

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Docket No. 2012-0338

City of Concord

v.

Secretary of State

Rule 9 Interlocutory Appeal Without Ruling

OPENING BRIEF FOR CITY OF CONCORD

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RELEVANT CONSTITUTIONAL PROVISIONS

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.

ISSUES PRESENTED

1. Whether RSA 662:5 (2012) violates Part II, Article 11 of the New Hampshire Constitution because the redistricting plan fails to provide towns and city wards having a sufficient number of inhabitants with their own district of one or more representative seats.
2. Whether RSA 662:5 (2012) is severable in the event that it is determined unconstitutional.

STATEMENT OF THE CASE

The City of Concord brings this 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 under New Hampshire Constitution, Part II, Article 11 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. 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.

The City of Concord's action has been consolidated with five other redistricting actions against the Secretary of State. All of the redistricting actions involve requests for declaratory and injunctive relief based upon the constitutionality of RSA 662:5 (2012). The parties to those actions agreed to an interlocutory transfer without ruling under Superior Court Rule 9. On May 5, 2012, the Court accepted the appeal. This brief addresses the constitutionality of RSA 662:5 (2012), as well as issues relating to its severability.

STATEMENT OF FACTS¹

A. The Redistricting Process

The biennially elected New Hampshire House of Representatives has 400 members. *See* RSA 662:5; *see also* Agreed Statement of Facts at ¶57. The constitutional requirements governing the activities of redistricting the New Hampshire House of Representatives are set forth in the New Hampshire Constitution, Part II, Articles 9 and 11. The New Hampshire Constitution, Part II, Article 9 requires the Legislature to redraw each representative district “as equal as circumstances will admit” every ten years, based upon the decennial census conducted by the United States Census Bureau. It also requires that, in apportioning seats, “no town, ward or place shall be divided nor the boundaries thereof altered.” N.H. CONST. pt. II, art. 9.

The New Hampshire Constitution, Part II, Article 11, as amended in 2006, further requires the formation of districts for the New Hampshire House of Representatives in the following manner:

[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.

(Emphasis added.)

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

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 towns and wards with at least 3,291 people would be given its own representative.

B. The City of Concord's Wards

The results of the 2010 United States Census established that the City of Concord's wards were unevenly distributed, and, therefore, the City subsequently undertook measures to realign its wards so as to be as equal as possible. Appendix to Interlocutory Appeal Statement (App.) at 27. The new ward lines were approved by the City of Concord voters during the

November 8, 2011 elections. App. 42. The City of Concord has now 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 Agreed Statement of Facts at ¶6.

More specifically, with respect to Concord Ward 5, the 2010 United States Census had determined that Concord Ward 5 had a total of 4,370 people. App. 28. The realignment of ward lines resulted in Concord Ward 5 having a total population of 4,077 people, which still requires it to maintain its own district of one representative. App. 42. The ideal population of a district is 3,291. Agreed Statement of Facts at ¶57. The excess population of 786 inhabitants in Concord Ward 5 may be combined with the excess population from other districts to allow for an additional at-large or floterial representative.

C. The Redistricting Plan - RSA 662:5 (2012)

In enacting RSA 662:5 (2012), 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. Agreed Statement of Facts at ¶69. Concord Ward 5 has a total population of 4,077 people. *Id.* The Town of Hopkinton has a total of 5,589 people. *Id.* Both of those political subdivisions have enough inhabitants to entitle them to their own representative seat in the New Hampshire House of Representatives. The City of Concord contends that the creation of a multi-member district, which combines Concord Ward 5 and the Town of Hopkinton, denies Concord Ward 5 with its constitutional right to have its own representative.

The combining of Concord Ward 5 and the Town of Hopkinton raises issues for the City of Concord. The Town of Hopkinton has a larger population than Concord Ward 5, and, therefore, there is a concern that the three representatives will be chosen from the Town of Hopkinton, thereby reducing the City of Concord's current thirteen representatives to twelve. Moreover, Concord Ward 5 and the Town of Hopkinton should not share representatives because they are different. Agreed Statement of Facts 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.* 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.

Significantly, Concord Ward 5 is not the only town or ward that was denied its own representative. On March 26, 2012, Governor John Lynch vetoed the redistricting plan based on his concerns about the unconstitutionality of the plan, stating as follows:

Under federal and state law, towns and wards that equal or are within 5 percent of this ideal population are entitled to their own representative. Based on the 2010

census, there are 152 towns and wards in New Hampshire that qualify for their own representative.

HB 592 denies a total of 62 New Hampshire towns and wards their own seats in the House. For example, the towns of Atkinson, Hudson, Meredith, and Pelham all have sufficient population under state and federal constitutional standards to have their own representative, but all are denied their own representative under the House-approved plan. This is completely contrary to what the citizens of New Hampshire called for in the state constitutional amendment adopted in 2006.

Another significant flaw with the House-approved redistricting plan is that it unnecessarily breaks-up cities and wards.

For example, in Manchester, the state's largest city, HB 592 combines Wards 8 and 9 with the town of Litchfield. Pelham will again share its representatives with Hudson. Strafford will share a representative with New Durham. And Concord's Ward 5 will now be made part of a district that includes the Town of Hopkinton.

Certified Record, CHR-001948. On March 28, 2012, the Legislature overrode the Governor's veto. *Id.* at CHR-001709. This redistricting lawsuit followed.

SUMMARY OF THE ARGUMENT

The redistricting plan set forth in RSA 662:5 should be overturned because it is contrary to law. The Legislature is not permitted to ignore the requirements of Part II, Article 11, which guarantees that towns and wards with an adequate population will be provided its own representative. In accordance with the New Hampshire Constitution, Part II, Article, 11, the New Hampshire Legislature was obligated to enact a plan which would meet the requirements of the United States and New Hampshire Constitutions even if the redistricting plan required the utilization of an increased range of deviation over 10%. The Legislature could have alternatively utilized the aggregate method to calculate the total deviation, which would have provided more flexibility in meeting its constitutional obligations under the United States and New Hampshire Constitutions with respect to redistricting. A redistricting plan that utilized the aggregate method would be constitutional, and it would have afforded Concord Ward 5 the right to elect its own representative.

The New Hampshire Legislature has attempted to justify its redistricting plan on the basis that it was unable to provide many towns and wards with their own representative, even though required by the New Hampshire Constitution, Part II, Article 11, because it was compelled by adherence to the “one person, one vote” doctrine under the Equal Protection Clause of the United States Constitution. In adopting guidelines for redistricting, the New Hampshire Legislature took the position that a reapportionment plan must stay within the 10% deviation which the United States Supreme Court has stated will be considered presumptively constitutional. Certified Record, CHR-000528. The Legislature also chose to create a plan in which the representative districts: (1) do not divide any towns or wards; (2) are composed of contiguous territories; and (3) do not cross county lines. *Id.* It is anticipated that the Legislature will argue

that, based on that criteria, it could not draft a reapportionment plan with a constitutionally permissible population deviation except by creating multi-member legislative districts. This argument is in error.

ARGUMENT

A. Standard of Review

The sole issue in this matter is whether the challenged legislative enactment is unconstitutional. While a statute is presumed to be constitutional and the court “will not declare it invalid except upon inescapable grounds,” a statute will be held unconstitutional when a “clear and substantial conflict exists between it and the constitution.” *New Hampshire Ass’n of Counties v. State*, 158 N.H. 284, 288 (2009).

When the court is required to interpret a provision of the constitution, it views the language used in light of the circumstances surrounding its formulation. *Id.* It is necessary to give the words in question the meaning they must be presumed to have had to the electorate when the vote was cast. *Id.*

B. The Redistricting Plan Set Forth In RSA 662:5 (2012) Violates Part II, Article 11 of the New Hampshire Constitution

In New Hampshire, legislative redistricting plans are subject to the requirements of the United States and New Hampshire Constitutions. The United States and New Hampshire Constitutions guarantee that each citizen’s vote will have equal weight. *See* U.S. CONST. amend XIV, §1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws”); *Reynolds v. Sims*, 377 U.S. 533, 577 (1964) (discussing federal limitations on the power of a state legislature in regard to electoral districts include the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, which requires that state legislative districts must be substantially equal in population so that each person’s vote has equal weight as nearly as practicable); N.H. CONST. pt. I, art. 11 (“All elections are to be free, and every inhabitant of the state of 18 years of age and upwards shall have an equal right to vote in any election.”).

Part II, Articles 9 and 11 of the New Hampshire Constitution ensure that each citizen's vote will have equal weight when electing members of the New Hampshire House of Representatives. Part II, Article 9 requires the Legislature to redraw each representative district "as equal as circumstances will admit" every ten years, based upon the decennial census conducted by the United States Census Bureau. It also requires that, in apportioning seats, "no town, ward or place shall be divided nor the boundaries thereof altered." N.H. CONST. pt. II, art. 9. The New Hampshire Constitution, Part II, Article 11 further requires 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).

Based on the foregoing, the operative mandates under the United States and New Hampshire Constitutions require the Legislature to devise a legislative map of representative districts that establishes as a single-member district all towns and wards with sufficient inhabitants to entitle them to one or more seats for the state House of Representatives. These single-member districts are required to be nearly equal in population as practicable, and the boundaries of the towns and wards must be preserved. To the extent that an excess number of inhabitants from a district exists, or a town or ward does not have an adequate population to

entitle it to a representative, the Legislature is require to create a floterial or multi-member district with towns and wards that are contiguous.

1. History of Part II, Article 11

In 2006, New Hampshire voters passed a constitutional amendment to reinstate the guarantee that towns and wards with enough inhabitants to entitle them to one or more House seats would be established as single-town districts. Certified Record, CHR-000615. 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 constitutional amendment also explicitly allowed 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, at the present time:

The Constitution does not guarantee that each town or ward having enough inhabitants to entitle it to one representative seat in the Legislature shall have its own district. The 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 seat in those towns and wards that do not have enough inhabitants to form a district.

[If adopted, t]his amendment will allow the legislature to create districts in the same manner that districts were drawn prior to 2002. It will increase the total number of districts and therefore increase the probability that the people of a town will be represented by a member of their own community.

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. Where a town, ward or unincorporated place does not have enough inhabitants necessary for a representative seat, the Legislature shall form multi-town or multi-ward districts, to qualify for one or more representative seats. Excess population in one or more contiguous districts may be combined to allow for additional at-large or floterial representatives.

Id. This amendment was passed by over 70% of the voters in New Hampshire.

The New Hampshire Supreme Court has recognized that this most recent constitutional amendment was likely a response to the large multi-member districts used in the court-ordered redistricting plan in the *Burling* case. *Town of Canaan*, 157 N.H. at 797-98 (discussing amendment to Part II, Article 11 of the New Hampshire Constitution).² There should be no dispute that Part II, Article 11, is now intended to ensure that towns and wards with an adequate population receive their own representative. This requirement is no less important than the other provisions in Part II, Articles 9 and 11 of the New Hampshire Constitution, which require the preservation of boundaries and compactness.

2. Requirement of the One Person/One Vote Standard

In enacting RSA 662:5 (2012), the New Hampshire Legislature has justified its failure to provide many towns and wards with their own representative, even though required by the New Hampshire Constitution, Part II, Article 11, on the basis that it was compelled by adherence to the “one person, one vote” doctrine under the Equal Protection Clause of the United States Constitution. In adopting guidelines for redistricting, the New Hampshire Legislature has taken the position that a reapportionment plan must stay within the 10% deviation which the United

² In 2002, the New Hampshire Supreme Court was required to create a court-ordered redistricting plan for the New Hampshire House of Representatives. *Burling*, 148 N.H. at 145-46. Using the language in the 1964 constitutional amendments, the New Hampshire Supreme Court declined to employ “floterial” redistricting schemes within the 2002 court-ordered reapportionment. *Id.* at 157. 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. However, at the time of the *Burling* case, there was no express constitutional guarantee that towns and wards with an adequate population receive its own representative, and there was no express constitutional provision allowing floterial districts.

States Supreme Court has stated will be considered presumptively constitutional. Certified Record, CHR-000528. The Legislature also chose to create a plan in which the representative districts: (1) do not divide any towns or wards; (2) are composed of contiguous territories; and (3) do not cross county lines. *Id.* It is anticipated that the State will argue that, based on that criteria, the Legislature could not draft a reapportionment plan with a constitutionally permissible population deviation except by creating multi-member legislative districts. For the following reasons, that argument should be rejected.

a. The Legislature Was Not Compelled To Stay Within A 10% Deviation

With respect to population equality, the United States Supreme Court has stated, and has recently reaffirmed, in support of the “one person, one vote principle,” that “minor deviations from mathematical equality among state legislative districts are insufficient to make out a *prima facie* case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State.” *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973). The United States Supreme Court has never required a redistricting plan to stay within a 10% deviation, but rather, has stated that States may exceed such a deviation to the extent that they have a legitimate and constitutionally valid countervailing interest. *Reynolds*, 377 U.S. at 579.

The United States Supreme Court has further stated that “deviations from population equality *may be necessary* to permit States to pursue other legitimate objectives such as maintaining the integrity of various political subdivisions and providing for compact districts of contiguous territory.” *Brown v. Thomson*, 462 U.S. 835, 842 (1983) (emphasis added) (quotations and brackets omitted); *see also Gaffney*, 412 U.S. at 749 (critiquing apportionment approaches that slavishly labor under an “unrealistic overemphasis on raw population figures” such that relevant and legitimate factors and interests that states must account for are

submerged). For that reason, it is constitutionally permissible for a plan to exceed the *de minimus* deviation of 10% so long as the plan “may reasonably be said to advance a rational state policy.” *Brown*, 462 U.S. at 843 (brackets and quotations omitted) (quoting *Mahan v. Howell*, 410 U.S. 315, 328 (1973)).

Despite the foregoing, the State contends that the Legislature is permitted to violate the New Hampshire constitutional requirement that towns and wards receive a representative, where it is compelled by adherence to the one person/one vote mandate of the Equal Protection Clause of the United States Constitution. That argument should be rejected because the Legislature is required to enact a plan that complies with the constitutional provisions of both the United States and New Hampshire Constitutions. *See, e.g., In re Colorado Gen. Assembly*, Docket No. 11SA282, 2011 WL 5830123, at *1 (Colo. Nov.15, 2011) (“We hold that the Adopted Plan is not sufficiently attentive to county boundaries to meet the requirements of” the Colorado Constitution); *Holt v.2011 Legislative Reapportionment Comm’n*, 2012 WL 375298 at *41 (Pa. Feb.3, 2012) (holding that the “importance of the multiple commands in [the Pennsylvania Constitution], which embrace contiguity, compactness, and the integrity of political subdivisions, no less than the command to create legislative districts as nearly equal in population as ‘practicable.’”). Given New Hampshire’s constitutional mandate, and its particular circumstances (geographic and amount of representatives), there should be no question that a deviation above 10% “would still pass muster under federal constitutional standards in view of the decisions of the United States Supreme Court.” *Hellar v. Cenarrusa*, 683 P.2d 524, 527-28 (Idaho 1984) (holding that redistricting plan which disregarded state constitutional requirement of dividing districts was unconstitutional because, even assuming a different plan yielded a

population deviation of over 10%, it was still necessary to devise a plan that complied with both state and federal constitutions).

Here, there should be no dispute that a redistricting plan for the New Hampshire House of Representatives that exceeded a 10% deviation would meet the constitutional requirements of “one person/one vote.” Over the last forty years, the United States Supreme Court has taken a less restrictive approach to the population equality principle when certain countervailing circumstances are present. For example, in *Abate v. Mundt*, 403 U.S. 182 (1971), the Court considered a plan to reapportion Rockland County in New York State. When compared with ideal population equality for each of the five districts within the county, the total deviation amounted to 11.9%. The Court reiterated that population equality remained crucial, but opined that “the particular circumstances and needs of a local community as a whole may sometimes justify departures from strict equality.” *Id.* at 185.

Similarly, in *Mahan*, 410 U.S. at 318-19, the Court reviewed and upheld a plan created by the Virginia state assembly to reapportion both of its legislative houses in which political subdivisions were largely left intact, but the total deviation from ideal population equality was 16.4% in the Virginia House of Delegates. The Court recognized that “broader latitude” may be permissible in state apportionment matters, when considerations such as the integrity of political subdivisions are at issue. As the Court explained, “[t]he State can scarcely be condemned for simultaneously attempting to move toward smaller districts and to maintain the integrity of its political subdivision lines.” *Id.* at 322, 327. Notably, the *Mahan* opinion described maintenance of subdivision integrity and providing for population equality as a “dual goal” that the Virginia plan managed to satisfy on both counts. *Id.* at 328 n.9, 329.

Moreover, in *Gaffney*, 412 U.S. at 735-36, the Court considered a reapportionment plan involving the State of Connecticut. The Connecticut Constitution provided that within the bounds of federal constitutional standards, division of towns with regard to state house districts was not permitted except in narrow express circumstances. The Court critiqued apportionment approaches that would slavishly labor under an “unrealistic overemphasis on raw population figures” such that relevant and legitimate factors and interests that states must account for are submerged. 412 U.S. at 749. The Court stressed that the work of state apportionment authorities tasked with state legislative redistricting need not be rejected solely on the basis of deviations from population equality, explaining that “[w]e doubt that the Fourteenth Amendment requires repeated displacement of otherwise appropriate state decision making in the name of essentially minor deviations from perfect census-population equality that no one, with confidence, can say will deprive any person of fair and effective representation in his state legislature.” *Id.*

Similarly, the *Brown* case recognized the importance of Wyoming’s constitutional policy of preserving county boundaries. 462 U.S. at 843. In *Brown*, the United States Supreme Court approved a population deviation as high as 89% as to one county in Wyoming. *Id.* at 839. In that case, the Court held that reapportionment which permitted a county with a population of only 2,924 persons to have its own representative, although ideal apportionment would have been 7,337 persons per representative, did not violate Equal Protection Clause. *Id.* The Court explained that while substantial equality of population among districts is the paramount consideration in adopting redistricting plans, state policies, such as maintaining the integrity of various political subdivisions, are also necessary to consider. *Id.* at 842.

Here, as in the foregoing cases, the need for a population deviation over 10% results from consistent and neutral application of a legitimate and historical policy of allowing towns and

wards with an adequate population to receive their own representative. The need to exceed the 10% *de minimus* standard is particularly important for New Hampshire, which has the largest state House of Representatives (400 members) in the country. *Burling*, 148 N.H. at 157. New Hampshire also has one of the smallest state populations (1,316,470 people) in the country. *Id.* According to the 2010 federal census, New Hampshire's population ranks 42nd in the country. See http://www.census.gov/geo/www/guidestloc/pdf/NH_GSLCG.pdf. Because New Hampshire has such a large House of Representatives and such a small population, it takes very few people to affect deviation substantially. *Id.* For instance, a 10% deviation represents only 329 people, and a 1% deviation represents a mere 32 people. As the New Hampshire Supreme Court recognized in 2002, this is in contrast with Pennsylvania, in which a 10% deviation in 2002 represented 6,050 individuals or Maine in which a 10% deviation represented more than 800 people. *Burling*, 148 N.H. at 157-58.

In short, the New Hampshire Legislature is required to take measures to meet both the United States and New Hampshire Constitutions. There should be no dispute that there are rational state policies which require a total deviation that exceeds the so-called 10% standard set forth by the United States Supreme Court. The Legislature's self-imposed decision to enact the most "conservative" reapportionment plan to maintain a *de minimus* standard, while at the same time disregarding the constitutional mandate of the New Hampshire Constitution, Part II, Article 11, is unconstitutional.

b. The Special House Redistricting Committee And The Legislature Improperly Refused To Consider Redistricting Plans That Exceeded A 10% Deviation

Under the final reapportionment plan adopted by RSA 662:5, the Legislature has unconstitutionally chosen to create a multi-town legislative district in which Concord Ward 5 and Hopkinton have been combined to elect a total of three representatives. The New Hampshire

Constitution, Part II, Article 11 requires a ward to elect its own representative unless the apportionment will deny any other town or ward membership in one non-floterial representative district. This requirement could be achieved by a number of different methods, some of which are discussed as follows.³

Concord Ward 5 and the Town of Hopkinton: The first alternative option for a reapportionment plan is to create three districts which would allow Concord Ward 5 and the Town of Hopkinton to each elect its own representative, and the excess population in those contiguous districts would be combined to allow for an additional at-large representative. Concord Ward 5 has a population of 4,077 people and Hopkinton has a population of 5,589 people. Agreed Statement of Facts at ¶69. Each of those towns and wards have enough inhabitants to entitle its own representative seat in the House of Representatives. This option would not prevent another town or ward membership in one non-floterial representative district.

This option would also comply with the “one person/one vote” requirement because the plan falls within the acceptable range of deviations for calculating floterials, even using the component method of calculating deviation. Under the component method, deviations are measured for each underlying district individually. The deviation for the entire floterial district is not calculated. App. 107-11. A calculation of the deviation using the component method demonstrates that the relative deviation is 20%. Add. A1, Table 1.⁴ Although this deviation is higher than the so-called 10% *de minimus* deviation, a 20% deviation would still likely fall within the “one person/one vote” requirement because “smaller populations may permit larger

³ The City of Concord recognizes that the plan for apportionment should be developed by the Legislature. However, for purposes of determining whether it is feasible to allow Concord Ward 5 to elect its own representative, as mandated by the New Hampshire Constitution, Part II, Article 11, it is appropriate to review other options that were not considered by the Legislature. These alternative options demonstrate that the constitutional mandate requiring Concord Ward 5 to elect its own representative is achievable.

⁴ The parties agreed that although these calculations would not be included in the Agreed Statement of Facts, the City of Concord could utilize the calculations of deviations for purposes of its argument. In an effort to describe the manner in which the deviations were calculated, the City of Concord has included tables in the addendum.

percentage deviations in state than federal apportionment schemes.” *Boyer v. Gardner*, 540 F. Supp. 624, 627-28 (1982).

Concord Ward 1/Ward 5 and the Town of Hopkinton: It is also significant that, as an alternative option, the Legislature could have reduced the total deviation by creating two districts using either Concord Ward 1 or Concord Ward 3 and the Town of Hopkinton, which are also contiguous territories. App. 80. Those districts could each elect their own representative, and the excess population in those contiguous districts could be combined to allow for an additional at-large representative. Add. A2, Tables 2-3. Concord Ward 5 would then receive its own representative, and would replace either Concord Ward 1 or Concord Ward 3 in District No. 27, which is currently comprised under the final plan adopted by RSA 622:5 of Concord Wards 1, 2, 3, 4, 6 and 7. This option is feasible because Concord Ward 1 and Ward 3 have enough inhabitants to entitle them to a representative seat in the House of Representatives -- Concord Ward 1 has a population of 4,465 people and Concord Ward 3 has a population of 4,328 people. Those wards also have a closer population to Hopkinton, which has 5,589 people. For that reason, the deviation under the component method when using either Concord Ward 1 or Concord Ward 3 to create a floterial district is reduced to 12.7% (Ward 1) or 16% (Ward 3). Add. A2, Table 3-4. With respect to Ward 1, there should be no dispute that a deviation of 12.7% falls within the range of permissible levels approved by the United States Court.⁵

In short, in accordance with the New Hampshire Constitution, Part II, Article, 11, the New Hampshire Legislature was obligated to enact a plan which would meet the requirements of the United States and New Hampshire Constitutions, even if the redistricting plan required the

⁵ In addition to these options, a plan with an expanded deviation of 14% has also been submitted in this litigation. App. 142. That plan also provides Concord Ward 5 and the Town of Hopkinton with their own representative. App. 147-48.

utilization of an increased range of deviation. The Legislature’s self-imposed decision to enact the most “conservative” reapportionment plan to maintain a *de minimus* standard, while at the same time disregarding the constitutional mandate of the New Hampshire Constitution, Part II, Article 11, is unconstitutional. For those reasons, the redistricting plan set forth in RSA 662:5 should be held unconstitutional as it applies to the Concord Ward 5.

c. The Legislature Was Permitted To Use The Aggregate Method To Calculate Deviation

Under its conservative approach to developing a reapportionment plan, the Legislature employed the component method to adhere to the 10% *de minimus* deviation standard. By way of background, there are two primary methods for calculating deviations for house redistricting. App. 108. The aggregate method for computing deviations combines all of the districts (both regular and floterial) into one district for purposes of computation. App. 110. The total population encompassed by the districts and the total number of legislative seats assigned to the districts (both regular and floterial) are variables used in the computation. *Id.* In contrast, as discussed previously, the component method apportions the representative seat assigned to the float district between the individual districts that are within the float. *Id.* The apportionment is weighted based on the population percentage that an individual district makes up of the whole. It is well established that the component method for calculating floterials is the more “stringent” or “conservative” manner to calculate deviation, because it will result in a deviation that is significantly higher than the deviation using the aggregate method. *Boyer*, 540 F. Supp. at 627-28.

The New Hampshire Supreme Court has considered the component method for purposes of calculating the proposed deviation of floterials submitted for a *court-ordered redistricting plan*, but it has never required the Legislature to utilize this method to calculate deviations. *See*

Burling, 148 N.H. at 155.⁶ It is also noted that, for purposes of calculating deviation, the use of the component method for floterials appears to be flawed. *Id.* at 152-55. There appears to be no basis to utilize the aggregate method to calculate multi-member districts, while at the same time, using the component method to calculate the deviation of floterials, because both of these types of districts combine wards and towns to elect an at-large representative. *Id.* Even more importantly, the New Hampshire Constitution, Part II, Article 11 was amended to expressly allow the use of floterial districts after the *Burling* case was issued. The New Hampshire Supreme Court has recognized that the constitutional amendment was likely a response to the New Hampshire Supreme Court's refusal to allow floterial districts, which was based on a determination that the deviation of such districts was too high when calculated under the component method of calculation. *Town of Canaan*, 157 N.H. at 797.

The United States Supreme Court also has never required the component method to be used to calculate deviations for a redistricting plan. *See, e.g., Mahan*, 410 U.S. at 319, n. 6 (adopting aggregate method to calculate floterial districts, and rejecting argument that component method of computation for calculating deviation of floterial districts would have resulted in maximum deviation of 23.6% because “[w]e decline to enter this imbroglio of mathematical manipulation and confine our consideration to the figures actually found by the court and used to support its holding of unconstitutionality”); *see also Boyer*, 540 F. Supp. at 628 (explaining that the United States Supreme Court has traditionally applied aggregate method in examining challenged reapportionment plans, and to use component method to compare percentages discussed by United States Supreme Court's decisions would be to compare “apples to oranges”); *Hellar*, 682 P.2d at 572 (applying aggregate method of calculation to floterial

⁶ Court ordered redistricting plans are held to higher standards than those developed by legislative bodies, and they must achieve the goal of population equality with little more than *de minimus* variation. *Chapman v. Meier*, 420 U.S. 1 (1975).

districts for purposes of determining whether requirements under both United States and Idaho Constitutions could be achieved).

For those reasons, the Legislature could have alternatively utilized the aggregate method to calculate the total deviation of floterials, which would have provided more flexibility in meeting its constitutional obligations under the United States and New Hampshire Constitutions with respect to redistricting. A calculation of the deviation using the aggregate method to determine the deviation of a floterial using the excess population of Concord Ward 5 and the Town of Hopkinton demonstrates that the relative deviation is approximately two percent. Add. A1, Table 2. A redistricting plan that utilized the aggregate method would be constitutional, and it would provide Concord Ward 5 the right to elect its own representative.

C. The Unconstitutional Portions Of The Redistricting Plan Are Severable With Respect To Merrimack County

The City of Concord only seeks to have the portions of the redistricting plan which relate to the Concord Ward 5 deemed unconstitutional. The United States Supreme Court has stated that it is permissible for a party to limit a redistricting case to address the constitutionality of a single community. *Brown*, 462 U.S. at 846, n.9 (limiting review of constitutionality of plan to one county, and stating that it was unnecessary to review the entire redistricting plan). The City of Concord recognizes, however, that in the event the Court should find that that RSA 662:5 (2012) is unconstitutional as to the City of Concord, it will be necessary for the Court to declare unconstitutional the plan for all or portions of Merrimack County, because of the need for the Legislature to reapportion several districts.

CONCLUSION

For the foregoing reasons, the City of Concord respectfully requests that the Court declare RSA 662:5 to be unconstitutional, and to require the Legislature to redistrict Concord Ward 5 in a manner that complies with Part II, Article 11 of the New Hampshire Constitution.

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 23, 2012

By: 
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CERTIFICATION

I hereby certify that the foregoing were served by electronic mail on May 23, 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

Calculation of Deviation Tables for Concord Wards..... A1

**TABLE 1: CONCORD WARD 5 AND TOWN OF HOPKINTON
COMPONENT METHOD**

Town	Population	Seats	Ratio Share (Pop÷ Total)	Adjusted Seats	Ideal Population (Seats x 3,291)	Absolute Deviation (Pop – Ideal)	Relative Deviation (Ab÷Ideal)
Ward 5	4,077	1	.42	1.42	4,673	-596	-12.7%
Hopkinton	5,589	1	.578	1.578	5,193	396	7%
<i>Float</i>		1					
Total	9,666	3					

**TABLE 2: CONCORD WARD 5 AND TOWN OF HOPKINTON
AGGREGATE METHOD**

Town	Population	Representatives/Seats
Ward 5	4,077	1
Hopkinton	5,589	1
<i>Float</i>		1
Total	9,666	3

Relative Deviation = (Total Population – Total Ideal Population) ÷ Total Ideal Population

Relative Deviation = (9,666 - 9,873) ÷ 9,873 = .020 or 2%

**TABLE 3: CONCORD WARD 1 AND TOWN OF HOPKINTON
COMPONENT METHOD**

Town	Population	Seats	Ratio Share (Pop÷ Total)	Adjusted Seats	Ideal Population (Seats x 3,291)	Absolute Deviation (Pop – Ideal)	Relative Deviation (Ab÷Ideal)
Ward 1	4,465	1	.44	1.44	4,739	-274	-5.7%
Hopkinton	5,589	1	.578	1.578	5,193	396	7%
<i>Float</i>		1					
Total	10,054						

**TABLE 4: CONCORD WARD 3 AND TOWN OF HOPKINTON
COMPONENT METHOD**

Town	Population	Seats	Ratio Share (Pop÷ Total)	Adjusted Seats	Ideal Population (Seats x 3,291)	Absolute Deviation (Pop – Ideal)	Relative Deviation (Ab÷Ideal)
Ward 1	4,328	1	.43	1.43	4,706	-378	-8%
Hopkinton	5,589	1	.56	1.56	5,133	456	8%
<i>Float</i>		1					
Total	9,917						