

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Docket No. 2012-0338

City of Concord

v.

Secretary of State

Rule 9 Interlocutory Appeal Without Ruling

**BRIEF FOR CITY OF CONCORD
(TO ADDRESS STANDING)**

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**RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES
AND OTHER AUTHORITIES**

New Hampshire Constitution, Part II, Article 9 (Representatives Elected Every Second Year; Apportionment of Representatives)

There shall be in the legislature of this state a house of representatives, biennially elected and founded on principles of equality, and representation therein shall be as equal as circumstances will admit. The whole number of representatives to be chosen from the towns, wards, places, and representative districts thereof established hereunder, shall be not less than three hundred seventy-five or more than four hundred. As soon as possible after the convening of the next regular session of the legislature, and at the session in 1971, and every ten years thereafter, the legislature shall make an apportionment of representatives according to the last general census of the inhabitants of the state taken by authority of the United States or of this state. In making such apportionment, no town, ward or place shall be divided nor the boundaries thereof altered.

New Hampshire Constitution, Part II, Article 11 (Small Towns; Representation by Districts)

When the population of any town or ward, according to the last federal census, is within a reasonable deviation from the ideal population for one or more representative seats, the town or ward shall have its own district of one or more representative seats. The apportionment shall not deny any other town or ward membership in one non-floterial representative district. When any town, ward, or unincorporated place has fewer than the number of inhabitants necessary to entitle it to one representative, the legislature shall form those towns, wards, or unincorporated places into representative districts which contain a sufficient number of inhabitants to entitle each district so formed to one or more representatives for the entire district. In forming the districts, the boundaries of towns, wards, and unincorporated places shall be preserved and contiguous. The excess number of inhabitants of district may be added to the excess number of inhabitants of other districts to form at-large or floterial districts conforming to acceptable deviations. The legislature shall form the representative districts at the regular session following every decennial federal census.

RSA 491:22, I (Declaratory Judgments)

I. Any person claiming a present legal or equitable right or title may maintain a petition against any person claiming adversely to such right or title to determine the question as between the parties, and the court's judgment or decree thereon shall be conclusive. The existence of an adequate remedy at law or in equity shall not preclude any person from obtaining such declaratory relief. However, the provisions of this paragraph shall not affect the burden of proof under RSA 491:22-a or permit awards of costs and attorney's fees under RSA 491:22-b in declaratory judgment actions that are not for the purpose of determining insurance coverage.

44:1 (Rights; Duties)

All cities now or hereafter incorporated shall have, exercise and enjoy all the rights, immunities and privileges of, and shall be subject to all the duties incumbent upon, or appertaining to, the town corporations to which they succeed.

44:2 (Provisions Applicable)

All provisions of statutes, now made or hereafter enacted relating to towns, shall be understood to apply to cities; and all provisions relating to the selectmen and town clerks of towns shall be construed to apply to the mayor and aldermen and clerks of cities, respectively, unless a different intention appears.

RSA 44:3 (City Councils)

The administration of all the fiscal, prudential and municipal affairs of any city, and the government thereof, shall be vested in one principal officer called mayor, a board of aldermen, and a common council, and the said mayor and aldermen and common council, in their joint capacity, shall be called the city councils.

RSA 44:4 (Wards)

Each ward into which a city may be divided by law, or in pursuance of law, shall be a town for the purpose of the election of governor, councilor, state senator, representative to the general court, all county officers, senator and representative in congress, and electors of president and vice-president of the United States, and in all matters relating to jurors.

RSA 44:12 (Ward Officers)

Three selectmen, a moderator and a clerk shall be elected in each of the wards, who shall have the powers, perform the duties, and be subject to the liabilities, of those officers in towns, so far as relates to the warning of meetings, conducting elections, counting and declaring votes, recording the same, making returns of the votes received and certificates of elections, and all other matters relating to elections.

City of Concord Charter §11 (Term and Number of Members)

Except as otherwise provided in this Charter, all the powers of the City shall be vested in a City Council of fifteen (15) members consisting of a Mayor, four (4) Councilors-at-large elected by the qualified voters of the City at-large, and ten (10) Ward Councilors elected from each ward by the qualified voters thereof. Councilors-at-large shall be elected to terms of four (4) years. Ward Councilors shall be elected to terms of two (2) years. Newly elected members of the City Council shall assume office on the first day of January in each even numbered year. The City Clerk shall act as Clerk of the City Council.

City of Concord Charter §25 (General Powers and Duties of Manager)

The City Manager shall supervise the administrative affairs of the City and shall carry out the policies enacted by the City Council. The City Manager shall be charged with the preservation of the public peace and health and safety of persons and property, and shall see to the enforcement of the Ordinances of the City, this Charter, and general state laws which apply to the City. The City Manager shall keep the City Council informed of the conditions and needs of the City, shall make such reports and recommendations as the City Manager may deem advisable, and perform such other duties as may be prescribed by this Charter, or required by Ordinance or Resolution of the City Council not inconsistent with this Charter. The City Manager shall have and perform such other powers and duties not inconsistent with the provisions of this Charter as now are or hereafter may be conferred or imposed by Ordinance or upon mayors of cities by state law. The City Manager shall have the right to take part in the discussion of all matters coming before the City Council, but not the right to vote.

City of Concord Code of Ordinances, Article 10-2, City Solicitor, Section 2 (Duties)

It shall be the duty of said City Solicitor, by himself, or by some person by him duly authorized, for whose conduct, skill and faithfulness he shall be accountable, to draft all bonds, deeds, obligations, contracts, leases, conveyances, agreements and other legal instruments of whatever nature which may be required of him by any ordinance or order of the City Manager and City Council, or which may be required to be done and made by the City of Concord, and any person or persons contracting with the City in its corporate capacity, and which, by law, usage and agreement, the City is to be at the expense of drawing; to commence and prosecute all actions and suits to be commenced by the City before any tribunal in this state, whether in law or in equity; and also to appear in, defend, advocate the rights and interests of the City, in any suit or prosecution, wherein any estate, right, privilege, ordinances or acts of the City government, or any breach of any ordinance, may be brought in question. And said City Solicitor shall also appear before the legislature of this state, or before any committee thereof, whether of either or both branches of the same, and there, in behalf of the City, represent, answer for, defend and advocate the interest and welfare of said City whenever the same be directly or indirectly affected, whether to prosecute or defend the same; and he shall in all matters do all and every professional act incident to the office which may be required of him by the City government, or by special committee thereof; and he shall, when required, furnish the City Manager and City Council, or any special committee of said Council and any officer of the City government who may require it in the official discharge of his duties, with his legal opinion on any subject touching the duties of their respective offices.

ISSUE PRESENTED

1. Whether The City of Concord Has Standing To Raise Constitutional Issues Under The New Hampshire Constitution, Part II, Article 11, Relating To The Redistricting Of Its Wards.

STATEMENT OF THE CASE

The City of Concord brings this consolidated action seeking injunctive and declaratory relief regarding the redistricting of state legislative districts. More specifically, the City of Concord seeks a declaration that House Bill 592, enacted as 2012 Laws, Chapter 9 and codified into RSA 662:5 (2012), is unconstitutional to the extent that the statutory redistricting plan denies Concord Ward 5 a state representative, and, instead, combines Concord Ward 5 with the Town of Hopkinton to create a multi-member district which votes for three state representatives. This multi-member district, which denies Concord Ward 5 its own representative, violates the New Hampshire Constitution, Part II, Article 11. The City of Concord also seeks to require the legislature to create and institute an alternate apportionment plan for Concord Ward 5 under RSA 662:5 in time for the primary election to be held on September 11, 2012 and the general election to be held on November 6, 2012.

On May 5, 2012, the Court issued a briefing schedule requiring the submission of briefs to address issues relating to standing. On May 17, 2012, the Speaker of the New Hampshire House of Representatives, who intervened in this action, filed a brief arguing that the Cities of Manchester, Concord, Dover and Gilford do not have standing to file a petition raising claims under the New Hampshire Constitution, Part II, Article 11. The Secretary of State filed a response stating that it concurred with the position being taken by the Speaker of the House of Representatives.

Pursuant to the Court's briefing schedule, the City of Concord now submits this brief to address its standing in this matter. It should be noted that the City of Concord is only addressing the issue of whether it has standing to raise arguments under Part II, Article 11 of the New Hampshire Constitution. The City of Concord is not addressing whether it has standing to assert

the equal protection and voting rights of its inhabitants, or issues relating to communities of interest, because no such claims were filed by the City of Concord. The City of Concord is also not addressing whether it has standing to challenge RSA 662:5 in its entirety under Part II, Article 11, because the City of Concord is only challenging those portions of RSA 662:5 which deny Concord Ward 5 the right to its own district.

STATEMENT OF FACTS¹

By way of background, in 2006, the citizens of New Hampshire voted and passed Constitutional Amendment Concurrent Resolution 41 (CACR 41). The constitutional amendment modified Part II, Article II of the New Hampshire Constitution as follows:

[Small Towns; Representation by Districts.] When the population of any town or ward, according to the last federal census, is within a reasonable deviation from the ideal population for one or more representative seats, the town or ward shall have its own district of one or more representative seats. The apportionment shall not deny any other town or ward membership in one non-floterial representative district. When any town, ward, or unincorporated place has fewer than the number of inhabitants necessary to entitle it to one representative, the legislature shall form those towns, wards, or unincorporated places into representative districts which contain a sufficient number of inhabitants to entitle each district so formed to one or more representatives for the entire district. In forming the districts, the boundaries of towns, wards, and unincorporated places shall be preserved and contiguous. The excess number of inhabitants of district may be added to the excess number of inhabitants of other districts to form at-large or floterial districts conforming to acceptable deviations. The legislature shall form the representative districts at the regular session following every decennial federal census.

The constitutional amendment was passed to ensure that towns and wards with enough inhabitants to entitle them to one or more House seats would be established as single-town districts. *See Town of Canaan v. Secretary of State*, 157 N.H. 795, 797-98 (2008) (discussing history of Part II, Article 11 of the New Hampshire Constitution).

The constitutional amendment also expressly allows for the creation of “floterial” districts. The purpose of floterial districts is to combine the “excess population” of two or more districts to create an overlying, at-large district. As the voter guide explained, “[t]he Constitution permits the Legislature to form multi-town and multi-ward districts for electing state representatives, but does not expressly permit or prohibit the Legislature to form so-called ‘floterial’ or at-large districts using excess inhabitants from one district to create a representative

¹ Many of the following facts are taken directly from the Agreed Statement of Facts set forth in the Interlocutory Transfer Statement.

seat in those towns and wards that do not have enough inhabitants to form a district.” Certified Record, CHR-000807. The voter guide further explained that, if the amendment was adopted, “[e]xcess population in one or more contiguous districts may be combined to allow for additional at-large or floterial representatives.” *Id.*

In anticipation of the reapportionment process required by the 2010 United States Census released on April 1, 2011, the House Special Committee on Redistricting conducted a review of the requirements for a redistricting plan. On March 15, 2011, Representative Paul Mirski, Chairman of the House Special Committee on Redistricting, sent a letter to all of the cities and towns for the purpose of obtaining information regarding realignment of wards. Certified Record, CHR-001000. In the letter, Representative Mirski explained:

Due to the passage of a constitutional amendment in 2006, there’s one change this time around. Every city, town, or ward that has enough population for a representative (it appears 3,291 will be the ideal number) must in fact be given a representative. That means that for all cities with wards in excess of 3,291 people, we may no longer allow representatives to be chosen at-large citywide.

Our work will proceed under the assumption that all cities will realign their wards so as to be as equal in population as possible. After all, if you elect local officials on a ward basis, you fall under the “one man/one vote” mandate as well. If you do not plan to create an equal realignment, please contact us as soon as possible. If you do, please let us know of your new ward lines and populations when you complete the process. We will certainly need to group certain wards together for the purpose of floterials after each ward is provided its requisite number of stand alone representatives.

Id. It is apparent from this letter that the House Special Committee on Redistricting recognized the constitutional mandate that all wards with at least 3,291 people would be given its own representative.

The City undertook measures to realign its wards so as to be as equal as possible. The new ward lines were approved by the City of Concord voters during the November 8, 2011

elections. Certified Record, CHR-001043-1068. The City of Concord is a municipality with a total population according to the 2010 Census of 42,695. Certified Record, CHR-001068.

Concord has divided itself into ten wards of roughly equal population based on 2010 Census block data, which are as follows:

- a. Concord Ward 1 – 4,465;
- b. Concord Ward 2 – 4,381;
- c. Concord Ward 3 – 4,328;
- d. Concord Ward 4 – 4,137;
- e. Concord Ward 5 – 4,077;
- f. Concord Ward 6 – 4,165;
- g. Concord Ward 7 – 4,251;
- h. Concord Ward 8 – 4,141;
- i. Concord Ward 9 – 4,342;
- j. Concord Ward 10 – 4,408

Id.; see also Interlocutory Appeal Statement, Agreed Statement of Facts at ¶6. Concord Ward 5 now has a total population of 4,077 people, which requires it to have its own district of one representative. *Id.* The ideal population of a district is 3,291, and, therefore, the excess population of 786 inhabitants may be combined with another ward or town to allow for an additional floterial representative.

The City of Concord brings this action because RSA 662:5 denies Concord Ward 5 its own representative. In enacting RSA 662:5, the legislature created a multi-member legislative district in which Concord Ward 5 and the Town of Hopkinton have been combined to elect a total of three representatives. Concord Ward 5 has a total population of 4,077 people, and the

Town of Hopkinton has a total of 5,589 people. *Id.* at ¶69. Each of those towns and wards have enough inhabitants to entitle its own representative seat in the House of Representatives. The creation of a multi-member district which combines Concord Ward 5 and the Town of Hopkinton denies Concord Ward 5 with the right to have its own representative.

In the prior decade, all of Concord's wards were their own district and three representatives were elected at large in a flatorial district that covered the entire City. Interlocutory Appeal Statement, Agreed Statement of Facts at ¶109. The City of Concord has found no record that the New Hampshire Legislature has ever reapportioned the City of Concord to share a representative with another town. *Id.* at ¶110.

Moreover, the City of Concord and the Town of Hopkinton are different. *Id.* at ¶111. Each community, among other things, raises its own taxes, operates its own schools, and maintains its own roads. *Id.* The City of Concord's emergency services include police and fire departments, which are different in size and scope than Hopkinton's emergency services. *Id.* The City of Concord's interests with respect to education funding, the meals and rooms tax, and health and human services, may not be consistent with the Town of Hopkinton. *Id.* For those reasons, the City of Concord contends that it is inappropriate to combine Concord Ward 5 and the Town of Hopkinton, and, instead, Concord Ward 5 should be entitled to elect its own representative.

SUMMARY OF THE ARGUMENT

The City of Concord has standing to assert that RSA 622:5 violates Part II, Article 11 of the New Hampshire Constitution. The plain language of Part II, Article 11 sets forth the requirement that “when the population of any town or ward, according to the last federal census, is within a reasonable deviation from the ideal population for one or more representative seats, *the town or ward shall have its own district of one or more representative seats.*” Part II, Article 11 ensures that towns and wards with an adequate population will have one or more one or more representatives in the House of Representatives. As a result, towns and wards have the right to challenge a state statute that runs counter to this constitutional provision.

The Speaker of the House of Representatives incorrectly contends that, to the extent Part II, Article 11 confers rights on political subdivisions, only towns and wards hold those rights, not entire cities. This argument is in error. It is well settled that “all provisions of statutes . . . relating to towns, shall be understood to apply to cities.” RSA 44:2. There is no question that a city has the same authority to bring this action, as that of a town. With respect to a ward, a ward does not have authority to file suit or take other actions relating to the redistricting plan, because it exists solely for election purposes. RSA 44:3 establishes the requirement that cities are governed by a city council, and it provides that “[t]he administration of *all the fiscal, prudential and municipal affairs of any city*, and the government thereof, shall be vested in one principal officer called mayor, a board of aldermen, and a common council, and the said mayor and aldermen and common council, in their joint capacity, shall be called the city councils.” A ward does not have the authority to file suit, or to engage in any other fiscal, prudential or municipal affairs, on behalf of a city.

ARGUMENT

A. Standard of Review

The issues on appeal include a challenge to the City of Concord's standing to file suit in this matter. In addressing a party's standing to sue, a court "must look beyond the plaintiff's unsubstantiated allegations and determine, based on the facts, whether the plaintiff has sufficiently demonstrated his right to claim relief." *Ossipee Auto Parts v. Ossipee Planning Board*, 134 N.H. 401, 403-04 (1991). A party's standing is a question of subject matter jurisdiction, which may be addressed at any time. *Hughes v. N.H. Div. of Aeronautics*, 152 N.H. 30, 35 (2005).

B. The City of Concord Has Standing To Challenge Whether RSA 662:5 Violates The New Hampshire Constitution, Part II, Article 11

The City of Concord has standing to assert that RSA 622:5 violates Part II, Article 11 of the New Hampshire Constitution to the extent that it deprives Concord Ward 5 the right to its own representative. It is well established that a party has standing when it has "suffered a legal injury against which the law was designed to protect." *Asmussen v. Comm's, N.H. Dep't of Safety*, 145 N.H. 578, 587 (2000) (quotations omitted). The requirement that a party demonstrate harm to maintain a legal challenge is based "upon the constitutional principle that the judicial power ordinarily does not include the power to issue advisory opinions." *Id.* at 588 (quotations omitted). The claims raised "must be definite and concrete touching the legal relations of parties having adverse interest." *Id.* at 587 (quotations omitted). The controversy also "must be of a nature which will permit an intelligent and useful decision to be made through a decree of a conclusive character." *Id.* (quotations omitted). As discussed below, the City of Concord meets those requirements.

The New Hampshire Supreme Court has not addressed a municipality's standing to file a suit which contests the manner in which its territory has been redistricted, and, therefore, this is a matter of first impression. The plain language of the New Hampshire Constitution, Part II, Article 11 nonetheless makes it apparent that municipalities are provided certain protections with respect to the manner in which they are redistricted. More specifically, the New Hampshire Constitution, Part II, Article 11 provides as follows:

When the population of any town or ward, according to the last federal census, is within a reasonable deviation from the ideal population for one or more representative seats, *the town or ward shall have its own district of one or more representative seats*. The apportionment shall not deny any other town or ward membership in one non-floterial representative district. When any town, ward, or unincorporated place has fewer than the number of inhabitants necessary to entitle it to one representative, the legislature shall form those towns, wards, or unincorporated places into representative districts which contain a sufficient number of inhabitants to entitle each district so formed to one or more representatives for the entire district. In forming the districts, the boundaries of towns, wards, and unincorporated places shall be preserved and contiguous. The excess number of inhabitants of district may be added to the excess number of inhabitants of other districts to form at-large or floterial districts conforming to acceptable deviations. The legislature shall form the representative districts at the regular session following every decennial federal census.

(Emphasis added). Part II, Article 11 sets forth specific requirements that the House of Representatives must consider and balance during the redistricting process. Those requirements include the guarantee that towns and wards with an adequate population will receive one or more representative seats, and boundaries must be preserved and contiguous.

Despite the foregoing, the Speaker of the House of Representatives contends that the City of Concord lacks standing because Part II, Article 11 of the New Hampshire Constitution does not confer rights on political subdivisions to the extent it only "protects a citizen's right to vote." The Speaker of the House of Representatives also argues that, even if political subdivisions have constitutional rights under Part II, Article 11, the City of Concord as a whole lacks standing

because those rights are reserved to towns and wards, not to entire cities. Those arguments should be rejected.

1. Part II, Article 11 Of The New Hampshire Constitution Confers Standing On Municipalities

The City of Concord has standing to bring constitutional claims under Part II, Article 11 of the New Hampshire Constitution. The plain language of Part II, Article 11 sets forth the requirement that “when the population of any town or ward, according to the last federal census, is within a reasonable deviation from the ideal population for one or more representative seats, *the town or ward shall have its own district of one or more representative seats.*” It is apparent from this language that Part II, Article 11 was intended to ensure that towns and wards with an adequate population will have one or more representatives in the House of Representatives.

The requirement that towns and wards have their own representative is rooted in New Hampshire history. Prior to 1889, the New Hampshire Constitution rotated representatives in the smallest of communities to ensure every town, no matter how small, had a dedicated representative for some period of time.² Add. A4. An 1889 amendment to Part II, Article 11, changed the law to ensure that towns with less than 600 people had proportional representation. Add. A10-13. More specifically, the constitutional provision stated that “any town or place having less than six hundred inhabitants should be entitled to a representative such proportionate part of the time, as the number of its inhabitants shall bear to six hundred.” Add. A9; *see also Opinion of Justices*, 101 N.H. 523, 524 (1957). In 1942, the New Hampshire Constitution, Part 11, Article 11 was amended to provide “that the Legislature shall authorize any town or ward having less than the number of inhabitants necessary to entitle it to one representative to send a

² Copies of the historical versions of the constitutional amendments are referenced in James Fairbanks Colby, *Manual of the Constitution* (1912). The relevant portions of those provisions are include in the Addendum (“Add.”). The various amendments to the New Hampshire Constitution, Part II, Article 11 are also referenced on the State of New Hampshire’s website at <http://www.nh.gov/constitution/house.html>.

representative such proportionate part of the time as the number of its inhabitants shall bear to the requisite number established for one representative and without such authority no town or ward shall send a representative; *provided, however*, that each town and ward shall be entitled to representation in at least one session in every ten years.” *Opinion of Justices*, 101 N.H. at 524 (citing Laws 1951, ch. 247) (emphasis in original) (brackets and quotations omitted). These constitutional amendments demonstrate that the New Hampshire Constitution has always recognized the importance for towns and wards to have representation in the Legislature.

In 1964, Part II, Article 11 was amended to permit small towns to be placed in multi-member districts. Part II, Article 11, as amended in 1964, stated, in pertinent part:

When any town, ward, or unincorporated place, according to the last federal decennial census, has less than the number of inhabitants necessary to entitle it to one representative, the legislature shall form those towns, wards, or unincorporated places into representative districts which contain a sufficient number of inhabitants to entitle each district so formed to one or more representatives for the entire district. In forming the districts, the boundaries of towns, wards and unincorporated places shall be preserved and the towns, wards and unincorporated places forming one district shall be reasonably proximate to one another.

N.H. CONST. pt. II, art. 11. Based on that language, in the case *Burling v. Speaker of the House*, 148 N.H. 143 (2002), the New Hampshire Supreme Court declined to employ “floterial” redistricting schemes within the 2002 court-ordered reapportionment. The New Hampshire Supreme Court instead placed many towns that had enough inhabitants to elect their own representatives into large multi-member legislative districts. *Id.* at 159 (discussing the court-ordered redistricting plan).

The New Hampshire Constitution was subsequently amended in 2006 to reinstate the guarantee that towns and wards have their own representative. Towards that end, the voter’s guide explained that if the constitutional amendment was adopted, “[e]ach town or ward having

enough inhabitants to entitle it to one or more representative seats in the Legislature *shall be guaranteed its own district* for the purposes of electing one or more representatives. . . .”

Certified Record, CHR-000807 (emphasis added). The New Hampshire Supreme Court has recognized that this most recent constitutional amendment was likely a response to the court-ordered redistricting plan in *Burling*, which created large multi-member districts. *Town of Canaan*, 157 N.H. at 797-98 (discussing amendment to Part II, Article 11 of the New Hampshire Constitution).

There should be no dispute, based on the foregoing, that Part II, Article 11, is intended to protect the legal interests of towns and cities. A municipality is considered a “body corporate and politic.” RSA 31:1. It has the right to purchase, hold, sell and convey real and personal estate, and it may also make any contracts necessary for the transaction of its public business. RSA 31:3. A municipality also has financial obligations, which include the responsibility to appropriate funds for welfare programs, pensions, and other matters. *See, e.g., Bell v. Arel*, 123 N.H. 311, 316 (1983). The United States Supreme Court has recognized that the constitutional requirements which entitle political subdivisions to a representative in their own district is based on the long-standing recognition of the importance of “insuring some voice to political subdivisions.” *Reynold v. Sims*, 377 U.S. 533, 580 (1964). It is important for political subdivisions to have representation because “local governmental entities are frequently charged with various responsibilities incident to the operation of state government.” *Id.*

This is particularly important in New Hampshire, which has home rule provisions that limit a municipality’s authority. Part II, Article 2 of the New Hampshire Constitution provides: “The supreme legislative power, within this state, shall be vested in the senate and house of representatives.” This Court has interpreted this language to mean that cities and towns, as

political subdivisions of the state, “have only such powers as are expressly or impliedly granted to them by the legislature.” *JTR Colebrook, Inc. v. Town of Colebrook*, 149 N.H. 767, 772-73 (2003); *Lower Village Hydroelectric Assoc., L.P. v. City of Claremont*, 147 N.H. 73, 77 (2001) (“Thus, in New Hampshire, cities and towns are political subdivisions of a single state, organized for the benefit, and serving at the pleasure, of the sovereign”) (quotations omitted). A municipality has important legal rights and interests which will be affected to the extent that it is denied a representative in its district. For those reasons, a municipality needs to have the ability to challenge whether a redistricting plan violates the New Hampshire Constitution, Part II, Article 11.

The Speaker of the House of Representatives nonetheless argues that the legislative history supports a determination that the amendment of Part II, Article 11 was solely to protect a citizen’s interest in voting. This argument is not supported by the legislative history, and, in fact, Secretary of the State, William Gardner, testified in support of the constitutional amendment because it protected a town’s right to have representation, which he stated is a guarantee that goes back to the colonial times. Certified Record, CHR-000794. As the Secretary of State explained, the amendment

. . . . brings us back to the founders and what the idea here was that the towns would have. When the towns came together, they gave up certain rights to be part of the state and they did that before we were a state. . . . The idea, at the provincial level, was to try to make sure that they were given back as much as possible and that was their representation, that was their opportunity to have someone in the assembly or now someone in the Legislature.

Id. at CHR-000797; *see also* 13 Laughlin, *New Hampshire Practice, Local Government Law* §13 at 2-4 (discussing establishment of cities). This legislative history demonstrates that the constitutional amendment was intended to ensure that the rights of towns and wards would be adequately protected by having representation.

The Speaker of the House of Representatives also incorrectly contends that the cases *In re Below*, 151 N.H. 135 (2004) and *Burling v. Chandler*, 148 N.H. 143 (2002) stand for the proposition that Part II, Article 11 only protects a citizen's right to vote. The reliance on those cases should be rejected because they do not address the issue of whether a municipality has standing to challenge a redistricting plan. Even more importantly, those decisions were issued before Part II, Article 11 was amended in 2006. As discussed above, Part II, Article 11 now provides the guarantee that towns and wards with enough inhabitants will have at least one representative. The Speaker of the House of Representatives also incorrectly relies on the case *Appeal of Town of Exeter*, 126 N.H. 685, 688 (1985). That case did not involve whether a municipality has the right to challenge a redistricting plan, and, instead, it addressed the issue of whether a municipality had the right to raise an equal protection clause and first amendment claim on behalf of citizens relating to open bargaining sessions. There were no issues relating to redistricting addressed in that matter.

The other case relied upon by the Speaker of the House of Representatives, which is the *City of Greenwood Village v. Petitioners for Proposed City of Centennial*, 3 P.3d 427 (Colo.2000), also does not support a determination that the City of Concord lacks standing to pursue a redistricting lawsuit. That case addressed whether a political subdivision has standing to challenge the constitutionality of state statutes. The New Hampshire Supreme Court has never adopted a *per se* rule that a political subdivision does not have standing to challenge the constitutionality of a statute. See, e.g., *Londonderry Sch. Dist. v. State*, 154 N.H. 153, 155 (2006) (addressing claims brought by non-profit corporation representing nineteen school administrative units and towns that school funding statute was unconstitutional); *Claremont School Dist. v. Governor*, 138 N.H. 183 (1993) (addressing claims brought by school districts

alleging that the system by which the state financed education was unconstitutional); *State v. City of Dover*, 153 N.H. 181, 192-93 (2006) (assuming without deciding that a municipality has the rights to a remedy under New Hampshire Constitution, Part 1, Article IV); *see also* RSA 31:1 (stating that public corporations “may sue and be sued, prosecute and defend, in any court or elsewhere”). The United States Supreme Court has also rejected such a concept, explaining that a reading of its caselaw “is not that the state has plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations, but rather that the state’s authority is unrestrained by the particular prohibitions of the constitution considered in those cases.” *Gomillion v. Lightfoot*, 364 U.S. 339, 344 (1960).

It is also important that the *City of Greenwood*, 3 P.3d at 438, recognized “an exception to the rule when a state statute impacts a home-rule city’s interests in the administration of local affairs.” Under that exception, the City of Greenwood was allowed to bring a claim challenging a state law relating to municipal annexation as special and retrospective legislation, and as an unconstitutional impairment of contract. *Id.* at 436-38. The court concluded that the law would impact the City of Greenwood’s municipal interests in tax collection, budgeting, and expansion of the its infrastructure base. *Id.* at 437. Similar to that case, the City of Concord needs to have standing to challenge a state law which governs the manner in which its wards have been redistricted, because it has a legally protected interest to ensure that it has a representative voice to address issues relating to local concerns.

Significantly, a review of redistricting cases further demonstrates that courts have permitted municipalities to address claims relating to redistricting. In the case *Town of Canaan*, 157 N.H. at 796, the New Hampshire Supreme Court addressed redistricting arguments raised by various towns. The Speaker of the House of Representative’s position that a town does not have

standing is directly contradicted by that lawsuit, which is a case that he served as counsel and filed on behalf of the Town of Canaan, Town of Enfield, Town of Litchfield, Town of Loudon, Town of Weare and the Town of Wilton. Add. A13. It is unreasonable for the Speaker of the House of Representatives to now take a contradictory position, and to argue that a municipality does not have standing to file a redistricting suit.

There are also cases from other jurisdictions which have allowed municipalities to file suit and/or intervene to address claims relating to redistricting. *See, e.g., Twin Falls Cnty. v. Idaho Comm'n on Redistricting*, 271 P.3d 1202 (Idaho 2012) (addressing claims brought by various counties and cities to challenge legislative redistricting plan); *Kenai Peninsula Borough v. State*, 743 P.2d 1352 (Alaska 1987) (addressing claim brought by borough to challenge redistricting plan); *Hellar v. Cenarusa*, 682 P.2d 524 (Idaho 1984) (addressing claims brought by Coeur D'Alene, a municipal corporation, to challenge legislative reapportionment scheme); *see also Mahan v. Howell*, 410 U.S. 315 (1973) (addressing claims in redistricting suit involving City of Virginia Beach as intervening party); *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 121 P.3d 843, 849 (App.2005) (addressing redistricting case in which various counties and cities intervened to protect their interests). Similar to those cases, the City of Concord has important constitutional interests that must be protected through this lawsuit.

For all of the foregoing reasons, the City of Concord respectfully requests this Court to determine it has standing to address the issues raised in its redistricting lawsuit.

2. The City of Concord Has Authority To File An Action to Address Issues Relating To Concord Ward 5

The Speaker of the House of Representatives also incorrectly contends that, to the extent Part II, Article II confers rights on political subdivisions, only towns and wards hold those rights,

not entire cities. That argument lacks any basis because it is well established that a municipality “may establish either a town or city government,” RSA 49–B:2, I, and must prepare its charter according to the framework statutorily mandated for that municipal form. RSA chapter 49–C (city); RSA chapter 49–D (town). Pursuant to RSA 44:1, all cities enjoy the same “rights, immunities and privileges of, and shall be subject to all the duties incumbent upon, or appertaining to, the town corporations. . . .” All statutes which relate to towns are also “understood to apply to cities.” RSA 44:2. With respect to cities, RSA 44:3 establishes the requirement that cities are governed by a city council, and it provides that “[t]he administration of *all the fiscal, prudential and municipal affairs of any city*, and the government thereof, shall be vested in one principal officer called mayor, a board of aldermen, and a common council, and the said mayor and aldermen and common council, in their joint capacity, shall be called the city councils.”

The Speaker of the House of Representatives incorrectly argues that a ward, rather than a city, has sole authority to file a redistricting case. That argument should be rejected because a ward does not have authority to file suit or take other actions relating to the redistricting plan, because it exists solely for election purposes. RSA 44:4 provides that a city may adopt wards solely for purposes of establishing state, county and federal elections, as well as all matters relating to jurors. RSA 44:12 further provides that wards officers shall be elected to conduct elections. *See Attorney General v. Caldwell*, 92 N.H. 216, 218-19 (1942) (holding that a ward officer has limited authority, and he or she may only perform duties with respect to elections). A ward does not have the authority to file suit, or to engage in any other fiscal, prudential or municipal affairs, on behalf of a city.

The Speaker of the House of Representatives' argument is also contradicted by the City's charter, which was adopted in accordance with RSA chapter 49-B . Under the City of Concord's charter, all issues relating to the financial and administrative affairs of a city must be conducted by the City Council. The governing body in the City of Concord is a fifteen member City Council. Concord, N.H., City Charter § 11. The City Manager is the chief administrative officer, and is responsible for supervising the administrative affairs of the City. *Id.* at § 25. The City of Concord's ordinances further provides that the City Solicitor has the sole authority to "commence and prosecute all actions and suits to be commenced by the City before any tribunal in this state, whether in law or in equity; and also to appear in, defend, advocate the rights and interests of the City, in any suit or prosecution, wherein any estate, right, privilege, ordinances or acts of the City government, or any breach of any ordinance, may be brought in question. . . ." Concord, N.H., Ordinance 10-2-2. There is simply no basis for the suggestion that a ward has the authority or power to file suit regarding to challenge the constitutionality of a redistricting plan.

In short, the Speaker of the House of Representative's argument that only a town or ward has authority to file suit lacks any legal basis. The suggestion that a ward officer has the authority to file suit, or to take any other measures on behalf of a municipality – other the conducting elections –is not supported by any New Hampshire statutes or caselaw, and it is also directly contradicted by the City of Concord's charter and ordinances. For those reasons, the City of Concord respectfully requests that the Court reject the argument that it does not have standing to pursue this action.

C. The City of Concord, In The Alternative, Seeks To File An Amicus Brief

In the event that this Court determines that the City of Concord does not have standing to file suit, the City of Concord seeks to submit its brief as an amicus curiae. New Hampshire Supreme Court Rule 30(3) states that it is unnecessary for a political subdivision to receive consent to file an amicus brief. Sup. Ct. R. 30(3) (“consent to the filing of a brief of an amicus curiae is unnecessary when the brief is presented for . . . any political subdivision of the State by its authorized law officer”). The parties have nonetheless consented to the filing of other amicus briefs in this matter, including the City of Dover. For those reasons, the City of Concord should be permitted to alternatively submit its brief as amicus curiae.

CONCLUSION

For the foregoing reasons, the City respectfully requests that the Court rule in its favor with respect to its standing to pursue this action.

ORAL ARGUMENT

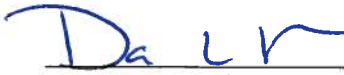
Deputy City Solicitor Danielle Pacik requests to present oral argument on behalf of the City (15 minutes).

Respectfully submitted,

CITY OF CONCORD

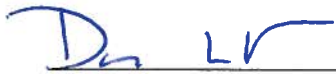
By its attorney,

Date: May 21, 2012

By: 
James Kennedy, Bar No. 15849
City Solicitor
Danielle L. Pacik, Bar No. 14924
Deputy City Solicitor
41 Green Street
Concord, NH 03301
(603) 271-3657

CERTIFICATION

I hereby certify that the foregoing were served by electronic mail on May 21, 2012 to Jason B. Dennis, Esquire, Tony F. Soltani, Esquire, Jason M. Surdukowski, Esquire; Martin P. Honinberg, Esquire; Thomas J. Donovan, Esquire, Peter V. Millham, Esquire, Matthew D. Huot, Esquire; Anne M. Edwards, Associate Attorney General; Stephen G. LaBonte, Attorney; Richard J. Lehmann, Esquire; David A. Vicinanza, Esquire; and Anthony J. Galdieri, Esquire.

By: 
Danielle L. Pacik, Bar No. 14924
Deputy City Solicitor

ADDENDUM

J. Colby, *Manual of the Constitution* (1912)..... A1

Petition -Town of Canaan v. Gardner A13

27
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TILDEN FOUNDATIONS

MANUAL

OF THE

CONSTITUTION

OF THE

STATE OF NEW HAMPSHIRE.

COMPILED FROM OFFICIAL SOURCES AND EDITED, WITH
SKETCH OF THE CONSTITUTIONS OF THE STATE, THE
BASIS OF REPRESENTATION, AND APPENDIX,

BY

JAMES FAIRBANKS COLBY.

REVISION OF 1912.

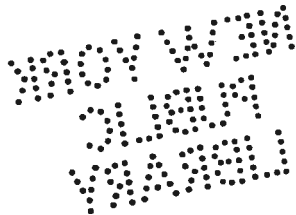
CONCORD, 1912.

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this state for the time being, with the advice and consent of the council, for the public service, in the necessary defense and support of the government of this state and the protection and preservation of the subjects thereof, according to such acts as are or shall be in force within the same: [*provided*, that the general court shall not authorize any town to loan or give its money or credit, directly or indirectly, for the benefit of any corporation having for its object a dividend of profits, or in any way aid the same by taking its stock or bonds.]¹

General court prohibited from authorizing towns to aid certain corporations. lvi, 514.

[ART. 6.] [The public charges of government or any part thereof may be raised by taxation upon polls, estates, and other classes of property, including franchises and property when passing by will or inheritance; and there shall be a valuation of the estates within the state taken anew once in every five years, at least, and as much oftener as the general court shall order.]²

Valuation and taxation. iv, 568. viii, 573. lviii, 538. lx, 347.

[ART. 7.] [No member of the general court shall take fees, be of counsel, or act as advocate in any cause before either branch of the legislature; and, upon due proof thereof, such member shall forfeit his seat in the legislature.]³

Members of legislature not to take fees or act as counsel.

[ART. 8.] [The doors of the galleries of each house of the legislature shall be kept open to all persons who have decently except when the welfare of the state, in the opinion of either branch, shall require secrecy.]⁴

Legislature to sit with open doors.

HOUSE OF REPRESENTATIVES.⁴

[ART. 9.] [There shall be, in the legislature of this state, a representation of the people, biennially elected and founded upon principles of equality, and, in order that such representation may be as equal as circumstances will admit, every town, or place entitled to town privileges, and wards of cities having six hundred inhabitants by the last general census of the state, taken by authority of the United States or of this state, may elect one representative; if eighteen hundred such inhabitants, may elect two representatives; and so proceeding in that proportion, making twelve hundred such inhabitants the mean increasing number for any additional representative: *provided*, that no town shall be divided or the boundaries of the

Representatives elected biennially.

Ratio of representation.

¹ Inserted, 1879.

² Substituted for original Article 6, 1903.

³ Inserted, 1793.

⁴ Provisions under this head followed those under head "senate" prior to 1783.

wards of any city so altered as to increase the number of representatives to which such town or city may be entitled by the next preceding census; *and provided further*, that, to those towns and cities which since the last census have been divided or had their boundaries or ward lines changed, the general court in session next before these amendments shall take effect shall equitably apportion representation in such manner that the number shall not be greater than it would have been had no such division or alteration been made.]¹

Number of representatives not to be increased by dividing towns.

[ART. 10.]²

Small towns may elect a proportionate part of time.

[ART. 10 (11).] [Whenever any town, place, or city ward shall have less than six hundred such inhabitants,³ the general court [shall]⁴ authorize such town, place, or ward to elect and send to the general court [a representative]⁵ such proportionate part of the time as the number of its inhabitants shall bear to six hundred; but the general court shall not authorize any [such]⁶ town, place, or ward to elect and send such representative, except as herein provided.]⁴

Biennial election of representatives in November.

[ART. 11 (12).] The members of the house of representatives shall be chosen [biennially]⁸ in the month of [November],¹³ and shall be the second branch of the legislature.

Qualification of electors.

[ART. 12 (13).] All persons qualified to vote on the election of senators shall be entitled to vote, within the district¹⁰ where they dwell, in the choice of representatives.

Representatives, how elected, and qualifications of.

[ART. 13 (14).] Every member of the house of representatives shall be chosen by ballot, and, for two years, at least, next preceding his election, shall have been an inhabitant, 9.

¹ Substituted for original Article 9, 1878.

² Stricken out, 1889. Subject covered by next section.

³ Indicates numbering of sections previous to 1889.

⁴ Substituted for original Article 11, 1878.

⁵ "And be so situated that it cannot conveniently be classed with any other town, place, or ward," stricken out, 1889.

⁶ Substituted for "may," 1889.

⁷ Inserted, 1889.

⁸ Substituted for "annually," 1878.

⁹ "Town" left out in engrossed copy of 1793, apparently without authority.

¹⁰ "Parish or place" left out in engrossed copy of 1798, apparently without authority.

¹¹ Substituted for "March," 1878.

Constitution unchanged, 1877-1889. The following table shows the dates of the approval of the several acts of the legislature between 1876 and 1889, providing for taking the sense of the qualified voters on the expediency of calling a convention to revise the constitution, and the aggregate, the affirmative, and the negative votes on the question as returned by the town clerks:

Date of act.	Total.	Yea.	Nay.
1883, July 27	27,156	13,036	14,120
1885, August 13	21,679	11,466	10,213

Seventh Constitutional Convention, 1889. The delegates to this convention assembled in the hall of the House of Representatives in Concord on Wednesday, January 2, 1889, at 11 o'clock A. M.

At the afternoon session Charles H. Bell of Exeter was elected President; and on the following day James R. Jackson of Littleton was elected Secretary, and William Tutherly of Claremont Assistant Secretary of the convention.

The rules of the convention of 1876 were adopted as the rules of this convention till otherwise ordered.

On January 3 Mr. Hadley of Concord, from the committee on rules and method of procedure, submitted the following report, which was adopted by the convention:

1. The President shall take the chair at precisely the hour to which the convention shall have adjourned, shall immediately call the members to order, and at the commencement of each day's session shall cause the journal of the preceding day to be read. He shall preserve decorum and order, and may speak on points of order in preference to other members, and may substitute any member to perform the duties of the chair, such substitution not to extend beyond an adjournment.

2. All committees shall be appointed by the President unless otherwise directed by the convention; and the first named member of any committee appointed by the President shall be chairman.

3. No person but the members and officers of the convention shall be admitted within the chamber unless by invitation of the President or some member of the convention.

4. No member shall speak more than twice to the same question without leave of the convention.

5. When any question is under debate no motion shall be received but 1st, to adjourn; 2d, to lay on the table; 3d, to postpone to a day certain; 4th, to commit; 5th, to amend; which several motions shall take precedence in the order in which they are arranged. Motions to adjourn and lay on the table shall be decided without debate. (J. 1889, pp. 18-20.)

6. Any member may call for a division of the question when the sense will admit of it; but a motion to strike out and insert shall not be divided.

7. A motion for commitment, until it is decided, shall precede all amendments to the main question; and all motions and reports may be committed at the pleasure of the convention.

8. No vote shall be reconsidered unless the motion for reconsideration be made by a member who voted with the majority.

9. Every question shall be decided by yeas and nays whenever a demand for the same shall be made and sustained by at least ten members.

10. The convention may resolve itself into a committee of the whole convention at any time on the motion of a member; and in forming a committee of the whole the President shall leave the chair and appoint a chairman to preside in committee; and the rules of proceeding in convention shall be observed in committee of the whole, except the rule limiting the times of speaking, and rule 9.

11. After the journal has been read and corrected the order of business shall be as follows: first, the presentation of resolutions and petitions; second, the reports of committees; third, the unfinished business of the preceding day.

MODES OF PROCEDURE.

Resolved that the methods of procedure in revising the constitution shall be as follows:

1. All amendments proposed shall be offered in writing, and shall be read by the Secretary for the information of the convention, when, unless rejected or otherwise disposed of, the same shall be referred to an appropriate committee, who shall examine and report the amendments referred to the convention with such recommendations as they may deem advisable. No

proposition for an amendment shall be received after Wednesday of the second week unless by unanimous consent of the convention, or upon the recommendation of the committee.

2. There shall be appointed by the President five separate committees consisting of two members from each county, which shall be committees on the following subjects:

- (1.) On bill of rights and executive department.
- (2.) On legislative department.
- (3.) On judicial department.
- (4.) On future mode of amending the constitution, and other proposed amendments.
- (5.) On time and mode of submitting to the people the amendments agreed to by the convention.

On January 7 the President appointed the standing committees, naming their chairmen as follows:

On Bill of Rights and Executive Department, Isaac W. Smith of Manchester.

On Legislative Department, James F. Briggs of Manchester.

On Judicial Department, Ellery A. Hibbard of Laconia.

On Future Mode of Amending the Constitution, and other Proposed Amendments, William S. Ladd of Lancaster.

On Time and Mode of Submitting to the People the Amendments Agreed to by the Convention, Charles A. Dole of Lebanon.

Among the other leading members of this body were John D. Lyman of Exeter, Calvin Page of Portsmouth, John W. Sanborn of Wakefield, Joseph B. Walker, Amos Hadley, and Benjamin A. Kimball of Concord, Frank N. Parsons, Isaac N. Blodgett, and Alvah W. Sulloway of Franklin, David Cross, Charles H. Bartlett, George C. Gilmore, and Henry E. Burnham of Manchester, Robert M. Wallace of Milford, George B. French of Nashua, Ira Colby of Claremont, Dexter Richards of Newport, and Edward R. Ruggles of Hanover.

The most important changes in the constitution proposed by this convention were the abolition of the system of classifying towns for the election of a Representative, the change in the time of the meeting of the legislature from June to January, the granting of a fixed salary for the members of the legislature, and the addition of a clause prohibiting the

manufacture, or sale, or keeping for sale of all alcoholic or intoxicating liquors as a beverage.

The convention prepared seven amendments, which were submitted; in the form of questions, to the qualified voters on the second Tuesday of March, 1889. Five of these were ratified and became a part of the constitution of the state. The text of the amendments and questions voted upon, together with the result of the vote, is given on pages 225-228.

This convention by resolution fixed the time when the several proposed amendments to the constitution should take effect, provided any or all of them should be ratified by the people.

The convention, after having provided by resolution for their reassembling at the call of the President or Governor of the state, should such action seem to either of them necessary, adjourned on January 12th *sine die*.

By order of this convention the journal of its proceedings was published.

AMENDMENTS TO THE CONSTITUTION.

PROPOSED IN 1889.

BILL OF RIGHTS.

Art. 6. Strike out this article and insert the following:

"Art 6. As morality and piety will give the best and greatest security to government, and will lay in the hearts of men the strongest obligations to due subjection, and as the knowledge of these is most likely to be propagated through a society by the institution of the public worship of the DEITY, and of public instruction in morality and religion, therefore, to promote these important purposes the people of this state have a right to empower, and do hereby fully empower the legislature to authorize from time to time the religious societies within this state to make adequate provision, at their own expense, for the support and maintenance of public teachers of piety, religion, and morality.

"The several religious societies shall at all times have the exclusive right of electing their own public teachers, and of contracting with them for their support and maintenance; and no person of any one particular religious sect or denomination

shall ever be compelled to pay toward the support of the teacher or teachers of another persuasion, sect, or denomination.

"And every religious sect or denomination demeaning themselves quietly and as good subjects of the state shall be equally under the protection of the law; and no subordination of any one sect or denomination to another shall ever be established by law."

Rejected.

PART II.

Arts. 3, 25, 32, 33, 42, 43, 60, 66. Strike out the word "June" wherever it occurs in these articles, and insert the word "January" in place thereof.

Arts. 10, 11. Strike out these articles, and insert the following:

"Art. 10. Whenever any town, place, or city ward shall have less than six hundred such inhabitants the General Court shall authorize such town, place, or ward to elect and send to the General Court a Representative such proportionate part of the time as the number of its inhabitants shall bear to six hundred; but the General Court shall not authorize any such town, place, or ward to elect and send such Representative except as herein provided."

Art. 15. Strike out this article, and insert the following:

"Art. 15. The presiding officers of both houses of the legislature shall severally receive out of the state treasury, as compensation in full for their services for the term elected, the sum of two hundred and fifty dollars, and all other members thereof, seasonably attending and not departing without license, the sum of two hundred dollars, exclusive of mileage; provided, however, that when a special session shall be called by the Governor such officers and members shall receive for attendance an additional compensation of three dollars per day, for a period not exceeding fifteen days, and the usual mileage."

Art. 34. Strike out all after the word "state," and insert the following:

"All vacancies in the Senate arising by death, removal out of the state, or otherwise, except from failure to elect, shall be filled by a new election by the people of the district, upon the requisition of the Governor, as soon as may be after such vacancies shall happen."

Art. 49. Add to this article the following words:

"Whenever the chair, both of the Governor and President of the Senate, shall become vacant by reason of their death, absence from the state, or otherwise, the Speaker of the House shall during such vacancies have and exercise all the powers and authorities which by this constitution the Governor is

vested with when personally present. But when the Speaker of the House shall exercise the office of Governor, he shall not hold his office in the House."

Add Article 102 as follows:

"Art. 102. The sale, or keeping for sale, or manufacture of alcohol or intoxicating liquor, except cider, or of any compound of which such liquor is a part, to be used as a beverage, is a misdemeanor, and is hereby prohibited." Rejected.

The convention of 1889 submitted to the people its proposed amendments in the form of the following questions:

1. Do you approve of changing the time for the meeting of the legislature from June to January, and of changing the time when the terms of office of the executive and legislative departments shall commence, and the other amendments in conformity therewith, as proposed in the amended constitution?
2. Do you approve of compensating the members of both houses of the legislature by a fixed salary, as proposed in the amended constitution?
3. Do you approve of filling vacancies in the Senate by a new election, as proposed in the amended constitution?
4. Do you approve of having the Speaker of the House act as Governor in case of vacancies in the offices of Governor and President of the Senate, as proposed in the amended constitution?
5. Do you approve of inserting in the constitution an article prohibiting the manufacture, or sale, or keeping for sale of alcoholic or intoxicating liquor as a beverage, as proposed in the amended constitution?
6. Do you approve of amending article 6 of the bill of rights making the same non-sectarian, as proposed in the amended constitution?
7. Do you approve of amending the constitution with reference to representation in classed towns as proposed in the amended constitution?

(J. 1889, pp. 254-255.)

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7. Do you approve of amending the constitution with reference to representation in classed towns as proposed in the amended constitution?

(J. 1889, pp. 254-255.)

VOTE ON SEVEN AMENDMENTS TO THE CONSTITUTION SUBMITTED TO THE PEOPLE ON THE SECOND TUESDAY OF MARCH, 1889.

COUNTIES.	No. 1.		No. 2.		No. 3.		No. 4.		No. 5.		No. 6.		No. 7.	
	Yes.	No.	Yes.	No.	Yes.	No.	Yes.	No.	Yes.	No.	Yes.	No.	Yes.	No.
Belknap	2,280	453	2,252	504	1,959	601	2,081	456	1,583	1,568	1,133	1,266	1,466	548
Carroll	2,289	204	2,298	235	2,131	330	2,157	299	1,375	1,234	1,217	1,014	1,831	323
Cheshire	3,584	421	3,572	420	3,258	456	3,389	473	2,023	2,351	2,366	793	3,039	510
Coos	1,818	507	1,799	512	1,691	527	1,737	520	1,317	1,144	1,524	722	1,572	566
Grafton	4,368	1,137	4,338	1,139	3,796	1,302	3,863	1,169	2,745	3,028	2,378	2,649	3,242	1,565
Hillsborough...	8,331	2,123	8,168	2,334	7,667	2,178	7,763	1,965	4,956	7,358	6,912	3,672	6,591	2,294
Merrimack	5,185	2,539	5,357	2,139	4,883	2,271	5,042	2,115	3,769	4,327	4,012	3,225	4,068	2,359
Rockingham...	4,328	2,989	4,204	3,314	3,689	3,384	4,023	3,175	3,801	5,113	2,952	4,188	3,227	3,374
Stratford	4,073	906	3,722	1,279	3,997	778	3,846	955	3,460	3,303	3,236	1,728	3,324	760
Sullivan	2,096	375	2,162	342	1,909	397	1,878	403	1,247	1,520	1,437	791	1,602	547
Totals	38,352	11,664	37,872	12,218	34,990	12,224	35,768	11,580	25,786	30,976	27,737	20,048	30,002	12,846

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT
DOCKET #

Town of Canaan, Town of Enfield, Town of Litchfield, Town of Loudon,
Town of Weare, Town of Wilton, Honorable Ralph Boehm, Judith Finsterbusch,
Joseph Frazier, Honorable Gary Hopper, Honorable Loren Jean,
Honorable Neal Kurk, Anthony Lozeau, Honorable Roy D. Maxfield, and Ed Naile,
Petitioners

v.

William M. Gardner, in his official capacity
as Secretary of State of the State of New Hampshire,
Respondent

**PETITION FOR DECLARATORY AND INJUNCTIVE RELIEF
WITH REQUEST FOR EXPEDITED PRELIMINARY AND FINAL HEARINGS**

Now come the Petitioners and complain against the Respondent and say the following:

NATURE OF THE CASE

- 1- The New Hampshire House of Representatives is the fourth-largest English-speaking legislative body in the world. The primary reason for its size is the historical New Hampshire principle that each and every community, no matter how small, should have the right to elect their representatives from within the town. Indeed, this principle predates the Constitution of 1784; it occurred first in early 1774. One of the chief complaints about New Hampshire's so-called "temporary constitution of 1776" was that it disenfranchised the seacoast and western towns. *See, e.g.,* Susan E. Marshall, *The New Hampshire Constitution* (Praeger, 2004) at 7-9.
- 2- The history of Part II, Article 11 of the New Hampshire Constitution is all about assuring that towns were appropriately enfranchised. For example, an amendment passed in 1942 required that every town, regardless of size, have its own representative in the House at

least once every 10 years. *See Marshall, supra*, at 133. The 1942 amendment of Part II, Article 11 repealed an 1889 constitutional amendment that for a 53-year period required New Hampshire House that towns of less than 600 inhabitants should be represented a proportional amount of time, instead of the annual rotation of representation that had been set forth in Part II, Article 10, which was repealed in 1889.

- 3- Unfortunately, in the course of creating the last two redistricting plans for the House this historical principle was largely forgotten. Many towns that qualified to elect their own representatives under applicable constitutional principles have been nonetheless placed within large, multi-town legislative districts. *See Burling v. Speaker of the House*, 148 N.H. 143, 157 (2002) (31 districts with more than four state representatives); *RSA 662:5*.
- 4- To remedy this deficiency, the New Hampshire Legislature enacted a Constitutional Amendment Concurrent Resolution (hereinafter referred to as “CACR”) that placed a proposed constitutional amendment (CACR 41) on the November, 2006 ballot through a ballot question that asked the voters of New Hampshire if they wanted to restore the historical prerogative and tradition of qualifying towns being guaranteed representation from within the town. *Appendix* at pages 16 through 18 (2006 Session CACR 41) and *Appendix* at pages 14 and 15 (2006 Voters’ Guide).
- 5- Despite significant media opposition and claims that the ballot question was confusing, New Hampshire voters overwhelmingly voted by an over 70% majority to amend Part II, Article 11 of the New Hampshire Constitution to accomplish this objective. *Appendix* at page 19 (STATE OF NEW HAMPSHIRE ELECTIONS DIVISION STATE GENERAL ELECTION – November 7, 2006).

- 6- As a result, the districts established by RSA 662:5 are unconstitutional because 106 qualified towns and cities, including Petitioner towns, are not guaranteed representation from within the town. See *RSA 662:5 and Appendix* at pages 1 through 13 (NH HOUSE – Analysis of Population-Appropriate Representation by House District)
- 7- Fifteen of these disenfranchised towns presently have no representatives from within the towns at all. *Appendix* at pages 1 through 13.
- 8- Despite two opportunities to do so, the current House has refused to remedy this constitutional infirmity by implementing Part II, Article 11. More specifically, a House-sponsored redistricting bill was defeated in 2007 and a Senate-sponsored redistricting bill went down to defeat in 2008. See <http://www.gencourt.state.nh.us/ie/rollcall/rollcallsbyvotedetail.asp?sessionyear=2007&voteno=61&body=H> (accessed May 1, 2008) (defeat of HB 687 by 283 to 72 roll call vote) and *House Journal 10* at 550 (defeat of SB 45 by voice vote).
- 9- Petitioners seek to have RSA 662:5 declared unconstitutional and to have the Respondent enjoined from conducting the 2008 primary and general election based on RSA 662:5.

THE PARTIES

- 10- Petitioner Town of Canaan is a political subdivision of the State of New Hampshire with offices at 1169, U.S. Route 4, Canaan, New Hampshire 03741. Under Part II, Article 11, it is guaranteed at least one seat in the New Hampshire House. Under RSA 662:5, it is grouped in a multi-legislator district with several other towns.
- 11- Petitioner Town of Enfield is a political subdivision of the State of New Hampshire with offices at 23 Main Street, Enfield, New Hampshire 03748. Under Part II, Article 11, it is

guaranteed at least one seat in the New Hampshire House. Under RSA 662:5, it is grouped in a multi-legislator district with four other towns.

- 12- Petitioner Town of Litchfield is a political subdivision of the State of New Hampshire with offices at 2 Liberty Way, Litchfield, New Hampshire 03052. Under Part II, Article 11, it is guaranteed at least two seats in the New Hampshire House. Under RSA 662:5, it is grouped in a multi-legislator district with Hudson and Pelham. Hudson has over three times the population of Litchfield, while Pelham is about one and one-half times as large. None of the current representatives in the district is from Litchfield.
- 13- Petitioner Town of Loudon is a political subdivision of the State of New Hampshire with offices at 29 South Village Road, Loudon, New Hampshire 03307. Under Part II, Article 11, it is guaranteed at least one seat in the New Hampshire House. Under RSA 662:5, it is grouped in a multi-legislator district with Andover, Boscawen, Canterbury and Salisbury. None of the current representatives in the district is from Loudon.
- 14- Petitioner Town of Weare is a political subdivision of the State of New Hampshire with offices at 15 Flanders Memorial Drive, Weare, New Hampshire 03281. Under Part II, Article 11, it is guaranteed at least two seats in the New Hampshire House. Under RSA 662:5, it is grouped in a multi-legislator district with Goffstown, which has more than double Weare's population.
- 15- Petitioner Town of Wilton is a political subdivision of the State of New Hampshire with offices at 42 Main Street, Wilton, New Hampshire 03086. Under Part II, Article 11, it is guaranteed at least one seat in the New Hampshire House. Under RSA 662:5, it is

grouped in a multi-legislator district with four other towns. None of the current representatives in the district is from Wilton.

- 16- Petitioner the Honorable Ralph Boehm is an individual and resides at 6 Gibson Drive, Litchfield, New Hampshire 03052. He is a former representative to the New Hampshire House from the town of Litchfield. He ran for reelection in 2006 and was defeated by candidates residing in Hudson. Mr. Boehm is currently an elected school board member.
- 17- Petitioner Judith Finsterbusch is an individual and resides at 33 Caleb Dyer Lane, Enfield, New Hampshire 03748. She currently serves as a member of Enfield's Budget Committee.
- 18- Petitioner Joseph Frazier is an individual and resides at 36 Sunset Lane, Canaan, New Hampshire 03741. He currently serves as a member of Canaan's Planning Board.
- 19- Petitioner the Honorable Gary Hopper is an individual and resides at 107 Buxton School Road, Weare New Hampshire 03281. He is currently a representative in the New Hampshire House from Hillsborough District no. 7.
- 20- Petitioner the Honorable Loren Jean is an individual and resides at 25 Charles Bancroft Highway, Litchfield, New Hampshire 03052. He is a former representative to the New Hampshire House from the town of Litchfield. He also is a former member of Litchfield's Planning Board and a former member of New Hampshire's Human Rights Commission.
- 21- Petitioner the Honorable Neal Kurk is an individual and resides at RR 1, Weare, New Hampshire 03281. He is currently a representative in the New Hampshire House from

Hillsborough District no. 7. He was the prime sponsor of CACR 41 in the 2006 General Court session. *Appendix* at page 16.

- 22- Petitioner Anthony Lozeau is an individual and resides at 177 Jones Hill Road, Enfield, New Hampshire 03748. He currently serves as a member of Enfield's Planning Board.
- 23- Petitioner the Honorable Roy D. Maxfield is an individual and resides at 7126 School Street, Loudon, New Hampshire 03307. He is a former representative to the New Hampshire House from the town of Loudon.
- 24- Petitioner Ed Naile is an individual and resides at 61 Tubbs Hill Road, Deering, New Hampshire 03244. He is a former member of the Board of Selectmen of the Town of Deering.
- 25- Respondent William M. Gardner is the Secretary of State of the State of New Hampshire, with an office at 107 North Main Street, Concord, New Hampshire. He is named as a respondent in this action solely in his official capacity of Secretary of State of New Hampshire.

JURISDICTION AND VENUE

- 26- The Court has jurisdiction over this matter pursuant to RSA 491:7, RSA 498:1 and RSA 498:2.
- 27- Venue is proper in this Court under RSA 507:9 because the Secretary of State has his office in Concord.

GOVERNING LAW

- 28- The New Hampshire Supreme Court has declared that it is the responsibility of the judiciary "in our co-equal, tripartite form of government to interpret the Constitution and

to resolve disputes arising under it.” *Petition of Below*, 151 N.H. 135, 139 (2004) (quoting *Monier v. Gallen*, 122 N.H. 474, 476 (1982)).

- 29- Additionally, the “judiciary has a responsibility to ensure that constitutional rights not be hollowed out.” *Londonderry v. State*, 154 N.H. 153, 162 (2006) (citing *Petition of Below*, *supra*).
- 30- In this state, both the right to vote and the right to be elected have been afforded the status of fundamental rights. *See Akins v. Secretary of State*, 154 N.H. 67, 71 (2006).
- 31- The fundamental rights to vote and to be elected are violated when elections are not conducted in accordance with constitutional guidelines on legislative redistricting.

BACKGROUND FACTS

- 32- A constitutional amendment, CACR 41, was introduced during the 2006 legislative session to restore the historical prerogative of qualifying towns to elect their own representatives to the House. *Appendix* at pages 16 through 18.
- 33- CACR 41 was submitted to the voters by the 2006 Legislature on votes of 256 to 55 in the House of Representatives and 16 to 7 in the Senate. *See <http://www.sos.nh.gov/concon-2006.htm>*.
- 34- The Voter’s Guide explained that the purpose of the amendment was to “allow the legislature to create districts in the same manner that districts were drawn prior to 2002. ... Each town or ward having enough inhabitants to entitle it to one or more representative seats in the Legislature shall be guaranteed its own district for the purposes of electing one or more representatives, unless such action prevented a neighboring town

from being included in a single-representative district before it is part of a floterial district.” *Appendix* at page 14.

- 35- The voters overwhelmingly expressed their approval of CACR 41 by a vote of 240,767 to 100,688, well in excess of two-thirds of the qualified voters present and voting on the subject as required by New Hampshire Constitution Part II, Art. 100. *See Appendix* at page 19.
- 36- The extant House districts do not comply with Part II, Article 11. There are 106 municipalities guaranteed the right to elect at least one representative from within the town that are now unconstitutionally grouped into multi-town, multi-legislator districts by RSA 662:5. *Compare RSA 662:5 and Appendix* at pages 1 through 13.
- 37- Fifteen of these disenfranchised towns presently have no representatives from within the town. *Id.*
- 38- Legislation was introduced in the House during the 2007 legislative session to implement amended Part II, Article 11. *See <http://www.gencourt.state.nh.us/legislation/2007/HB0687.html>* (accessed May 1, 2008); *Appendix* at pages 20 and 21 (2007 Session House Bill 687).
- 39- This legislation was defeated by a vote of 283 to 72. *See <http://www.gencourt.state.nh.us/ie/rollcall/rollcallsbyvotedetail.asp?sessionyear=2007&voteno=61&body=H>* (accessed May 1, 2008).

- 40- The House, in 2008, also defeated a bill passed by the New Hampshire Senate that would have implemented amended Part II, Article 11. *House Journal 10* at 550 (defeating SB 45 by voice vote).
- 41- As a result of the above actions, unless the relief requested in this Petition is granted, the 2008 election for the House will take place in unconstitutional districts. Filings for the 2008 primary under the districts established by RSA 662:5 are scheduled for June 4, 2008 to June 13, 2008. See <http://www.sos.nh.gov/spfile.htm> (accessed May 1, 2008).
- 42- Prompt judicial review is warranted due to the important constitutional issue presented and the proximity of the upcoming election.¹
- 43- The holding of the New Hampshire Supreme Court in *Petition of Below*, 151 N.H. at 149, to the effect that “when a Legislature once makes an apportionment following an enumeration no Legislature can make another until after the next enumeration,” does not preclude the remedy sought in this Petition for each and all of the following reasons:
- A. The above 2004 holding did not address the situation of a new constitutional apportionment requirement, such as the 2006 amendment to Part II, Article 11, coming into existence subsequent to a legislative apportionment following a decennial enumeration but before the next decennial enumeration.
- B. The exceptional circumstances of a new constitutional apportionment requirement that is not being fulfilled is similar to the exceptional circumstance of the General

¹ The right to a constitutional election would take precedent, of course, over adherence to the filing period presently established by the Secretary of State. Stated alternatively, the primary sign-up scheduled for June 4 to June 13, 2008 cannot act as a bar to the relief requested in this Petition. In 2002, for example, the filing was delayed until August in order to assure a constitutional election. See *Burling v. Speaker of the House*, 148 N.H. 143, 160 (2002) (injunction against House candidates filings in effect until July 31, 2002).

Court having failed to reapportion at the first regular session following the decennial census, which failure gave rise to the exception found in *Petition of Below* to its rule against subsequent redistrictings based on the same decennial enumeration. *Id.* at 148.

- C. The holding in *Petition of Below* is not applicable because New Hampshire voters have since passed a constitutional amendment that requires the Legislature to redistrict before the next decennial census, and the implementation of that amendment, and not the concern underling *Petition of Below*, of multiple redistrictings with the possibility of confusion and impermissible motivations, is the controlling issue in this action.
- D. The Constitutional requirement that all districts be apportioned in accordance with Part II, Article 11 supersedes the holding of the Court in *Petition of Below, supra*, to the extent that this subsequently enacted Constitutional provision and the *Below* holding are inconsistent.
- E. The holding in *Petition of Below* that once the General Court has fulfilled its constitutional duty to reapportion based on the last federal census, it may not reapportion again until the next federal census, *id.* at 146, was based in part on the Supreme Court's earlier holding in *Opinion of Justices*, 105 N.H. 125 (1963), wherein it was stated that "since the [New Hampshire] Constitution provides for no reapportionment during the ten-year period following [the first reapportionment following the last federal census], it is not "constitutionally competent" for the General Court to authorize an election of a representative [in a

district formulated since that reapportionment].” *Id.* at 128. In the instant case, the 2006 amendment to Article 11, Part II of the Constitution does provide such “constitutional competency.”

- F. The only additional citation of the Supreme Court in *Petition of Below* in holding a prohibition of mid-decennial apportionments was the 2000 decision of the South Dakota Supreme Court which opined that, “[o]nce the legislature has enacted a valid apportionment law, ‘no future [reapportionment] act may be passed by [it] until after the next regular apportionment period prescribed by the Constitution.’” *Certification of a Question of Law*, 615 N.W.2d 590, 595 (S.D. 2000). However, that South Dakota decision was explicitly based upon a provision of the South Dakota Constitution and not the New Hampshire Constitution. Nor did it examine the issue of reapportionment to accommodate a constitutional amendment enacted following an initial decennial apportionment, such as here; and it did not, either in language or in logic, prohibit mid-decennial apportionments required to comply with new constitutional language. The South Dakota decision dealt with a constitutional provision unique to that state’s apportionment scheme of explicitly vesting contingent reapportionment duties in its supreme court, an approach foreign to New Hampshire. It was the uniqueness of that joint legislature/court approach to redistricting that gave the South Dakota Court reason to prohibit mid-decennial Legislative reapportionments. *See id.* at 596 (“If the Legislature were free to apportion at any time, why transfer this duty

to the Court to be performed within a specific period of time in the event the Legislature fails to act?")

G. The *Petition of Below* decision was made prior to the holding of the U.S. Supreme Court in *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006), wherein it was held that the mere occurrence of a mid-decennial reapportionment is not sufficiently suspect so as to give rise to an actionable claim to void the reapportionment.

44- Reapportionment of the current state House of Representative districts is constitutionally mandated to achieve districts that comply with Part II, Article 11 of the Constitution as it has been amended in the last general election in November 2006. That constitutional requirement per force overrides any concerns relating to convenience, familiarity or simplicity.

45- The Legislature has had ample and repeated opportunities to meet its constitutional obligation to conduct redistricting prior to the upcoming primary and general election in compliance with the 2006 amendment to the Constitution, but has failed to do so.

COUNT I
DECLARATORY RELIEF

46- When interpreting a constitutional provision, the Court should “look to its purpose and intent,” and “give the words in question the meaning they must be presumed to have had to the electorate when the vote was cast.” *Opinion of the Justices*, 126 N.H. 490, 495 (1985).

- 47- The Supreme Court has instructed that it is the reviewing court's "duty ... to place itself as nearly as possible in the situation of the parties at the time the instrument was made, that it may gather their intention from the language used, viewed in the light of the surrounding circumstances." *Warburton v. Thomas*, 136 N.H. 383, 387 (1992) (quotation omitted).
- 48- "The language used ... by the people in the great paramount law which controls the legislature as well as the people, is to be always understood and explained in that sense in which it was used at the time when the constitution and the laws were adopted." *N.H. Motor Transport Assoc. v. State*, 150 N.H. 762, 765 (2004) (quotation and brackets omitted).
- 49- Here, under the circumstances of its passage, there can be no question what the electorate understood amended Part II, Article 11 to mean.
- 50- The Voter's Guide unambiguously explained that the purpose of the amendment was to "allow the legislature to create districts in the same manner that districts were drawn prior to 2002." *Appendix* at page 14.
- 51- More specifically, "[e]ach town or ward having enough inhabitants to entitle it to one or more representative seats in the Legislature shall be guaranteed its own district for the purposes of electing one or more representatives, unless such action prevented a neighboring town from being included in a single-representative district before it is part of a floterial district." *Id.*
- 52- The Voter's Guide as it informed the voters through the language quoted in the immediately preceding two paragraphs clearly provided that on passage of the proposed

constitutional amendment future elections to the New Hampshire House of Representatives would be in accordance with the new constitutional provision.

- 53- Contrary to the requirements of the New Hampshire Constitution, RSA 662:5 fails to provide that “[e]ach town or ward having enough inhabitants to entitle it to one or more representative seats in the Legislature” has its own representative.
- 54- As stated above, there are 106 towns and cities that are now constitutionally guaranteed the right to elect at least one representative from within the municipality but that, notwithstanding that constitutionally requirement, are grouped into multi-town, multi-legislator districts by RSA 662:5.
- 55- Fifteen of these disenfranchised towns presently have no representatives from within the town at all. *Compare RSA 662:5 and Appendix* at pages 1 through 13.
- 56- Accordingly, the Court should declare RSA 622:5 unconstitutional.

COUNT II
INJUNCTIVE RELIEF

- 57- A preliminary injunction should issue when there is an immediate danger of irreparable harm to the party seeking injunctive relief, there is no adequate remedy at law and the party seeking the injunction is likely to succeed on the merits. *See, e.g., ATV Watch v. New Hampshire Dept. of Resources and Economic Development*, 923 A.2d 1061, 1065 (N.H. 2007).
- 58- These conditions are all met.
- 59- In the instant case, there is an immediate danger of irreparable harm that can be avoided only by the issuance of a preliminary injunction because the Secretary of State would

otherwise proceed to conduct the primary and general election in accordance with RSA 662:5, thus,

- A. violating in the upcoming primary and general election the fundamental voting rights of the individual Petitioners, and those in their circumstances, under the New Hampshire Constitution to elect residents of their municipalities to the New Hampshire House of Representatives, and
- B. violating in the upcoming primary and general election the fundamental rights of the individual Petitioners, and those citizens of New Hampshire in their circumstances, to not be unconstitutional constrained or burdened from being elected to the New Hampshire House of Representatives.

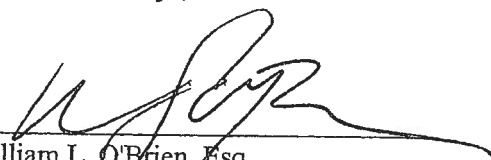
- 60- The Petitioner towns would be irreparably harmed because they and their inhabitants would be denied the right under Part II, Article 11 of the Constitution to have representation from within the town in the state House of Representatives.
- 61- Individual Petitioners would be irreparably harmed because their right to elect a representative from within their town or to be elected as a representative by the voters of their town would be denied.
- 62- There is no adequate remedy at law because this Petition involves the right to vote and the right to be elected, the loss or denial of which cannot be remedied by monetary damages.
- 63- There is no other adequate remedy for the reason that once there is a general election and qualification by the General Court of its members, the Court is without any authority to remove those members.

- 64- Petitioners are likely to succeed on the merits, based on the clear language of Part II, Article 11 of the Constitution.
- 65- The language in both the Voter's Guide and in the amendment to Part II, Article 11 itself is mandatory – the Legislature must redistrict the House based on the 2000 census in order to create House districts that conform to Part II, Article 11. A flawed election based on unconstitutional House districts must not be allowed to occur.

WHEREFORE, the Petitioners respectfully request that the Court:

- A. Schedule an expedited preliminary hearing;
- B. Issue a preliminary injunction enjoining the Secretary of State from conducting the 2008 election under RSA 662:5;
- C. Schedule an expedited final hearing;
- D. Declare RSA 662:5 to be unconstitutional;
- E. Enter the foregoing as permanent injunctive relief; and
- F. Grant such further and other relief as justice and equity may require.

Respectfully submitted,
The Petitioners, Town of Canaan, Town of Enfield,
Town of Litchfield, Town of Loudon, Town of
Weare, Town of Wilton, Honorable Ralph Boehm,
Judith Finsterbusch, Joseph Frazier, Honorable
Gary Hopper, Honorable Loren Jean, Honorable
Neal Kurk, Anthony Lozeau, Honorable Roy D.
Maxfield, and Ed Naile,
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