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SECRETARY OF STATE
State of Texas

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VIA HAND DELIVERY

The Honorable Rick Perry
Governor
State Capitol, Room 2S.1
Austin, Texas 78711

Election Law Opinion GSC -1

Dear Governor Perry:

This formal election law advisory opinion is in response to your letter, dated December 30, 2003, requesting this office's opinion on matters relating to residency in Texas. Specifically, you requested the opinion of this office concerning how Section 1.015 of the Texas Election Code ("Code") applies to college students currently attending Prairie View A&M University. Because you have raised issues of general importance, I shall address your question within the context of this formal election law opinion, which is rendered under my authority to obtain and maintain uniformity in the interpretation of elections laws. TEX. ELEC. CODE ANN. § 31.001(a) (Vernon 2003).

Question: What is the proper interpretation and application of Section 1.015 of the Code in the context of voter registration by and "residency" of college students, in particular, those students currently attending Prairie View A&M University?

Short Answer: The definition of residence for the purpose of voter registration is well settled in Texas. As stated in the seminal case of *Mills v. Bartlett*, 377 S.W.2d 636, 637 (Tex.1964), "[n]either bodily presence alone nor intention alone will suffice to create the residence, but when the two coincide at that moment the residence is fixed and determined. There is no specific length of time for the bodily presence to continue." Most importantly, a college student cannot be held to stricter residency

standards than other classes of Texas voters as a precondition to submitting an application and becoming a registered voter in this state.

I. APPLICABLE TEXAS STATUTES

In general, a person is eligible to vote in elections in Texas if such person first meets the requirements in Section 11.001 of the Code as set forth below:

§ 11.001. Eligibility to Vote.

Except as otherwise provided by law, to be eligible to vote in an election in this state, a person must:

- (1) be a qualified voter as defined by Section 11.002 on the day the person offers to vote;
- (2) be a resident of the territory covered by the election for the office or measure on which the person desires to vote; and
- (3) satisfy all other requirements for voting prescribed by law for the particular election.

TEX. ELEC. CODE ANN. § 11.001 (Vernon 2003). The next step in the analysis of who is permitted to vote in Texas requires a review of the definition of “qualified voter” set forth in Section 11.002 of the Code:

§ 11.002 Qualified Voter.

In this code, “qualified voter” means a person who:

- (1) is 18 years of age or older;
- (2) is a United States citizen;
- (3) has not been determined mentally incompetent by a final judgment of a court;
- (4) has not been finally convicted of a felony or, if so convicted, has:
 - (A) fully discharged the person's sentence, including any term of incarceration, parole, or supervision, or completed a period of probation ordered by any court; or
 - (B) been pardoned or otherwise released from the resulting disability to vote;

(5) *is a resident of this state*; and

(6) is a registered voter.

TEX. ELEC. CODE ANN. § 11.002 (Vernon 2003) (*emphasis added*). Clearly, if it appears that a person meets all of the aforementioned requirements, then such person shall be permitted to vote in Texas.

The definition of “residence” is as set forth below:

§ 1.015. Residence

(a) In this code, “residence” means domicile, that is, one's home and fixed place of habitation to which one intends to return after any temporary absence.

(b) Residence shall be determined in accordance with the common-law rules, as enunciated by the courts of this state, except as otherwise provided by this code.

(c) A person does not lose the person's residence by leaving the person's home to go to another place for temporary purposes only.

(d) A person does not acquire a residence in a place to which the person has come for temporary purposes only and without the intention of making that place the person's home.

(e) A person who is an inmate in a penal institution or who is an involuntary inmate in a hospital or eleemosynary institution does not, while an inmate, acquire residence at the place where the institution is located.

TEX. ELEC. CODE ANN. § 1.015 (Vernon 2003). An analysis of Section 1.015 of the Code and the judicial interpretations thereof follows immediately below.

II. ANALYSIS

A. *Applicable Federal Cases*

Texas has a history of providing test cases for what were sometimes referred to in the past as transient voters, especially with respect to constitutional questions concerning presumptions against a particular class of voters (i.e., military and student voters, etc.). Some of these test cases, and their holdings are outlined below:

- The state constitutional conclusive presumption against military voters using a Texas military base as their home during their service was struck down as violating the

Equal Protection Clause of the Fourteenth Amendment. *Carrington v. Rash*, 380 U.S. 89, 85 S.Ct. 775 (1965).

- A previous Election Code provision which sought to create a rebuttable statutory presumption against student voters establishing their college town as home was struck down as unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. *Whatley v. Clark*, 482 F.2d 1230 (5th Cir. 1973) (hereinafter referred to as “*Whatley*”).
- The actions of a Texas county registrar that required student voters to fill out a questionnaire demonstrating an intent to remain after graduation was struck down as violating the Twenty-Sixth Amendment. *United States v. Texas*, 445 F. Supp. 1245, 1249,1257 (S. D. Tex. 1978), *aff’d in memorandum op. sub nom. Symm v. United States*, 432 U.S. 1105 (1979) (hereinafter referred to as “*Texas*”).

As noted in the *Texas* case:

The trial court's opinion in *Ballas v. Symm*, 351 F.Supp. 876, at 877, discusses the fact that on October 2, 1972, the United States District Court for the Eastern District of Texas (Judge Wayne Justice) decided *Whatley*, holding at the trial court level that the statutory presumption contained in Article 5.08(k) was unconstitutional. The opinion also discusses the fact that on October 3, 1972, the Chief Election Officer of the State of Texas, Secretary of State, Robert Bullock, issued a bulletin to all voting registrars, advising that: "No county registrar may require any affidavits or questionnaire in addition to the information required on the application for a voter registration certificate."

Texas, at 1246. It is the opinion of this office that the decisions in *Whatley* and *Texas* are binding, definitive precedents in this state with respect to issues concerning the rights of students to register to vote.

B. Applicable State Cases

The statutory definition of residence adopts Texas common law, reinforcing the notion that residence involves a mixed question of law and fact. See TEX. ELEC. CODE ANN. § 1.015(b) (Vernon 2003). College students, and other travelling Texans, including those in the United States military, have, on a number of occasions, expressed concerns to personnel in my office about their proper residency for voting purposes due to the fact that their lives are “split” among one or more physical locations.

There are a plethora of election cases on Texas residence regarding both voters and candidates. Because of the fact-intensive nature of the residence question, some have argued that it is possible to select one case or another as “proving” that a certain factor is dispositive with respect to the question of intent for residence purposes. However, it is the opinion of this office that such an approach can be misleading. The one constant in the common law tests that have

been approved by the Texas Supreme Court, and federal courts interpreting Texas law, is that no one factor is dispositive. As stated by the Texas Supreme Court in the leading Texas case, *Mills v. Bartlett*, 377 S.W.2d 636, 637 (Tex.1964), regarding residence:

The meaning that must be given to it [residence] depends upon the circumstances surrounding the person involved and largely depends upon the present intention of the individual. Volition, intention and action are all elements to be considered in determining where a person resides and such elements are equally pertinent in denoting the permanent residence or domicile.

...

Neither bodily presence alone nor intention alone will suffice to create the residence, but when the two coincide at that moment the residence is fixed and determined. *There is no specific length of time for the bodily presence to continue.*

Mills, at 637 (*emphasis added*). The majority of Texas courts have consistently ruled that residency is a combination of intention and fact, and that the voter's intention must be reviewed to make a final determination of residence. *McBeth v. Streib*, 96 S.W.2d 992 (Tex. Civ. App. – San Antonio 1936, no writ). For example, the El Paso Court of Appeals held that “the voter's intention was material to a proper determination of the voter's residence requirement.” *Simmons v. Jones*, 838 S.W.2d 298, 301 (Tex. App. – El Paso 1992, no writ). Coupled with the voter's intention, there must also exist a physical connection to the place in which such voter is claiming residence. *Commercial Standard Ins. Co. v. Nunn*, 464 S.W.2d 415 (Tex. Civ. App. – Texarkana 1971, writ dism'd).

As the attorney general stated in an opinion addressing “winter Texans,” residence is a fact question that does not yield broad categorical answers. Op. Tex. Att'y Gen. No. JM-611 (1986); see also Op. Tex. Att'y Gen. No. JM-231 (1984). For the general principle that adults, including students, may determine their residence, see Op. Tex. Att'y Gen. No. H-301 (1974) (a person at least 18 years of age may determine his own residence in the same legal manner and with the same legal result as any other adult). See also Op. Tex. Att'y Gen. No. JC-520 (2002) (construing the Transportation Code, but noting that “if we consider the analogous question of voter registration, college students residing in dormitories routinely register to vote from such addresses.”).

The high standard of proof required to contravert a voter's stated or written intent should also be examined. In any judicial proceeding against a student for alleged residence violations under the Code, the burden of proof of any challenging official will include negating the presumption that a student has the right to determine his or her own residence in the same manner and with the same effect of any other adult. See *Texas*, 445 F. Supp. at 1247 (quoting from *Whatley*, 482 F.2d at 1230, that the statutory presumption of non-residency contained in prior Article 5.08(k) of the Texas Election Code [the predecessor to current Section 1.015 of the Code] is unconstitutional).

C. *Application to Student Voters in Texas*

While not a trier of fact, my office is statutorily authorized to give voters the definition of residence for them to use when completing the voter registration application, based wholly upon the facts known to them at the time the application is completed. We can advise prospective registrants on the common law only in the most general terms, by giving them examples of the tests announced by the courts, and the array of factors taken into consideration.

Evidence of intent to establish domicile may include, but is not limited to, such factors as where a person “exercises civil and political rights, pays taxes, owns real and personal property, has driver’s and other licenses, maintains bank accounts, belongs to clubs and churches, has places of business or employment, and maintains a home for his family.” *Coury v. Prot*, 85 F.3d 244, 251 (5th Cir. 1996). While an address at a college dormitory might constitute some limited probative evidence that there is no intent to remain, a conclusive presumption that there is no bona fide domicile based solely on the nature of such address is impermissible. See Op. Tex. Att’y Gen. No. JC-520 (2002).

We note in particular that the naming of the parents’ home as the voting home of a young student voter is not the stronghold against challenge it is sometimes reputed to be. In *Alvarez v. Espinoza*, 844 S.W.2d 238 (Tex. App. – San Antonio 1992, writ dism’d w.o.j.), a student attended college in the same town as her husband and her family. The couple had no definite plans for their residence after the wife’s graduation. They received mail and voted in a different county, using the home address of the husband’s parents. This couple was ruled not to reside at the home address of the husband’s parents; rather, the court found they were residents of their college town, even though their intent to remain after the wife’s graduation was indefinite. *Alvarez*, at 248.

In *Guerra v. Pena*, 406 S.W.2d 769 (Tex.Civ.App. – San Antonio 1966), two single people who had jobs elsewhere were held not to be residents of their parents’ home where they returned for the holidays.

As we have noted above, analysts of Texas residence cases select a single case at their peril. However, by way of further guidance, a case especially pertinent for voters who spend time in different locations is *Guerra v. Pena*. In analyzing the scenarios of a number of voters, including migrant workers who were compelled to spend months at a time at different places, the court emphasized that:

A removal to divest one of his right to vote must be accompanied by an intent to make a new domicile and quit the old. Mere removal, coupled with an intent to retain the original domicile and return to it, will not constitute a change.

Guerra, at 776, and cases cited therein. This is codified in the Code at Section 1.015(c). Many voters who travel are in the position of naming the best home they can under the circumstances. If a voter who spends several months in one location and several months in another location were told that he or she could not register in either location, the voter is effectively disenfranchised.

Aside from such general advice, we caution other officials and those conducting voter registration drives against seeking to influence the voter’s choice of a residence address. The

presumption is not in favor of the parents' home *or* the college home; rather, the presumption is in favor of the voter's own assessment of the facts and his or her intent. Accordingly, there is no broad answer that will fit all college students.

For instance, one student might consider a parent's home as the "home base" because he or she grew up there and returns there for extended vacations. Another student could consider the college town his or her residence, because he or she is engaged in the occupation of being a full-time student, and intends to return each semester for three-quarters of the year for four years. A third student might spend the last summer of his or her college career working at an internship at a third Texas location where he or she intends to return for a permanent job.

A voter who wishes to register at one location while temporarily spending time at another may use registration by mail and ballot by mail procedures to continue to vote in the precinct where the permanent home is located. If a voter is a student in Texas and wishes to vote using a residence location in another state, that student would of course need to consult with the election authorities concerning the laws of that state.

In sum, when a student registers to vote and describes his or her permanent residence in Texas for voting purposes, the presumption is in favor of the voter's factual statement on the face of the application.

D. Duration of Residence Generally

We note that a common complaint about students and other voters who travel is the concern that these voters will not consider the residence location on the application to be their home in the future (e.g., five years from the application date). No applicant is required to assert such a future durational intention when registering to vote. If a voter were held to such a standard, it is the opinion of this office that such a requirement would be contrary to the rationale in *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct 995, 31 L.Ed2d 274 (1972). In *Dunn*, a durational residence requirement of time in the location before registration was struck down.

As the court in *Texas* observed:

In *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct 995, 31 L.Ed2d 274 (1972), the Supreme Court held unconstitutional Tennessee's one-year durational residency requirement because such requirements penalize persons who travel from one place to another to establish a new residence during the qualifying period, and thus deny a portion of the citizenry their rights under the Equal Protection Clause of the 14th Amendment.

Texas, at 1261. It is our opinion that any state requiring a voter to state that he or she will be residing in a location for a stated number of months or years in the future would face a similar challenge. An applicant filling out a Texas voter registration form is not required to state that the residence will be his or her home forever, or for the next five years, or even the next year. The applicant is only required for administrative reasons to submit the application 30 days before the

election in which the applicant wishes to vote. See TEX. ELEC. CODE ANN. § 13.143 (Vernon 2003).

III. CONCLUSION

No more or less can be required of college students during the voter registration process than any other Texas voter. In particular, no Texas county voter registrar may require an affidavit or questionnaire in addition to the information required on the application for a voter registration certificate. A person who has reached the age of majority is presumed able to make a factual statement about his or her voting residence. Moreover, the student is presumed to be in the best position to make such factual statements about the residence of the student. In addition, Texas law does not require a statement of durational future residence. These principles apply equally to college students as well as other voters, and no more can be required of them in order for them to register and vote in the State of Texas.

Very truly yours,



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