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THE STATE OF NEW HAMPSHIRE

SUPREME COURT

CASE NO. 2018-0267

Request for an Opinion of the Justices (Amending RSA 21:6 and 21:6-a)

MEMORANDUM OF LAW OF THE NEW HAMPSHIRE SENATE

NOW COMES the New Hampshire Senate, by and through counsel, and respectfully submits this memorandum urging this Honorable Court to return answers to the questions posed by the Governor and Council in the negative.

QUESTIONS PRESENTED

The governor and executive council have requested that the justices of the supreme court give their opinion upon the following questions of law:

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 RSA 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 FACTS, LEGISLATIVE HISTORY, AND INTEREST OF THE NEW HAMPSHIRE SENATE

HB 1264 was introduced to the House on January 3, 2018, and referred to the committee on election law. A public hearing was held on January 25, 2018. At the executive session held on February 13, 2018, a majority of the House committee reported the bill out "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 full House adopted a motion that HB 1264 ought to pass, and sent the bill to the Senate for consideration.

HB 1264 was introduced into the Senate on March 8, 2018, and referred to the election law and internal affairs committee. A public hearing was held April 10, 2018. At that hearing, Secretary of State William Gardner testified and answered questions from the committee. His testimony included the following:

- New Hampshire has had the easiest access to voting with Election Day registration for over 20 years.
- There are no other states in the country that have Election Day registration, no durational residency requirements and no provisional ballots.
- We are the only state where you do not have to be a resident to vote. In every other state, a person must be a resident to vote.
- People are confused and have a hard time with the difference between domicile and residence.
- The reason for this confusion is because of the court case stating that the four words "for the indefinite future" confused people because you cannot call someone a resident or make someone say they are a resident. The court decision said if you are going to have those words, it is unconstitutional.

The committee heard substantial additional testimony for and against the bill. See, *Senate Appendix at* 2-12.

Approximately three weeks later, on May 2, 2018, the senate election law and internal affairs committee reported the bill out "ought to pass" and the bill was brought to the floor before the full Senate on May 2, 2018. On that date Senator Birdsell moved floor amendment #2018-1890, changing the effective date of the bill from sixty days after passage to January 1, 2019. Floor amendment #2018-1890 was adopted by voice vote and the amended bill was passed by roll call vote of 14-10.

On May 10, 2018 the House concurred with the Senate amendment and passed House Bill 1264 as amended by the Senate.

On May 17, 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.

The New Hampshire Senate is a party interested in the answer to the questions put by the Governor and Council due to the fact that the Senate passed HB 1264 by a

vote of 14-10 on May 2, 2018. That HB 1264 ought to pass and become the law of the State of New Hampshire was the position of a majority of the Senate, whose assent is reflected in the affirmative vote. Accordingly, this memorandum supports the Senate position by asking the Honorable Court to return answers in the negative to both questions.

ARGUMENT

The House of Representatives has, on this day, filed a memorandum advocating the same answers as the Senate. The Senate incorporates the arguments made by Attorney Ovide Lamontagne on behalf of the House herein by reference, and further states as set forth in this memorandum.

HB 1264 DOES NOT VIOLATE EQUAL PROTECTION

The Governor and Council posed questions concerning state and federal equal protection guarantees, both on their face and specifically as applied to students who claim New Hampshire domicile for voting purpose, but who are not New Hampshire residents. "The first question in an equal protection analysis is whether the State action in question treats similarly situated persons differently." *Longchamps Electric, Inc. v. New Hampshire State Apprenticeship Council*, 145 N.H. 502, 506 (2000)(quoting *Petition of Abbott*, 139 N.H. 412, 417 (1995)). "The equal protection guarantee is essentially a direction that all persons similarly situated should be treated alike." *Lennartz v. Oak Point Associates, P.A.*, 167 N.H. 459, 462 (2015).

It is difficult here to discern a basis to argue that HB 1264 treats similarly situated people differently. To the extent that the bill unifies the definitions of "domicile," "resident," and "inhabitant," it *eliminates* disparate treatment and treats similarly situated people *similarly* rather than *differently*. By removing the fine, and often confusing, delineations between "domicile," "resident," and "inhabitant," HB 1264

removes distinctions among the class of voters. If HB 1264 becomes law, all voters will be treated equally by the State.

Current law creates a special classification of privileged voters who are empowered to make *a la carte* decisions about which aspects of membership in the body politic they will accept and which they will reject. The privilege includes the right to participate in elections without incurring the obligations undertaken by the vast majority of voters. HB 1264 does not eliminate all of the advantages enjoyed by this class of mobile workers, persons with multiple homes, or students, as HB 1264 would still permit such persons to choose where, among the multiple places they could call a state of residence, they choose to exercise the franchise. Compared to a high school graduate who has lived in New Hampshire all of his or her life, and has no such choice, the power to choose among multiple states in which to vote remains a political advantage. Requiring a person seeking to maximize his or her political voice by voting in New Hampshire to be become a New Hampshire resident, and to participate on the same level as the life-long New Hampshire resident, does not create an impermissible class.

In *Newburger v. Peterson*, 344 F.Supp. 556 (D.N.H.1972), the federal court identified the problem with the New Hampshire "indefinite intention" requirement that is removed by HB 1264. That court wrote:

> The New Hampshire indefinite intention requirement is too crude a blunderbuss to pass muster.
>
> On the one hand, 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. On the other hand, those persons who are less precise in their planning or less confident that their plans will be realized at a time certain are allowed to vote. It is impossible for use to see how such people would possess any greater knowledge, intelligence, commitment, or responsibility than those with more precise time schedules.
>
> Equally important, New Hampshire would give the franchise to a student born and raised in New Hampshire who planned to leave at graduation; to any resident who had accepted a job elsewhere; to a recent arrival who, the day after registering, accepted a job in another community; to one who had a firm intention to move away but at an uncertain time; to one with no plan at all but with a high statistical probably of moving.

Newburger, 344 F.Supp. at 562-63.

HB 1264 resolves the "blunderbuss" identified in *Newburger* in the simplest, most precise way – it simply allows *all* of the people identified in the passage to vote in New Hampshire, as long as they choose to become residents of New Hampshire. All people will have the same opportunity to become voting members of the body politic of this State, and the class of people who choose to vote in New Hampshire elections will all have the same obligations as residents of this State. All people who choose to declare New Hampshire residence by voting here will be treated equally.

HB 1264 DOES NOT BURDEN THE RIGHT TO VOTE

During Senate hearings on HB 1264, witnesses provided testimony suggesting that the bill impermissibly burdens the right to vote. It is also anticipated that this position will be repeated in this Court in favor of affirmative answers to the questions. These arguments should be rejected.

It was argued during the Senate hearing that HB 1264 creates a poll tax. This is patently incorrect. The question presented by the Governor and Council asks whether "the requirements to take actions required by RSAs 261:45 and 263:35 and to pay any fees or taxes associated therewith," violate the right to vote. Those provisions concern a

duty of residents who wish to drive a motor vehicle on New Hampshire roads to register their vehicle and obtain a drivers' license. Payment of those fees is not a precondition to the right to vote.

A poll tax is invalid when the payment of the tax is "made a condition to the exercise of the franchise." *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 669 (1966). The proposed law creates no conditions prior to voting. Nothing in New Hampshire law, whether in its current form or after passage of HB 1264, conditions the right to vote on payment of a tax, registration of a motor vehicle, obtaining a drivers' license, or compliance with any other New Hampshire law, with the narrow exception convicted felons serving their sentences, which is not applicable here. Under HB 1264, all other New Hampshire residents, whether they paid their taxes, registered their cars, or obtained drivers' licenses, would remain fully eligible to vote.

That fact that a declaration of residency may require payment of motor vehicle fees is insufficient to constitute a burden on the right to vote. The obligation to follow the same laws and rules as other voters is not a burden on the right to vote. New Hampshire residents moving into our neighboring states and declaring residency there would also be required to obtain a drivers' license and motor vehicle registration in their new states. Additionally, they would be required to purchase car insurance, or post a bond, due to the establishment of residency in those states, a burden not imposed upon New Hampshire residents.

HB 1264 IS CONSISTENT WITH THE LEGISLATIVE HISTORY OF PART I, ARTICLE 11

The inclusion of the word "domicile" in Part I, Article 11 was adopted by the voters on November 2, 1976. 1976 *Red Book*, at page 688, after being proposed at the 1974 Constitutional Convention. The Journal of the Convention strongly suggests that the

drafters of the language intended for the term "domicile" to connote a greater degree of contact and permanence with the place in which a person intended to vote, rather than the lesser degree of connection that word has subsequently come to embody.

Resolution No. 86, adopted by the 1974 Constitutional Convention proposed amending Part I, Article 11, in part so that "domicile rather than being an inhabitant in a town, ward o[r] unincorporated place will be a prerequisite for the voting privilege ...." *Journal of the Constitutional Convention*, 1974, at 521. In the course of its work, the delegates to the Constitutional Convention debated the terms "residence" and "domicile" prior to deciding to use the term "domicile. That resolution stated, "Providing . . . that domicile rather than residence in a town, ward or unincorporated place will be a prerequisite for the voting privilege . . ." 1974, *Journal of Constitutional Convention*, of page 177.

> Del. HALL of Rochester: The Commission to Study the Constitution did recommend that the use of the word "residence" be dropped in favor of the word "domicile," **for the reason being that the word "domicile" seems to have, in our law, a more definite meaning than "residence."** By this, let me say that, though there do not seem to be any New Hampshire cases specifically involved, **domicile has a stronger meaning than residence in that it denotes more permanency in the place where one abides or, perhaps, it might be further defined as being the permanent place of abode to which a person intends to return.** It does not have the same transitory quality that the word "residence" does, which has created some problems. In the judgment of the Study Commission and in the judgment of the Committee, this is a desirable change in the wording. I might say in addition to this, that the Legislature, at the past session, saw fit to use the word "domicile" in connection with some legislation defining the rights of out-of-state students in New Hampshire to become residents for tuition purposes[1], and it certainly was very important in that connotation. . . .

[1] Whether HB 1264 changes the tuition rules and would impact the budget of the University System of New Hampshire was raised during the legislative hearings. It would not. The Board of Trustees has adopted BOT.IV.E., which sets out the classification of students for tuition purposes. That rule clearly indicates that USNH considers domicile for tuition purposes to be different from domicile for voting purposes. BOT.IV.E.1. Further, a student is classified by USNH for tuition purposes at the time of his or

1974, Journal of Constitutional Convention, Wednesday, June 12, 1974, pages 179-80 (emphasis added). Responding to a question from Delegate Brock, regarding whether the intent of using "domicile" was to extend the durational residency requirement, Delegate Hall stated:

> No, I don't think that is the intention. **I think the intention is that the word "residence" has some transitory connotations to it. People may reside in one place but have a domicile in another. And it is to try to make more definite for the purposes of our checklist and for the purposes of determining exactly where one does intend to make a permanent domicile, as opposed to a residence, to alleviate some of the problems, with respect to town clerks for instance, trying to decide whether a person is entitled to vote in a particular place.**
>
> Del. Brock: I thought that you had indicated it was your opinion that the word "domicile" was more restrictive than the word "residence" which we have at the present time. Would you tell us in what sense your use of the word "domicile" is more restrictive than our present use of the word "residence" which, for voting purposes, requires 30 days' residence in the State of New Hampshire.
>
> Del. HALL: I think I probably would have to answer your question by saying that **the word "domicile" and the word "residence" in that context would be considered synonymous by our courts.**

1974, *Journal of Constitutional Convention*, Wednesday, June 12, 1974, pages 180-81 (emphasis added).

Three things about this exchange stand out. First, it was the clear intention of the drafting committee that the universe of people who met the conditions for having a "domicile" would be smaller than the universe of people who would meet the conditions for being a "resident." The current situation, in which a

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her first admission to the University System. BOT.IV.E.3. https://www.usnh.edu/policy/bot/iv-financial-policies/e-classification-students-tuition-purposes-residency-rules. *Last accessed* May 30, 2018.

person can have a domicile in New Hampshire without being a resident is precisely the opposite of the original intent of the amendment's drafters. Second, the above exchange reflects that confusion between the definitions of "domicile" and "resident" that continues to this day. *See, supra, Testimony of Secretary of State William Gardner, Senate Appendix at 5.* Finally, the fact that the current relationship between "domicile" and "resident" is precisely the opposite of what the drafters intended reflects that the General Court retains authority to define those terms, an authority it exercised in passing HB 1264.

THE PRESUMPTION OF CONSTITUTIONALITY

Opponents of HB 1264, or those seeking an affirmative answer to the questions presented by the Governor and Council, have a high burden in establishing that the legislation is unconstitutional. A central tenet of constitutional law is that, "[i]n reviewing a legislative act, [the Court will] presume it to be constitutional and will not declare it invalid except upon inescapable grounds." *Baines v. N.H. Senate President,* 152, N.H. 124, 133 (2005). This means that "we will not hold a statute to be unconstitutional unless a clear and substantial conflict exists between it and the constitution." *Id.* (quotation omitted). It also means that "[w]hen doubts exist as to the constitutionality of a statute, those doubts must be resolved in favor of its constitutionality." *New Hampshire Health Care Ass'n v. Governor,* 161 N.H. 378, 385 (2011)(quoting *Bd. of Trustees of N.H. Judicial Ret. Plan v. Sec'y of State,* 161 N.H. 49, 53 (2010)). "The party challenging a statute's constitutionality bears the burden of proof." *Id.* (quoting *Tuttle v. N.H. Med. Malpractice Joint Underwriting Assoc.,* 159 N.H. 627, 640 (2010)(quotation omitted).

In addition to the burden opponents face in regard to the general presumption of constitutionality, a "facial challenge to a statute is a head-on attack of a legislative judgment, as assertion that the challenged statute violates the Constitution in all, or virtually all, of its applications. *Hollenbeck,* 164 N.H. 154, 158 (2012)(quoting *United States v. Carel,* 668 F.3d 1211, 1217 (10th Cir.2011). "To prevail on a facial challenge, to a statute, 'the challenger must establish that no set of circumstances exists under which the Act would be valid.'" *Id.* (quoting *United States v. Salerno,* 481 U.S. 739, 745 (1987)). "An as-applied challenge," on the other hand, "concedes that the statute may be constitutional in many of its applications, but contends that it is not so under the particular circumstances of the case." *Id.* "When an as-applied challenge is not tied to any case specific discussion that would make [defendant's] as applied challenge different from his facial challenge, court[s] treat them as the same." *Id.* quoting *United States v. Riquene,* 2012 WL 171080, AT *7 N. 9 (M.D.Fla. Jan. 20, 2012).

As set forth above, and in the memorandum filed by the House, HB 1264 does not discriminate and does not impinge on the right to vote. It is clearly not unconstitutional "in all, or virtually all" of its applications. To the contrary, it is difficult to imagine even as-applied applications in which it would deprive a person of the right to vote. Nothing in HB1264 affects the right to vote in New Hampshire. It simply establishes the same type of residency requirement that exists in other states. *See Senate Appendix* at 13.

ANY ATTEMPT TO LIMIT *POST HOC* "JUSTIFICATIONS" FOR HB 1264 SHOULD BE REJECTED

It is likely that filers of memoranda supporting a negative answer to the query by the Governor and Counsel will argue that "justifications" for HB 1264 cannot be presented to this Court cannot be "invented *post* hoc in response to litigation" or

otherwise rely on "overbroad generalizations." This language was used by the Court in another voting rights, case, *Guare v. State*, 167 N.H. 658 (2015), and is likely to reappear in this matter. This formulation severely impinges on the independence of a coequal branch, violates the separation of powers, violates Part II, Articles 22, and 37, and should not be applied to laws passed by the General Court. While the Senate recognizes that the Court's past cases have precedential value, it is also true that the legislature has never before participated in proceedings in which these issues have been raised. No party appearing before this Court has approached this question from the perspective of the legislature and therefore, no party has raised these issues with the Court.

The converse of a judicially created rule that states that, "the government may not rely upon justifications that are hypothesized or 'invented *post* hoc' in response to litigation," is a judicial rule that says, in effect, "when enacting legislation, the General Court must supply the courts with justification for their actions." These two statements are different sides of the same coin.

"The authority to adopt procedural rules for passing legislation is demonstrably committed to the legislative branch by Part II, Article 22 and 37 of the State Constitution." *Baines*, 152 N.H. at 130. See, *Horton v. McLaughlin*, 149 N.H. 141, 144 (2003); *Bednar v. King*, 110 N.H. 475, 476 (1970). Part II, Article 37 reads, "The senate shall appoint their president and other officers, and determine their own rules of proceedings...." Part II, Article 22 is functionally equivalent, reading, "The House of Representatives shall choose their own Speaker, appoint their own officers, and settle the rules of proceedings in their own House...." This Court has previously found that matters relating to internal proceedings of the legislature lie entirely within the purview of General Court, and that "the legislature, alone, has the "has complete control and discretion whether it shall observe, enforce, waive, suspend, or disregard its own rules

of procedure." *Hughes v. Speaker*, 152 N.H. 276, 284 (2005)(quoting *Des Moines Register v. Dwyer*, 542 N.W.2d 491, 496 (Iowa 1996)). "The same is true of statutes that codify legislative procedural rules." *Id.* citing *Baines*, 152 N.H. at 131.

"Courts generally consider that the legislature's adherence to the rules or statutes prescribing procedure is a matter entirely within legislative control and discretion, not subject to judicial review unless the legislative procedure is mandated by the constitution." *Id.* (quotations omitted).

Judicial deference to legislative authority concerning internal legislative procedures expresses itself in the nonjusticiability, or political question, doctrine. "The political question doctrine is essentially a function of the separation of powers, existing to restrain courts from inappropriate interference in the business of the other branches of Government, and deriving in large part from prudential concerns about the respect [courts] owe the political departments." *Baines*, 152 N.H. at128 (quoting *Nixon v. United States*, 506 U.S. 224, 252-53 (1993)(Souter J., concurring)(quotations and citations omitted). "The justiciability doctrine prevents judicial violation of the separation of powers by limiting judicial review of certain matters that lie within the province of the other two branches of government." Id. (citing *In re Judicial Conduct Committee*, 151 N.H. 123, 129 (2004)

Undersigned counsel is not aware of an instance in which this Court has declined to consider explanations of the state's interest in legislation because it found that the "justifications" were "invented *post* hoc in response to litigation." This Court has cited the relevant language on several occasions, and it does not appear that the Court has ever prohibited a party from asserting a justification for legislation in any of those instances. See, *Alonzi v. Northeast Generation Services Co.*, 156 N.H. 656 (2008)(upholding constitutionality of workers compensation death benefit based on extensive record,

including New Hampshire Supreme Court cases, concerning "radical legislative response to the evils predating workers' compensation law."); *In re Concord Teachers (New Hampshire Retirement System)*, 158 N.H. 529 (2009)(finding NHRS agency action survives intermediate scrutiny because it is consistent with legislature's established policy); *Community Resources for Justice v. City of Manchester*, 154 N.H. 748 (2007)(overruling *Carson v. Maurer*, 120 N.H. 925 (1980)(describing new middle-tier scrutiny test, but not declining to consider any proffered justification for provision of city zoning ordinance). Notably, *none* of these cases involved in counsel for the State defending an act of the General Court.

This Court recognizes the potential importance of having counsel for the state participate in proceedings in which the constitutionality of state statutes is called into question. *See generally, SCR 31, Cases in Which the State is Not a Party, But Which Involve the State's Interests.* The only case to come before this Court in which the State was represented as a party is *Guare.* In that case it appears that, despite the urging of the plaintiffs, the Court did not enforce "*post* hoc justification" rule it announced in *Community Resources.*

The "*post* hoc justification" rule is not found in the New Hampshire Constitution and it is not a rule of substantive law. It is merely a procedural rule, borrowed from the United States Supreme Court's decision in *United States v. Virginia*, 518 U.S. 515 (1996). *Virginia* was an equal protection, sex discrimination case involving the refusal of the State of Virginia to admit women to the Virginia Military Institute. Under the law applied in the Virginia case, "[p]arties who seek to defend gender-based government action must demonstrate an "exceedingly persuasive justification" for that action." *Id.* at 531. This exceptional level of scrutiny was required because "our nation has had a long and unfortunate history of sex discrimination." *Id.* quoting *Frontiero v. Richardson*, 411

U.S. 677, 684 (1973). It was from this long history of sex discrimination, both at VMI, which was founded and had been single-sex since 1839, and in society at large, that the *Guare* statement about "post hoc" justifications finds its source. That language did not come from incidental line drawing by the Virginia legislature. It came from a longstanding system that allowed men access to a unique educational opportunity that was completely barred to all women. *Id.* at 522-23.

Neither the Supreme Court nor the First Circuit Court of Appeals have expanded this "*post* hoc" limitation on the state's ability to answer challenges in the way that this Court has. The overwhelming number of jurisdictions apply the "*post* hoc justification" bar only in the unique context of sex discrimination cases. Indeed, the First Circuit Court of Appeals recently rejected an attempt by counsel, many of whom may file memoranda in this case, to apply the *Virginia* rule to a legislatively adopted change to the ballot access laws. *See, Libertarian Party of New Hampshire v. Gardner*, 843 F.3d 20, 31 (2016)(rejecting petitioner's urging First Circuit to "ignore the state's asserted interest in ensuring a minimal level of support for parties appearing on the ballot"). In terms of even restating the "*post* hoc justification" rule in cases not involving sexual discrimination, this Court appears to be an outlier.

Federal courts deciding federal cases are bound by Supreme Court precedents governing the rules of decision. This Court is bound by the dictates of our State Constitution, including the provisions establishing separation of powers and legislative primacy of the conduct of legislative business not otherwise directed by a provision of the Constitution. Nothing about the intermediate scrutiny test compels the Court to intrude in the legislative domain and there is nothing about the "*post* hoc justification" rule that is necessary to allow the Court to determine whether substantive constitutional rights, i.e. whether "the challenged legislation [is] substantially related to

an important governmental objective," *Community Resources*, 154 N.H. at 762, are violated. This Court can perform its important, constitutional function without dictating to the General Court what information its legislative hearings must contain. *See, State v. Hollenbeck*, 164 N.H at 158 (holding "the legitimate government interest posited by the State need not be the State's actual interests in adopting the statute."); *State v. Wamala*, 158 N.H. 583, 595 (2009) (holding "Regardless of whether preventing abuse of the jury selection process in criminal cases was the legislature's actual purpose in enacting RSA 500-A:12-a and distinguishing between civil and criminal *voir dire*, it is a conceivable justification for so doing, and, thus, constitutes a rational basis); *State v. Chrisicos*, 158 N.H. 82, 88 (2008) (holding "Nevertheless, even without inquiring into whether the purpose cited by the trial court actually motivated the legislature, we conclude that it is a conceivable purpose to which the statute is rationally related.").

A limitation on "*post* hoc justifications" for legislatively enacted statutes is a uniquely bad fit to the New Hampshire General Court. Our state legislature is large, consisting of 424 members, who are effectively volunteers. In the House of Representatives, committee members serve as secretaries and their notes form a substantial part of the legislative record. There is little training of these citizen-legislators and little ability to control how they go about their legislative work. While the Senate has professional committee staff, they are stretched thin during busy periods. The House has sometimes has a full-time legal counsel, and sometimes not. The Senate never has an attorney able to devote himself or herself full time to the job.

Perhaps more importantly any of the 424 legislators can sponsor a bill without leave of the leadership. Unlike other states, committee chairs have no ability to execute a "pocket-veto" by not scheduling a bill, and thereby letting proposed legislation die without a hearing. Likewise, bills do not die in committee. Every bill gets a full hearing

in front of the committee it is assigned to, and at that hearing, any member of the public is free to testify. This can lead to a confusing and sometimes muddled legislative record, but it is a price that the General Court has long been willing to pay in exchange for the openness of the process it engenders. Unlike most other states, a committee cannot "kill" a bill, it can only make a recommendation that is carried to the full body. Every bill gets an up-or-down vote before the full body. These facts makes our state legislature among the most democratic in the world. It also makes it a very busy place and one in which a judicially imposed standard of decision making requiring all potential grounds supporting legislation to be stated in the legislative record would be intensely and uniquely burdensome. While HB 1264 had substantial public input, including testimony by the Secretary of State, most bills, including bills addressing "important substantive rights" that will be subject to middle-tier scrutiny, pass without leaving a legislative record containing expressions of justification for the rule. The rule is simply inconsistent with the longstanding practice, established under authority conferred in our Constitution, of the General Court.

The "*post* hoc justification" rule is effectively a rule of evidence, setting forth what legal arguments can be made in support of the presumptively constitutional legislative action. Deference to a co-equal branch should lead this Court to permit actions of the General Court to be defended by any grounds the law's defenders care to put before the Court, and not require the General Court to include in its legislative journals or other sources of legislative history, the reasons it chooses to exercise its broad powers under Part II, Article 5.

CONCLUSION

For the foregoing reasons, the Senate requests that this Honorable Court advise the Governor and Council that HB 1264 is constitutional, both on its face and as it is likely to be applied to post secondary school students studying in New Hampshire.

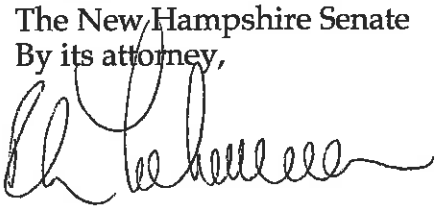
ORAL ARGUMENT

The Senate requests 5 minutes oral argument, or such other time as the Court may determine is fair, appropriate, and in the best interests of justice in this matter.

CERTIFICATION

The undersigned hereby certifies that, upon learning of parties who filed memoranda in response to this Court's Order of May 17, 2018, that counsel will promptly deliver a copy of this memorandum to all such parties.

RESPECTFULLY SUBMITTED
The New Hampshire Senate
By its attorney,



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