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RECEIVED
NEW HAMPSHIRE
SUPREME COURT

2018 MAY 29 A 10: 52

May 29, 2018

DELIVERED BY HAND

New Hampshire Supreme Court
1 Charles Doe Drive
Concord, NH 03301

Re: CASE NO. 2018-0267
Request for an Opinion of the Justices (Amending Definition of
Resident and Residency)

Supreme Court:

As allowed by your order dated May 17, 2018 in the case referenced
above, I submit an original and eight copies of:

**MEMORANDUM OF ED MOSCA IN SUPPORT OF THE
CONSTITUTIONALITY OF HOUSE BILL 1264**

If you prefer reading online, it is posted on Granite Grok,
<http://granitegrok.com/blog/2018/05/so-governor-you-want-to-talk-about-the-constitutionality-of-hb-1264-lets-talk#more-147378>, and on my own blog,
<http://www.edmosca.com/?p=6757>.

If you have any questions, you may contact me.

Submitted by,



Edward C. Mosca

Enclosures

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

CASE NO. 2018-0267

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

MEMORANDUM OF ED MOSCA
IN SUPPORT OF THE CONSTITUTIONALITY OF HOUSE BILL 1264

I. INTRODUCTION - A COURT OF LAW OR A WOKE COURT?

In *Guare v. State*, 117 A.3d 731 (2015), this Court ruled that the act of declaring a voting domicile in New Hampshire did not establish residency in New Hampshire because the statutory definitions of the terms differed:

The basic difference between a "resident" and a person who merely has a New Hampshire "domicile," is that a "resident" has manifested an intent to remain in New Hampshire for the indefinite future, while a person who merely has a New Hampshire "domicile" has not manifested that same intent.

... the challenged language inaccurately states New Hampshire law. The challenged language informs a potential voter that, upon declaring New Hampshire as her domicile, she is "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." Laws 2012, 285:2. This is inaccurate. A person who has only a New Hampshire domicile, but who does not meet the statutory definition of "resident," is *not* "subject to the laws of the state of New Hampshire which apply to all residents."

House Bill 1264 eliminates the anomaly between domicile and resident in our statutory law by removing the indefinite intent element from the definition of resident. As a result, if you register to vote in New Hampshire you will be deemed to have declared residency in New Hampshire.

This is merely what other States already do. For example, in our neighbor to the North, Maine, the act of registering to vote constitutes a declaration of residency:

Consequences of Declaring Your Voting Residence (by Registering to Vote) in Maine

... if you register to vote in Maine, you will be deemed to have declared residency in Maine, which may require compliance with other Maine laws, including the motor vehicle laws and tax laws. If you drive a car in Maine, you are required to obtain a Maine driver's license within thirty days of establishing residency here. ... *By declaring Maine as your voting residence, you may also be treated as a resident of Maine for income tax purposes and be subject to Maine income tax. ...*

<http://www.maine.gov/sos/cec/elec/voter-info/resident.html>.

Our neighbors to the South and West, Massachusetts and Vermont, treat residency as a prerequisite to voting. That is, in order to be eligible to vote in Massachusetts and Vermont one must declare himself or herself to be a resident:

You can use this form to:

- register or pre-register to vote in Massachusetts; and/or
- update your name, address, and political party.

To register or pre-register to vote in Massachusetts you must:

- **BE A U.S. CITIZEN;** and
- be a Massachusetts resident; and
- be at least 16 years old.

Penalty for Illegal Registration: Fine of not more than \$10,000 or imprisonment for not more than five years or both.

-Massachusetts General Laws, chapter 56 section 8.

<https://www.sec.state.ma.us/ele/elepdf/Voter-reg-mail-in.pdf>.

VERMONT Application for Addition to the Checklist (VOTER REGISTRATION FORM)
17 V.S.A. § 2145 (Please print clearly, use ballpoint pen, and bear down hard.)

I, _____ apply to have my name
(Last Name) (First Name) (Middle Initial)

added to the checklist of the Town/City of _____

By checking the boxes below, I swear or affirm that these are true statements:

Yes	No	Are you a citizen of the United States?
Yes	No	Will you be eighteen years of age or older on or before the day of election?
Yes	No	Are you a resident of Vermont?

If you checked "No" in response to any of the three questions above, DO NOT complete this form. You are not qualified to vote in Vermont. Contact the Office of the Secretary of State, Elections Division, for more information at (800) 439-8683.

<https://www.sec.state.vt.us/media/33935/2016-voter-app.pdf>

Given that House Bill 1264 merely does what this Court in *Guare* indicated needed to be done to make registering to vote in New Hampshire a declaration of residency in New Hampshire:

[f]or the purposes of this appeal, the State has agreed that the 2012 law that added the challenged language to the voter registration form, Laws 2012, 285:2, does not alter the statutory definitions of "domicile" and "residence." The State has also acknowledged that the statutory definition of "domicile" and the statutory definition of "residence" differ ...

and given that House Bill 1264 merely brings New Hampshire statutory law into conformity with the corresponding laws of other States, it is fair to ask: Why is this Court even being asked to opine on the constitutionality of House Bill 1264?

The answer is that the political stakes are immense. As shown in the next section, it is undeniable that without the votes of non-residents —primarily out-of-State college students—Maggie Hassan would not have been elected United States Senator in 2016, and it is arguable that without these votes Hillary Clinton would not have won the State's four electoral votes. The Left has brought enormous political pressure on the Governor to veto House Bill 1264 because they recognize how the loss of the votes of non-resident college students would hurt Democrat

candidates and they fear that many of these students would not vote in New Hampshire if the act of voting were to constitute a declaration of residency.

Of course, the Left cannot and are not saying openly that this is why they oppose House Bill 1264. Instead, they disingenuously claim that the bill would “disenfranchise” college students—as if students not wishing to declare residency in New Hampshire would not be able to vote absentee in the States they wish to remain residents of—and raise bogus legal arguments, such as claiming that House Bill 1264 is an unconstitutional “poll tax.” The Governor has passed the political hot potato to this Court. Whether House Bill 1264 becomes the law in New Hampshire is now up to this Court.

Undoubtedly, this Court would receive effusive praise from the Left—which includes virtually every press organization in New Hampshire—if it were to opine that House Bill 1264 is unconstitutional. Perhaps some on this Court share the Left’s concerns that House Bill 1264 will make it harder to elect Democrats in New Hampshire. But this Court’s job under the system of government intended by our State constitution is to be apolitical, not to be “woke.” If this Court does its job and addresses House Bill 1264 as a court of law, it can only return an opinion that House Bill 1264 is constitutional.

II. CONTEXT - GUARE AND THE 2016 ELECTION

A. *Guare*

Guare involved language similar to the language in use in Maine (see above) to inform voters that registering to vote constitutes a declaration of residency:

"In declaring New Hampshire as 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." Laws 2012, 285:2.

Although this Court in framed the “sole issue in this appeal [a]s whether the challenged language required by Laws 2012, 285:2 violates Part I, Article 11 of the New Hampshire Constitution,” this Court never compared the language in issue to the constitution:

Although the State Constitution does not define "domicile," the legislature has defined it as ...

This is, to say the least, an unorthodox approach to constitutional analysis. Constitutions do not define many things, but courts do not analyze free speech, or due process or equal protection — to name just a few examples— by deferring to the legislature’s position.

Had this Court construed the term “domicile” in Part I, Article 11 to reflect the common law definition of domicile at the time the State Constitution was enacted —“when required to interpret a provision of the constitution, we ... give the words in question the meaning they must be presumed to have had to the electorate when the vote was cast”— this Court would have been hard pressed to rule that the “challenged language” violated Part I, Article 11. New Hampshire’s “venerable common law of domicile ... views an intention to remain permanently or indefinitely in a particular town as essential to the acquisition of domicile.” *Newburger v. Peterson*, 344 F. Supp. 559 (1972) citing *State v. Daniels*, 44 N.H. 383 (1862); *see also Leach v. Pillsbury*, 15 N.H. 137 (1844); *Atherton v. Thornton*, 8 N.H. 178 (1835). By declaring New Hampshire as his or her domicile in the sense contemplated by Part I, Article 11 the voter would be declaring “an intention to remain permanently or indefinitely,” which would make the voter “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.”

This Court's approach to statutory construction in *Guare* was equally unorthodox. The only reasonable interpretation of the "challenged language" is that it was intended to do implicitly what House Bill 1264 does explicitly: eliminate the statutory anomaly between domicile and resident so that registering to vote in New Hampshire constitutes a declaration of residency in New Hampshire. Indeed, Senate President Peter Bragdon said exactly that in a guest column that ran in the *Union Leader* on September 17, 2012, which was when *Guare* was being litigated in the superior court:

The league's lawsuit raises a very important question: Should a student who attends college in New Hampshire, but who lives in Nebraska, gets a scholarship based on residency in Nebraska, is claimed as a dependent for tax purposes by parents in Nebraska, has a driver's license and car registration in Nebraska, and intends to return to Nebraska after graduating from college be allowed to vote in New Hampshire? The League of Women Voters thinks she should be able to vote here with no consequences. I think the student should vote in Nebraska. What's more, she can do so easily by simply requesting an absentee ballot from her home state.

The bottom line here is that the student has choices. She can register and vote here — if she is also willing to change her driver's license and car registration. Or she can vote absentee in her home state. She simply needs to pick one and accept the requirements either way. And either way she is not being disenfranchised.

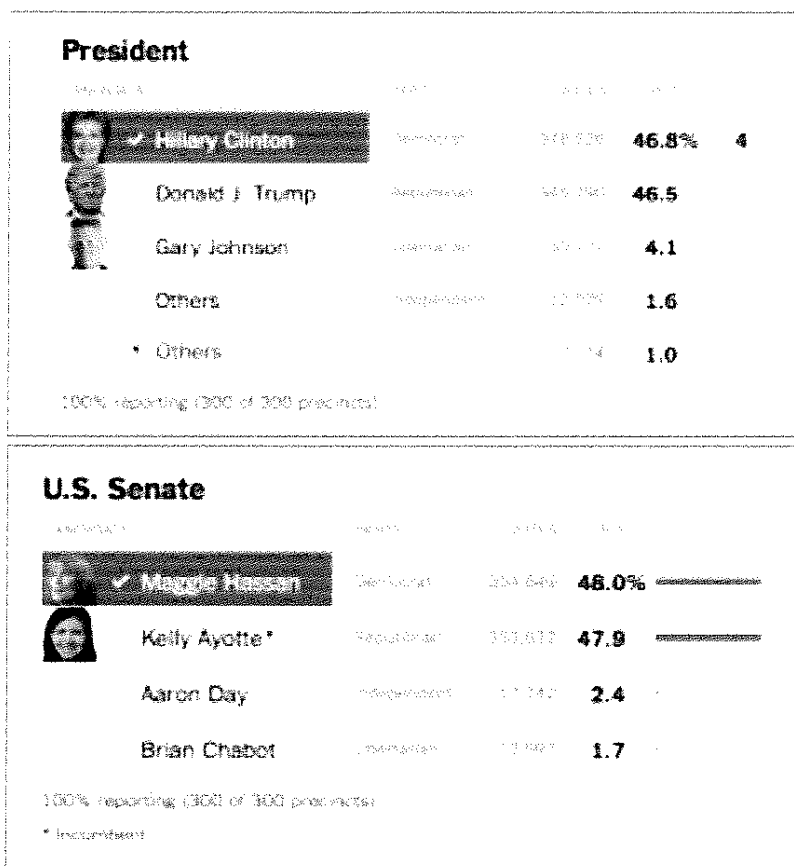
<http://www.unionleader.com/article/20120918/OPINION02/709189987/0/news03>. Yet this Court instead chose to find that the legislative intent of Laws 2012, 285:2 was to maintain the statutory anomaly between domicile and resident and to provide "confusing and inaccurate language" about the anomaly to voters.

This Court, in cases involving the interpretation of statutes, has often stated that "if the legislature disagrees with our construction of the statutory scheme, it is free to amend the statutes." See, e.g., *In the Matter of Fulton & Fulton*, 154 N.H. 264, 268 (2006). That is what the legislature has done. House Bill 1264 eliminates the anomaly between domicile and resident

in our statutory law that was the basis of this Court’s holding in *Guare*. As a result, if you register to vote in New Hampshire you will be deemed to have declared residency in New Hampshire.

B. *The 2016 Election - Out-of-State College Students Snag a United States Senate Seat, and Quite Possibly Four Electoral Votes.*

Here is the 2016 vote tally in New Hampshire for President and for United States Senate:

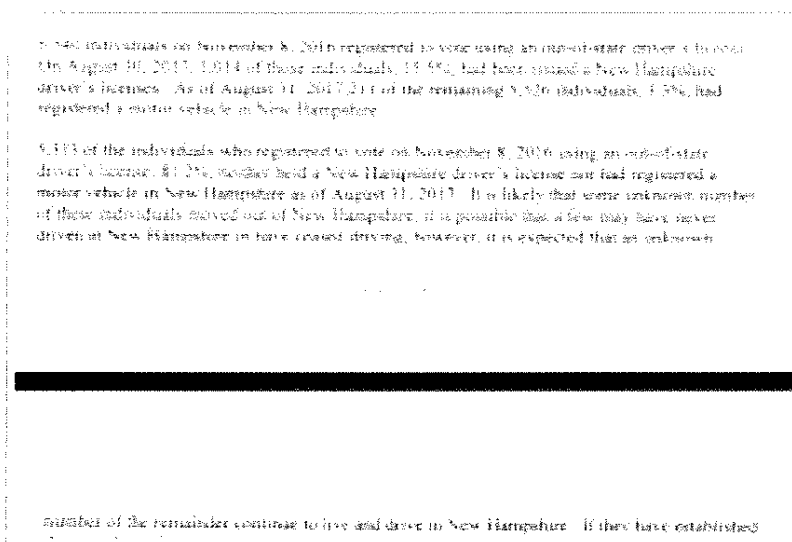


Hillary Clinton beat Donald Trump by only 2,736 votes, while Maggie Hassan beat Kelly Ayotte by an even smaller margin, a mere 1,017 votes.

Data provided by the New Hampshire Secretary of State allows us to calculate how many non-residents voted and to make a reasonable estimate of how these votes were allocated between the candidates. It is undeniable that without the votes of non-residents —primarily

out-of-State college students— Maggie Hassan would not have been elected United States Senator in 2016, and it is arguable that without these votes Hillary Clinton would not have won the State’s four electoral votes.

According to a report by the Secretary of State, 6,450 persons registered to vote on November 8, 2016 using a out-of-State driver’s license. As of August 30, 2017, 5,313 of these voters had neither obtained a New Hampshire driver’s license nor registered a car in New Hampshire.



<https://htv-prod-media.s3.amazonaws.com/files/gardnerbarthelmesreporttojasper-1504829159.pdf>

It is reasonable to assume that these 5,313 voters were primarily out-of-State college students. In a September, 2017 article in the Union Leader, Kevin Landrigan identified 3,403 likely non-resident college students who voted in New Hampshire in 2016:

Last February, Gardner reported about 5,900 “new” voters — those not on the pre-election checklist — who cast ballots last November presented out-of-state driver’s licenses at the polls. Among this group, nearly two-thirds of them voted in college towns: Durham (1,608); Hanover (774); Keene (624); and Plymouth (397).

<http://www.unionleader.com/article/20170907/NEWS0621/170909402&template=mobileart>.

Landrigan’s count, however, is clearly incomplete because he did not count voters using out-of-State driver’s licenses in municipalities adjacent to the “college towns,” or municipalities that are the locations of other colleges. To wit:

Dover (UNH) - 113
Goffstown (Saint Anselm’s) - 186
Henniker (New England College) - 135
Hooksett (SNHU) - 165
Manchester (SNHU and Saint Anselm’s) - 264
Rindge (Franklin Pierce) -214

<http://nhpr.org/post/where-were-out-state-ids-used-vote-new-hampshire-last-november#stream/0>

Add these voters to Landrigan’s and the count goes up to 4,367.

Let us assume—in order to make the arithmetic easy and because the count above certainly missed some college students (because it does not list all adjacent towns)—that 4,500 of the 5,333 voters who voted in 2016 using an out-of-State driver’s license and who did not subsequently obtain a New Hampshire driver’s license were non-resident college students. The question, then, is how to allocate these votes.

The Left has argued that we should assume that the non-resident college student vote split evenly between the parties. In other words, “no harm, no foul.” Poppycock.

According to Pew, young voters—voters aged 18 to 29—voted for Clinton over Trump by 55 percent to 37 percent. <http://www.pewresearch.org/fact-tank/2016/11/09/behind-trumps-victory-divisions-by-race-gender-education/>. It is reasonable to assume that the gap is significantly higher among college students. For example, the Secretary of State’s records show

that Hanover voted for Clinton over Trump by 6,561 to 926 or more than seven to one.

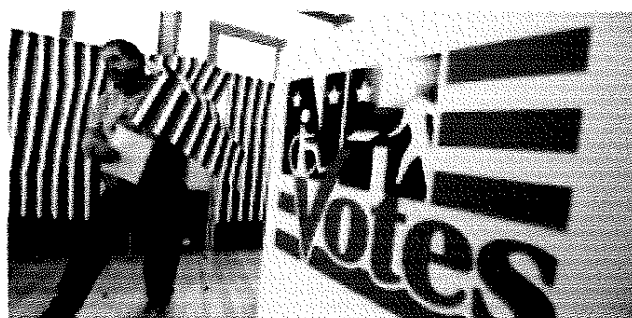
sos.nh.gov/2016PresGen.aspx?id=8589963634.

Let us assume that only three-quarters of the 4,500 non-resident college students voted Democrat, an extremely cautious assumption given —as noted above— that Hanover voted for Clinton by more than seven to one. This nets to 2,250 votes for Democrat candidates. “Un-counting” these votes gives Ayotte approximately a 1,250 vote victory over Hassan, and cuts Clinton’s margin over Trump to less than 500 votes. The Left is well aware of this:



Olivia O'Bryen

the GOP didn't want students to vote because the student vote in Durham is why Maggie Hassan won - and that's the voting power republicans are afraid of



New Hampshire Republicans Are Pushing Another Measure Restricti...

President Donald Trump has claimed widespread voter fraud cost him the election in the state, but has presented no evidence

And, needless to say, this is why the Left is so frantic to prevent House Bill 1264 from becoming law.

III. The Governor's Questions

A. Not a "Post-Election Poll Tax"

The first question submitted by Governor Sununu involves the Left's claim that eliminating the statutory anomaly between domicile and resident would impose a "poll tax" or "post-election poll tax." To wit:

While students finish finals and head home for the holidays, Chris Sununu & his Republican allies are trying to pass an insidious bill to impose a poll-tax on students who vote!

#NoHB372
#Handsoffourballot

NHYD



“

"Having turned 18 this summer, it's upsetting & disheartening to hear that New Hampshire Republicans are attempting to disenfranchise college students like myself through what could be a post-election poll tax.

If HB 372 were to go through, it would make it much more difficult for myself and other college students to exercise our constitutional right to vote"

Elizabeth Janowski
Dartmouth College, '21

The 24th Amendment (ratified in 1964), which provides as follows, outlawed “poll taxes”:

The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

In 1966, in *Harper vs. Virginia Board of Elections*, the United States Supreme Court extended the 24th Amendment to State elections, ruling that Virginia’s poll tax was unconstitutional under the 14th Amendment.

The obvious problem with arguing that House Bill 1264 is a poll tax is that House Bill 1264 does not require the payment of any tax or fee or fine to vote. More specifically, House Bill 1264 does not require a voter to prove that he or she has obtained a New Hampshire’s driver’s license or registered his or her car in New Hampshire in order to vote.

Characterizing House Bill 1264 as a post-election poll tax does not solve the problem. House Bill 1264 does not negate the votes of voters who after voting fail to comply with RSA 263:35 or RSA 261:45.

The poll tax argument really is the argument that this State —unlike Maine, unlike, Massachusetts, unlike Vermont, to name just a few examples— cannot define the act of registering to vote as a declaration of residency. Because this argument is totally ludicrous, the opponents of House Bill 1264 feel the need to disguise it. Hence the heavy application of poll tax lipstick.

That the Governor does not understand, or chooses to ignore, that House Bill 1264 eliminates the statutory anomaly between domicile and resident —“[b]y subjecting those who are

domiciled in New Hampshire for voting purposes to the same legal requirements as those who are residents”— does not change the analysis or the conclusion. The meaning of House Bill 1264 is determined by the words of House Bill 1264, not by what the Governor may think House Bill 1264 says.

B. *No Special Constitutional Status for Snowflakes*

The second question submitted by Governor Sununu essentially asks whether non-resident college students enjoy a special constitutional status that allows them to vote in New Hampshire elections, but prevents the legislature from deeming their act of voting as a declaration of residency. Stated slightly differently, the Governor asks whether it is unconstitutional for the legislature to deem the act of voting as a declaration of residency without making an exception for non-resident college students.

Non-resident college students are not a suspect class under the equal protection clauses of either the United States Constitution or the New Hampshire Constitution. So there is no reasonable equal protection argument to be made against House Bill 1264.

As discussed in our examination of *Guare*, the term “domicile” in Part I, Article 11 means a resident with the intention to remain permanently or indefinitely in a particular town. No reasonable argument can be made that Part I, Article 11 creates special rights for individuals with just the opposite intention.

That a federal district court in 1972 ruled that a permanent or indefinite intention test for voting violated the federal constitution’s equal protection clause, *Newburger v. Peterson*, 344 F. Supp. 559 (1972), does not require the State to maintain a statutory distinction between domiciliary and resident based on an indefinite intention test. All that would be required —

assuming for the sake of analysis that *Newburger* represents a correct statement of the law— is that no permanent or indefinite intention test be used to qualify voters.

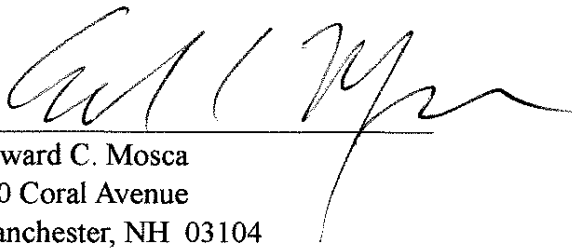
That the Governor does not understand, or chooses to ignore, that House Bill 1264 eliminates the statutory anomaly between domicile and resident —“[b]y subjecting those who are domiciled in New Hampshire for voting purposes to the same legal requirements as those who are residents”— does not change the analysis or the conclusion. The meaning of House Bill 1264 is determined by the words of House Bill 1264, not by what the Governor may think House Bill 1264 says.

IV. Conclusion

The issues raised by the opponents of House Bill 1264, which are reflected in the Governor’s questions, are not legal issues but political issues. It is not the job of this Court under our system of government to take sides in political disputes. If this Court is to act as a court of law —as opposed to a court of social or therapeutic justice, that is a “woke” court— it can only return an opinion that House Bill 1264 is constitutional.

Submitted by,

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May 29, 2018