THE STATE OF NEW HAMPSHIRE
SUPREME COURT

IN CASE NO. 2012-0338

City of Manchester, et al.
v.
William M. Gardner, in his official capacity as Secretary of State of the State of New Hampshire

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

Hon. Mary Jane Wallner, et al.
v.
William M. Gardner, in his official capacity as Secretary of State of the State of New Hampshire

Town of Gilford, et al.
v.
William M. Gardner, in his official capacity as Secretary of State of the State of New Hampshire

Hon. Marshall E. Quandt, et al.
v.
William M. Gardner, in his official capacity as Secretary of State of New Hampshire

Interlocutory Transfer Pursuant to Rule 9

BRIEF FOR THE INTERVENOR ON THE ISSUE OF STANDING

Respectfully Submitted,

The New Hampshire House of
Representatives, Through Its Speaker

By Its Attorneys,

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ORAL ARGUMENT REQUESTED

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QUESTIONS PRESENTED

A. Whether the petitioners lack standing, thereby depriving the court of subject matter jurisdiction to decide the constitutionality of RSA 662:5.

CONSTITUTIONAL AND STATUTORY AUTHORITY

The text of the relevant constitutional authorities, redistricting statutes, and redistricting maps in the Appendix to the Interlocutory Transfer Statement ("Iapp."). They are:

Part I, Article 1 of the New Hampshire Constitution (Iapp. at 1.)

Part I, Article 2, of the New Hampshire Constitution (Iapp. at 1.)

Part I, Article 11 of the New Hampshire Constitution (Iapp. at 1.)

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RSA 662:5 (2012) (Iapp. 50 – 87.)

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2002 House Plan adopted in *Burling v. Chandler*, 148 N.H. 143 (2002) (Iapp. 89-99.)

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.

STATEMENT OF THE CASE

Section I of the Interlocutory Transfer Statement ("ITS") contains the Statement of the Case.

STATEMENT OF THE FACTS

Section II of the ITS contains the Statement of the Facts. In addition to the facts detailed in that section, it appears that the petitioners in *Quandt v. Gardner* filed an assented-to motion to add petitioners on the morning of May 11, 2012. It does not appear that information relevant to those petitioners made it into the ITS before it was delivered to the Superior Court. Accordingly, the facts relevant to those petitioners are stated below.

The Honorable David Pierce is an individual who resides in Etna, New Hampshire, a village within the town of Hanover, New Hampshire. Hanover has a total population according the 2010 federal census of 11,260. (Iapp. at 19.)

The Honorable Peter Lieshman is an individual who resides in Peterborough, New Hampshire. Peterborough has a total population according to the 2010 federal census of 6,284. (Iapp. at 26.)

Nicholas J. Lavasseur is an individual who resides in Manchester, New Hampshire.

The Honorable Shaun Doherty is an individual who resides in Pelham, New Hampshire.

The Honorable Peter Schmidt is an individual who resides in either Ward 1 or Ward 2 in Dover, New Hampshire.

The City of Dover is a municipality with a total population according the 2010 federal census of 29,987. (Iapp. at 36.) Dover has divided itself into six wards of roughly equal population based on 2010 federal census block data. (Iapp. 42-43.) The total population of each ward is as follows:

1. Dover Ward 1 – 4,991;

2. Dover Ward 2 – 5,074;

3. Dover Ward 3 – 5,028;

4. Dover Ward 4 – 5,134;

5. Dover Ward 5 – 4,773;

6. Dover Ward 6 – 4,987.

Id. at 43.

SUMMARY OF THE ARGUMENT

Part II, Article 11 of the New Hampshire Constitution ("Part II, Article 11"), like all other constitutional redistricting requirements, protects a citizen's right to vote. Specifically, Part II, Article 11 protects in part a citizen's ability to vote for one or more representatives from his or her political subdivision. Political subdivisions do not vote and consequently have no voting rights under Part II, Article 11. Accordingly, Manchester, Concord, Dover, and Gilford do not have standing under RSA 491:22, I to assert that RSA 662:5 is unconstitutional under Part II, Article 11. For similar reasons, Manchester, Concord, Dover, and Gilford do not have standing under RSA 491:22, I to assert that RSA 662:5 is unconstitutional under the Fourteenth Amendment of the United States Constitution or under Part I, Articles 1, 2, and 11 and Part II, Article 9 of the New Hampshire Constitution.

Even assuming that Part II, Article 11 confers rights on political subdivisions, however, those rights would be reserved to towns and wards, not to entire cities. Accordingly, Manchester, Concord, and Dover would not have standing under RSA 491:22, I to assert that RSA 662:5 is unconstitutional under Part II, Article 11.

Even assuming that Part II, Article 11 confers rights on entire cities, neither Manchester nor any of the petitioners who reside in Manchester[1] have standing under RSA 491:22, I to challenge RSA 662:5 as unconstitutional under Part II, Article 11 because RSA 662:5 does not impair or prejudice their ability to vote for one or more representatives from their political subdivisions. Part II, Article 11 requires the Legislature to provide all towns and wards with sufficient population their own district with their own representatives. The excess inhabitants of those districts may then be placed with the excess inhabitants of other districts into floterial

[1]The following petitioners reside in Manchester: (1) Barbara E. Shaw; (2) John R. Rist; (3) Thomas Katsiantonis; (4) Leo Pepino; (5) Steven Vaillancourt; (6) Irene Messier; and (7) Nicholas J. Lavasseur.

districts conforming to constitutional deviations.[2] Regarding Manchester, RSA 662:5, VI gives the inhabitants of every Manchester ward their own district with their own two representatives. It then places the excess inhabitants of those formed districts with the excess inhabitants of other formed districts into floterial districts containing two or three representatives. In this way, Manchester's wards comply fully with the requirements of Part II, Article 11. Accordingly, neither Manchester nor any of the petitioners who reside in Manchester have standing under RSA 491:22, I to assert that RSA 662:5 impairs their ability to vote under Part II, Article 11. For the same reasons, the following additional petitioners do not have standing under RSA 491:22, I to challenge RSA 662:5 as unconstitutional under Part II, Article 11: (1) Marshall E. Quandt; (2) Matthew E. Quandt; (3) Julie E. Brown; (4) James Pilliod; (5) James McKay; (6) Peter Leishman; and (7) Peter Schmidt.

The petitioners also lack standing under RSA 491:22, I to challenge RSA 662:5 as unconstitutional under Part I, Articles 1, 2, and 11 and Part II, Articles 9 and 11 on the basis that those constitutional provisions somehow provide them with a legal right that requires the Legislature to consider community of interest factors when redistricting the State. No community of interest requirement exists in the New Hampshire Constitution and the Court should not read such a requirement into it. Thus, because the New Hampshire Constitution does not provide the petitioners with a legal right that requires the Legislature to consider community of interest factors when redistricting the State, the petitioners do not have standing under RSA 491:22, I to challenge RSA 662:5 as unconstitutional on that basis.

Additionally, none of the petitioners have standing under RSA 491:22, I to challenge the entirety of RSA 662:5 as unconstitutional under Part II, Article 11. Part II, Article 11 protects a

[2] Following this Court's lead, the enacted redistricting plan achieves a total statewide deviation of 9.9% and employs the component method of measuring deviation in floterials. *Burling v. Chandler*, 148 N.H. 143 (2002).

citizen's right to vote. The right to vote is personal in nature. Thus, while the petitioners may challenge RSA 662:5 as unconstitutional as applied to them under Part II, Article 11, they may not challenge RSA 662:5 as unconstitutional because of how it treats the inhabitants of other towns or wards who are not parties to this lawsuit. This case is not a class action and should not be treated as such.

ARGUMENT

I. Many of the petitioners do not have standing because they either lack constitutional rights under the constitutional provisions at issue or cannot demonstrate that RSA 662:5 has impaired or prejudiced their rights.

"[A] party's standing to bring suit 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). In order to demonstrate standing under RSA 491:22, I, the declaratory judgment statute, "a party must claim 'a present legal or equitable right or title,'" *Avery v. N.H. Dept. of Educ.*, 162 N.H. 604, 608 (2011) (quoting RSA 491:22, I), and "'will not be heard to question the validity of a law, or any part of it, unless he shows that some right of his is impaired or prejudiced thereby.'" *Id.* (quoting *Baer v. N.H. Dept. of Educ.*, 160 N.H. 727, 730 (2010)).

The petitioners in the following cases have limited their state constitutional claims in their petitions to claims under Part II, Article 11 of the New Hampshire Constitution (hereinafter "Part II, Article 11"): (1) *City of Concord v. Gardner*; (2) *Town of Gilford v. Gardner*; and (3) *Quandt v. Gardner*. The petitioners in *City of Manchester v. Gardner* have limited their state constitutional claims in their petition to claims under Part I, Articles 1, 2, and 11 and Part II, Articles 9 and 11 of the New Hampshire Constitution.

A. Manchester, Concord, Dover, and Gilford do not have standing to challenge RSA 662:5 as unconstitutional under Part II, Article 11 because Part II, Article 11 does not confer rights on political subdivisions.

Part II, Articles 9 – 24 of the New Hampshire Constitution apply solely to the House of Representatives. Part II, Article 11, by its plain terms, applies solely to the legislative redistricting process for the House of Representatives. In this regard, Part II, Article 11, like every other constitutional redistricting requirement, protects a citizen's right to vote. *See, e.g., In re Below*, 151 N.H. 135, 136 (2004) ("To safeguard the equal voting rights of the New

Hampshire electorate, this court, in 2002, was called upon to establish new districts for the house and senate.") (emphasis added); *id.* at 142 ("Before adjourning on June 10, 1964, the convention successfully amended Part II, Article 11 to allow citizens of small towns and wards full-time representation.") (emphasis added); *Burling v. Chandler*, 148 N.H. 143, 149 (2002) ("In light of the history of the 1964 amendments to Part II, Articles 9 and 11, we hold that these provisions are at least as protective of a citizen's right to vote as the federal constitutional standard of one person, one vote.") (emphasis added).

Specifically, Part II, Article 11 protects a citizen's ability to vote for one or more representatives from the political subdivision in which he or she resides. (*See* Legislative Record ("Leg. Rec."), CHR – 000807-08, 2006 Voters' Guide ("[This amendment] 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.")) Such an interpretation is supported by the legislative history of CACR 41, the 2006 amendment to Part II, Article 11. The purpose underlying CACR 41 was to promote closeness of representation and to make it more likely that a citizen would get to vote for a representative from his or her political subdivision. (*See* Leg. Rec., CHR – 000579-616.) Representative Neal Kurk's introductory remarks before the Senate Committee on Internal Affairs illustrate this point:

> The key thing in New Hampshire government has been the closeness of representatives to their constituents. I represent, before 2004, three thousand eighty-nine people. I may not know every one of them, but they all know and call me. That gives me a closeness that is absolutely essential. People who would not feel comfortable calling Senator Flanders . . . , feel very comfortable in calling their Representative because he is in jeans down at the corner drugstore or the corner supermarket buying stuff and he is out raking his lawn. That is very important; that connection means that people are involved. That is why we have such a high rate of involvement in all sorts of activities, especially volunteer type activities.
>
> So, this bill, in effect, allows the state to resume that practice. . . . .

(Leg. Rec., CHR-000591-92.)

Political subdivisions do not vote. *See Reynolds v. Sims*, 377 U.S. 533, 527 (1964) ("Legislators are elected by voters, not farms or cities or economic interests."); *id.* at 537-38 ("Citizens, not history or economic interests cast votes. . . . Again, people, not land or trees or pastures, vote."). Consequently, political subdivisions do not have rights under Part II, Article 11 or any other state constitutional redistricting requirement. Such a conclusion is consistent with the general rule in New Hampshire that municipalities do not have standing to bring challenges against the State based upon constitutional provisions that protect individuals. *See Appeal of Town of Exeter*, 126 N.H. 685, 688 (1985) (holding that town lacked standing to bring claims against the State under the federal Equal Protection Clause and the First Amendment as well as under Part I, Article 22 of the New Hampshire Constitution).

Political subdivisions exist to carry out the will of the State; they do not exist to interfere with the administration of state government. *See Bd. Of Water Comm'rs v. Mooney*, 139 N.H. 621, 625 (1995) ("Municipalities have only powers [that] are expressly granted to them by the legislature and such as are necessarily implied or incidental thereto.") (internal quotations omitted); *Opinion of the Justices (Weirs Beach)*, 134 N.H. 711, 715 (1991) ("Municipalities in the State of New Hampshire are divisions of the State, and they derive their authority from the legislature.").

Because of this, it has also generally been held that a political subdivision does not have standing to challenge a statute that directs it to perform a duty as unconstitutional. *City of Greenwood Village v. Petitioners for the Proposed City of Centennial*, 3 P.3d 427, 437 (Colo. 2000). "The rule barring political subdivisions of the state from challenging state statutes directing the performance of their duties exists so that courts do not unnecessarily intrude into

matters which are more properly committed to resolution in another branch of government." *Id.* at 437 (internal quotation omitted). The rule is based on the fact that "political subdivisions of the state exist only for the convenient administration of the state government, and are created to carry out the will of the state." *Id.* (internal quotation omitted). RSA 662:5 directs political subdivisions to establish certain House districts. Political subdivisions therefore do not have standing under RSA 491:22, I to challenge RSA 662:5 as unconstitutional under Part II, Article 11.

Accordingly, because political subdivisions do not possess rights under Part II, Article 11, Manchester, Concord, Dover, and Gilford do not have standing under RSA 491:22, I to challenge RSA 662:5 as unconstitutional under Part II, Article 11.

1. Even assuming political subdivisions have rights under Part II, Article 11, Manchester, Concord, and Dover lack standing because Part II, Article 11 speaks only in terms of towns and wards.

As stated earlier, in order to demonstrate standing to challenge the validity of a law under RSA 491:22, I, a petitioner must establish "that some right of his is impaired or prejudiced" thereby. *Avery*, 162 N.H. at 608. Part II, Article 11 seeks to ensure that the inhabitants of towns and wards receive their own district with their own representatives if they have sufficient population to so entitle them. However, to the extent Part II, Article 11 confers rights on political subdivisions, only towns and wards would hold those rights, not entire cities. N.H. Const. Pt. II, Art. 11 ("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.") (emphasis added). Allowing an entire city to assert the rights of its wards is tantamount to third-party standing. *See Powers v. Ohio*, 499 U.S. 400, 410-11 (1991). The plain language of RSA 491:22, I does not appear to permit third-party standing, and, in any event, no facts exist in the

undisputed record that would justify third-party standing in these cases. *See id.* (holding that in order to demonstrate third-party standing a plaintiff must demonstrate (1) an injury-in-fact, (2) a close relation to the third-party, and (3) some hindrance to the third party's ability to protect his or her own interests).

Thus, even assuming towns and wards have rights under Part II, Article 11, Manchester, Concord, and Dover would lack standing under RSA 491:22, I to assert those rights on behalf of their wards.

B. Manchester, Concord, Dover, and Gilford do not have standing to assert the equal protection and voting rights of their inhabitants.

"The general rule in New Hampshire is that a party has standing to raise a constitutional issue only when the party's own rights have been or will be directly affected." *Hughes*, 152 N.H. at 35. As stated earlier, the right to vote is personal in nature and reserved to New Hampshire's citizens, not to its political subdivisions. *See, e.g.*, *Reynolds*, 377 U.S. at 561 n.39 ("As stated by Mr. Justice Douglas, the rights sought to be vindicated in a suit challenging an apportionment scheme are 'personal and individual.'") (quoting *South v. Peters*, 339 U.S. 276, 280 (1950)).

Any attempt by Manchester, Concord, Dover, and Gilford to assert the equal protection and voting rights of their citizens is tantamount to third-party standing. Third-party standing is prohibited except in rare and unusual circumstances not applicable here. *See Powers*, 499 U.S. at 410-11. Moreover, as stated earlier, the plain language of RSA 491:22, I does not appear to permit third-party standing, and no facts exist in the record that would support a finding of third-party standing in these cases. *See id.* Accordingly, Manchester, Concord, Dover, and Gilford lack standing to assert the equal protection and voting rights of their citizens under the federal and state constitutions. *See Appeal of Exeter*, 126 N.H. at 688.

C. The petitioners lack standing to challenge RSA 662:5 as unconstitutional on the basis that the New Hampshire Constitution confers on them a legal right that requires the Legislature to consider community of interest factors.

In order to demonstrate standing under RSA 491:22, I, "a party must claim 'a present legal or equitable right or title.'" *Avery*, 162 N.H. at 608 (quoting RSA 491:22, I). The Petitioners in *City of Manchester v. Gardner* possess no legal right under Part I, Articles 1, 2, and 11 or Part II, Articles 9 and 11 that requires the Legislature to consider community of interest factors during the redistricting process. No such community of interest requirement exists in the New Hampshire Constitution and one should not be read into it by this Court. *See, e.g., In re Senate Joint Resolution of Legislative Apportionment 1176*, 2012 Fla. LEXIS 507, *112 (Fla.) ("If we were to include 'communities of interest' within the term 'compactness,' the Court would be adding words to the constitution that were not put there by the voters of this state.").

In order to keep districts small and to accord representation to the inhabitants of individual political subdivisions to the greatest extent possible, Part II, Article 11 specifically contemplates that the Legislature has the power and authority to combine towns and city wards into multi-member and floterial districts. This Court recognized as much with regard to multi-member districts in 2002 when it combined the cities of Berlin, Laconia, Claremont, Franklin, Rochester, Somersworth, and Portsmouth into multi-member districts with neighboring towns and cities in the *Burling* case. *See* 148 N.H. at 152 ("While the New Hampshire Constitution specifically contemplates the use of multi-member districts, *see* N.H. Const. pt. II, art. 11, it is silent as to floterials."); (Interlocutory Transfer Statement Appendix ("Iapp.") at 89-99.)

Nonetheless, the petitioners would have this Court read a community of interest right into the New Hampshire Constitution that would restrain the Legislature from creating such districts. Such a right does not exist in the New Hampshire Constitution and should be rejected as

unworkable. *See In re Legislative Redistricting of the State*, 805 A.2d 292, 322 (Md. 2002) (declining to read into the Maryland Constitution a community of interest requirement and holding such a concept "nebulous and unworkable"). Just as the petitioners in the *City of Manchester v. Gardner* can allege that Manchester Wards 8 and 9 do not share a community of interest with Litchfield so too could the petitioners in the next redistricting case argue that Manchester Ward 3 (Downtown) does not share a community of interest with Manchester Ward 1 (North End) and that neither of them have a community of interest with Manchester Ward 6 (rural/suburban). Such a requirement is unworkable, lacks justiciable standards, would subject an enacted redistricting plan to endless attack, and would require this Court to act as a super-legislature in deciding what political subdivisions may or may not be joined together into an electoral district. *See id.* (explaining that the Maryland Supreme Court had rejected the a communities of interest requirement because "such communities, 'involving concentrations of people sharing common interests,' are virtually unlimited and admit of no reasonable standard.") (quoting *In re Legislative Districting*, 475 A.2d 428, 445-46 (Md. 1984)).

Thus, for the above reasons, the Court should hold that none of the petitioners have a legal right under the New Hampshire Constitution to insist that the Legislature take into consideration community of interest factors during the redistricting process. All of the petitioners, therefore, lack standing under RSA 491:22 to challenge RSA 662:5 as unconstitutional on that basis.

D. Many of the petitioners in this case do not have standing to challenge RSA 662:5 as unconstitutional under Part II, Article 11 because RSA 662:5 has not impaired or prejudiced their rights.

Under Part II, Article 11, "[w]hen 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 [must be given] its own district of one or more

representative seats," unless "[t]he apportionment [will] deny any other town or ward membership in one non-floterial representative district." "The excess number of inhabitants of [a] district may [then] be added to the excess number of inhabitants of other districts to form at-large or floterial districts conforming to acceptable deviations." N.H. Const. Pt. II, Art. 11.

1. Manchester and the petitioners who reside in Manchester do not have standing to challenge RSA 662:5 as unconstitutional.

In this case, the following petitioners from Manchester lack standing under RSA 491:22, I to challenge RSA 662:5 as unconstitutional under Part II, Article 11: (1) the City of Manchester (assuming *arguendo* that Part II, Article 11 protects it); (2) Barbara E. Shaw; (3) John R. Rist; (4) Thomas Katsiantonis; (5) Leo Pepino; (6) Steven Vaillancourt; (7) Irene Messier; and (8) Nicholas J. Lavasseur. (*See* Interlocutory Transfer Statement ("ITS") at ¶¶3-5, 9, 36, 38-39.) The above petitioners lack standing to assert these claims because RSA 662:5 has not impaired or prejudiced their ability to vote for one or more representatives from their political subdivisions.

Consistent with Part II, Article 11, RSA 662:5, VI gives the inhabitants of each Manchester ward their own district with their own two representatives. (Iapp. at 50-68, 76.) It then places the excess inhabitants of each ward into the following floterial districts:

> (a) Manchester Wards 1, 2, and 3 – two representatives (Hillsborough County, District No. 42);
>
> (b) Manchester Wards 4, 5, 6, and 7 – three representatives (Hillsborough County, District No. 43);
>
> (c) Manchester Wards 8, 9, and Litchfield – two representatives (Hillsborough County, District No. 44); and
>
> (d) Manchester Wards 10, 11, and 12 – two representatives (Hillsborough County, District No. 45).

Id. Based on these undisputed facts, it is apparent that Manchester and the petitioners who reside in Manchester have the ability to vote for and elect representatives from the political subdivisions in which they reside in accordance with Part II, Article 11.

Nonetheless, some of these petitioners appear to argue that Part II, Article 11, or some other more nebulous requirement not expressly enumerated in Part II, Article 11, forbids the Legislature from combining towns and city wards into floterial districts with each other.

Nothing in Part II, Article 11 forbids the Legislature from putting the excess inhabitants of city wards into floterial districts with the excess inhabitants of towns. Such a requirement does not exist in the New Hampshire Constitution and should not be read into it by the Court. Rather, the plain language of Part II, Article 11 expressly contemplates that towns, wards, and unincorporated places may be formed into single-member and multi-member districts and that the "excess . . . inhabitants of [formed] district[s] may be added to the excess . . . inhabitants of other [formed] districts to create floterial districts." (emphasis added). Part II, Article 11 does not differentiate between town districts and city ward districts.

In fact, in 2002, this Court recognized that cities and towns could be joined into multi-member districts when it combined the cities of Berlin, Laconia, Claremont, Franklin, Rochester, Somersworth, and Portsmouth into multi-member districts with neighboring towns and cities in the *Burling* case. *See* 143 N.H. at 149 (holding that "the reference to 'those towns, wards or unincorporated places' was not intended to limit the legislature's discretion as to how to form multi-member districts.") (quoting JOURNAL OF CONSTITUTIONAL CONVENTION 231 (1964)); (Iapp. at 89-99.) The previous House redistricting plan, RSA 662:5 (2004), also joined the cities of Berlin, Somersworth, Claremont, Portsmouth, and Franklin into multi-member districts with neighboring towns. (*See* Iapp. at 100-06.)

In this case, all of Manchester's wards comply fully with Part II, Article 11's requirements. The inhabitants of each ward have received their own district with their own two representatives. The excess inhabitants of each formed district have been placed with the excess inhabitants of other formed districts into floterial districts conforming to constitutional deviations. Thus, because all of the House districts comprising the City of Manchester comply fully with Part II, Article 11's requirements, Manchester and the petitioners who reside there lack standing under RSA 491:22, I to challenge RSA 662:5 as unconstitutional under Part II, Article 11.

2. Petitioners Marshall E. Quandt, Matthew E. Quandt, Julie E. Brown, James Pilliod, James McKay, Peter Leishman, and Peter Schmidt also do not have standing to challenge RSA 662:5 as unconstitutional.

i. Marshall E. Quandt and Matthew E. Quandt.

Petitioners Marshall E. Quandt and Matthew E. Quandt reside in Exeter, New Hampshire. (ITS at ¶¶33-34.) RSA 662:5, VIII gives Exeter its own district with its own four representatives (Rockingham County, District No. 18). (Iapp. at 82.) It then places the excess inhabitants of Exeter with the excess inhabitants of other formed districts into a floterial district containing one representative (Rockingham County, District No. 36). *Id.*

Based on these undisputed facts, it is apparent that Exeter complies fully with Part II, Article 11's requirements. The inhabitants of Exeter have received their own district with their own four representatives. The excess inhabitants of Exeter have been placed with the excess inhabitants of other formed districts into a floterial district containing one representative. Thus, because the House districts in which petitioners Marshall and Matthew Quandt reside comply fully with Part II, Article 11's requirements, Marshall and Matthew Quandt lack standing under RSA 491:22, I to challenge RSA 662:5 as unconstitutional under Part II, Article 11.

ii. Julie E. Brown.

Petitioner Julie E. Brown resides in Rochester, New Hampshire. (ITS at ¶37.) The City of Rochester is divided into six wards of roughly equal population based on 2010 federal census block data. *Id.* RSA 662:5, IX gives the inhabitants of each Rochester ward their own district with their own representative (Strafford County, District Nos. 7-12). (Iapp. at 84.) It then places the excess inhabitants of each ward into the following floterial districts:

(a) Rochester Wards 1 and 6 – one representative (Strafford County, District No. 22);

(b) Rochester Wards 2 and 3 – one representative (Strafford County, District No. 23);

(c) Rochester Wards 4 and 5 – one representative (Strafford County, District No. 24).

Id.

In this case, all of Rochester's House districts comply fully with Part II, Article 11's requirements. The inhabitants of each Rochester ward have received their own district with their own representative. The excess inhabitants of each formed district have been placed with the excess inhabitants of other formed districts into floterial districts containing one representative. Thus, because the House districts in which Petitioner Brown resides comply fully with Part II, Article 11's requirements, Petitioner Brown lacks standing under RSA 491:22, I to challenge RSA 662:5 as unconstitutional under Part II, Article 11.

iii. James Pilliod.

Petitioner James Pilliod resides in Belmont, New Hampshire. (ITS at ¶ 40.) RSA 662:5, I gives the inhabitants of Belmont their own district with their own two representatives (Belknap County, District No. 6). (Iapp. at 69.) It then places the excess inhabitants of that district with the excess inhabitants of another multi-member district into a floterial district containing one representative (Belknap County, District No. 9). *Id.*

Belmont's House districts also comply fully with Part II, Article 11's requirements. The inhabitants of Belmont have received their own district with their own two representatives. The excess inhabitants of Belmont have been combined with the excess inhabitants of another formed district into a floterial district containing one representative. Thus, because the House districts in which Petitioner Pilliod resides comply fully with Part II, Article 11's requirements, Petitioner Pilliod lacks standing under RSA 491:22, I to challenge RSA 662:5 as unconstitutional under Part II, Article 11.

iv. James McKay.

Petitioner James McKay resides in Ward 4 in Concord, New Hampshire. (ITS at ¶41.) RSA 662:5, VII gives the inhabitants of Concord Ward 4 their own district with their own representative (Merrimack County, District No. 14). (Iapp. at 79.) It then places the excess inhabitants of that district with the excess inhabitants of other single-member districts into a floterial district containing two representatives (Merrimack County, District No. 27). *Id.*

Concord Ward 4's House districts comply fully with Part II, Article 11's requirements. The inhabitants of Concord Ward 4 have received their own district with their own representative. The excess inhabitants of Concord Ward 4 have been combined with the excess inhabitants of other single-member districts into a floterial district containing two representatives. Thus, because the House districts in which Petitioner McKay resides comply fully Part II, Article 11's requirements, Petitioner McKay lacks standing under RSA 491:22, I to challenge RSA 662:5 as unconstitutional under Part II, Article 11

v. Peter Leishman.

Petitioner Peter Leishman resides in Peterborough, New Hampshire. RSA 662:5, VI gives the inhabitants of Peterborough their own district with their own two representatives. (Iapp. at 76.) Peterborough has no excess population and, as such, its inhabitants are not part of

a floterial district. *Id.* In this way, Peterborough's House district complies fully with Part II, Article 11's requirements. Accordingly, Petitioner Leishman lacks standing under RSA 491:22, I to challenge RSA 662:5 as unconstitutional under Part II, Article 11.

vi. Peter Schmidt.

Petitioner Peter Schmidt represents Dover Wards 1 and 2 in the New Hampshire House of Representatives and therefore resides in one of those wards. RSA 662:5, IX gives the inhabitants of Dover Wards 1 and 2 their own district with their own representative. (Iapp. at 85.) It then places the excess inhabitants of Ward 1 with the excess inhabitants of Ward 2 into a floterial district containing one representative. In this way, Dover Wards 1 and 2 comply fully with Part II, Article 11's requirements. Accordingly, Petitioner Schmidt lacks standing under RSA 491:22, I to challenge RSA 662:5 as unconstitutional under Part II, Article 11

E. All of the petitioners lack standing to challenge RSA 662:5 as unconstitutional in its entirety under Part II, Article 11.

All of the petitioners lack standing under RSA 491:22, I to challenge RSA 662:5 as unconstitutional in its entirety under Part II, Article 11. The United States Supreme Court in *United States v. Hays*, 515 U.S. 737 (1995) has addressed whether and under what circumstances a plaintiff who does not reside in an affected legislative district may challenge another legislative district as unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. The plaintiffs in *Hays* directed their Equal Protection challenge at District 4 of the redistricting plan at issue, but were residents of District 5. *Id.* at 743. The Supreme Court held that the plaintiffs did not have standing to challenge District 5 as unconstitutional under the Fourteenth Amendment because, in an equal protection claim, only "those persons who are personally denied equal treatment by the challenged discriminatory conduct," suffer an injury-in-fact sufficient to confer standing. *Id.* at 743-44 (internal quotation omitted). The Supreme Court

reasoned that a plaintiff must show some injury-in-fact, *id.* at 745, otherwise a plaintiff "would be asserting only a generalized grievance against governmental conduct of which he or she does not approve." *Id.* At least one state court has extended the Supreme Court's standing analysis in *Hays* to compactness and contiguity challenges under its state constitution. *See Wilkins v. West*, 571 S.E.2d 100, 107 (Va. 2002).

As stated earlier, Part II, Article 11 protects a citizen's right to vote. The right to vote is personal in nature and reserved to each individual citizen. Thus, while the petitioners may challenge RSA 662:5 as unconstitutional as applied to them under Part II, Article 11, they may not challenge RSA 662:5 as unconstitutional because of how it treats the inhabitants of other towns or wards who are not parties to this lawsuit. Such a challenge would be tantamount to third-party standing, would violate the general rule that individuals do not have standing to assert generalized grievances against the government, and would essentially convert this case into a class action. It would be manifestly unfair to allow a single state representative who is unhappy generally with the entire redistricting plan to attempt to overturn the plan by asserting the equal protection or voting rights of third-parties who did not choose to file an action and may prefer the enacted plan to any alternatives. *See Singleton v. Wulff*, 428 U.S. 106, 113-14 (1976) (explaining the justification for the third-party standing rule in part as follows: "First, the courts should not adjudicate [constitutional] rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not.").

Accordingly, the petitioners lack standing under RSA 491:22, I to assert that RSA 662:5 is unconstitutional in its entirety under Part II, Article 11.

CONCLUSION

The petitioners in *City of Manchester v. Gardner* lack standing under RSA 491:22, I to assert all of their claims except to the extent that this Court is satisfied that those petitioners who reside in Manchester have asserted in their petition that RSA 662:5 violates the predominant federal-state requirement of one person, one vote.

The petitioner in *City of Concord v. Gardner* lacks standing under RSA 491:22, I to assert that RSA 662:5 is unconstitutional under Part II, Article 11. Accordingly, the petition in that case must be dismissed.

The following petitioner in *Wallner v. Gardner* lacks standing under RSA 491:22, I to assert that RSA 662:5 is unconstitutional under Part II, Article 11: Thomas Katsiantonis. Accordingly, because Thomas Katsiantonis' only claim in this case is under Part II, Article 11, he must be dismissed.

The following petitioner in *Town of Gilford v. Gardner* lacks standing under RSA 491:22, I to assert Part II, Article 11 claims: the Town of Gilford. Accordingly, because Gilford's only claims arise under Part II, Article 11, Gilford must be dismissed.

The following petitioners in *Quandt v. Gardner* lack standing under RSA 491:22, I to assert Part II, Article 11 claims: (1) Marshall E. Quandt; (2) Matthew E. Quandt; (3) Leo Pepino; (4) Julie E. Brown; (5) Steven Vaillancourt; (6) Irene Messier; (7) James Pilliod; (8) James McKay; (9) Peter Leishman; (10) Peter Schmidt; and (11) the City of Dover. Accordingly, because these petitioners' only claims arise under Part II, Article 11, these petitioners must be dismissed.

All of the above petitioners and the remaining petitioners lack standing under RSA 491:22, I to challenge RSA 662:5 as unconstitutional on the ground that the New Hampshire

Constitution provides them with a legal right to insist that the Legislature take into account community of interest factors during the redistricting process.

All of the above petitioners and the remaining petitioners also lack standing under RSA 491:22 to challenge RSA 662:5 as unconstitutional in its entirety. Accordingly, to the extent the remaining petitioners challenge RSA 662:5 as unconstitutional in its entirety, those claims must be dismissed.

REQUEST FOR ORAL ARGUMENT

The Intervenor respectfully requests oral argument to be presented by David A. Vicinanzo.

Respectfully Submitted,

The New Hampshire House of
Representatives, Through Its Speaker

By Its Attorneys,
NIXON PEABODY LLP

Date: May 17, 2012

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CERTIFICATE OF SERVICE

I hereby certify that a copy of forgoing *Brief for the Intervenor* was served on this 17th day of May, 2012, by electronic mail to Jason B. Dennis, Esquire; Tony F. Soltani, Esquire; Jason M. Surdukowski, Esquire; Martin P. Honigberg, Esquire; Danielle L. Pacik, Esquire; Thomas J. Donovan, Esquire; Peter V. Millham, Esquire; Matthew D. Huot, Esquire; Anne M. Edwards, Esquire; Stephen G. LaBonte, Esquire; and Richard J. Lehmann, Esquire; counsel of record.

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