

AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE

From: Gilles Bissonnette, Legal Director, American Civil Liberties Union of New Hampshire
To: The Honorable Members of the New Hampshire Senate Election Law Committee
Date: March 7, 2017
Re: ACLU-NH Opposition to SB3

I submit this testimony on behalf of the American Civil Liberties Union of New Hampshire (ACLU)—a non-partisan, non-profit organization with approximately 5,000 members working to protect civil liberties throughout the state for nearly 50 years. SB3 would needlessly hinder the voting rights of constitutionally-eligible voters in New Hampshire. We respectfully urge the Committee to recommend that the Senate deem SB3 *inexpedient to legislate*. We are not aware of any other state that has a voting law like SB3's terms.

I. The Added Domicile "Acts" Impacting All Voters

SB3's List of Acts Determining Domicile Adds an Additional Voting Criteria and May Have a Disenfranchising Impact: This bill imposes an additional eligibility criteria to vote: not only must a voter live here, but he or she must also affirmatively perform an act to prove to the government this domicile intent (a requirement that goes beyond what the Constitution requires). And if they do not meet this additional "act" criteria—or they do not have documentation to show it—they will have committed an offense for exercising their right to vote.

Moreover, the bill references multiple "acts" disconnected from the N.H.'s Constitution's domicile voting standard, like having a New Hampshire driver's license or car registration—which both use an "indefinite intention to remain" standard that cannot be constitutionally imposed for voting purposes. This could impact college students who live in New Hampshire and have a constitutional right to vote here,¹ but may have graduated from high school in another state. Indeed, this list is heavily skewed towards "acts" that require money being paid to the government.

This List of Acts Fails to Provide Any Guidance on How they are to be Balanced: The bill gives no direction to election officials as to how to weigh the 10 "acts" listed in this bill. This lack of clarity will not only lead to voter confusion, but also to inconsistent voter eligibility decisions across the state, especially if a voter cannot meet one of the 10 "acts." This bill will make the hard job of elections officials even harder, by requiring them to apply this confusing voter eligibility standard. As the New Hampshire Supreme Court recently held, confusing language addressing voter eligibility raises serious constitutional concerns under Part I, Article 11 of the New Hampshire Constitution. See *Guare v. State*, 167 N.H. 658 (2015).

II. Impact on All Same-Day Registrants Who Do Not Provide Proof of Domicile on Election Day

This Bill Will Needlessly Burden Legitimate Same-Day Voters: This bill would add considerable burdens to same-day registrants who are unable to produce domicile documentation by requiring them to expend money and resources to, within 10 days (or within 30 days if the clerk's office is open less than 20 hours weekly), (i) appear once again in person at a local town or city hall to produce the required domicile documents if they have them, or (ii) mail the required documents if they have them. Requiring voters to go to their local clerk's office within 10 or 30 days of an election is burdensome. Not all clerk's offices in New Hampshire—especially in rural areas—are regularly open. Nor is it easy for individuals to take off time from work or arrange child care to visit the clerk's office during the day. Nor does every voter have a copying machine on hand at home.

This Bill Will Not Only Needlessly Subject Voters to Police Interactions, But Will Effectively Criminalize Individuals Who Are Unable or Fail to Submit the Domicile Documentation. As the bill itself explains, if a person does not have or provide the required documentation, the supervisors of the checklist would be authorized to "[r]equest[] local law enforcement during their routine patrols to visit the address and verify that the individual was domiciled there on election day." Indeed, as the registration form in this bill states for voters who have moved within 30 days of an election: "Failing to report and provide evidence of verifiable action will prompt a visit by government officials ..." These voters will also have their names removed from the checklist without any process.

Amazingly, the bill goes so far as to effectively criminalize these voters if the information is not submitted to the local clerk's office, even in the absence of actual fraud. According to the bill: "An applicant whose voter registration is approved based on a domicile affidavit who fails to provide a document to the city or town clerk as required by this paragraph shall be subject to the penalties of wrongful voting as established in RSA 659:34"—which is punishable by a fine of up to \$5,000. This is also made clear in the bill's amendment to RSA 659:34. Nevertheless, this prospect for punishment does not appear on the registration form (the registration form only says that there will be a further investigation.). This shocking penalty, as well as the criminal investigations themselves, will deter individuals—especially those

¹ *Newburger v. Peterson*, 344 F. Supp. 559, 563 (D.N.H. 1972) (college students have a constitutional right to vote in New Hampshire where they live regardless of whether they intent to live in New Hampshire indefinitely).

who may not have physical proof because they just moved—from voting through the same-day registration process. Given this severe impact on same-day voter registration, the legislature should look seriously at whether this bill, if enacted, would compromise New Hampshire’s NVRA exemption.

In short, this bill falsely assumes that all same-day voters who do not provide domicile documentation at the polls are fraudulent. However, as the Attorney General of New Hampshire has explained,² there is no evidence to suggest voter fraud among this class of people that would remotely justify this assumption.

III. Two Classes of Voters: Added Impact on Voters Who Move Within 30 Days of an Election and Register and Vote on Election Day

SB3 Needlessly Creates Two Class of Voters by Requiring One Class Voting Same-Day to Provide Verifiable Proof of Domicile on the Registration Form: This bill creates two classes of voters—people who have moved to a New Hampshire municipality within 30 days of an election and people who have not. Under this bill, people who have moved within 30 days of an election are, despite any evidence, presumptively deemed “temporary” unlawful voters and not domiciled in their NH town or city. This presumption can be rebutted if they “provide evidence a verifiable action has been taken”—*though they may have just moved to their location before the election and may not yet have such evidence*—on the registration form using a list of affirmative acts designed to determine whether the person is domiciled in New Hampshire. Again, as the Attorney General of New Hampshire has explained, there is no widespread evidence of voter fraud in New Hampshire that would justify a presumption that these voters are all fraudulent.

The Registration Form for these Voters Explicitly Discriminates Against College Students: As explained above, some of the “verifiable acts” listed in this bill—which are also on the registration form—are disconnected from the N.H.’s Constitution’s domicile voting standard, like having a New Hampshire driver’s license or car registration—which both use an “indefinite intention to remain” standard that cannot be constitutionally imposed for voting purposes. This seems targeted at college students who live in New Hampshire and have a constitutional right to vote here, but may have graduated from high school in another state. Moreover, the registration form expressly omits the “residency at an institution of higher learning” act that exists earlier in the bill—an omission that is likely to disenfranchise college students.

Giving a Landlord Veto Power: The bill also requires voters who live in “an abode rented, leased, or purchased by another” but are “not listed on the rental agreement, lease or deed” to “provide a written statement ... from a person who is listed on such document.” This too will impact college students who live in a dormitory without a written lease. Moreover, a landlord should not get veto power on whether someone should vote.

This Lengthy Registration Form for These Voters Will Lengthen Lines in Polling Places: This registration form for this class of voters is incredibly long and, as explained above, confusing. As a result, processing these voters will take much more time, which will create longer lines and wait times at busy polling places for same-day registrants. Voting should not be a test of endurance. For example, if you spend an extra 3 minutes with 3,000 voters, that is an additional 150 hours of poll workers’ time.

Conclusion: The result of this bill is that a voter who moves to New Hampshire within 30 days of his or her move and who registers using the same-day registration process, but does not bring proof of domicile to the polls, now must (i) fill out a separate registration form declaring “verifiable actions” establishing domicile and (ii) present such evidence to the local clerk’s office within 10 or 30 days of the election. And if they are unable to do so, they will have committed an offense punishable by a fine of up to \$5,000.

IV. SB3 Needlessly Limits the Use of Domicile Affidavits to Same-Day Registration. Thus, the result of this bill is that a registrant must, unless he is registering “same day” at the polling place on Election Day, provide physical proof of domicile to the local clerk’s office – proof which contains many of the same problems addressed above. If that voter does not go to the clerk’s office with the required documentation, that voter cannot register and is compelled to come back later to the clerk’s office with the appropriate documentation. This is needless and may deter registrants from coming back a second time. This person then is more likely to vote through the same-day registration process at the polling place on Election Day, which (i) is already being burdened by other aspects of the bill for the reasons explained above, and (ii) will needlessly lead to longer lines and wait times at the same-day table.

² As Attorney General Joseph Foster has explained, “We have seen no evidence of large-scale voter fraud whatsoever, and none has been brought to our attention.” See John DiStaso, “FEC Commissioner to Trump: Show Evidence of ‘Astonishing NH Voter Fraud Scheme’ Claim,” *WMUR*, Feb. 11, 2017, available at <http://www.wmur.com/article/fec-commissioner-to-trump-show-evidence-of-astonishing-nh-voter-fraud-scheme/8732187>.