

BRENNAN
CENTER
FOR JUSTICE

February 24, 2011

VIA E-MAIL and HAND-DELIVERED

House Election Law Committee
New Hampshire House of Representatives
107 North Main Street
308 LOB
Concord, New Hampshire 03301

RE: House Bill 176

Dear Chairman Bates and Members of the Election Law Committee,

We are writing on behalf of the Brennan Center for Justice at New York University School of Law to express concern about proposed House Bill 176, related to qualifications for voting. House Bill 176 creates unwise and unlawful barriers to full participation by New Hampshire voters, and it would make New Hampshire an outlier among the states in its discriminatory treatment of military personnel and college students. We urge you to reject this bill.

The Brennan Center is a non-partisan public policy and legal advocacy organization that unites scholars and advocates in pursuit of a vision of inclusive and effective democracy. To that end, the Center's Democracy Program researches and promotes reforms that eliminate barriers to full and equal political participation. The Brennan Center has worked to ensure fair and accurate registration and voting policies. This work has included thorough research on election law and technology, assistance in drafting regulatory and legislative provisions, testimony before legislative bodies, and, where necessary, litigation to compel compliance with obligations under state and federal law, including the United States Constitution.

The Brennan Center has grave concerns about House Bill 176, which has recently been introduced in the New Hampshire House of Representatives. This bill would redefine "domicile" for the purposes of voter registration. Paragraph III of the bill creates a special voter residency standard for students and members of the military who lived elsewhere – including elsewhere in New Hampshire – prior to matriculating or being stationed in New Hampshire. Specifically, the provision creates an irrebuttable presumption that such students and service members cannot establish voting residency

during any military or educational placement, automatically disqualifying them from voting where they are stationed or matriculated.

New Hampshire may insure that its voters are limited to eligible and *bona fide* state residents, and the state may impose reasonable, nondiscriminatory durational residency requirements to achieve that end. However, state law must also comply with constitutional safeguards protecting the fundamental right to vote. Because House Bill 176 restricts voting rights, it is subject to close constitutional scrutiny, requiring New Hampshire to show a compelling state interest warranting the extreme residency restrictions in the bill.¹ Under the Supreme Court’s case law, New Hampshire cannot present a compelling state interest to warrant the disparate treatment of service members and students found in House Bill 176.

Federal and state courts have examined similar laws in the past and struck them down. It is unconstitutional for a state to create a presumption against a particular group of eligible voters – including students² or service members³ – for the purposes of establishing a voting residence. Indeed, even a law including a *rebuttable* presumption against student residency has been found unconstitutional for placing an extra voting burden on a particular group.⁴ In singling certain groups out for disparate treatment under the state’s voter registration system, House Bill 176 therefore runs afoul of the 14th Amendment’s guarantee of equal protection. In addition, by automatically disqualifying students and soldiers on the presumption that they do not intend to remain in New Hampshire, the bill leaves them with the option to vote in their previous home counties or states. These citizens may find themselves in a Catch 22: they cannot vote in their new place of residence and they may no longer meet the residency requirements of a previous address once they have affirmatively left for a long term in the military or at school. Service members and students in this unfortunate position will be completely, and unlawfully, denied the right to vote.

If House Bill 176 were enacted, it would become the most restrictive residency requirement in the country. In most jurisdictions, citizens generally do not gain or lose domicile when they move to a state for school.⁵ In fact, many states actually assume the burden of registering students and informing them of their voting rights.⁶ No state categorically denies voting residency to an individual solely because of their military

¹ See *Dunn v. Blumstein*, 405 U.S. 330, 337 (1972).

² See, e.g., *Newberger v. Peterson*, 344 F. Supp. 559, 563 (D.N.H. 1972) (ruling in favor of a student who was denied voter registration solely because he stated to registration officials that he intended to leave New Hampshire upon graduation, holding that such an “indefinite intention” requirement “offends the equal protection clause”); *Whatley v. Clark*, 482 F.2d 1230, 1234 (5th Cir. 1973) (relying on *Newberger* and *Dunn* to hold a similar “indefinite intention” statute unconstitutional because it presumed students to be non-residents); *Williams v. Salerno*, 792 F.2d 323, 327-28 (2d Cir. 1986) (“The equal protection clause of the fourteenth amendment does not... permit a state to discriminate against students by denying them the right to vote or by subjecting them to more vigorous registration requirements than are generally applied”); *Wilkins v. Bentley*, 385 Mich. 670, 678 (1971) (holding that even a rebuttable presumption of student non-residence at school is unconstitutional because it deprives them of due process and equal protection).

³ See, e.g., *Carrington v. Rash*, 380 U.S. 89, 96 (1965) (“By forbidding a soldier ever to controvert the presumption of nonresidence, the Texas Constitution imposes an invidious discrimination in violation of the Fourteenth Amendment”); *Evans v. Cornman*, 398 U.S. 419, 424 (1970) (holding that persons temporarily living on the grounds of a federal enclave had sufficient nexus with the community to be considered state residents for voting purposes).

⁴ *Wilkins v. Bentley*, 385 Mich. 670, 678 (1971).

⁵ See, e.g., NY CLS Elec § 5-104 (New York); MCLS § 168.11 (Michigan); ARS § 16-593 (Arizona).

⁶ See, e.g., Cal Elec Code § 2146 (California); O.C.G.A. § 20-2-310 (Georgia); KRS § 116.046 (Kentucky).

status. Passage of House Bill 176 would make New Hampshire an outlier among the states for restrictive voter residency laws.

Additionally, this bill arbitrarily targets certain segments of the community – New Hampshire’s students and military – as being mobile when, in reality, most Americans are highly mobile. Approximately 45% of Americans move every 5 years. According to Census data, in 2009 alone, over 37 million Americans changed their residence. This bill unfairly targets service members and students who may be in the voting jurisdiction for a fixed period of time but are nonetheless full members of their communities. American citizens have a right to choose where they vote by determining the community in which they are most invested. The state cannot substitute a blanket judgment for that choice. Doing so in a manner that arbitrarily disenfranchises students and service members is discriminatory and unlawful.

For the above reasons, we believe that House Bill 176 is both unwise as a matter of policy and unlawful under federal case law. We urge you to reaffirm New Hampshire’s commitment to full and fair voting rights by voting against this restrictive bill. Please do not hesitate to contact us if you have questions or concerns about this testimony. Thank you for your time and attention to this critical voting rights issue.

Very truly yours,



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