

To: New Hampshire State Supreme Court
From: Coalition of NH Taxpayers Chairman, Ed Naile
8 North Main St. Concord, NH 03301
Re: Court Review of NH Election Law Legislation
Date: May 29, 2018

MEMORANDUM OF LAW

Statement of Facts:

New Hampshire has a practice of allowing citizens of other states to vote in New Hampshire during our General Elections, which includes elections for Federal office. This practice has increased in volume since the adoption of same day registration in 1996. Any person, from any state, who has attained the age of 18 can simply show proof identity to register to vote in New Hampshire, including a current, valid, out-of-state driver's license. The registrant simply signs an affidavit as per RSA 654:12. It is known as a: QUALIFIED VOTER AFFIDAVIT.

The Attorney General's Office, Elections Division, is tasked with enforcing election laws as per RSA 7:6 c. This office may prosecute - at its discretion.

There has been a decades old state of confusion regarding the terms "domicile" and "resident" which has been the source of several lawsuits regarding out-of-state college voters and transient campaign workers who choose to vote in New Hampshire instead of their legal residence in their home state.

The suits start in 1972 with *Newburger v. Peterson*, a durational residency case, then to *Rivers v. NH* which evolved into *Annemarie Guare v. NH*.

While the New Hampshire Constitution in Part I, Article 11 quite clearly states that to be qualified to vote in NH an inhabitant must have a "domicile." The State Constitution does not say a registrant must "intend" to have a domicile. The word "resident" is not included in Part I, Article 11. And still the confusion persists.

In NH's Statutory Construction Statute clearly states that a resident or inhabitant is one who is domiciled in this state, and must demonstrate a current intent as such through all his actions:

21:6 Resident; Inhabitant. – A resident or inhabitant or both of this state and of any city, town or other political subdivision of this state shall be a person who is domiciled or has a place of abode or both in this state and in any city, town or other

political subdivision of this state, and who has, through all of his actions, demonstrated a current intent to designate that place of abode as his principal place of physical presence for the indefinite future to the exclusion of all others.

In none of the previous voter cases does a NH court use the legal definition the NH State Constitution's use of the word "domicile" found in Black's Law, any other legal dictionary, or previous court case regarding student voters from any other state. The NH Legislature repeatedly attempts to pass new legislation which is intended to remedy the confusion, but it has repeatedly ended in court challenges.

On November 8, 2016, a NH US Senate Seat changed hands by 1,017 votes out of 738,000 cast.

During the Sept 7, 2017 release of search of NH DMV records and the NH Voter Database request by NH House Speaker Shawn Jasper to Secretary of State William Gardner (Exhibit B page #13) shows that 5,313 November 8, 2016 same-day registrants who used an out-of-state driver's license as identification to vote in that election for Federal Offices, 81.2% had not registered a car or obtained a NH driver's license by August 31, of 2017.

The NH Attorney General's Office, Elections Division, has similar numbers of uninvestigated same-day, out-of-state voters returned envelopes going back to 2012.

The NH Statewide Voter Database, unlike many other state's voter databases, is not a public document. Vermont will, upon written request, send a statewide, updated voter database to anyone by email. Pennsylvania will email their statewide database by county for a nominal fee.

The paper records of municipal elections stored in State Archives are public documents but are not allowed to be reproduced by individuals.

The above facts represent some of the reason why so many NH citizens are questioning our State's voter integrity and do not serve a compelling interest of a State that hosts the First in the Nation Presidential Primary.

Questions Presented:

Does the word "domicile" used in Part I Article 11 of our State Constitution meet the definition found in Black's Law Dictionary:

“That place in which a man has voluntarily fixed the habitation of himself and family, not for a mere special or temporary purpose, but with the present intention of making a permanent home, until some unexpected event shall occur to induce him to adopt some other permanent home. *In re Garneau*, 127 Fed. G77, 02 C. C. A. 403. In its ordinary acceptance, a person’s domicile is the place where he lives or has his home. In a strict and legal sense, that is properly the domicile of a person where he has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning. *Anderson v. Anderson*, 42 Vt. 350, 1Am. Rep. 334. Domicile is but the established, fixed, permanent, or ordinary dwelling-place or place of residence of a person, as distinguished from his temporary and transient, though actual, place of residence. It is his legal residence, as distinguished from his temporary place of abode; or his home, as distinguished from a place to which business or pleasure may temporarily call him. *Salem v. Lyme*, 29 Conn. 74. Domicile is the place where a person has fixed his habitation and has a permanent residence, without any present intention of removing therefrom. *Crawford v. Wilson*, 4 Barb. (N. Y.) 504, 520. One’s domicile is the place where one’s family permanently resides. *Daniel v. Sullivan*, 40 Ga. 277.”

Does the requirement to be a qualified voter in NH State Constitution of having a “domicile” comport with the *Federal Practice and Procedure* definition of domicile:

“A person's domicile "is the place where he has his true, fixed home and principal establishment, and to which, whenever he is absent, he has the intention of returning." C. Wright, A. Miller & E. Cooper, 13 B Federal Practice & Procedure Sec. 3612, at 526 (1984).”

“Domicile generally requires two elements: 1) physical presence in a state, and 2) the intent to make such a state a home. J. Moore, J. Lucas, H. Fink, D. Weckstein & J. Wicker, 1 Moore's Federal Practice p 0.74[.3-1] (1988).”

In *Newburger v. Peterson*, 344 F. Supp. 559 (D.N.H. 1972), a durational residency case regarding a qualified student voter’s intent to stay in NH after registering and voting here, the Court summed up its decision by saying that to force a qualified student voter to stay in NH for an indefinite time was as offensive to the 14th Amendment of the US Constitution as forcing him to vote in a domicile he had abandoned.

“In this day of widespread planning for change of scene and occupation we cannot see that a requirement of permanent or indefinite intention to stay in one place is relevant to responsible citizenship. Or, to state it legally, the state has not shown that the indefinite intention requirement is necessary to serve a compelling interest.

We are sensitive to the compelling need "to preserve the basic conception of a political community". *Dunn v. Blumstein*, supra, 92 S. Ct. at 1004. But the challenged New Hampshire law forces persons who are in every meaningful sense members of New Hampshire political communities to vote in communities elsewhere which they have long departed and with whose affairs they are no longer concerned, if indeed the former community still recognizes the right.”

The Federal Court in *Newburger* recognized the concept of domicile in that a previous domicile must be abandoned to acquire a new one.

In *Annemarie Guare & a. v. State of New Hampshire No. 2014–558*, May 15, 2015

The Court ruled in part, regarding the definition of “domicile”:

“The legislature has defined “residence” differently from “domicile.” “Residence” is “a person's place of abode or domicile,” and the phrase “place of abode or domicile” is defined as “that [place] designated by a person as his principal place of physical presence for the indefinite future to the exclusion of all others.” RSA 21:6–a. Pursuant to RSA 21:6, a “resident” is “a person who is domiciled or has a place of abode or both in this state ., and who has, through all of his actions, demonstrated a current intent to designate that place of abode as his principal place of physical presence for the indefinite future to the exclusion of all others.” Our motor vehicle laws use this definition of “resident.” See RSA 259:88 (2014). Upon becoming a “resident” of New Hampshire, one has 60 days in which to register one's vehicle here and to obtain a New Hampshire driver's license. See RSA 261:45 (2014); RSA 263:35 (2014). These requirements do not apply to citizens who are not “residents” of New Hampshire although they have their “domicile” here. **The basic difference between a “resident” and a person who merely has a New Hampshire “domicile,” is that a “resident” has manifested an intent to remain in New Hampshire for the indefinite future, while a person who merely has a New Hampshire “domicile” has not manifested that same intent.**

Since it seems the Court has reversed the common, ancient, and legal meaning of the word “domicile” with the word “resident,” thereby creating confusion as well as including a word not found in Part I Article 11, has it has created two classes of voter?

One class of out-of-state voter or transient campaign worker can use and keep an out-of-state driver’s license for driving in NH and as identification and for voting in NH’s General Elections. The other class of voter is limited to voting in the Constitutional domicile he uses for all other functions, state and federal taxes, car registration, banking, travel, and placing children in public school.

The out-of-state student and transient campaign workers are still both “qualified” to vote in their home state simply by using the permanent residence address on their license as identification.

How does an out-of-state NH voter, possessing an out-of-state driver’s license, serve on a NH jury as required by a true NH citizen domiciled legally in this state? Does this two class of voter system NH conducts interfere with the selection of NH juries and Federal Grand Jury lists?

RSA 654:45,VI

VI. The voter database shall be private and confidential and shall not be subject to RSA 91-A and RSA 654:31. The secretary of state is authorized to provide voter database record data to the administrative office of the courts to assist in the preparation of master jury lists pursuant to RSA 500-A and to the clerk of the District Court of the United States for the District of New Hampshire to assist in the preparation of federal court jury lists. The voter checklist for a town or city shall be available pursuant to RSA 654:31. Any person who discloses information from the voter database in any manner not authorized by this section shall be guilty of a misdemeanor.

Does NH have a system of pre-selecting out-of-state NH voters from checklists so they are not called to NH jury duty since they may be on jury lists in their home state?

Does NH violate the Federal Real ID Act, UNITED STATES CODE TITLE 49, TRANSPORTATION, in that it allows a driver’s license holder from another state, who has declared under penalty of perjury that the address on his driver’s license is his true domicile, or permanent residence, while declaring on his NH Voter Registration Form that NH is his true domicile, or permanent residence?

The Real ID Act requires all states to include nine specific pieces of information on every state issued driver's license. One of those pieces of information is:

“Minimum Document Requirements. -To meet the requirements of this section, a State shall include, at a minimum, the following information and features on each driver's license and identification card issued to a person by the State:

"(1) The person's full legal name.

"(2) The person's date of birth.

"(3) The person's gender.

"(4) The person's driver's license or identification card number.

"(5) A digital photograph of the person.

"(6) The person's address of principle residence.

"(7) The person's signature.

"(8) Physical security features designed to prevent tampering, counterfeiting, or duplication of the document for fraudulent purposes.

"(9) A common machine-readable technology, with defined minimum data elements.”

Will reversing the meaning of “domicile” and “resident” effect the status of out-of-state tuition paying college students since, unlike the NH State Constitution, the UNIVERSITY OF NEW HAMPSHIRE NOTARIZED RESIDENCY STATEMENT FOR NEW HAMPSHIRE RESIDENTS form (Exhibit A, page11) uses the words “resident” and “domicile” in a manner recognized by anyone familiar with the standard accepted meaning of the words.

In the case of out-of-state tuition paying students, NH state colleges require an in-state student perjury clause for two types of NH domiciled student financial status that states:

1. “The parents of the above-named applicant have been legally domiciled in the state of NH for the past 12 months. The family has no other domicile.”

2. “I have been legally domiciled in the state of NH for the past 12 months. I have no other domicile and I am financially independent.”

According to *Guare v. NH* an out-of-state student can now be domiciled in NH and a resident of another state for driving purposes. This would fly in the face of the intent of the NH Legislature when they created RSA187-A:16 Authority of the Trustees to set up the notarized residency form.

Is NH's practice of letting non-citizens of NH vote same-day in our General Elections in conflict with 49 other individual state statutes regarding domicile. Many states have standards to define domicile. How can NH simply ignore the fact that Federal Elections are held in all 50 states and each is responsible for equal rights for each voter, not one state has an open-door policy. And how can that be in keeping with the 14th Amendment's intent of one person one vote in Federal Elections?

Because a person holding a driver's license from Pennsylvania is considered a citizen and therefore qualified registrant, or elector, of that commonwealth he can simply show up in New Hampshire, depending on his preference in any particular Federal race, and vote. Then he can simply unregister because NH uses the "domicile and resident are a state of mind" standard. NH would consider that vote lawful. This loose standard gives anyone from any state, student or not, an opportunity to vote in NH with no repercussions. This would explain the thousands of returned same-day voter envelopes the NH AG's Office has collected since 2012. The Coalition of NH Taxpayers caught and documented one voter who voted in Hooksett on November 8, 2016 after voting early in the General Elections of Florida and Georgia.

Can New Hampshire continue to fail to abide by the clear language in our State Constitution and allow non-citizen, out-of-state college students and transient campaign workers to vote in our General Elections for Federal Office and not offend the 14th Amendment of the US Constitution?

Previous cases regarding the Equal Protection Clause and voting give guidance:

"In other words, the privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the state may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals, in violation of the Federal Constitution."

Pope v. Williams, *supra*, 193 U.S. at 193 U. S. 632.

Discussion:

The issue in this case is whether The State of New Hampshire in conducting elections in which positions for Federal Office are voted on violates the rights of its legally domiciled citizens by allowing non-citizens to vote, thereby watering down the lawful votes of those citizens.

In allowing non-citizens to vote in NH, election officials have altered the outcome of the results of those elections and placed in jeopardy the true results of the intent of lawful NH voters who are qualified to make those decisions.

The failure of the courts and the legislature in New Hampshire to come to terms with the plain, explicit, legal definition of a qualified voter in its own state constitution has lingered on past numerous elections and court cases to the point only a ruling regarding under the US Constitution's 14th Amendment will remedy the situation.

It is more than likely a US Senate seat changed hands in 2016 due to thousands of non-citizen voters hiding under the cover of a perceived loophole in clear intent of the NH State Constitution.

There is absolutely no compelling reason NH should recognize out-of-state students, transient campaign workers, or interstate voters, who have a legal domicile in another state to vote in New Hampshire by absentee or in person.

NH's two classes of voters violates the US Constitution's 14th Amendment and poses a threat to national elections held in this state regarding Electoral College votes.

The State of New York settled a similar case of student voters in 1985:

“We do not agree with appellees that the Equal Protection Clause requires New York to forgo identification of classes of likely transients in favor of an acceptance of every applicant's claim of domicile, subject to further inquiry only upon some substantial challenge. Requiring groups likely to include transients to show something in addition to physical presence in the community in order to meet a neutral test of residence for purposes of voting comports with the element of "necessity" in the "strict scrutiny" test.”

AUERBACH v. RETTALIATA No. 828, Docket 84-7949

Texas dealt with domicile:

"In other words, the privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the state may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals, in violation of the Federal Constitution."

Pope v. Williams, supra, 193 U.S. at 193 U. S. 632.

Arizona:

"We need not resolve the issue concerning the degree of scrutiny for assessing the procedural distinction reflected in section 5-104 because, even according the provision the strict scrutiny appropriate to voter exclusion cases, we conclude that the provision on its face validly "reflects a state legislative judgment" of what is "necessary to achieve the State's legitimate goals."

Marston v. Lewis, supra, 410 U.S. at 680, 93 S. Ct. at 1212

Student voters in NY:

"By decisional law in this State, residence for the purposes of registration and voting imports not only an intention to reside at a fixed place, but also personal presence in that place coupled with conduct which bespeaks of such an intent (cf. Matter of Newcomb, 192 N.Y. 238, 250-252). It is the fixed and permanent home of the elector from which the Constitution, as well as the Election Law, contemplates that the elector shall register and vote; and, though residence in a university dormitory satisfies the requirement of physical presence, the coincidental declarations of applicants concerning their intent to reside in the State or relevant voting district are not conclusive and election officials may look to the actual facts and circumstances attending such professions."

Palla v. SUFFOLK CO. BD. OF ELECTIONS 31 N.Y.2d 36 (1972)

Conclusion:

The court would probably find that the State of New Hampshire has no compelling state interest in allowing qualified voters or people qualified to vote in other states to determine the outcomes of NH elections and that a determination that this practice offends the 14th Amendment of the US Constitution.

- (1) The Court should find that NH can impose reasonable domicile requirements on anyone registering to vote.

- (2) Anyone caught violating NH election laws should be investigated and where justified, prosecuted.
- (3) Find that no person registering to vote and claiming domicile in NH is compelled to acquire a NH driver's license but is prohibited from possessing a valid license from another state.
- (4) The Court should find that as in other cases where a word is in question a legal dictionary of record is used to determine the plain meaning of that word.
- (5) In the furtherance of a compelling state interest regarding jury selection for State and Federal Grand juries, the name and address anyone excused from NH jury duty for lack of domicile should be available as a public record as per RSA 91-A
- (6) The Court should find that the Legislature has the authority to make the statewide database a public document as per RSA 91-A and allow registered voters and other citizens access.

Signed _____

Ed Naile, Chairman, Coalition NH Taxpayers

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Exhibits on following pages