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March 30, 2015

HAND-DELIVERED

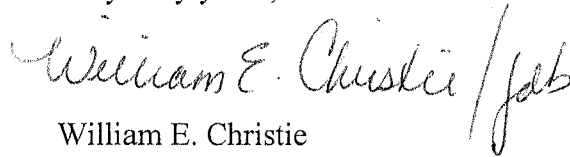
Eileen Fox, Clerk  
NH Supreme Court  
One Charles Doe Drive  
Concord, NH 03301

Re: Request for an Opinion of the Justices (Domicile for Voting Purposes)  
Case No. 2015-0171

Dear Clerk Fox:

Enclosed please find an original and eight (8) copies of a Memorandum of Law of The American Civil Liberties Union of New Hampshire, The League of Women Voters of New Hampshire, and The Fair Elections Legal Network for filing with the Court in the above-referenced matter.

Very truly yours,



William E. Christie  
wchristie@shaheengordon.com

WEC/jdb  
Enclosures  
cc: Gilles R. Bissonnette, Esq.

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT  
CASE NO. 2015-0171

**Request for an Opinion of the Justices (Domicile for Voting Purposes)**

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**MEMORANDUM OF LAW OF  
THE AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE,  
THE LEAGUE OF WOMEN VOTERS OF NEW HAMPSHIRE, AND  
THE FAIR ELECTIONS LEGAL NETWORK**

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NOW COME the American Civil Liberties Union of New Hampshire<sup>1</sup>, the League of Women Voters of New Hampshire<sup>2</sup>, and the Fair Elections Legal Network<sup>3</sup>, by and through their counsel, filing their Memorandum of Law addressing the unconstitutionality of HB 112.

### **INTRODUCTION AND SUMMARY OF ARGUMENT**

On March 18, 2015, the New Hampshire House of Representatives requested an opinion of the justices pursuant to Part II, Article 74 of the New Hampshire Constitution regarding House Bill 112 (“HB 112”), which is described as an act relative to domicile for voting purposes. HB 112 would amend RSA 654:1 by inserting a paragraph with the following language: “A person who declares an address in a New Hampshire town or ward as his or her domicile for voting purposes shall be deemed to have established his or her residence for motor vehicle law purposes at that address.” The questions from the House are as follows:

- 1) Does HB 112 violate Part I, Article 11 of the New Hampshire State Constitution?
- 2) Does HB 112 violate any other provisions of the United States or New Hampshire Constitution?

HB 112 discriminates against and imposes onerous motor vehicle fees on non-resident domiciliaries simply because they exercise their fundamental right to vote. This is not only arbitrary and irrational, but it would have the obvious effect of chilling these individuals, who

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<sup>1</sup> The American Civil Liberties Union of New Hampshire (“ACLU”) is the New Hampshire affiliate of the American Civil Liberties Union—a nationwide, non-partisan, public interest organization with approximately 500,000 members (including over 3,500 New Hampshire members). The ACLU engages in litigation, by direct representation and as *amicus curiae*, to encourage the protection of rights guaranteed by the federal and state constitutions, including the fundamental right to vote. The ACLU has litigated voting rights cases throughout the country and in New Hampshire. Most recently, the ACLU is litigating the matter *Guare, et al. v. New Hampshire*, No. 2014-0558, before the New Hampshire Supreme Court, which challenges voter registration form language that would have a chilling effect on the right to vote.

<sup>2</sup> The League of Women Voters of New Hampshire is a non-partisan political organization that encourages informed and active participation in government in New Hampshire, works to increase understanding of major public policy issues, and influences public policy through education and advocacy.

<sup>3</sup> The Fair Elections Legal Network (“FELN”) is a national, non-partisan voting rights and election reform organization dedicated to removing barriers to registration and voting for traditionally underrepresented constituencies, and improving overall election administration. Since 2006, the FELN has been involved in supporting election reform efforts and working with non-partisan organizations to remove barriers to voting and increase voter participation.

are constitutionally-entitled to vote in New Hampshire, from actually voting. This chilling effect violates Part I, Article 11 of the New Hampshire Constitution. In any event, despite HB 112's chilling effect on voting rights, this Court should ask to be excused from answering the House's legal inquiries because the constitutional questions raised under HB 112 involve the resolution of questions of fact. Therefore, the House's questions are not within the spirit or letter of Article 74. *See, e.g., Opinion of the Justices*, 123 N.H. 510, 511 (1983) ("Nor are we empowered to give advisory opinions on legal questions involving resolution of questions of fact."). The legal standard applied to HB 112 under Article 11 is, as this Court and analogous federal courts have explained, inherently fact specific. *See Anderson v. Celebrezze*, 460 U.S. 780, 788-789 (1983); *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992); *Atkins v. Sec. of State*, 154 N.H. 67, 71 (2006). Here, the precise interests asserted by the State or legislature in justifying HB 112 are simply unknown because the bill has not yet become law, nor is there a record of whether the State has attempted to address whatever concern is motivating HB 112 using lesser restrictive alternatives. As the U.S. Supreme Court itself explained in *Anderson v. Celebrezze*, "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).

Alternatively, if the Court does consider the questions presented, it should answer both questions in the affirmative. HB 112 is unconstitutional for the following independent reasons:

- HB 112 violates Part I, Article 11 and the Fourteenth Amendment to the United States Constitution because it would create a severe burden on the fundamental right to vote, thus requiring strict scrutiny review. *Atkins v. Sec. of State*, 154 N.H. 67, 71 (2006); *Newburger v. Peterson*, 344 F. Supp. 559, 563 (1972); *see also Anderson v. Celebrezze*, 460 U.S. 780, 788-789 (1983). Based on the available information concerning HB 112, this strict scrutiny standard—where the burden would be on the State to justify the law—cannot possibly be satisfied;
- HB 112 violates Part 1, Article 11 and the Twenty-Fourth Amendment to the United States Constitution because it would create a poll tax. *Harman v. Forssenius*, 380

U.S. 528, 540-41 (1965); *see also Veasey v. Perry*, No. 13-CV-00193, 2014 U.S. Dist. LEXIS 144080, at \*198-209 (S.D. Tex. Oct. 9, 2014); and

- HB 112 violates the Equal Protection Clauses of both the Fourteenth Amendment and Part I, Articles 1 and 2 of the New Hampshire Constitutions by imposing discriminatory financial requirements on those non-resident domiciliaries who exercise their fundamental right to vote, while not imposing such financial requirements on those non-resident domiciliaries who do not exercise their fundamental right to vote. This classification regime—which is conditioned solely on whether one decides to vote with the obvious intent to deter non-resident domiciliaries from voting—is arbitrary and too fails strict scrutiny review.

## ARGUMENT

### **I. The Supreme Court Cannot Issue an Advisory Opinion on a Legal Issue That Involves Resolution of Questions of Fact**

Part II, Article 74 of the New Hampshire Constitution provides: “Each branch of the legislature as well as the governor and council shall have authority to require the opinions of the justices of supreme court upon important questions of law and upon solemn occasions.” N.H. CONST. pt. II art. 74. However, this constitutional duty to give advisory opinions “is limited to questions of law pending before the inquiring body and does not include legal questions which involve resolution of questions of fact.” *Opinion of the Justices*, 116 N.H. 358, 360 (1976) (emphasis added); *see also Opinion of the Justices*, 123 N.H. 510, 511 (1983).

The right to vote is fundamental under both the Federal and State Constitutions. *Newburger v. Peterson*, 344 F. Supp. 559, 560 (D.N.H. 560 (D.N.H. 1972) (three-judge court); *Atkins v. Sec. of State*, 154 N.H. 67, 71 (2006); N.H. Const. Pt I Art. 11. When an election law imposes “‘severe’ restrictions on voters’ rights, the regulation must withstand strict scrutiny to be constitutional.” *Atkins*, 154 N.H. at 72 (quotation omitted) (applying *Anderson/Burdick* framework); *see also Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Such regulations (i) must “be justified by a compelling governmental interest and [ii] must be necessary to the accomplishment of its legitimate purpose.” *Atkins*, 154

N.H. at 73 (quotation omitted). The State's justification must be "neither unduly restrictive nor unreasonable." *In re Christopher K*, 155 N.H. 219, 226 (2007). The second prong of this test "is similar to the federal narrowly tailored requirement." *Id.* at 226. Under strict scrutiny, the State cannot defend the law based upon mere "conceivable" post-hoc rationalizations set forth in a legal brief; rather, the State must rely on the actual purpose espoused by the legislature when the bill was under consideration. *Community Resources for Justice, Inc. v. City of Manchester*, 154 N.H. 748, 762 (2007) (in applying strict scrutiny, "the government may not rely upon justifications that are hypothesized or invented post hoc in response to litigation, nor upon overbroad generalizations") (internal quotations omitted).

Because strict scrutiny applies to HB 112 given its severe burden on voting rights,<sup>4</sup> the legal questions presented by the House involve resolution of questions of fact that are unresolved in the absence of a full record. For example, this Court would first have to consider the legislative history of HB 112 and the legislature's actual purpose in proposing the law. But there is no record here to determine the purpose of the bill and, since strict scrutiny applies, the Court is not permitted to speculate beyond those reasons specifically articulated by the legislature. The questions presented neither identify a justification for the proposed law nor contain discussion of the legislative history.<sup>5</sup> Thus, the Court is simply unable to conduct the constitutional analysis required by law. *See Barr v. Galvin*, 626 F.3d 99, 109 (1st Cir. 2010) (noting that the

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<sup>4</sup> Simply because the right to vote is enshrined in Part I, Article 11 as "fundamental does not mean that any impingement upon that right triggers strict scrutiny." *Atkins*, 154 N.H. at 71. As stated in the main text, "when the election law at issue subjects plaintiff's rights to 'severe' restrictions, the regulation must withstand strict scrutiny to be constitutional." *Id.* at 72. "When the election law imposes only 'reasonable, nondiscriminatory restrictions' on plaintiff's rights, then 'the State's important regulatory interest are generally sufficient to justify the restrictions.'" *Id.* at 72; *see also Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). As explained in more detail below, consistent with *Atkins*, *Newburger*, and *Guare*, HB 112's restrictions on voting are severely burdensome, thus requiring strict scrutiny review. However, to even consider the question of whether strict scrutiny or some other standard applies to HB 112 by analyzing its burden on voting rights, the Court must have before it a factual record. There is no factual record here, and thus the Court cannot issue an advisory opinion.

<sup>5</sup> Even if the Court could review the legislative history from the House, because the Senate has not considered HB 112, there is no legislative history from the entire legislature to which the Court may apply strict scrutiny review.

constitutional issues involved mandate a weighing of the “precise interests put forward by the State as justifications for the burden imposed”).

Just as problematic—and even assuming the State has a legitimate or even compelling interest in passing HB 112 (which is far from clear)—the Court would have to rigorously test whether HB 112 is narrowly tailored to effectuate the State’s purported purpose in enacting the legislation. *Atkins*, 154 N.H. at 72. In the absence of a fully-developed adversarial record testing whether less restrictive alternatives exist to address any purported state interests, the Court simply does not have the necessary information before it to apply strict scrutiny review under Article 11. *See Cruz v. Melecio*, 204 F.3d 14, 22 (1st Cir. 2000) (“The fact-specific nature of the relevant inquiry [under *Anderson*] obviates a resolution of this case on the basis of the complaint alone.”). These critical questions require a vigorous adversarial proceeding, review of documents, and the examination of witnesses, including the Secretary of State and voters. Thus, the Court cannot opine on these questions.

Several New Hampshire court decisions demonstrate that the resolution of factual issues is necessary to resolve the constitutionality of laws burdening the fundamental right to vote. In *Atkins*, the plaintiffs challenged a law regulating ordering of candidates for elective office on the ballot. 154 N.H. at 68. Under the law as it then existed, candidates of the party that received the highest vote totals combined in the prior election were listed first within each box as it appeared on the ballot. *Id.* Candidates were then arranged alphabetically by surname within each party. *Id.* Citing evidence regarding the advantage the so-called primacy effect can give candidates listed higher on the ballot over candidates listed lower on the ballot, this Court applied strict scrutiny and struck down the law because it “discriminate[d] against candidates running in

minority parties and against candidates whose surnames do not begin with letters located near the beginning of the alphabet.” *Id.* at 73.

Similarly, in *Guare v. State of Hampshire*, two Superior Court Judges (Lewis, J. and Tucker, J.) applied strict scrutiny to SB 318—a 2012 law that amended the language of the standard voter registration form to require any person, including individuals domiciled in New Hampshire who are not legal New Hampshire residents, to execute a declaration stating, in relevant part:

In declaring New Hampshire my domicile, I am subject to the laws of the state of New Hampshire which apply to all residents, including laws requiring a driver to register a motor vehicle and apply for a New Hampshire driver’s license within 60 days of becoming a resident.

RSA 654:7, IV (as amended by 2012 Session Law ch. 285). In finding the law unconstitutional in violation of Part I, Article 11 after a robust discovery process, the Superior Court reviewed the statutory scheme, the legislative history of SB 318, and the factual record where plaintiffs presented un rebutted testimony regarding the confusion and chilling effect created by the law. The Court first resolved the factual question of whether the burden on voting rights was “severe,” thus triggering strict scrutiny review. Concluding that the burden was “severe,” the Court explained:

[M]isleading, confusing, or untrue statements of the law on the registration form may have a significant impact on whether a domiciliary decides to register to vote in the first instance. If, by reading the information on the form a domiciliary chooses not to register to vote, the form has directly caused a citizen to forego a fundamental right. The threat to the fundamental right to vote here is at least as acute as the danger that alphabetical listing of candidates had on the right to be elected in *Atkins*.

*Guare, et al. v. New Hampshire*, No. 2012-cv-458, at \*7 (N.H. Super. Ct, Strafford Cty., July 24, 2014) (Tucker, J.). Then, applying strict scrutiny to the factual record, the Superior Court held that the added language in the voter registration form was a “confusing and unreasonable



description of the law” that was “unduly restrictive and/or unreasonable” with respect to the right to vote embedded within Article 11.<sup>6</sup>

Finally, in *Newburger v. Peterson*, 344 F. Supp. 559 (D.N.H. 1972), a three-judge panel of the federal district court considered, upon a stipulated record, a state law that required a residency “permanent or indefinite intention to stay” standard in order to register to vote. After reviewing the stated purpose of the statute and its impact on voters, the Court held: “[W]e cannot see that a requirement of permanent or indefinite intention to stay in one place is relevant to responsible citizenship .... [T]he state has not shown that the indefinite intention requirement is necessary to serve a compelling interest.” *Id.* at 563. This requirement “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.” *Id.*

In each of these cases, the Supreme Court, the Superior Court, and the Federal District Court reviewed a fully-developed factual record establishing the actual purpose behind the law, the burden on voting rights, and evidence testing the law’s rationale. Under both federal and state law, this same factual analysis is required to correctly apply strict scrutiny to HB 112. Accordingly, because analysis of the legal questions presented by the House involve resolution of questions of fact, the Court cannot issue an advisory opinion in this matter. *Opinion of the Justices*, 116 N.H. at 360.

**II. Alternatively, If The Court Reaches The Constitutional Question—Which It Should Not—House Bill 112 Would Place a Severe and Unconstitutional Burden on the Right to Vote In Violation of Part I, Article 11**

The right to vote is fundamental under both the Federal and State Constitutions. *E.g.*, *Newburger*, 344 F. Supp. at 560 (three-judge court); *Akins*, 154 N.H. at 71 (“[T]he right to vote

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<sup>6</sup> *Guare* is currently on appeal to this Court. Oral argument is scheduled for April 22, 2015.

is fundamental”). Part I, Article 11 of the New Hampshire Constitution states, in relevant part, that “[a]ll elections are to be free, and every inhabitant of the state of 18 years of age and upwards shall have an equal right to vote in any election.” N.H. Const. pt. I, art. 11. “Every 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).

This fundamental right is incorporated into the laws describing who is eligible to vote in New Hampshire and recognizes crucial differences in the definitions of “domicile” for voting purposes and legal “residency.” For example, RSA 654:1, I states:

Every inhabitant of the state, having a single established domicile for voting purposes, being a citizen of the United States, of the age provided for in Article 11 of Part First of the Constitution of New Hampshire, shall have a right at any meeting or election, to vote in the town, ward or unincorporated place in which he or she is domiciled. *An inhabitant's domicile for voting purposes is that one place where a person, more than any other place, has established a physical presence and manifest an intent to maintain a single continuous presence for domestic, social and civil purposes relevant to participating in democratic self-government.* A person has the right to change domicile at any time, however a mere intention to change domicile in the future does not, of itself, terminate an established domicile before the person actually moves.

RSA 654:1, I (emphasis added). New Hampshire law explicitly permits students attending school here to choose New Hampshire as their voting domicile. RSA 654:1, I-a. However, the definition of legal “resident” is different. RSA 21:6 states:

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 or adobe as his principal place of physical presence for the indefinite future to the exclusion of all others.*

RSA 21:6 (emphasis added).

Thus, the law governing eligibility to vote does not require voters to be legal “residents” of the state as defined in RSA 21:6. Unlike a legal “resident,” a New Hampshire voter need not

have an intention to live in New Hampshire “for the indefinite future” in order to be considered “domiciled” in New Hampshire. *See* RSA 654:1, I. And this is for good reason. As courts have held, an “indefinite intention to remain” standard cannot be a criteria to vote because it would disenfranchise large groups of people. For example, as the *Newburger* Court explained:

[Under an “indefinite intention to remain” 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.

344 F. Supp. at 563.<sup>7</sup>

With this backdrop, it is clear that HB 112 would create a severe burden on voting rights by imposing onerous financial requirements on non-resident domiciliaries simply if they register and exercise their right to vote. Under HB 112, a legal non-resident who is domiciled in New Hampshire under RSA 654:1(I)—and thus has a constitutional right to vote here under Part I, Article 11—would be required to obtain a New Hampshire driver’s license and vehicle registration if and only if that person registers to vote. And, under HB 112, this obligation would exist even though the non-resident domiciliary would not otherwise be required to obtain a New Hampshire driver’s license or vehicle registration under RSA 21:6/259:88.<sup>8</sup> Even worse, if this

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<sup>7</sup> At the outset, HB 112 would undermine these common sense distinctions between domicile and legal residency by keeping the current domicile test set forth in RSA 651:1, I while at the same time rendering any individual who satisfies that test and elects to register to vote to *per se* “have established his or her residence for motor vehicle purposes at that address” under RSA 21:6. In essence, HB 112 conflicts with RSA 21:6 by confusingly suggesting that domiciliaries who do not satisfy the definition of legal residency under RSA 21:6 actually are legal residents under RSA 21:6 if they register to vote even though they do not satisfy the criteria under RSA 21:6.

<sup>8</sup> Under existing law, RSA 259:88 defines residency for motor vehicle law purposes as “a resident of the state as defined in RSA 21:6, except that no person shall be deemed to be a resident who claims residence in any other state for any purpose.” RSA 21:6 includes as a criterion that a resident have an intention to live in New Hampshire “for the indefinite future.” Under HB 112, because voting domiciliaries who do not satisfy this “indefinite intention to remain” criteria under RSA 21:6 will be deemed residents only as a result of having registered to vote and would not otherwise be considered legal residents under state motor vehicle law, the burden of needing to register vehicles in

voter does not obtain a New Hampshire license or vehicle registration and pay these fees within sixty (60) days, she has now committed a crime. *See* RSA 263:35; RSA 263:1; *see also* RSA 260:10, 263:5-a, 263:12, 261:45, 263:35; RSA 263:42, I (requiring payment of fees for issuance of a driver's license); 261:19, 261:20, 261:52, 261:141, 261:148, 261:153 (requiring payment of motor vehicle title fees, registration fees, and municipal permit fees). These motor vehicle fees are also substantial. A New Hampshire driver's license costs \$50, and registration fees can be in the hundreds of dollars.<sup>9</sup> However, under HB 112, if that non-resident domiciliary *does not* exercise his or her constitutional right to vote, no fees will be required. Even in the absence of a legislative or discovery record, it is apparent that HB 112's discriminatory requirement that non-resident domiciliaries who exercise their constitutional right to vote be subjected to significant motor vehicle fees will, in practice, chill those individuals from voting. Put another way, HB 112 will deter citizens who are domiciled in New Hampshire for voting purposes, *see* RSA 654:1, but who lawfully retain an out-of-state driver's license or car registration because they are not New Hampshire legal residents as defined in the state's motor vehicle laws, *see* RSA 21:6/259:88, from registering to vote in New Hampshire. Given this severe chilling effect on voting rights, strict scrutiny applies.

Even beyond deterring legitimate New Hampshire domiciliaries from registering to vote, deeming such individuals residents who are required to register a motor vehicle and apply for a New Hampshire driver's license would be inconsistent with the decision of the U.S. District Court for the District of New Hampshire in *Newburger v. Peterson*, 344 F. Supp. 559 (1972). In

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*New Hampshire and obtain a New Hampshire driver's license would not otherwise be applicable but for such voting domiciliaries having registered to vote.*

<sup>9</sup> For an explanation of fees, please see RSA 261:141 for state fees, and RSA 261:153 for town/city fees. In addition to the registration fees, there is an \$8.00 plate fee for the first time one orders license plates. <http://www.nh.gov/safety/divisions/dmv/registration/vehicle.htm#fees>; <http://www.nh.gov/safety/divisions/dmv/driver-licensing/apply/fees.htm>.

*Newburger*, the Court held that the state and its political subdivisions could not require voters to affirm that they have an indefinite intention to remain in this state as a criteria to vote. *Id.* at 562-63. But what *Newburger* held cannot be done directly, HB 112 attempts to do indirectly. Where *Newburger* explained that a legal “indefinite intention to remain” residency standard cannot be a criteria to vote, HB 112 attempts to impose on non-resident domiciled voters all the fees and requirements that legal residents must satisfy who meet the “indefinite intention to remain” standard of RSA 21:6. In ongoing litigation in *Guare v. State of New Hampshire*, currently pending before this Court, the State has conceded that a residency requirement for voting would be unconstitutional under the standard articulated in *Newburger*.<sup>10</sup>

Finally, because HB 112 imposes a severe restriction on the rights of certain citizens to vote in New Hampshire—without being necessary to achieve any legitimate State interest (let alone a compelling one)—HB 112, if enacted, could not withstand strict scrutiny. There can be absolutely no legitimate justification for the proposed law, though the questions presented regarding HB 112 include no findings that even attempt to provide any such justification. *First*, we anticipate that, if enacted and subsequently challenged, the State would identify the avoidance of voter fraud as the motivation for the law. If the interest is to deter alleged “drive-by voting fraud”—a situation where, though there is no evidence of it being a systemic problem, one who is not domiciled in New Hampshire under RSA 654:1 comes to this state to vote—HB 112 is not remotely tailored to address this interest because it would deter from voting people

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<sup>10</sup> HB 112 would create a chilling effect in another way. HB 112’s necessary implication is that non-resident domiciliaries who vote are deemed residents under RSA 21:6 even though they do not meet the criteria for legal residency under RSA 21:6 and RSA 259:88. In fact, RSA 259:88 states that a person who claims legal residency elsewhere shall not be deemed a legal resident of New Hampshire. This would put a non-resident domiciliary who decides to exercise his or her right to vote in an untenable position where he would have to falsely swear that he is a legal resident under RSA 21:6 at the DMV even though he does not meet the criteria of legal residency because he does not have an intention to remain in New Hampshire indefinitely under RSA 21:6. Under New Hampshire law, applicants face criminal penalties if they make a false statement in an application for license by falsely claiming residency. See RSA 260:10, 263:5-a, 263:12, 263:35.. Faced with this possible scenario, non-resident domiciliaries likely will simply not exercise their constitutional right to vote.

who are domiciled in New Hampshire under RSA 654:1 and, thus, have a constitutional right to vote here. And if the purported interest is to deter from voting non-resident domiciliaries who are constitutionally entitled to vote here—which, by definition, would not be fraudulent—this, of course, is not a legitimate governmental interest and will only risk the loss of confidence in state elections. See *Dunn v. Blumstein*, 405 U.S. 330, 345 (1972) (voter fraud not a permissible rationale for a one-year durational residency requirement because it would “bar[] newly arrived residents from the franchise along with nonresidents”); *Veasey v. Perry*, No. 13-CV-00193, 2014 U.S. Dist. LEXIS 144080, at \*170 (S.D. Tex. Oct. 9, 2014) (“There is a substantial risk of the loss of confidence when fully qualified, registered voters cannot vote in person and are relegated to the less reliable mail-in ballot or cannot vote at all.”). Moreover, even if HB 112 could somehow combat some unspecified voter fraud, there surely has been no evidence tested through the adversarial process that voter fraud even exists in New Hampshire that would make such a drastic infringement on voting rights necessary. Second, there cannot be an administrative or regulatory need for this bill, nor would it be permissible to justify impeding voting rights on the basis that the State wishes to raise more funds through motor vehicle fees. See *Guare, et al. v. New Hampshire*, No. 2012-cv-458, at \*9-10 (N.H. Super. Ct, Strafford Cty., July 24, 2014) (Tucker, J.) (“the subject language may actually cause the collection of more fees than the State would otherwise be entitled to receive [under RSA 21:6]”). Third, it would not be appropriate to impose HB 112 on the grounds that those who pay motor vehicle fees have, through such payment, allegedly shown that they are somehow more “knowledgeable” or more committed to New Hampshire. Such a rationale, understandably, has been rejected by the United States Supreme Court. See *Dunn*, 405 U.S. at 355 (1972) (rejecting “knowledgeable voter” justification on the ground that “[f]encing out’ from the franchise a sector of the population because of the

way they may vote is constitutionally impermissible”) (quoting *Carrington v. Rash*, 380 U.S. 89 (1965)).

Accordingly, HB 112 violates Part 1, Article 11 of the New Hampshire Constitution.

**III. House Bill 112 Violates the Twenty-Fourth Amendment to the United States Constitution and the Poll Tax Provisions of Part I, Article 11 of the New Hampshire Constitution**

Under HB 112, individuals would also be unconstitutionally deterred from registering to vote in violation of the Twenty-Fourth Amendment to the United States Constitution and Part I Article 11 of the New Hampshire Constitution, which prohibit denying or conditioning the right to vote on payment of a poll tax. HB 112 would directly link unavoidable financial costs to registering to vote by imposing the requirement of paying driver’s license fees, vehicle title and registration fees, and vehicle municipal permit fees as a consequence of one’s choice to vote. Moreover, anyone who wishes to obtain a New Hampshire driver’s license must certify that he or she has “paid all resident taxes or Interest and Dividends Tax (RSA 77) for which I am liable ....” See New Hampshire Department of Safety, Division of Motor Vehicles, Form DSMV450; RSA 263:15.

The United States Supreme Court has made clear that the Twenty-Fourth Amendment “nullifies sophisticated as well as simple-minded modes of impairing the right guaranteed.” *Harman v. Forssenius*, 380 U.S. 528, 540-41 (1965). The category of forbidden poll taxes is broad in order to root out any procedural requirements that deny or abridge the right to vote. *Id.* at 541. It therefore covers not just direct taxes on the right to vote but any imposition that constitutes a “material requirement solely upon those who refuse to surrender their constitutional right to vote in federal elections without paying a poll tax.” *Id.*; see also *Veasey*, 2014 U.S. Dist. LEXIS 144080, at \*198-209 (holding that Texas law requiring showing of voter ID constituted

an unconstitutional poll tax, based upon the required costs of obtaining a birth certificate in order to obtain suitable identification), *stayed pending appeal*, 769 F.3d 890 (5th Cir. 2014), *denying motion to vacate stay*, 135 S. Ct. 9 (2014). Again, the fees associated with obtaining a driver's license and registering a vehicle—as well as the certification of payment of taxes necessary to obtain a driver's license—can amount to hundreds of dollars and would all constitute unlawful poll taxes if the right to vote were, as HB 112 seeks to do, ultimately conditioned on the payment of these fees. *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966) (\$1.50 poll tax for state elections unconstitutional). Further, the law is also discriminatory in that it imposes varied costs on individuals depending on their municipality of residence and the number and value of their vehicles, in violation of the Twenty-Fourth Amendment. Accordingly, HB 112 is unconstitutional for this independent reason.

#### **IV. HB 112 Violates the Equal Protection Clauses of the United States and New Hampshire Constitutions**

HB 112 also violates the Equal Protection Clauses of both the Fourteenth Amendment and Part I, Article 1 and 2 of the New Hampshire Constitutions because it fails strict scrutiny review. *Dunn v. Blumstein*, 405 U.S. 330 (1972) (applying equal protection clause and, ultimately strict scrutiny, to law that imposed a one-year residency waiting period to vote); *Veasey*, 2014 U.S. Dist. LEXIS 144080, at \*150 (applying equal protection clause); *see also McGraw v. Exeter Region Coop. Sch. Dist.*, 145 N.H. 709, 711 (2001). Here, HB 112 treats similar non-resident domiciliaries differently solely based on the decision to register to vote.

The following example is illustrative of the unconstitutional nature of the law: Two twins over the age of 18 move from Kittery, Maine to the same address in Portsmouth, New Hampshire for jobs. They live at the same location, work for the same employer, and engage in the same civic and social activities. They establish a physical presence and manifest intent to maintain a



single continuous presence at their Portsmouth address. *See* RSA 654:1, I. In short, they each are in the same community, operate within the same form of local New Hampshire government, and have a full stake in how this government operates. However, for personal and professional reasons, both individuals may move back to Kittery at some point in the future so neither has a current intent to live at their Portsmouth address “for the indefinite future.” *See* RSA 21:6. Thus, under RSA 654:1, both are domiciled in New Hampshire for voting purposes and have a constitutional right to vote here, but neither are legal residents of New Hampshire under RSA 26:1. Accordingly, they are not required to obtain a New Hampshire driver’s license or vehicle registration. In fact, because they are not residents it would be illegal to do so.

Under HB 112, if neither person registers to vote, their status as described in the preceding paragraph would not change. However if one twin registers to vote, she would be required to obtain a New Hampshire driver’s license and vehicle registration and pay all the fees and taxes associated with this requirement. The twin who does not register to vote is not required to obtain a New Hampshire driver’s license and vehicle registration and pay all the fees and taxes associated with this requirement. Again, it would be illegal for her to do so.

For the same reasons above, under any standard of review, there is absolutely no justification to impose financial burdens on the one twin who wants to register the vote and not the other twin who does not register the vote. Accordingly, HB 112 violates the equal protection principles embedded within the federal and state constitutions.

THE AMERICAN CIVIL LIBERTIES UNION OF  
NEW HAMPSHIRE, THE LEAGUE OF WOMEN  
VOTERS OF NEW HAMPSHIRE, AND THE  
FAIR ELECTIONS LEGAL NETWORK,

BY AND THROUGH THEIR ATTORNEYS,



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