our elections is, rather than succumb to such falsities, to affirm to the public that our elections are, in fact, reliable and trustworthy.

Second, proponents of HB 1264 have often argued that this bill is necessary to address “confusion” that exists between the “domicile” standard in RSA 654:1, I and the “residency” standard in RSA 21:6. However, there is no confusion. None of the scores of college students who testified against HB 1264 at the legislature were confused. And nothing in the *Guare* decision created confusion. As *Guare* explained, New Hampshire has clear, but distinct, definitions for domicile for voting purposes under RSA 654:1, I and for legal residency under

on Voter Fraud,” *Union Leader*, Nov. 28, 2016, available at <http://www.unionleader.com/voters-first/NH-election-officials-dispute-Trump-tweet-on-voter-fraud-11282016>.

²² With respect to the President's fraud claims, Secretary of State William Gardner stated that “[e]veryone has ways to take pictures and there is nothing. We have nothing. Show me something.” See Ray Duckler, “Secretary of State Won't Buy Voter Fraud Claims Without Proof,” *Concord Monitor*, Feb. 15, 2017, available at <http://www.concordmonitor.com/For-Secretary-of-State-Bill-Gardner-the-votes-are-in--and-final-8098277>.

²³ Annie Linskey, et al., “Trump Makes Groundless N.H. Voter Fraud Claims,” *Boston Globe*, Feb. 10, 2017, available at <https://www.bostonglobe.com/news/nation/2017/02/10/trump-makes-groundless-voter-fraud-claims/fcnMJfLgOx0UAVhJeTS8TP/story.html>.

RSA 21:6. *See Guare v. State*, 167 N.H. 658, 664 (2015). However, in the voting registration form enacted in 2012, the legislature deliberately conflated these standards in ways that were both confusing and legally inaccurate. *Id.* There is nothing in the law itself that is confusing; rather, it was the legislature’s manipulation of the law on the registration form that caused confusion designed to chill students’ voting rights.

Relatedly, some of HB 1264’s proponents have argued that this bill is a technical correction to address *Newburger v. Peterson*, 344 F. Supp. 559 (D.N.H. 1972). This too is incorrect. There, the Court correctly held that New Hampshire’s voting standard could not impose an “indefinite intention to remain” requirement because such a standard would disenfranchise constitutionally-eligible voters who live in New Hampshire, but who have plans to leave at some indefinite point in the future. Such an “indefinite intention to remain” voting standard would, for example, disenfranchise hospital residents, military personnel, professors who will be leaving New Hampshire in three years, and college students who know they will leave after graduation. Again, HB 1264 does not actually change the voting criteria in RSA 654:1, I. New Hampshire’s domicile standard in RSA 654:1 already, in recognition of *Newburger*, does not contain an “indefinite intention to remain” standard.

Third, there is not an administrative or regulatory need for HB 1264, nor would it be permissible to justify burdening voting rights on the basis that the State wishes to raise more funds through motor vehicle fees. No legislator supporting HB 1264 has suggested that this bill is needed to raise motor vehicle fees or to tighten the requirements for motor vehicle registration in New Hampshire. The DMV did not propose this bill. Rather, the intent behind this bill has been focused on its impact on voting rights. Of course, imposing a post-election poll tax to raise

funds from voters as a condition of voting is itself unconstitutional, *see* Section II.B, and cannot possibly be a compelling or significant governmental interest.

Fourth, it would not be appropriate to impose HB 1264 on the ground that those who pay motor vehicle fees have, through such payment, allegedly shown that they are somehow more “knowledgeable” or more committed to New Hampshire. Such a rationale, understandably, has been rejected by the United States Supreme Court. *See Dunn*, 405 U.S. at 355 (rejecting “knowledgeable voter” justification on the ground that “[f]encing out’ from the franchise a sector of the population because of the way they may vote is constitutionally impermissible”) (quoting *Carrington v. Rash*, 380 U.S. 89 (1965)).

Fifth and finally, unlike what HB 1264 intends to accomplish, many states do not, in mandatory fashion, require those who register to vote to pay residency motor vehicle fees. Only a small minority of states have mandatory provisions where voter registration conclusively establishes residency for motor vehicle purposes. Most states have either no explicit connection, or else treat voter registration only as a non-conclusive factor in determining motor vehicle residency (or vice versa). Examples of states with this more permissive connection include Georgia, Idaho, Maine, New York, Oregon, and South Carolina.²⁴ For example, in Maine, while “[t]he place where any motor vehicle owned by the person is registered” and “[t]he residence address ... shown on any motor vehicle operator’s license held by the person” are factors that may be considered in determining residency for voting purposes, *see* Me. Rev. Stat. Ann. tit. 21-A, § 112(1)(A)(6), (12), these factors are not dispositive. Unlike what HB 1264 attempts to do, a person is not required to obtain a Maine license and car registration if they have voted or wish to

²⁴ *E.g.*, GA. CODE ANN. § 21-2-217(B), ID. CODE § 34-107. (1), ME. REV. STAT. ANN. TIT. 21-A, § 112, N.Y. ELEC. LAW § 5-104, OR. REV. STAT. § 247.035(3)(C), S.C. CODE ANN. § 7-1-25.

vote in Maine. The Maine Secretary of State has also confirmed this interpretation of the law.²⁵ Moreover, many states contain no explicit link between voter registration and motor vehicle residency.²⁶

Other states even make clear that college students are not obligated to pay motor vehicle residency fees. Vermont, for example, does not tie motor vehicle residency fees to the act of voting for eligible voters—like college students—who know that they will only be here for a fixed time, likely because it would create the very same poll tax on college students that HB 1264 would create. Under 23 V.S.A. 4(30), “persons who live in the State for a particular purpose involving a defined period of time, including students, migrant workers employed in seasonal occupations, and persons employed under a contract with a fixed term, are not residents for purposes of [the Motor Vehicle title] only.” Vermont’s law is similar in effect to how current New Hampshire law operates with respect to motor vehicle obligations and domicile for voting purposes. In Arizona, students who came from other states are also explicitly exempted from a requirement to register their vehicles. *See* Ariz. Rev. Stat. § 28-2001. In Arkansas, the definition of a “voting resident” is ruled by an individual’s domicile under Ark. Code Ann. § 7-5-201, which is separate from the definition of “resident” for the purposes of motor vehicle registration in Ark. Code. Ann. § 27-16-104. The latter definition of “resident” for motor vehicle purposes explicitly excludes persons in the state as students. *See* Ark. Code. Ann. § 27-16-104(7)(B).

²⁵ *See also* Statement from Maine Secretary of State: “It is wrong to imply that a failure to comply with motor vehicle statutes after voting is a crime.” *See* Associated Press, “Dunlap Criticizes Lewiston Mayor for Intimidating Letter to New Voters,” *Bangor Daily News*, Mar. 8, 2018, available at <https://bangordailynews.com/2018/03/08/politics/lewiston-mayor-voting-carries-additional-legal-obligations/>.

²⁶ Such states without any explicit link in statute or regulation include Alabama, Alaska, Connecticut, Delaware, Hawaii, Illinois, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, North Carolina, Ohio, Pennsylvania, South Dakota, Texas, Utah, Virginia, and Wisconsin.

3. New Hampshire's History of Trying to Disenfranchise College Students

It is important to note that HB 1264's attempt to deter college students from voting is nothing new in New Hampshire. These efforts have existed since the 26th Amendment—which lowered the voting age from 21 to 18—was ratified in 1971. In the early 1970s, for example, New Hampshire had a law in place that disqualified a citizen from voting in a municipality if the citizen has a firm intention of leaving that town at a fixed time in the future. This law explicitly targeted college students and was struck down in *Newburger*. 344 F. Supp. at 562.

During the 2000 election, the right of college students to vote was also an issue. As one writer has explained: “Republicans passed out flyers warning out-of-state UNH students that if they voted in New Hampshire, they could lose scholarships, health insurance or car insurance based on their legal residency in another state and asserting that they would be obliged to register their cars and obtain driver’s licenses here. Town officials told students the same thing on Election Day, and Republican lawyers at the polls challenged nearly every out-of-state student trying to register. The Democrats responded by sending their own lawyers, and ultimately, the state attorney general’s office was called in to referee.”²⁷

In 2012, the New Hampshire legislature similarly enacted a law that amended the voter registration form to suggest that voters must comply with all obligations “which apply to all residents, including laws requiring a driver to register a motor vehicle and apply for a New Hampshire[] driver’s license within 60 days of becoming a resident.” The goal there—like the goal of HB 1264—was to compel college students to pay motor vehicle fees as a condition of registering to vote. As the House Speaker stated at the time, college students are “[v]oting as a liberal. That’s what kids do.” He complained that college students lack “life experience,” and

²⁷ Katharine Webster, “Much Ado About Student Voters,” *UNH Magazine*, Fall 2015, available at <https://www.unh.edu/unhtoday/2015/12/much-ado-about-student-voters>.

“they just vote their feelings.”²⁸ Three college students brought suit and, once again, this Court in *Guare* struck down this language in 2015. *See Guare*, 167 N.H. at 665.²⁹

In 2015, House Bill 112—which stated in RSA 654:1 that “[a] person who declares an address in a New Hampshire town or ward as his or her domicile for voting purposes shall be deemed to have established his or her residence for motor vehicle law purposes at that address”—was similarly targeted at students with the purpose of imposing motor vehicle “residency” fees on this voting population. The memorandum of law filed with this Court by the House of Representatives in support of HB 112 acknowledged this goal of imposing motor vehicle fees. This Court correctly declined to opine on this bill’s constitutionality, and the bill was not enacted. *See Opinion of the Justices*, 167 N.H. 539, 541 (2015).

The 2016 election further emboldened efforts to restrict college student voting in light of the perception that these students played a dispositive role during that election.³⁰ Representative Michael Moffett—who voted in support of HB 1264—stated on Facebook after the 2016 general election that “[m]any out-of-state college students in Durham, Plymouth, Keene, Manchester, Henniker and Hanover registered late and most voted Democrat ... Ayotte had her reelection stolen from her by out-of-staters ... and Clinton’s razor-thin victory was stolen as well ...” *See* Rep. M. Moffett Post, Appendix *Exhibit 2*, at 003-5. However, unable to directly disenfranchise non-resident domiciliary college students after the *Newberger* and *Guare* decisions, proponents of more restrictive voting laws—under the guise of “tightening” up voting standards—have

²⁸ *See* Rochester 9/12 Event Video (9:45), at https://www.youtube.com/watch?time_continue=624&v=B8tqpBzLNzE.

²⁹ Indeed, as the *Guare* Court itself noted, “a few legislators publicly opined that the challenged language requires a voter with a New Hampshire domicile, who is not a New Hampshire ‘resident,’ to obtain a New Hampshire driver’s license and to register her vehicle here, before voting here.” *Id.* at 665.

³⁰ *See* Jeff McMenemy, “College Towns Have Big Impact on NH Election,” *Foster’s Daily Democrat*, Nov. 13, 2016, available at <http://www.fosters.com/news/20161113/college-towns-have-big-impact-on-nh-election>.

resorted to indirect efforts to impact the student vote. *See Burrows v. Keene*, 121 N.H. 590, 597 (1981) (noting that the government “cannot do indirectly that which it cannot do directly”).

Most recently, in 2017, New Hampshire enacted SB 3, which is currently in litigation. This bill creates a proof of domicile requirement and imposes onerous penalties for noncompliance which have been temporarily enjoined by the Superior Court.³¹ Senator Jeb Bradley—also a proponent of HB 1264—explained in his discussion of SB 3: “I went to school in Massachusetts I wouldn’t have dreamed of voting in Massachusetts. I always thought I was a New Hampshire resident even when I was going to Tufts University, so I voted absentee or I came home.”³² HB 1264 is the sequel to SB 3 and is designed to get around the *Guare* decision in which this Court did not permit the imposition of motor vehicle fees on non-resident domiciliary college students through the voter registration form.

The apparent view among some of HB 1264’s proponents is that these college students who live in New Hampshire, but who do not have an indefinite intention to remain, simply do not have sufficient “skin in the game” or a “long-term vested interest” in New Hampshire to vote here. However, as the *Newburger* Court explained in referencing such voters, “[i]t is impossible for us to see how such people would possess any greater knowledge, intelligence, commitment, or responsibility than those with more precise time schedules.” *See Newburger*, 344 F. Supp. at 563 (college students have a constitutional right to vote in New Hampshire where they live regardless of whether they intend to live in New Hampshire indefinitely); *see also Guare*, 167 N.H. at 665 (acknowledging that three college student petitioners were domiciled in New

³¹ *See League of Women Voters of New Hampshire v. Gardner*, No. 2017-cv-00433 (N.H. Hillsborough Cty. Super. Ct. South, Sept. 12, 2017), available at <https://htv-prod-media.s3.amazonaws.com/files/nh-democratic-party-et-al-v-gardner-et-al-preliminary-injunction-1505216669.pdf>.

³² *See* Dave Solomon, “College Students Fret Over Election Law Changes,” *Union Leader*, Mar. 4, 2017, available at <http://www.unionleader.com/College-students-fret-over-election-law-changes>.

Hampshire and therefore were constitutionally eligible to vote in New Hampshire). This constitutional right to vote in New Hampshire is no less strong if college students have the option to vote by absentee ballot in the state from which they moved. As *Newberger* also explained, it is inappropriate “to force persons who are in every meaningful sense members of New Hampshire political communities to vote in communities elsewhere which they have long departed and with whose affairs they are no longer concerned.” *Id.* Indeed, as these college students have satisfied the definition of “domicile” under RSA 654:1, I, they spend more time in New Hampshire than anywhere else. They spend money at New Hampshire restaurants and businesses. They also spend thousands of dollars attending New Hampshire educational institutions. To suggest that these voters are somehow less worthy of the right to vote than others is wrong. History is replete with unfortunate examples of legislatures unconstitutionally restricting the voting rights of populations they deem unworthy or as lacking a vested interest in the community. *See, e.g., Dunn*, 405 U.S. at 355.

B. HB 1264 Violates Part I, Article 11 Because it is a Poll Tax

HB 1264 also violates Part I, Article 11 for the independent reason that it creates a poll tax. HB 1264 would directly link unavoidable financial costs to registering to vote by imposing the requirement of paying driver’s license fees, vehicle title and registration fees, and vehicle municipal permit fees as a consequence of one’s choice to register. And if this registrant does not pay these motor vehicle fees within 60 days of registering, that voter will have committed a misdemeanor. *See* RSA 263:48.

The United States Supreme Court has made clear in the context of the Twenty-Fourth Amendment that its provisions “nullif[y] sophisticated as well as simple-minded modes of impairing the right guaranteed.” *Harman v. Forssenius*, 380 U.S. 528, 540-41 (1965). In

Harman, the Court struck down a scheme in which individuals who did not pay the revised, non-mandatory Virginia poll tax would have to file a certificate attesting to their residency in the state six months prior to an election. *Id.* at 541. The Court held that this scheme placed a “real obstacle” to those asserting their right to vote without paying a poll tax. *Id.*

The category of forbidden poll taxes is broad in order to root out any procedural requirements that deny or abridge the right to vote. *Id.* at 541. It therefore covers not just direct taxes on the right to vote but any imposition that constitutes a “material requirement solely upon those who refuse to surrender their constitutional right to vote in federal elections without paying a poll tax.” *Id.* The fact that these fees are imposed after one votes, rather than before one votes, is irrelevant. As in *Harman*, regardless of whether the State requires motor vehicle fees to be paid before or after one registers, they still constitute a “material requirement” imposed “solely upon those who refuse to surrender their constitutional right to vote.” *Id.*³³ Again, the fees associated with obtaining a driver’s license and registering a vehicle—as well as the certification of payment of taxes necessary to obtain a driver’s license—can amount to hundreds of dollars. *See also Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966) (\$1.50 poll tax for state elections unconstitutional). For current non-resident domiciliary college students, this financial burden would not fall on these student voters automatically under HB 1264; rather, it would be triggered if that voter elects to exercise his or her constitutional right to vote. Deputy Secretary Scanlan confirmed this during the hearing on HB 1264 before the House of Representatives’

³³ The House Election Law Majority Committee Report on HB 1264 acknowledges that these motor vehicle fees are imposed on voters, but argues (incorrectly) that these fees are not a poll tax because they are imposed *after* an election. *See* House Election Law Majority Committee Report on HB 1264, House of Representatives Journal No. 6, pp. 132-36 (“Some objection to the change made reference to the fact that certain voters, who currently do not need to comply with motor vehicle laws, would have to with this bill. It was said that a requirement to comply with motor vehicle licensing and registration of vehicles would create a post-election poll tax. A poll tax is something that must be required before the vote; this change creates no such pre-vote obligation.”), *available at* http://www.gencourt.state.nh.us/house/caljournals/journals/2018/HJ_6.pdf.

Election Law Committee.³⁴ And if these students choose not to pay after registering to vote, they will have committed a crime punishable by a jail sentence.

C. HB 1264 Violates Part I, Article 11 Because it Discriminates on the Basis of Age

Part I, Article 11 states that “[a]ll elections are to be free, and every inhabitant of the state of 18 years of age and upwards shall have an equal right to vote in any election.” This right to vote is at least as protective as the right to vote embedded in the 26th Amendment to the United States Constitution. The 26th Amendment protects the right to vote of “citizens of the United States, who are eighteen years of age or older,” from “deni[al] or abridge[ment] by ... any State on account of age.” That the text of this amendment tracks that of the 15th and 19th Amendments, which prohibit the denial or abridgement of voting rights on account of race and sex, respectively, is no accident: “The authors of the [26th] Amendment consciously modeled it after the [15th] and [19th].” Note, Eric S. Fish, *The Twenty-Sixth Amendment Enforcement Power*, 121 Yale L.J. 1168, 1175 (2012). Accordingly, consistent with the 15th and 19th Amendments, the 26th Amendment prohibits age-based discrimination in the voting context. *Accord Walgren v. Howes*, 482 F.2d 95, 101 (1st Cir. 1973) (noting that “the [15th] and [19th] Amendments served as models for the [26th]” and stating that “[m]ost relevant would seem to be the general admonitory teaching of” *Lane v. Wilson*, 307 U.S. 268 (1939), a 15th Amendment case).

Like the 15th Amendment, the 26th Amendment—and thus Article 11 to the New Hampshire Constitution—prohibits not just age-based denials of the right to vote but also age-

³⁴ Casey McDermott, “N.H. Election Chief: Voters Should Have to Claim Residency to Participate,” *NHPR*, Jan. 26, 2008 (Deputy Secretary of State David Scanlan stating that “[a] student would have to decide whether they want to claim if they’re a resident of the state of New Hampshire ... and if they do, they’re subject to whatever else would be required of any other resident of the state of New Hampshire,” which includes motor vehicle residency fees), available at <http://nhpr.org/post/nh-election-chief-voters-should-have-claim-residency-participate#stream/0>.

based impediments to that right. “[T]he backers of the amendment argued ... that the frustration of politically unemancipated young persons, which had manifested itself in serious mass disturbances, occurring for the most part on college campuses, would be alleviated and energies channeled constructively through the exercise of the right to vote.” *Walgren*, 482 F.2d at 100-01; *see also Sloane v. Smith*, 351 F. Supp. 1299, 1304 (M.D. Pa. 1972); *Colo. Project-Common Cause v. Anderson*, 495 P.2d 220, 223 (Colo. 1972). Further, “[t]he goal was not merely to empower voting by our youths but was affirmatively to encourage their voting, through the elimination of unnecessary burdens and barriers, so that their vigor and idealism could be brought within rather than remain outside lawfully constituted institutions.” *Worden v. Mercer Cnty. Bd. of Elections*, 294 A.2d 233, 243 (N.J. 1972).

Unlawful discriminatory purpose may be shown by either direct or circumstantial evidence, including that the law places particular burdens on young voters as a group. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (“Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.”).

Here, the evidence establishes that the challenged provisions, both individually and collectively, were motivated, at least in part, by an intent to discriminate against New Hampshire’s youngest voters who go to college in this State but who do not have an indefinite intention to remain. Senator Gannon was clear as to this intent when acknowledging, on the Senate floor when HB 1264 was debated, that these college students do not “really have skin in the game” that justifies them voting.³⁵ And the sequence of events since the 2016 election further establish this intent. The perception among many of HB 1264’s proponents has been that

³⁵ See May 2, 2018 Senate floor debate (3:58:35), available at <http://sg001-harmony.sliq.net/00286/Harmony/en/PowerBrowser/PowerBrowserV2/20180502/-1/16288#agenda>.

college students swayed the 2016 election in close New Hampshire races that had national implications. After the election, Senator Dan Innis argued that these college students “shouldn’t be able to vote here.”³⁶ As a result, immediately after that election, legislators began a strategy of imposing new voting restrictions making it more difficult for college students to vote, including through HB 1264. *See Arlington Heights*, 429 U.S. at 267 (evidence of decisionmaker’s purpose may include historical background of and sequence of events leading up to challenged decision). Accordingly, HB 1264 is unconstitutional.

For these three independent reasons, HB 1264 violates Part 1, Article 11 of the New Hampshire Constitution.

III. HB 1264 Violates the Equal Protection Clauses of the United States and New Hampshire Constitutions

As to questions (a) and (c) in Section I and Section II of this Court’s May 17, 2018 order, HB 1264 also violates the Equal Protection Clauses of both the Fourteenth Amendment and Part I, Article 1 and 2 of the New Hampshire Constitutions because it fails strict scrutiny review. *Dunn v. Blumstein*, 405 U.S. 330 (1972) (applying equal protection clause and, ultimately strict scrutiny, to law that imposed a one-year residency waiting period to vote); *see also McGraw v. Exeter Region Coop. Sch. Dist.*, 145 N.H. 709, 711 (2001). Here, HB 1264 treats similarly situated non-resident domiciliaries differently solely based on the decision to register to vote. As intended under HB 1264, college student voters who do not have an indefinite intention to remain will be deemed “residents” under RSA 21:6 and compelled to comply with motor vehicle residency fees if—and only if—they register to vote. If they do not register to vote, these obligations will not be triggered.

³⁶ See Jeff McMenemy, “College Towns Have Big Impact on NH Election,” *Foster’s Daily Democrat*, Nov. 13, 2016, available at <http://www.fosters.com/news/20161113/college-towns-have-big-impact-on-nh-election>.

The following example is illustrative of the unconstitutional nature of the law: Two twins over the age of 18 move from Kittery, Maine to the same address in Durham, New Hampshire to attend school at the University of New Hampshire. Both own a car registered in Maine and have a Maine driver's license. They live at the same location and engage in the same civic and social activities in Durham. They establish a physical presence and manifest intent to maintain a single continuous presence at their address near the University of New Hampshire. *See* RSA 654:1, I. In short, they each are in the same community, operate within the same form of local New Hampshire government, and have a full stake in how this government operates. However, for personal and professional reasons, both individuals may move back to Kittery in four years after graduation so neither has a current intent to live at their Durham address "for the indefinite future." *See* RSA 21:6. Thus, under RSA 654:1, both are domiciled in New Hampshire for voting purposes and have a constitutional right to vote here, but neither are legal residents of New Hampshire under RSA 26:1. Accordingly, under current law, they are not required to obtain a New Hampshire driver's license or vehicle registration.

Under HB 1264, if neither person registers to vote, their status as described in the preceding paragraph would not change. They have not declared their domicile in New Hampshire under RSA 654:1, I-a by registering to vote, and therefore they have not declared their "residency" in New Hampshire under RSA 21:6. However, if one twin registers to vote, she would be declaring her "residency" under RSA 21:6 and now would be required to obtain a New Hampshire driver's license and vehicle registration and pay all the fees and taxes associated with this requirement. The twin who does not register to vote is not required to obtain a New Hampshire driver's license and vehicle registration and pay all the fees and taxes associated with this requirement.

For the same reasons above, under any standard of review, there is absolutely no justification to impose financial burdens on the one twin who wants to register to vote and not the other twin who does not register to vote. Accordingly, HB 1264 violates the equal protection principles embedded within the federal and state constitutions.

CONCLUSION

WHEREFORE, for these reasons, this Court should decline to answer the questions presented by the Governor and Executive Council concerning HB 1264 consistent with *Opinion of the Justices*, 167 N.H. 539 (2015). Alternatively, if this Court is inclined to answer these questions, it should schedule oral argument and deem HB 1264 unconstitutional in violation of the New Hampshire and United States Constitutions.

THE AMERICAN CIVIL LIBERTIES UNION OF
NEW HAMPSHIRE and THE FAIR ELECTIONS
CENTER,

BY AND THROUGH THEIR ATTORNEYS,



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May 31, 2018

APPENDIX

EXHIBIT 1



Senator Sharon Carson

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STOP DRIVE-BY VOTING IN NH!!!

The student being interviewed actually makes the case for the legislation, he wants to keep his out-of-state drivers license and drive his out-of-state registered car (because he doesn't live in NH) but wants to VOTE IN OUR STATE ELECTIONS!

Getting an absentee ballot from your home state is as easy as a telephone call or an email.

Call Gov. Sununu's office at 271-2121 and demand he sign HB 1264, only NH residents should vote in state and local elections.



Write a comment...

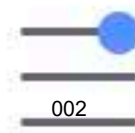


EXHIBIT 2



Q Search



write a reply...

**Michael Moffett**

Many out-of-state college students in Durham, Plymouth, Keene, Manchester, Henniker and Hanover registered late and most voted Democrat ... Ayotte had her reelection stolen from her by out-of-staters...and Clinton's razor-thin victory was stolen as well ... evidence will eventually be produced.... I'm a Republican and if I couldn't win without cheating or using identity politics, I'd rather lose



Write a comm...



Post



2



004



Q Search



Ayotte had her reelection stolen from her by out-of-staters...and Clinton's razor-thin victory was stolen as well ... evidence will eventually be produced.... I'm a Republican and if I couldn't win without cheating or using identity politics, I'd rather lose So shameful ...

Monday at 12:58 AM · Like · Reply

View 1 previous reply...



Mark Emerson

Tim, the Census counts people in place no



Write a comm...



Post



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