

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

2018 TERM

CASE NO. 2018-0267

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2018 MAY 31 A 10:38

REQUEST FOR AN OPINION OF THE JUSTICES

MEMORANDUM OF LAW ON BEHALF OF THE NEW HAMPSHIRE
HOUSE OF REPRESENTATIVES

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May 31, 2018

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QUESTIONS PRESENTED FOR REVIEW

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.

STATEMENT OF THE FACTS AND LEGISLATIVE HISTORY

House Bill 1264 was introduced to the House on January 3, 2018. The majority on the House Election Law Committee recommended that House Bill 1264 “ought to pass.” In its Statement of Intent, the majority noted the importance of ensuring an equal right to vote by unifying the definitions of domicile, resident, and inhabitant. On March 6, 2018, the House adopted a motion that House Bill 1264 ought to pass. House Bill 1264 was then introduced to the Senate on March 8, 2018. The Senate Election Law Committee also recommended that House Bill 1264 “ought to pass with amendment,” and on May 10, 2018 the House concurred with the Senate amendment and passed House Bill 1264. On May 26, 2018, the Governor and Executive Council requested an Opinion of the Justices concerning the constitutionality of House Bill 1264. House Bill 1264 seeks to amend RSA 21:6 and RSA 21:6-a by eliminating “for the indefinite future” from the statutory definitions of “resident or inhabitant” and “residence or residency.” The Governor and Executive Council posed the aforementioned questions.

SUMMARY OF THE ARGUMENT

The Court presumes a statute to be constitutional. *Gonya v. Comm’r, New Hampshire Ins. Dep’t*, 153 N.H. 521, 524 (2006). Even where the Court has doubts as to the constitutionality of a statute, the Court will not intervene absent “inescapable grounds” or a “clear and substantial conflict.” *N.H. Ass’n of Counties v. State*, 158 N.H. 284, 288 (2009); *Gonya*, 153 N.H. at 524.

House Bill 1264 is constitutionally valid under the following constitutional provisions: the Equal Protection Clause of Part I, Article 2 of the New Hampshire Constitution; Part I, Article 11 of the New Hampshire Constitution; and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. First, House Bill 1264 amendments to statutory definitions of “resident or inhabitant” and “residence or residency” comply with the Court’s ruling in *Newburger*. Second, under the proposed amendments, voter eligibility remains unchanged and any future burden

conferred upon citizens is nondiscriminatory. While House Bill 1264 will trigger future obligations on citizens who register to vote and choose to drive in the State, these obligations take effect post-participation in the franchise and are applied in a uniform, nondiscriminatory manner. Third, to the extent the statutory definitions of “resident or inhabitant” and “residence or residency” impact voter eligibility, House Bill 1264 remains constitutionally valid because House Bill 1264 does not deny the franchise to any individual. Rather, the proposed amendments provide clarity and remedy a class division among registered voters under existing law that results in the unequal imposition of obligations. *See Guare v. State*, 167 N.H. 658, 664 (2015). Finally, House Bill 1264 is necessary to safeguard the essence of a political community by incentivizing voters to have a stable connection to the community in which they exercise their franchise. Thus, the New Hampshire House of Representatives, acting through its duly elected leaders, requests the Justices of the Supreme Court to advise the Governor and Council that House Bill 1264 is constitutional under both the New Hampshire and United States Constitutions.

ARGUMENT

I. STANDARD OF REVIEW

The Court presumes a statute to be constitutional. *Gonya*, 153 N.H. at 524. In the absence of “inescapable grounds” or “a clear and substantial conflict” between the statute and the constitution, the Court refrains from declaring the statute invalid. *N.H. Ass’n of Counties*, 158 N.H. at 288; *Gonya*, 153 N.H. at 524. Even where doubts exist as to the constitutionality of a statute, “those doubts must be resolved in favor of [the statute’s] constitutionality.” *Bd. of Trustees, N.H. Judicial Ret. Plan v. Sec’y of State*, 161 N.H. 49, 53 (2010). The power to decide the “wisdom, effectiveness, and economic desirability of a statute” vests solely with the legislative branch and the Court will not substitute its own judgment for that of the elected legislature. *Smith Insurance, Inc. v. Grievance Committee*, 120 N.H. 856, 863 (1980).

Under Part I, Article 11 of the New Hampshire Constitution, the right to vote is a fundamental right. *Akins v. Sec'y of State*, 154 N.H. 67, 71 (2006). “Article I, Section 4, Clause 1 of the United States Constitution grants states the right to regulate the time, place, and manner of state and federal elections” *Id.* (citing *Burdick v. Takushi*, 504 U.S. 428, 433 (1992)). Where a fundamental right is potentially impinged upon by state regulation, the Court determines the applicable level of scrutiny by “[balancing] the legislature’s right to regulate elections with the citizens’ rights to vote and be elected.” *Id.* Strict scrutiny solely applies where state regulation subjects citizens to “severe restrictions,” such as “denying the franchise to some otherwise qualified citizens.” *Burdick*, 504 U.S. at 433-34; *Newburger v. Peterson*, 344 F.Supp. 559, 561 (D.N.H. 1972). The test for strict scrutiny is “whether the exclusions [from the franchise] are necessary to promote a compelling state interest.” *Newburger*, 344 F.Supp. at 561 (quoting *Dunn v. Blumstein*, 405 U.S. 330, 337 (1972)). Where state regulation imposes only “reasonable, nondiscriminatory restrictions” on citizens’ rights, then intermediate scrutiny applies and “the State’s important regulatory interests are generally sufficient to justify the restrictions.” *Id.* The test for intermediate scrutiny is whether the challenged law substantially relates to an important governmental objective. *Guare*, 167 N.H. at 665. Under intermediate scrutiny, the State bears the burden of proof. *Id.*¹

As between these two standards of review, intermediate scrutiny applies because House Bill 1264 is nondiscriminatory and does not deny access to the franchise or infringe upon the fundamental right to vote of current New Hampshire residents, inhabitants, and domiciled persons. House Bill 1264 solely triggers an obligation, 60 days from the date of establishing residency, on those who register to vote *and* choose to avail themselves of the statutory right to drive in New Hampshire. *See* N.H. Rev. Stat. Ann. § 261:45; N.H. Rev. Stat. Ann. § 263:35. The triggering of an obligation that relates to a statutory right cannot constitute a “severe restriction” or denial of the

¹ While rational basis may be the applicable standard of review if a challenge were brought against an enacted House Bill 1264, the New Hampshire House of Representatives believes it would be more helpful, for the purposes of this memorandum, to focus on the higher standards of review, where House Bill 1264 would still be upheld as constitutional.

franchise. Even if the Court were to find that strict scrutiny standard of review applies, however, House Bill 1264 remains constitutionally valid because the State has a compelling interest in “[preserving] the basic conception of a political community” by incentivizing voters to have a stable connection to the State. *Dunn v. Blumstein*, 405 U.S. 330, 344 (1972).

House Bill 1264 amends RSA 21:6 and RSA 21:6-a to ensure an equal right to vote through aligning the definitions of domicile, resident, and inhabitant. In *Guare*, the Court articulated that, “[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.” *Guare*, 167 N.H. at 664. Under *Guare*, RSA 21:6 and RSA 21:6-a as they currently stand effectively create two distinct classes of registered voters. House Bill 1264 amendments remedy this class division, and validly trigger potential obligations on all citizens of the State who establish residency or domicile. Uniformly imposing obligations on voters is necessary and narrowly tailored to promote this interest of “[preserving] the basic conception of a political community.”

II. HOUSE BILL 1264 DOES NOT CHANGE VOTER ELIGIBILITY.

The proposed amendments to RSA 21:6 and RSA 21:6-a do not change the eligibility requirements for voter registration. Rather, the amendments unify voters in the State by equally subjecting voters to potential obligations. Complying with *Newburger*, House Bill 1264 preserves access to the franchise and statutorily removes the requirement that a resident, inhabitant, or domiciliary maintain a “permanent or indefinite intention to stay in one place.” *Newburger*, 344 F.Supp. at 561.

The Court only declares a statute invalid where an individual’s access to the franchise or eligibility to participate in the franchise is limited. In *Newburger*, the Court struck down the New Hampshire indefinite intention test as unconstitutional and prohibited a durational residential requirement for voter eligibility. *Id.* at 561; *see also Dunn*, 405 U.S. at 359-60 (finding that durational residential requirements “exclude too many people who should not, and need not, be

excluded [from the franchise.]”). Similarly in *Evans*, the Court rejected a Maryland statute that attempted to exclude residents that lived on tax-exempt property from the franchise. *Evans v. Cornman*, 398 U.S. 419, 425-26 (1970). The *Evans* Court reasoned that the differences between Maryland residents and those who lived on a federal enclave “do not come close to establishing that degree of disinterest in electoral decisions that might justify a total exclusion from the franchise.” *Id.*

Here, unlike in *Newburger*, *Dunn*, and *Evans*, a citizen’s constitutional eligibility to participate in the franchise remains unchanged. House Bill 1264 does not implicate or even touch upon voter eligibility and access to the franchise. Specifically, the voter eligibility requirements for hospital residents, professors, college students, and snow birds remain entirely unchanged. House Bill 1264 solely triggers a uniform obligation under RSA 261:45 and RSA 263:35 on all individuals who establish residency and choose to drive in the State. In the event that an individual establishes residence through voter registration, that individual may freely exercise his or her right to the franchise. If the individual drives a motor vehicle in New Hampshire, then under House Bill 1264, the individual has an obligation to obtain a New Hampshire license and vehicle registration within sixty (60) days. Thus, the proposed amendments to RSA 21:6 and RSA 21:6-a, as well as the triggered obligations under RSA 261:45 and RSA 263:35, are valid under the New Hampshire Constitution and United States Constitution because voter eligibility is unaffected and no segment of the population is disenfranchised.

III. IN THE EVENT THE COURT FINDS THAT HOUSE BILL 1264 INFRINGES UPON CITIZENS’ RIGHT TO VOTE, THE AMENDMENTS ARE ALSO NECESSARY AND NARROWLY TAILORED TO PROMOTE THE STATE’S COMPELLING INTEREST IN ENSURING A STABLE CONNECTION BETWEEN VOTERS AND THEIR POLITICAL COMMUNITY.

The State has an obligation to its citizens to safeguard the franchise by ensuring that those who participate in the franchise are subject to the laws of the State. The statutory scheme under RSAs 21:6, 21:6-a, 261:45, and 263:35 complies with the New Hampshire and United States Constitutions and validly triggers obligations on citizens who establish residence in the state. In

Carrington, the United States Supreme Court acknowledged the State's interest in "protecting the franchise from infiltration by transients." *Carrington v. Rash*, 380 U.S. 89, 93 (1965). While "fencing out [a sector of the population] from the franchise," is unconstitutional, a State retains the right to require registered voters to be "bona fide residents of the community." *Id.* at 93-94. Similarly in *Dunn*, the Court recognized circumstances where a bona fide resident requirement would be constitutional: "[an] appropriately defined and uniformly applied requirement of bona fide residence may be necessary to preserve the basic conception of a political community, and therefore could withstand close constitutional scrutiny." *Dunn*, 405 U.S. at 343-44. The State's interest in encouraging individuals to "align their strongest, personal political interest with the appropriate voting location," outweighs any perceived deterrence to the exercise of the franchise. *Wit v. Berman*, 306 F.3d 1256, 1264 (2d Cir. 2002).

Here, House Bill 1264 is necessary to accomplish the State's compelling interest in incentivizing voters to have a stable connection to the community where they exercise their franchise. The State should require that all individuals who register to vote are "subject to the laws of the state of New Hampshire which apply to all residents." *Guare*, 167 N.H. at 664. As the law stands currently, individuals who are domiciled in the State but maintain non-resident status can vote in local elections without any stake in the political outcome. Essentially exempt from the laws and obligations of the State, these individuals do not have to live with the consequences or political outcomes that result from the exercise of their franchise. House Bill 1264 remedies this inequity by unifying these two, distinct classes of voters and ensuring that all voters are subject to the laws and obligations of the State.

House Bill 1264 is the less restrictive means of achieving the State's compelling interest; the *Newburger* Court alluded to such a solution. *See Newburger*, 344 F.Supp. at 563. Unlike the indefinite intention test in *Newburger*, House Bill 1264 does not deny access to the franchise. Again, voter eligibility for hospital residents, professors, college students, and snow birds remains

unaffected by House Bill 1264. Imposing resident requirements on registered voters, such as obligations under motor vehicle laws, is a necessary and narrowly tailored incentive to further the State's compelling interest in "[preserving] the basic conception of a political community." *Newburger*, 344 F.Supp. at 563. Thus, the amended statutory scheme proposed by House Bill 1264 is constitutional under New Hampshire and the United States Constitutions.

IV. HOUSE BILL 1264 IS NOT AN UNCONSTITUTIONAL POLL TAX BECAUSE THE AMENDMENT DOES NOT IMPOSE ANY PRE-VOTE OBLIGATION.

A poll tax is unconstitutional where payment of the tax is "made a condition to the exercise of the franchise." *Harper v. Virginia State Bd. Of Elections*, 383 U.S. 663, 669 (1966); *see also* U.S. Const. Amend. XXIV ("The right of Citizens of the United States to vote in any primary or other election . . . 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 *Harper*, the Court declared state statutes requiring property or poll tax qualifications to participate in the franchise to be invalid under the Equal Protection Clause. *Harper*, 383 U.S. at 686. The Court, however, distinguished a poll tax from the State's power to levy taxes or fees from its citizens for a variety of licenses. *Id.* at 668-69. The Court noted the constitutionality of the State's ability to levy taxes and fees through licenses so long as the financial obligation is not a condition precedent to the exercise of the franchise. *Id.* Specifically, the Court recognized Maine's statute linking voter registration to future licensing fees: "Maine has a poll tax which is not made a condition of voting; instead, its payment is a condition of obtaining a motor vehicle license or a motor vehicle operator's license." *Harper*, 383 U.S. at 668 n. 5; *see* Me. Stat. tit. 21-A, § 112; *see also* Mass. Gen Laws ch. 90, § 3 ½ (11) (defining resident for motor vehicle registration and licensing purposes as any person registered to vote).

Here, House Bill 1264 cannot constitute an unconstitutional poll tax because it fails to impose any additional pre-vote tax or fee prior to a citizen's exercise of his or her franchise. House Bill 1264 does not require persons seeking to participate in the franchise to obtain a driver's license or register a motor vehicle prior to voting. In addition, House Bill 1264 does not restrict access to the

franchise through levying some type of tax or fee which is required to be paid as a condition precedent to vote. Unlike in *Harper*, House Bill 1264 imposes obligations equally, post-participation in the franchise, and solely to persons who wish to exercise the statutory right of driving in the State. The triggered obligations of House Bill 1264 in the form of motor vehicle fees are conditioned upon obtaining a motor vehicle license and *not* conditioned upon voting. *Harper* recognized the constitutionality of aligning the definitions of “resident” and “domiciliary” under voter registration and motor vehicle laws when it cited Maine legislation. The amendments to RSA 21:6 and RSA 21:6-a set forth in House Bill 1264 conform to the constitutional practices of neighboring states like Maine and Massachusetts. Thus, House Bill 1264 is constitutionally valid under the New Hampshire Constitution and United States Constitution due to the absence of any pre-vote obligation.

V. HOUSE BILL 1264 IS NECESSARY TO ENSURE EQUALITY AND UNIFORMITY UNDER THE BURDENS CONFERRED UPON CITIZENS THROUGH THE STATE’S LICENSING PRACTICES.

Equality under the New Hampshire Constitution demands “equality of right and not of enjoyment.” *In re Opinion of the Justices*, 129 A. 117, 119 (N.H. 1925). A law is equal where it “confers equal rights upon all citizens of the state, or subjects them to equal burdens.” *Id.* As RSA 21:6 and RSA 21:6-a currently stand in relation to RSA 261:45 and RSA 263:35, the statutory scheme fails to confer an equal burden or obligation on citizens who register to vote. Absent the House Bill 1264 amendments, the current statutory scheme imposes an obligation, in the form of motor vehicle fees, solely on registered voters who are considered “residents.” Yet, registered voters who are not “residents,” but who satisfy the domiciliary definition, are not subject to these motor vehicle obligations. Absent the amendments proposed by House Bill 1264, the law unequally imposes a burden on “residents” in the form of motor vehicle fees, while more transient voters are free from such burdens.

VI. INDIVIDUALS WHO REFUSE TO PARTICIPATE IN THE FRANCHISE BECAUSE OF TRIGGERED OBLIGATIONS RETAIN THE FUNDAMENTAL RIGHT TO VOTE IN THE STATE OF THEIR RESIDENCE.

House Bill 1264 does not infringe upon any citizen's fundamental right to vote. All persons have the freedom to choose where to establish residence for the purposes of exercising their franchise. This freedom of choice ensures that citizens exercise their franchise in a place where they have a connection to the community and an interest in the political outcomes. In the case of individuals who refuse to participate in the franchise because of a desire not to be subject to the laws and obligations of that State, such as motor vehicle laws and fees, those individuals retain the right to vote in the State of their residence through absentee ballots. "All states will mail an absentee ballot to certain voters who request one." National Conference of the State Legislatures, *Absentee and Early Voting*, <http://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx> (May 28, 2018, 12:19 PM).

Under House Bill 1264 a citizen's right to freely choose where to establish residency for the purposes of exercising their franchise remains intact and unchanged. Citizens, who decide to not exercise the franchise in New Hampshire because of a desire to not be subject to the laws of the State, retain the right to exercise their franchise in their state of residency. All states offer absentee ballot voting, so all citizens of the United States retain access to the franchise. "Citizens who have attained voting age certainly do not require spoon feeding and hand leading to assist them in the proper exercise of their franchise." *Young v. Gardner*, 497 F.Supp. 396, 400 (D.N.H. 1980).

CONCLUSION

House Bill 1264 is constitutionally valid on its face and complies with the following constitutional provisions: the Equal Protection Clause of Part I, Article 2 of the New Hampshire Constitution; Part I, Article 11 of the New Hampshire Constitution; and the Equal Protection Clause of the Fourteenth Amendment to the United State Constitution. The proposed amendments to RSA 21:6 and RSA 21:6-a under House Bill 1264, as well as the triggered obligations under RSA 261:45 and RSA 263:35, neither restrict access to the franchise, nor alter voter eligibility qualifications.

Rather, the statutory scheme validly, and in a nondiscriminatory manner, triggers uniform obligations on individuals who establish residence in the State.

House Bill 1264 is necessary and narrowly tailored to promote the State's compelling interest in preserving political communities by incentivizing voters to maintain a stable connection to their communities. Any future burdens or obligations imposed upon voters will now be applied equally and uniformly. For the foregoing reasons, the New Hampshire House of Representatives requests the Justices of the Supreme Court to find House Bill 1264 constitutional under both the New Hampshire and United States Constitutions.

ORAL ARGUMENT

The New Hampshire House of Representatives requests five (5) minutes for oral argument, or such other time as the Court deems appropriate. Attorney Ovide M. Lamontagne will argue on its behalf.

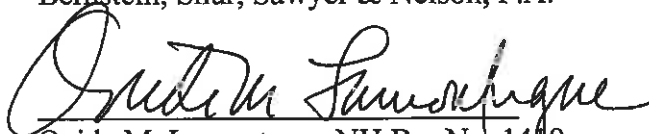
CERTIFICATION

Respectfully submitted,

The New Hampshire House of Representatives

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