

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Docket 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 ATTORNEY GENERAL

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ISSUES PRESENTED

- A. Whether RSA 662:5 is unconstitutional under the Federal or State Constitutions?
- B. If part of RSA 662:5 is determined to be unconstitutional, whether that part is severable from the remaining parts of the statute?

STATEMENT OF THE CASE

This matter comes before this Court by interlocutory transfer without a ruling pursuant to Supreme Court Rule 9. On March 28, 2012, the New Hampshire Legislature enacted RSA 662:5 (2012) defining the state representative districts for the upcoming 2012 general election. As a result, five separate actions have been filed and consolidated against Secretary of State William M. Gardner, in his official capacity, challenging the constitutionality of the statute. The actions seek a declaratory judgment and injunctive relief enjoining the Secretary of State from implementing the statute as currently enacted.¹

¹ The Secretary of State is a named party to this action solely in his official capacity. He takes no specific position with respect to the constitutionality of RSA 662:5 (2012). As these actions challenge the constitutionality of a state law, the Attorney General is defending that law under his common law authority and Supreme Court Rule 31.

STATEMENT OF THE FACTS

The Attorney General incorporates the Agreed Statement of Facts appearing in section II of the Interlocutory Transfer Statement.

SUMMARY OF THE ARGUMENT

One voter, one vote is the primary rule with regard to satisfying the constitutional mandate of substantial equality with respect to state legislative representation for all citizens. The Legislature is the governing body best situated to enact a state legislative apportionment plan based on equality. The Legislature may use single member, multi-member and flatorial districts in order to see that each person's vote is as near equal as possible.

The New Hampshire Constitution provides that the House of Representatives be founded on equality and maintains no less than three hundred and seventy-five or no more than four hundred representative seats. The state Constitution further provides that towns and wards with populations within a reasonable deviation of the ideal population be apportioned their own districts with one or more representatives. In drafting RSA 662:5, the Legislature adopted a ten percent deviation guideline as established by federal common law apportioning individual districts to the various towns and wards.

In 2006, Part II, Article 11 of the New Hampshire Constitution was amended with the purpose to provide as many single town districts as possible, while not allowing any town to be represented by a flatorial district. As currently enacted, RSA 662:5 (2012) provides for two hundred and four house districts, whereas the previously enacted statute provided one hundred and three house districts. The Legislature maintained the constitutionally required number of representative seats and assured that the boundaries of the towns, wards and unincorporated places were preserved and contiguous. The Legislature balanced all of the constitutional and common law requirements in enacting RSA 662:5. Presuming the statute is constitutional and considering all of the agreed upon facts, Petitioners have failed to meet their burden of proof and RSA 662:5 should be held to be constitutional.

ARGUMENT

I. RSA 662:5 (2012) IS CONSTITUTIONAL PURSUANT TO THE UNITED STATES AND NEW HAMPSHIRE CONSTITUTIONS.

RSA 662:5 (2012) is constitutional under the United States and New Hampshire Constitutions. RSA 662:5 is presumed constitutional and it will not be declared invalid except upon inescapable grounds. *See N.H. Assoc. of Counties v. State of New Hampshire*, 158 N.H. 284, 288 (2009). This Court will not hold a statute to be unconstitutional unless a clear and substantial conflict exists between it and the Constitution. *Id.* Further, it is this Court's role to interpret the Constitution and resolve the disputes arising under it. *Petition of Below*, 151 N.H. 135, 139 (2004). The Court is the final arbiter of the state's constitutional disputes. *Id.* When interpreting a constitutional provision, the Court looks to its purpose and intent, giving the words in question the meaning they must be presumed to have had to the electorate when the vote was cast. *Id.* The Court reviews the history of the Constitution and its amendments thereby making it the Court's "duty ...to place itself as nearly as possible in the situation of the parties at the time the instrument was made, [so] that it may gather their intention from the language used, viewed in light of the surrounding circumstances." *Id.*, quoting *Warburton v. Thomas*, 136 N.H. 383, 387 (1992). "In reviewing a state legislative reapportionment case, this Court must of necessity consider the challenged scheme as a whole in determining whether the ... state apportionment plan, in its entirety meets ... constitutional requisites." *Maryland Committee for Fair Representation v. Tawes*, 377 U.S. 656, 673 (1964).

"[T]here can be room but for a single constitutional rule – one voter, one vote." *Below v. Gardner*, 148 N.H. 1, 8 (2002) (citing *Gray v. Sanders*, 372 U.S. 368, 382 (1963)). "The equal protection clauses of the New Hampshire and Federal Constitutions 'demand no less than

substantially equal state legislative representation for all citizens, of all places as well as all races.” *Petition of Below*, 151 N.H. 135, 136 (2004). “Reapportionment is primarily a matter of legislative consideration in determination.’ (Citation omitted). A state legislature is by far the best situated to identify and then reconcile traditional state policies with the constitutionally mandated framework of substantial population equality.” *Below v. Gardner*, 148 N.H. 1, 5 (2002); *see also* New Hampshire Constitution Part II, Article 9-a. Therefore, the Legislature is constitutionally required to apportion legislative districts so that each person’s vote is as near equal as possible. *See Below*, 148 N.H. at 8. The Legislature “need not achieve absolute equality with respect to ...legislative districts.” *Id.* Single member, multimember and floterial districts may be used to accomplish the overriding objection of substantial equality of the population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen. *See Reynolds v. Simms*, 377 U.S. 533, 579 (1964).

The New Hampshire Constitution Part II, Article 9 provides in part that:

the legislature of this State, a House of Representatives ... founded on equality, and the 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.

The New Hampshire Constitution Part II, Article 11 further provides that:

[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 shall have its own district of one or more representative seats. The apportionment shall not deny any other town or ward of membership in one non floterial representative district. When any town, ward, or unincorporated places 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 a district may be added to the excess of inhabitants of other districts to form at-large or flotal districts, conforming to acceptable deviations.

In 2006, Part II, Article 11 of the New Hampshire Constitution was amended with the purpose to provide as many single town districts as possible while not allowing any town to be represented solely in a flotal district. Record at CHR-000579. In order to accomplish this, the amendment provided every town or ward, within a reasonable deviation of the ideal population, the respective number of representative seats based on its actual population, provided it would not deny another town or ward membership in one non-flotal district. Record at CHR-000581, 000513-14. As currently enacted, RSA 662:5 (2012) provides for 204 House districts.

Interlocutory Transfer Statement, ¶ 61. As previously enacted, RSA 662:5 provided for 103 House districts. *See* Appendix to the Interlocutory Transfer Statement, pp. 100-106. In forming the 204 new districts, the boundaries of towns, wards, and unincorporated places were preserved and remained contiguous. *Id.*, pp. 69-87.

When reviewing the constitutional history of the 2006 amendment, the Court must consider the phrase *reasonable deviation* used in the amended language in light of the constitutional mandate of equality provided by the United States Constitution Fourteenth Amendment and the New Hampshire Constitution Part II, Article 9. Considering the language above, a town or ward is only granted its own representative district under Part II, Article 11 of the New Hampshire Constitution if its actual population falls within a reasonable deviation of the ideal population. It has been established “as a general matter that an apportionment plan with a maximum population deviation under 10% falls within [a] category of minor deviations.” *Brown*

v. Thomson, 462 U.S. 835, 842 (1983). “A plan with larger disparities in population, however, creates a *prima facie* case of discrimination and therefore must be justified. *Id.* at 842-43. Along with the constitutional mandate of one person, one vote, the Legislature must maintain the constitutionally required number of representative seats and assure that the boundaries of the towns, wards and unincorporated places are preserved and contiguous unless otherwise requested by the town, ward, or place. *See* N.H. Const. Pt. II, Art. 9 and 11.

As currently enacted, RSA 662:5 (2012) provides for 400 representative seats. *See* Record at CHR-000943. The 2010 decennial census identifies New Hampshire as having a population of 1,316,470, resulting in, as the Legislature calculated, the ideal population per representative seat being 3,291. Interlocutory Transfer Statement, ¶ 56. In constructing RSA 662:5 (2012), the House Special Committee on Redistricting (“the Committee”) considered its obligation to conform to both the United States and New Hampshire Constitutions. *See* Record at 000005. The Committee endeavored to preserve the one person, one vote requirement of the Federal Constitution, while implementing the single town/ward districting system prescribed by Part II, Art. 11 of the State Constitution. *See Id.* The Committee undertook this task by using the less than 10% deviation guideline as established by federal common law. *See Id.*; *see also Brown v. Thomson*, 462 U.S. 835, 842 (1983). As currently enacted, RSA 662:5 (2012), satisfies the federal common law guideline with a statewide range of deviation of 9.9%. Interlocutory Transfer Statement, ¶ 56. As a result, RSA 662:5 (2012) is constitutional and the petitions requesting that it be declared unconstitutional should be denied.

II. THE PROVISIONS OF RSA 662:5 (2012) ARE SEVERABLE BY COUNTY.

Regarding severability, if any provisions of RSA 662:5 (2012) are determined to be unconstitutional, those provisions are severable by county. With respect to this issue, the Attorney General concurs with the arguments in the House's brief.

CONCLUSION

The Legislature balanced all of the constitutional and common law requirements in enacting RSA 662:5 (2012). Presuming the statute is constitutional and considering all of the agreed upon facts, Petitioners have failed to meet their burden of proof and their petitions should be denied. Based on the arguments presented in this brief, the Attorney General respectfully requests that this honorable Court affirm the presumption of constitutionality and find RSA 662:5 (2012) constitutional.


ORAL ARGUMENT

The Attorney General yields his time for oral argument to the Intervenor.

Respectfully submitted,

MICHAEL A. DELANEY
ATTORNEY GENERAL

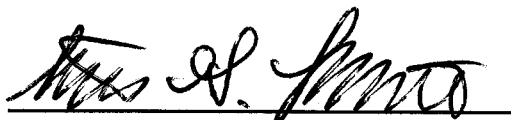
By his attorneys,

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CERTIFICATION

I hereby certify that two (2) copies of the foregoing were mailed this day, postage prepaid, to: Thomas J. Donovan, Esquire, Richard J. Lehmann, Esquire, David A. Vicinanzo, Esquire/Anthony J. Galdieri, Esquire, Peter V. Millham, Esquire, Danielle L. Pacik, Esquire, Martin P. Honigberg, Esquire/Jay Surdukowski, Esquire, Tony F. Soltani, Esquire/Jason B. Dennis, Esquire, and Allan Krans, Esquire.



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Dated: May 23, 2012

