

STATE OF NEW HAMPSHIRE  
SUPREME COURT

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NEW HAMPSHIRE  
SUPREME COURT

No. 2018-0267

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

**MEMORANDUM OF LAW OF SENATE MINORITY LEADER JEFF WOODBURN,  
SENATE DEPUTY MINORITY LEADER DONNA SOUCY, AND SENATE MINORITY  
POLICY DIRECTOR DAN FELTES**

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Now come Senators Jeff Woodburn, Donna Soucy, and Dan Feltes, by and through counsel, who respectfully submit this memorandum of law regarding New Hampshire House Bill 1264 (2018) (“HB 1264”).

## INTRODUCTION

To vote in New Hampshire, an otherwise eligible voter must be domiciled in New Hampshire, but need not establish full legal residency. The distinction is critical: a legal resident who drives and/or has a motor vehicle in the State, unlike a domiciliary, must obtain a New Hampshire driver's license and pay substantial fees to register his or her vehicle. HB 1264 would alter these longstanding principles by requiring prospective voters "domiciled" in New Hampshire for voting purposes to fulfill the same legal requirements of "residents." Put simply, HB 1264 would require, among other things, that voters pay money to the state if—and only if—they wish to vote in New Hampshire.

HB 1264 passed both the House and Senate along straight party lines, with the majority party unanimously supporting the bill. Members of the minority party were vocal in opposition to the bill, particularly citing the burdens that the law would impose on college students in New Hampshire. On May 16, 2018, the Secretary of State filed a copy of a resolution approved by the Governor and Executive Council requesting that this Court issue an advisory opinion regarding the constitutionality of HB 1264.

The questions from the Governor and Executive Council are as follows:

- 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.

### SUMMARY OF THE ARGUMENT

HB 1264 impermissibly discriminates against non-resident domiciliaries (who are disproportionately likely to be college students) by requiring them to fulfill the requirements of legal residency—and pay burdensome motor vehicle fees—as a direct consequence of exercising their constitutional right to vote in New Hampshire. As a threshold matter, this Court should decline to issue an advisory opinion regarding the constitutionality of HB 1264 because doing so would require the Court to resolve significant and complex questions of fact, which this Court has repeatedly held is not appropriate in an advisory opinion. As a practical matter, given the effective date of HB 1264 is not until July 1, 2019, there is no need to rush to constitutional judgment without a fully developed factual record.

Even if the Court reaches the constitutional questions, it should answer all six posed questions in the affirmative. By increasing the cost of voting (both literally and figuratively), HB 1264 would have a chilling effect on the right to vote and it would block otherwise eligible New Hampshire domiciliaries from voting. This constitutes a severe burden upon the right to vote under Part I, Article 11 of the New Hampshire Constitution and the Equal Protection Clauses of

both the New Hampshire and U.S. Constitutions.

The proponents of the bill can offer no sufficiently weighty state interest that would justify this overly-broad merger of statutory definitions— without any nuance or exception — and the resulting negative impact and burden on voting rights. Although it is anticipated that the proponents will claim HB 1264 is necessary to deter fraud or to discourage short-term residents from voting in New Hampshire, these justifications are at odds with authoritative precedent and cannot justify the imposition of burdens upon both residents and non-resident domiciliaries— *who have a constitutional right to vote in New Hampshire.*

For the above reasons, the Court should decline to answer the questions altogether, or, in the alternative, should answer all six questions in the affirmative.

#### LEGAL STANDARD

Voting is a fundamental right recognized by the New Hampshire Constitution. *See Akins v. Sec’y of State*, 154 N.H. 67, 71 (2006) (citing *McGraw v. Exeter Region Coop. Sch. Dist.*, 145 N.H. 709, 713 (2001)). To determine whether an election law violates the New Hampshire or U.S. Constitution, courts employ similar tests. First, courts assess the magnitude of the asserted injury to voting rights. *Guare v. State*, 167 N.H. 658, 663 (2015) (citing *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)). Then, courts weigh the burden against the precise interests put forward by the State as justifications for the burden imposed by its law, taking into consideration the extent to which those interests make it necessary to burden voting rights. *Id.*

The level of scrutiny that the court applies to the inquiry depends on the extent to which the challenged regulation burdens voters. *See id.* If the law imposes only “reasonable, nondiscriminatory restrictions” upon voters, “the State’s important regulatory interests are generally sufficient to justify the restrictions.” *Id.* at 663 (citing *Burdick*, 504 U.S. at 434). If the

burdens, however, are “severe,” the law must be narrowly drawn to advance a state interest of compelling importance. *Guare*, 167 N.H. at 663. If the burden on voting rights lies somewhere in between—not “reasonable” but also not “severe”—an “intermediate” level of scrutiny applies, requiring the State to “articulate specific, rather than abstract state interests, and explain why the particular restriction imposed is actually necessary, meaning it actually addresses, the interest put forth.” *Id.* at 667 (citations and quotation marks omitted). The State’s justification must be “neither unduly restrictive nor unreasonable.” *In re Christopher K*, 155 N.H. 219, 226 (2007). “Post-hoc” or overbroad justifications are not sufficient; the State must rely on the actual purpose advanced by the Legislature during consideration of the bill. *Community Resources for Justice, Inc. v. City of Manchester*, 154 N.H. 748, 762 (2007). If the State’s asserted interests cannot justify the imposition of the burden on voting rights, the law is unconstitutional.

## ARGUMENT

- A. The posed questions are not appropriate topics of an advisory opinion because they require the Court to resolve issues of fact without a fully-developed record and the Court should follow precedent by declining to rule on the constitutional merits.**

As a threshold matter, this Court should decline to issue an opinion regarding the constitutionality of HB 1264 because doing so would first require the Court to resolve questions of fact, or, at a minimum, mixed questions of fact and law, all without a fully-developed factual record. The plain language of Part II, Article 74 of the New Hampshire Constitution provides that the Court may issue an advisory opinion “upon important questions of law and upon solemn occasions.” N.H. CONST. pt. II art. 74 (Emphasis added).

The responsibility to issue advisory opinions “does not include legal questions which involve resolution of questions of fact.” *E.g., Opinion of the Justices*, 116 N.H. 358, 360 (1976). Accordingly, this Court has declined to issue advisory opinions on the constitutionality of fact

intensive implications of election law changes, including almost identical to the election law changes proposed in HB 1264 as the “analysis is inherently fact-specific.” *Opinion of the Justices (Domicile for Voting Purposes)*, 167 N.H. 539 (2015).

The questions posed by the Governor and Executive Council here, like in previous attempts to obtain advisory opinions on the constitutionality of election laws, demand fact-specific inquiries. *See id.* (declining to issue advisory opinion regarding constitutionality of election law because it would require resolutions of factual issues). In order to determine whether an election law comports with either the New Hampshire or U.S. Constitutions, courts must perform a number of fact-intensive inquiries, including assessing the magnitude of the burden on voters, the sufficiency of the state’s claimed interests, and the extent to which the challenged law actually addresses the state’s claimed interests. *Guare*, 167 N.H. at 663 (citing *Burdick*, 504 U.S. at 434). These analyses require in-depth assessment of a fully-developed factual record, honed through the adversarial process, including legislative history, testimony from witnesses, expert reports and testimony, as well as evidence evaluating the weight and sufficiency of the State’s claimed interests.

In the absence of a fully-developed factual record, critical information necessary to resolve these important questions is lacking. *See Opinion of the Justices (Domicile for Voting Purposes)*, 167 N.H. 539 (2015) (issuing advisory opinion on constitutionality of election law “would place [the Court] in the position of giving advice on issues without a developed factual record”). This Court’s precedent in *See Opinion of the Justices (Domicile for Voting Purposes)*, 167 N.H. 539 (2015) aligns with the view of the U.S. Supreme Court, who recognized in *Anderson v. Celebrezze* that “only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.” 460 U.S. 780, 789

(1983). Accordingly, this Court should decline to issue an advisory opinion on the constitutionality of HB 1264.

With *Opinion of the Justices (Domicile for Voting Purposes)*, 167 N.H. 539 (2015) in mind, the issuance an advisory opinion here may run afoul of the principles of the doctrine of *stare decisis*. Here, *Opinion of the Justices (Domicile for Voting Purposes)*, 167 N.H. 539 (2015), and the progeny cited therein, must "...been seen as so clearly an error that its enforcement was for that very reason doomed." *State v. Balch*, 167 N.H. 329, 334 (2015). If determining whether *Opinion of the Justices (Domicile for Voting Purposes)*, 167 N.H. 539 (2015) is in clear error:

We [the Court] consider[s] four factors in determining whether a prior decision has come to be seen as clear error: (1) whether the rule has proven to be intolerable simply by defying practical workability; (2) whether the rules is subject to a kind of reliance that would lend a special hardship to the consequences of overruling; (3) whether related principles of law have so far developed as to have left the old rule no more than remnant of abandoned doctrine; and (4) whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.

*Id.* No one has demonstrated these factors are present for a departure from precedent.

Additionally, unlike most debates in the New Hampshire legislature, the debate over HB 1264 was – unfortunately – highly partisan. The public’s confidence in the rule of law, including the independence of the separate branches, is advanced by this Court avoiding a highly partisan affair, irrespective of the party in the majority. Indeed, this Court has routinely acknowledged that “[t]he 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.” *State v. Perry*, 166 N.H. 716, 720 (2014). In situations such as these, it is ever more important to lean on Court precedent, not strain to deviate from it.

Nor is there any practical reason to deviate from *Opinion of the Justices* (Domicile for Voting Purposes), 167 N.H. 539 (2015), as the effective date of HB 1264 is July 1, 2019. As a result, the first election the law could implicate is in November of 2019, leaving ample time for the parties to develop the factual record necessary for this Court to adequately and appropriately review the constitutionality of HB 1264, consistent with precedent. Simply put, there exists no practical or legal reason for this Court to rush to constitutional judgment about HB 1264.

**A. HB 1264 violates Part I, Article 11 of the New Hampshire Constitution by requiring nonresident domiciliaries to fulfill the requirements of legal residency as a consequence of having chosen to vote.**

If the Court determines it can properly evaluate the constitutionality of HB 1264, it should conclude that HB 1264 violates Part I, Article 11 of the New Hampshire Constitution by requiring all voters to pay motor vehicle fees that were previously only required of residents.

- 1. By collapsing the distinction between residency and domicile, HB 1264 means that a person who asserts domicile for the purpose of voting will be likewise making an assertion of residency for multiple other purposes including the motor vehicle obligations of residents. This is designed to and will result in the chilling of the exercise of the right to vote by valid domiciliaries.**

Article 11 states that “[e]very 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). Domicile is defined as “that one place where a person, more than any other place, has established a physical presence and manifests an intent to maintain a single continuous presence for domestic, social and civil purposes relevant to participating in democratic self-government.” RSA 654:1, I. A person may be domiciled in one location despite harboring an intention to move elsewhere at some point in the future. *Id.* In that instance, the domicile does not change until the person actually moves. *Id.* New Hampshire law explicitly permits students



attending school here to choose New Hampshire as their domicile for voting purposes. RSA 654:1, I-a.

By contrast, under the current definition, a “resident” is domiciled here *and also* has manifested an intent to remain in New Hampshire *for the indefinite future*. RSA 21:6. Residents are subject to certain requirements that domiciliaries are not. Significantly, a person becoming a resident of New Hampshire who drives and/or owns a vehicle in the State has 60 days to obtain a New Hampshire driver’s license and to register their vehicle. *See* RSA 261:45 (2014); RSA 263:35 (2014). Fees incurred in accomplishing these tasks can be substantial: a standard driver’s license costs 50 dollars,<sup>1</sup> and registering a vehicle can cost upwards of several hundred dollars.<sup>2</sup>

New Hampshire has good reason for its longstanding rule that non-resident domiciliaries can vote in New Hampshire: requiring voters to establish residency would disenfranchise large swaths of voters. In *Newburger v. Peterson*, the U.S. District Court for the District of New Hampshire recognized as such when it rejected a previous attempt by the Legislature to impose a residency requirement. 344 F. Supp. 559, 563 (D.N.H. 1972). As the *Newburger* court explained:

[Under a residency 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.

*Id.*

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<sup>1</sup> <https://www.nh.gov/safety/divisions/dmv/driver-licensing/apply/fees.htm>.

<sup>2</sup> For a full breakdown of motor vehicle fees, see RSA 261:141 for fees collected by the state, and RSA 261:153 for additional fees collected separately by cities and towns. In addition to the registration fees, there is an \$8.00 license plate fee for first-time registrants. <http://www.nh.gov/safety/divisions/dmv/registration/vehicle.htm#fees>.

Although *Newburger* foreclosed the Legislature from directly disenfranchising students by denying the vote to those who did not intent to remain indefinitely, HB 1264 attempts to achieve the same goal through the indirect means by simply collapsing the distinction between residents and domiciliaries. It does this by removing the sole distinguishing element—the intent to remain indefinitely—so that anyone voting will have to comply with all the practical requirements of residency (including paying the attendant fees). But this, too, has been previously considered and rejected by a court: in *Guare*, the court determined that voter registration language which merely *suggested* that a voter must possess a New Hampshire driver's license in order to vote was considered an unconstitutional burden. *Guare*, 167 N.H. at 669. Under HB 1264, the dictate to obtain a license is no longer a suggestion but an actual requirement; “resident” and “domiciliary” become functionally the same. This conflicts with the plain text of Article 11, which unambiguously permits domiciliaries to vote in New Hampshire. The bill's proponents may argue that HB 1264 is but a simple adjustment to the general residency law leaving all existing election law intact, its real intent and meaning can be gleaned by the majority's assignment of HB 1264 to the election law committees of both the Senate and the House, rather than to the transportation committees.

**2. HB 1264 severely burdens voters, particularly college students, who are non-resident domiciliaries.**

By requiring nonresident domiciliaries to pay motor vehicle fees to vote, HB 1264 places a severe burden on the right to vote. In considering the severity of the burden, the court should assess the burden on the voters most impacted by the provision. *Guare*, 167 N.H. at 665 (assessing burdens on New Hampshire college students who were non-resident domiciliaries and did not possess New Hampshire driver's licenses). Here, as in *Guare*, the burden falls particularly heavily on college students in New Hampshire, who often live in the state during the

school year for a definite period of years, with the intention of re-locating out of state once they have completed their studies. HB 1264 would require these voters to navigate a time-consuming and expensive DMV bureaucratic process to meet the new legal requirements of residency, all for the sole purpose of voting. Students who arrive in New Hampshire with a valid out of state license that would not expire during their course of study here will be forced to pay the costs of an otherwise unneeded New Hampshire license as direct result of exercising their right to vote. Of course, if they relocate after graduation to another state, they will have to bear the cost of a second unneeded license, even if they are moving back to the original state with what would have been an unexpired license. As a result of these burdens, HB 1264 will cause otherwise eligible voters not to register or vote at all, or will force them to undergo severe burdens—including significant financial burdens—in order to exercise their fundamental right to vote.

**3. The State can offer no legitimate state interest, let alone a *compelling* one, to justify the severe burden on voters.**

Given the severity of the burden on voting rights, strict scrutiny applies and the State must show that the regulation is narrowly drawn to advance a state interest of compelling importance. *Guare*, 167 N.H. 665, 668. Although no factual record exists from which the Court can fully assess the State's claimed interests in the law, public statements of legislators indicate that the underlying rationale for the law is theoretical, at best, and cannot be squared with existing voting law or find grounding in practical reality.

For instance, some have stated that HB 1264 is necessary to prevent voter fraud.<sup>3</sup> But supporters have not produced a single piece of competent evidence that domiciliaries are engaging in voter fraud at all, much less that such fraud would be prevented if the domiciliaries

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<sup>3</sup> Rob Wolfe, Dozens Testify on N.H. Voter Bill, Valley News (April 11, 2018), available at <http://www.vnews.com/Voting-Bill-Concord-16770879> (Secretary of State Bill Gardner and Deputy Secretary David Scanlan discussing justifications behind HB 1264 and stating that the bill was needed to combat perceptions of fraud).

obtained New Hampshire driver's licenses or registered their vehicles in the state. And recent reports have made clear that voter fraud is not a pervasive problem in New Hampshire.<sup>4</sup> In any event, "electoral 'integrity' does not operate as an all-purpose justification flexible enough to embrace any burden, malleable enough to fit any challenge and strong enough to support any restriction." *McLaughlin v. N.C. Bd. of Elections*, 65 F.3d 1215, 1228 (4th Cir. 1995) (quotation marks omitted); *see also Guare*, 167 N.H. at 666-67.

Other reports have contended that the law was intended to "clarify" a "flaw" in voting law that permits non-residents to vote, and that it was intended to "encourage people who may be in the state temporarily to vote in the state in which they live."<sup>5</sup> But of course, domiciliaries *do* live in New Hampshire, by definition. And even if those concerns were supported by any evidence, HB 1264 does not address them. HB 1264 does not deter fraudulent voting, it deters voting by domiciliaries, *who have a constitutional right to vote in New Hampshire*. The State has no legitimate interest in "encouraging" its citizens not to exercise a constitutional right. These asserted "interests" cannot survive even the lowest level of scrutiny.

Here, this bill, HB 1264, comports with an unfortunate flurry of recent bills intended to restrict student voting, several of which have provoked litigation. *See Guare*, 167 H.H. at 669; *see also New Hampshire Democratic Party, et al. v. Gardner, et al.*, 226-2017-CV-00432 (Hills County. Sup. Ct. S. 2017) (challenging SB 3, a law that imposed additional registration requirements to prove that a voter is domiciled in New Hampshire, as an unconstitutional burden to student voting rights). But an intent to "fence out" a portion of the electorate is not a

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<sup>4</sup> John DiStasio, 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> (last accessed May 30, 2018).

<sup>5</sup> John DiStasio, *NH Senate passes GOP voter residency requirement bill along party lines*, WMUR (May 2, 2018), available at <http://www.wmur.com/article/nh-senate-passes-gop-voter-residency-requirement-bill-along-party-lines/20127823> (last accessed May 29, 2018).

permissible state interest and is itself unconstitutional. *See, e.g., Carrington v. Rash*, 380 U.S. 89, 94 (1965). And a desire to restrict student voting cannot be squared with established law in New Hampshire, which explicitly grants college students the right to vote in the town or city in which they live while attending college. RSA 654:1. Further, courts have not hesitated to declare laws unconstitutional if it determines that they unduly restrict students from exercising the right to vote. *See Guare*, 167 N.H. at 669; *Newburger v. Peterson*, 344 F. Supp. 559 (D.N.H. 1972); *accord Dunn v. Blumstein*, 405 U.S. 330, 356 n.28 (1972) (specifically denoting as an “impermissible purpose” the exclusion of college students who, on completion of their studies, “move on”).

Even if the above interests are legally permissible or sufficient—and they are not—HB 1264 is not even “reasonably calculated” to achieve the State’s stated ends, much less “narrowly tailored” to serve a “compelling interest.” *Atkins v. Sec. of State*, 154 N.H. 67, 73 (2006); *see Newburger v. Peterson*, 344 F. Supp. 559, 563 (D.N.H. 1972) (imposing a residency requirement “too crude a blunderbuss” to justify state’s asserted interests in ensuring voters were sufficiently invested in their communities). Indeed, Deputy Secretary of State David Scanlon acknowledged, in response to questions at the Senate Election Law committee hearing from Senator Donna Soucy, that HB 1264 could be narrowly tailored with the provision of exceptions and waivers, including for students under motor vehicle laws like other states do. *See* April 10, 2018 Hearing recording, Hr. 1 Min. 19 through Hr. 1 Min. 22. By any measure, HB 1264 is an overly-broad and “too crude a blunderbuss” of simply merging statutory definitions.

And while much attention has appropriately been given to the impact on college students, HB 1264’s overly-broad approach will also create confusion for those who do not drive or have a driver’s license, such as senior citizens in assisted living facilities. The following exchange on

the Senate floor between Senator Feltes and Senator Carson, the latter a proponent of HB 1264, illustrates just that problem:

Sen. Feltes (4:15:16): Thank you Senator for taking my question. You mentioned taking measures, such as getting a driver's license and registering a car. How would this affect Granite State senior citizens, many of whom are in assisted living facilities, who don't have a driver's license and who don't have a car?

Sen. Carson (4:15:41): Well, if they have declared New Hampshire to be their residency and they don't have a car and they don't have a license, they have to have some other proof that they live here in New Hampshire, that is my understanding of the law.

Sen. Feltes (4:15:58): What would be that other proof?

Sen. Carson (4:16:01): They could, thank you for the question, they would, could, probably get a statement from the assisted living facility in which they live that says that they live there in the facility.

May 2, 2018, Senate floor debate, 4 Hr. 15 Min. through 4 Hr. 16 Min. The overly-broad approach in HB 1264 may create confusion for persons eligible to vote who don't have a car or a license, such as seniors in assisted living facilities. At a minimum, the exchange above illustrates the need for the development of a factual record on this critical issue.

Given the record (or absence thereof), HB 1264 cannot be said to survive even the lower, intermediate level of scrutiny, because the State cannot "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." *Guare*, 167 N.H. at 667 (quotation marks omitted). Here, HB 1264 is only well-suited to two goals: 1.) chilling the willingness to vote and making it more difficult to vote for non-resident domiciliaries, and college students in particular; and 2.) chilling the willingness in the creation of confusion for persons who do not have a driver's licenses or a car, and low-income senior citizens in particular. Under any level of review, the justifications of the proponents do not outweigh the burdens and impact of HB 1264.

**B. HB 1264 violates Part I, Article 11 of the New Hampshire Constitution by functionally establishing a poll tax.**

Part I, Article 11 of the New Hampshire Constitution states, in relevant part, “[a]ll elections are to be free, and every inhabitant of the state 18 years of age and upwards shall have an equal right to vote in any election... the right to vote shall not be denied to any person because of the non payment of any tax.” *Id.* (Emphasis added). In the federal context, the 24th Amendment’s prohibition on poll taxes has been applied to a broad swath of regularity fees, barring not just direct taxes on the right to vote but also on any fee that constitutes a “material requirement solely upon those who refuse to surrender their constitutional right to vote.” *Harman v. Forssenius*, 380 U.S. 528, 540-41 (1965). Because HB 1264 requires payment of fees to the state, it cannot be reconciled with the plain text of Article 11.

Given that most of the public opposition to HB 1246 was based upon its essential nature as a poll tax, it is unfortunate that the Governor and Council failed to ask for an opinion on whether this also constitutes an unlawful poll tax under the 24<sup>th</sup> Amendment to the United States constitution. The value of an advisory opinion is severely diminished where, as case here, those posing the questions omit what is perhaps the most significant constitutional issue raised by the legislation, as this Court of course cannot address questions not specifically raised. *See, e.g., Opinion of the Justices*, 157 N.H. 265 (2008).

In the end, there could be no more “severe” restriction on a voter’s right than directly requiring payment of fees as a consequence of choosing to register to vote. While proponents of HB 1264 may argue the failure to pay required motor vehicle fees may not automatically remove the person from the voter roll, but such “trust us, we just won’t enforce this” statements cannot be relied upon when determining the constitutionality of a law. Even assuming, *arguendo*, that the law isn’t enforced, we shouldn’t then also assume Granite Staters who fail to

pay required motor vehicle costs will actually believe they actually can still vote if HB 1264 were law. In short, HB 1264's required payments and costs can only be said to be a tax on eligible voter participation, thereby violating the provision of Article 11 prohibiting any bar on voting for the "...non payment of any tax."

**C. HB 1264 violates the Equal Protection Clauses of both the New Hampshire and U.S. Constitutions by imposing unequal treatment upon non-resident domiciliaries if—and only if—they choose to exercise their fundamental right to vote.**

HB 1264 violates the Equal Protection Clause of both the Fourteenth Amendment and Part I, Articles 1 and 2 of the New Hampshire Constitution because it arbitrarily imposes unequal treatment on similarly situated non-resident domiciliaries (disproportionately college students) based *solely* on whether they wish exercise their right to vote in New Hampshire. For instance, consider two otherwise identical students enrolled at the University of New Hampshire. Both live in New Hampshire during the school year, but maintain their legal residence in home states other than New Hampshire. One registers to vote for an upcoming election; the other does not. The individual who decides to vote must undergo a time-consuming and expensive process to obtain a New Hampshire driver's license and to register her vehicle in New Hampshire. She must do *this for no other reason than that she wishes to vote, because her assertion of domicile for voting purposes would now be indistinguishable from an assertion of residency for motor vehicle purposes.* The other student, who chooses not to vote, can skip the process (and the fees) altogether, with no adverse consequences. The State imposes this differential treatment to discourage students from voting by making voting costly and burdensome. A State purpose to



abridge the student vote is certainly not a permissible basis for treating non-resident domiciliaries differently.<sup>6</sup>

As discussed at length above, these burdens are severe and require strict scrutiny. *Newburger*, 344 F. Supp. at 562-63. The State can offer no permissible interest—let alone a compelling one—to justify imposition of differential treatment based solely on whether the individual wishes to vote. Even if evaluated under a lower standard of review, the State cannot offer interests sufficient to justify the burdens that HB 1264 places on non-resident domiciliaries. *See infra* pp. 9-11.

### REQUEST FOR ORAL ARGUMENT

Given the nature and complexity of this matter, the undersigned hereby requests oral argument before the Court.

### CONCLUSION

For the reasons stated above, this Court should decline to issue an advisory opinion on the constitutionality of HB 1264. . If the Court reaches the constitutional questions, it should issue an opinion recognizing that HB 1264 violates both the New Hampshire and U.S. Constitution because it both chills eligible voting and its overly-broad approach severely burdens the right to vote far out of proportion to any of its purported benefits.

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<sup>6</sup> Although the Governor and Executive Council have not asked for guidance on whether HB 1264 violates the Twenty-Sixth Amendment, there is strong reason to suspect that it does. *See United States v. State of Tex.*, 445 F. Supp. 1245 (S.D. Tex. 1978), *aff'd sub nom. Symm v. United States*, 439 U.S. 1105, 99 S. Ct. 1006, 59 L. Ed. 2d 66 (1979) (town's requirement that college dormitory residents establish that they intended to remain in community after graduation before they could be registered to vote violated the Twenty-Sixth Amendment); *Sloane v. Smith*, 351 F. Supp. 1299, 1304 (M.D. Pa. 1972) ("If [college students] physically live in State College, are interested in the community, are anxious to vote there and nowhere else, and intend it as their legal residence, then there is no justifiable reason why they should not be allowed to vote...it is understandable why they seek a voice in the community they regard as their own.").

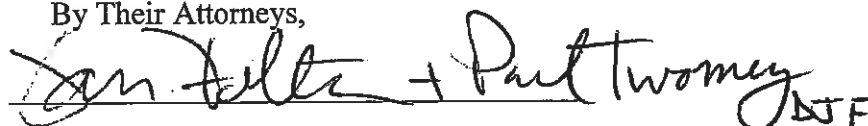
Respectfully submitted,

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By Their Attorneys,

Dated: May 31, 2018

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