State of New Hampshire
Supreme Court

No. 2012-0338

City of Manchester & a. v. Secretary of State

City of Concord v. Secretary of State

Mary Jane Wallner & a. v. Secretary of State

Town of Gilford & a. v. Secretary of State

Marshall Quandt & a. v. Secretary of State

On Interlocutory Transfer

BRIEF OF *AMICUS CURIAE*
City of Dover
Town of Meredith

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PRELIMINARY STATEMENTS

Amici hereby incorporates by reference the following preliminary statements in the Petitioner's Brief in Support of Interlocutory Transfer: the Question presented and the Statement of the Case and Facts.

STATEMENT OF INTEREST OF *AMICI*

The Interest of Political Subdivisions Generally

Political subdivisions are responsible for executing the functions delegated to them by Statute. On that matter, Petitioners and Respondents appear to agree. However political subdivisions cannot perform electoral functions that are unconstitutional, and therefore have an interest in the outcome of this case. In the Rhode Island Federal District Court case Fahey v. Darigan, it was acknowledged that in "those rare instances where [political subdivisions] perform public electoral functions (e.g., the nomination of candidates to fill vacancies or to run in special elections, or the giving or (sic) consent to candidacies by non-members of the party) . . . [the subdivision] is required by the Equal Protection Clause to apply the 'one-man, one-vote' principle, since in such cases it is unquestionably playing an integral part in the state scheme of public elections." Fahey v. Darigan, 405 F.Supp. 1386, 1392 (D.R.I. 1975) (holding that an entity created by statute, in this case a county party committee, must be likely to perform an electoral function to be subject to the one-person, one-vote standard). RSA 49-B and 49-C confer the responsibilities on incorporated political subdivisions to ensure the basic fairness of elections.

Despite this responsibility, Respondents would deny standing (and implicitly an "interest") to practically everyone in this case, except the Speaker of the House and the State Legislature. Respondents' first argument is that political subdivisions "exist to serve the State and to help the State administer and implement its laws." Manchester v. Gardner, "Memorandum of Law," --- N.H. --- (Hillsborough North Super. Ct., May 2, 2012), at 1. But Respondents apparently deny, without addressing the issue directly,

that political subdivisions have an interest in seeing that the laws they administer are not unconstitutional and do not deprive their residents of fundamental rights.

Similarly, Respondent would deny that political subdivisions have an interest in the outcome of this litigation because they are not people and cannot vote. E.g., "The right to vote is personal in nature." Id. Cities and towns from across New Hampshire will readily acknowledge that they are not people, but nevertheless have filed as Petitioners or *Amici* in this matter because they disagree with such false logic. The right to vote is distinct from the obligation to protect voters. The cities involved in this case cannot vote in the same fashion as individual citizens, but that alone does not obviate their statutory obligation to protect the voting interests of their residents.

In many cases, the ways in which political subdivisions are obligated to protect the voters are spelled out specifically by statute. In other cases, "catch-all" provisions have been enacted to ensure that cities and towns can do what is customary to protect the interests of their residents. In the case of RSA 49-C:15, cities are granted "all the powers. . . and duties. . . conferred or imposed upon city councils in convention, city councils voting concurrently, or boards of mayor and aldermen acting separately, by RSA 44 through RSA 48 or other general law now in force or later enacted, or upon the existing city councils or board of mayor and aldermen of the city by special laws not hereby repealed." *Amicus* contends that one of the powers delegated by convention to cities is determining whether the legislative voting districts within their boundaries are administered in a Constitutionally acceptable manner. In this instance, the City Council of Dover voted to move forward with this *Amicus* brief in the hopes the New Hampshire Supreme Court would clarify the Constitutional requirements of RSA 662:5, or the "redistricting statute" generally.

The Respondents go on to deny cities their interest in this litigation because Part II, Article 11 only protects towns. However, the intent of a Constitutional provision and any disputes arising under it are ultimately arbitrated by the New Hampshire Supreme Court. Whether Part II, Article 11 confers rights on cities (or other political subdivisions), and the extent of such rights, are questions of law which are as yet unresolved. Furthermore, such questions of law are reviewed *de novo*.

Under the Respondent Speaker's analysis, practically no individual or entity would have standing to challenge a law which dilutes their vote and offends the State Constitution. This is a nonsense result. The same arguments that are waged by the Respondents against cities, towns and individuals, so as to prevent them from bringing the Constitutional infirmities of a State redistricting scheme to light, could also be waged against the Speaker of the House of Representatives, who likewise does not assert a "personal" interest in the case (and therefore appears to lack standing), but seeks to appear in his official capacity. Similarly, the various political subdivisions that have petitioned this Court for redress seek to have their concerns, in their official capacities, and as entities that must adhere to the State Constitution, heard and fairly considered by this Court.

The Interest of the City of Dover

The City of Dover asserts an interest in this case by virtue of its broad authority and obligation to ensure the integrity of elections, as expressly delegated to it by RSA 49-C. The issue of whether the City of Dover can vote as a person is immaterial. Similarly, the issue of whether there is a "community of interests" or not is immaterial. The City of Dover does not assert its interest in the outcome of this Interlocutory Transfer based on the assertion that Dover, as a community, has common interests with its citizens. Instead, the City maintains that it has an obligation to protect its citizens from the drawing of arbitrary and dilutive district lines by virtue of its various responsibilities under RSA 49-C, which obligation is not based upon a community of interests argument.

The City has explicit authority to undertake several actions to promote free and fair elections. Such authority and responsibilities include drawing the boundaries of wards (RSA 49-C:3), paying for, giving notice of, and administering elections (RSA 49-C:4), qualifying voters consistent with State law (RSA 49-C:5), preparing ballots (RSA 49-C:6), confirming qualifications for office (RSA 49-C:9), and providing for vacancies (RSA 49-C:10). In addition, the City has express authority to undertake actions which are considered by convention to be necessary for the benefit of the City's residents (RSA 49-C:15). Furthermore, *Amicus* contends that the City has implicit authority to protect the elective franchise from

arbitrary and dilutive district lines. Otherwise, the explicit obligations imposed upon the City by RSA 49-C would be nonsensical. The City would be required to ensure the basic fairness of elections while administering a patently unfair system which dilutes votes on behalf of the State.

The City of Dover has within it six wards. Two of these wards, Wards 5 and 6, are unfairly underrepresented with respect to the rest of the City. These wards, despite having populations of 4,773 and 4,987 respectively, well above the 3,291 required for an "ideal" district, are denied single-member representation by RSA 662:5 in contravention of Part II, Articles 9 and 11 of the State Constitution. They are also denied multi-member representation, which would keep 2 Representatives within the city boundaries. Furthermore, they are inexplicably (no compelling state interest has even been asserted) combined into a floterial "super-district" with Somersworth Ward 2, which has 7 State Representatives serving it according to the new reapportionment, even though the Legislature's own analysis would apportion only 3.5 Representatives to the entire city.

The City of Dover cannot ensure the basic fairness of an election, or the equal weight of a citizen's vote, when the State system of apportionment precludes the possibility of voting equality. Even if the City of Dover is only a political subdivisions that exists to serve the will of the State, the City of Dover, by its duly elected City Councilors, wishes for the New Hampshire Supreme Court to clarify that the City cannot be expected to serve the State's will if it is unconstitutional.

The Interest of the Town of Meredith

As an example of the impact of the 2012 Redistricting Plan on communities other than Dover, consider that the 2012 amendment purports to assign a four (4) member floterial district to Gilford and Meredith. At the present time Meredith constitutes its own district with two (2) elected representatives. Gilford is currently part of a four (4) community floterial district represented by a total of seven (7) representatives, according to RSA 662:5, last previously amended effective May 28, 2004.

The New Hampshire Constitution, Pt. II, Art. 11, in part states, as it pertains to floterial districts, that, “In forming the districts, the boundaries of towns, wards, and unincorporated places shall be

preserved and contiguous." The contiguous requirement is mandatory (shall). "Contiguous" is normally defined as "adjacent." Webster's New World Dictionary, Third College Edition, 1994.

The borders of Gilford and Meredith geographically meet in the middle of Lake Winnipesaukee. The communities are otherwise completely separate with utterly no articulable common interests, are not geographically contiguous by land and are not otherwise adjacent as the word is commonly understood. Only this Court's tolerance of a legal fiction would support the Legislature's apparent conclusion that two communities separated by New Hampshire's largest lake are contiguous or adjacent.

The Town of Meredith, by undersigned counsel, joins this *amicus* brief in opposition to the redistricting scheme adopted by the 2012 amendment to RSA 662:5.

SUMMARY OF ARGUMENT

RSA 662:5 (2012) unconstitutionally disenfranchises voters of their right to "one man, one vote" as guaranteed by the New Hampshire Constitution, Part II, Articles 9 and 11. Taken together, these provisions require that voters be provided with reasonably proportionate representation in the State Legislature, and with districts that make geographic and physical sense. While the State's proposed calculations purport to show that representation is reasonable, this relies on flawed accounting surrounding the assignment of floterial Representatives. The Court has previously recognized this use of floterial districts as problematic in the past, especially when used in municipalities that are large enough to merit their own single-member districts. The State relies on the number of pre-existing wards in a city when determining the ideal number of voters, when they should be concerned with the population of the State as a whole. When examined in the context of the State's total population, it is clear that the model proposed by RSA 662:5 drastically increases some wards' representation, while drastically decreasing others'. These constitute massive and unexplained differentiations from the "ideal" district. These differentiations cannot be reasonably justified by the State, especially in light of the high burden placed on them by the strict scrutiny standard applicable to this case. Further, the State's bizarre drawing of certain districts ensures that towns with no common interest must share common legislators, further

burdening the residents' ability to receive the adequate representation that the "one man, one vote" principle is designed to preserve.

ARGUMENT

I. Standard of Review

A. De Novo Review

Petitioners challenge RSA 662:5 (2012) as unconstitutional based on the New Hampshire Constitution, Part II, Articles 9 and 11. See City of Concord v. Gardner, "City of Concord's Petition for Declaratory and Preliminary Hearing and Permanent Injunctive Relief with Request for Expedited Hearing," --- N.H. --- (Merrimack Super. Ct, Apr. 24, 2012), at 1; Manchester v. Gardner, "Verified Petition for Declaratory Judgment and Preliminary and Permanent Injunction Concerning House of Representatives Reapportionment," --- N.H. --- (Hillsborough North Super Ct., Apr. 23, 2012), at 2. Accordingly, this Court will review the Constitutional challenge *de novo*. "Whether or not a statute is constitutional is a question of law, which we review *de novo.*" Akins v. Secretary of State, 154 N.H. 67, 70 (2006).

The standard of *de novo* review requires the Court to determine the Constitutionality of RSA 662:5, in particular, its conformity to Part II, Articles 9 and 11. The Court is not limited to arguments that the parties have raised in the lower court when evaluating the Constitutionality of the statute, particularly when the statute touches upon the fundamental rights of voting and the equal protection clauses of the State and federal constitutions. The United States Supreme Court emphasized this when it gave "lower courts firm instructions for evaluating the constitutionality of a state legislative apportionment scheme, regardless of what matters were raised by the parties.... [I]n determining whether a good faith effort to establish districts substantially equal in population has been made, a court must necessarily consider a State's apportionment scheme as a whole. Only after evaluation of an apportionment in its totality can a court determine whether there has been sufficient compliance with the requisites of the Equal Protection Clause." Black Political Task Force v. Connolly, 679 F.Supp. 109, 124 (D.Mass. 1988) (citing Lucas v.

Colorado General Assembly, 377 U.S. 713, 735 n. 27 (1964)). Admittedly, the New Hampshire Supreme Court is not a "lower court" in the same sense in this instance, because the Constitutional challenges arise primarily out of the State Constitution, but to the extent a State Constitutional analysis of equal protection rights mirrors the federal analysis, Black Political Task Force is instructive.

B. Final Arbiter of a Constitutional Dispute

The New Hampshire Supreme Court is the final arbiter of the intent of a Constitutional provision, and any disputes arising under it. Akins, 154 N.H. at 70 ("It is the role of this court to interpret the State Constitution and to resolve disputes arising under it."); Below v. Gardner, 151 N.H. 135, 139 (2002) ("We are the final arbiter of State constitutional disputes.").

C. State Constitutional Provisions are at Least as Protective as the Federal Constitution

In the most notable redistricting case considered by this Court, Burling v. Chandler, the Court held that the State's Constitutional "provisions are at least as protective of a citizen's right to vote as the federal constitutional standard of one person/one vote," and therefore the Court would base its decision upon the State Constitution. Burling v. Chandler, 148 N.H. 143, 149 (2002). Nevertheless, the court will still cite to "federal cases for guidance only." Akins, at 70-71.

D. Fundamental Right

"[T]he right to vote is fundamental." Id. at 71 (holding that the right to be elected is an equivalently fundamental right). "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." Below, 151 N.H. at 136 (quoting Reynolds v. Sims, 377 U.S. 533, 555 (1964)).

E. Strict Scrutiny

As a fundamental right, statutes that potentially infringe on the right to vote are evaluated under a standard of strict scrutiny. As the Federal District Court of Rhode Island held (quoting Reynolds):

> The right to vote is fundamental, and "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise". Because the right to vote is so important, a showing of infringement automatically creates a presumption that the right is burdened; such infringement "must be carefully and meticulously scrutinized". Like the protection given speech under the first amendment, the right to vote in part derived from the right of free association is given an extraordinary degree of protection. Both rights are so important to the creation and preservation of a free democratic society that any restriction is enough to invoke a strict standard of review. "To the extent that a citizen's right to vote is debased, he is that much less a citizen. The fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote." The United States Supreme Court has held that where voting qualifications are concerned, "(t)he degree of the discrimination is irrelevant". Accordingly, the degree of burden imposed by a statute which dilutes voting power is irrelevant.

McCarthy v. Garrahy, 460 F.Supp. 1042, 1049-50 (D.R.I. 1978) (also quoting Harper v. Virginia Board of Elections, 383 U.S. 663, 668 (1966)) (citations omitted).

The New Hampshire Supreme Court has recently affirmed that "[G]enerally, when governmental action impinges upon a fundamental right, such matters are entitled to review under strict judicial scrutiny." Akins, at 71-73 (holding that "the ordering of parties on a ballot" were not "reasonable, nondiscriminatory restrictions," and therefore needed to be judged on the basis of strict scrutiny).

F. Compelling State Interest

Where the standard of strict scrutiny is used to evaluate the Constitutionality of a statute, it "places the burden upon the State to prove that the statute is 'narrowly tailored to promote a compelling [state] interest. If a less restrictive alternative would serve the [state]'s purpose, the legislature must use that alternative.'" State v. Zeidel, 156 N.H. 684, 686 (2008). See also Akins, at 73 ("To comply with strict judicial scrutiny, the governmental restriction must 'be justified by a compelling governmental interest and must be necessary to the accomplishment of its legitimate purpose.'") (internal citation omitted).

In the context of challenges to reapportionment legislation, particularly where deviations from the ideal population are egregious, federal courts in the First Circuit have required that such apportionment be "a reasonably necessary measure to achieve a compelling state interest" and even "if so justified, the divergences are also within tolerable limits." Black Political Task Force v. Connolly, 679 F.Supp. at 123; Ortiz v. Hernandex Colon, 385 F.Supp. 111, 116 (D. Puerto Rico 1974). Thus where redistricting legislation substantially impinges upon a Constitutional right, the additional burden of proving that the deviation is within a tolerable limit is imposed, regardless of how compelling the purported state interest is.

II. Application of One Person, One Vote

The State of New Hampshire pleads the protection of the "one-person, one-vote" principle in declaring that the reapportionment scheme is not violative of the State Constitution, because the Legislature did its best to "balance the federal and state constitutional requirement of one-person, one vote with various subordinate state constitutional requirements and policy goals to create the redistricting plan." City of Concord v. Gardner, "Emergency Motion to Intervene", --- N.H. --- (Merrimack Super. Ct., Apr. 26, 2012). The fact that certain districts are not contiguous (except by water), that certain wards are deprived of single-member or non-floterial Representatives for their ward even though they are entitled to such representation, and that various cities are deprived of the ideal number of Representatives is apparently based on the old "you can't make an omelet without breaking a few eggs" reasoning. In this case, the rights of citizens to "one-person, one vote" are the eggs, and the balance against "various subordinate. . . policy goals" is the omelet.

Since Respondents claim that they have complied with the one-person, one-vote principle, by duly balancing it against other interests, it is worth noting exactly how this Court defines the principle.

There is no doubt that the New Hampshire Supreme Court applies the principle of one-person, one-vote to Constitutional challenges to statutes based on the right to vote. Indeed, there is ample

jurisprudence from this Court to support the notion that the one-person, one-vote analysis is required whenever the right to vote is threatened by statute, and not simply when the Court has decided to intervene and reapportion districts because of the legislature's failure to do so in a Constitutionally permissible manner. As the Court stated in Burling v. Chandler, "We are primarily governed by the constitutional requirement of 'one person/one vote.'" Burling, 148 N.H. at 145. See also Town of Canaan v. Secretary of State, 157 N.H. 795, 796 (2008) (describing the Court's adoption of the principle of one-person, one-vote to "bring the reapportionment schemes into constitutional compliance"). As the Burling Court also stated, "We begin with a discussion of the one person/one vote standard under our own constitution. The New Hampshire Constitution guarantees that each citizen's vote will have equal [weight]. . . With respect to the house of representatives, this right is assured by Part II, Articles 9 and 11 of the State Constitution." Burling, at 146-47 (citation omitted). Furthermore, the Burling Court acknowledged the "fundamental democratic principle of one person/one vote" and accorded the principle "primacy" above other constitutional concerns and policy goals. Id., at 160.

Substantively, "one-person, one-vote" means nothing less than "substantial equality of population among the various [legislative] districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." Id., at 150 (quoting Reynolds, 377 U.S. at 579). It is, in essence, an egalitarian principle. (See discussion of egalitarian vs. limiting principle, below). Whether such equality has actually been achieved within the newly apportioned legislative districts is a question of fact. The requirement of such equal legislative apportionment "as circumstances will admit," is a settled matter of law, and is also codified in the State Constitution. N.H. CONST., Pt. II, Art. 9.

III. RSA 662:5 is Unconstitutional Because it Violates the Fundamental Principle of One-Person, One-Vote, Without Demonstrating a Compelling State Interest.

A. The Redistricting Statute is Unconstitutional Because It Relies on Flawed Methods to Calculate Population Deviations from the Ideal.

One of the immediately apparent problems with RSA 662:5, as passed, is the flawed method that the Legislature used to interpret the deviation from the ideal population for various communities. See City of Concord v. Gardner, "City of Concord's Petition," at Exhibit E, p. 52-61 (hereinafter "Concord, Exhibit E"). Apparently, the Legislature considered the deviation of each population's ward from a fanciful "ideal population" based on an erroneous formula, which was to divide the city's total population by the number of wards. This was clearly incorrect, since the equality of population under Part II, Article 9 applies to State legislative districts, not districts for electing city officers. For instance, within the City of Dover, the Legislature apparently concluded that the ideal population of each of Dover's 6 wards was 4,997.8 people. Id., at 54-55. It arrived at this figure by dividing Dover's 2010 population (based on the most recent decennial census), which was 29,987, by the total number of wards, which was 6. Id. By this method, the Legislature concluded that Dover's wards had the following deviations:

Ward	Population	Deviation from 4,997.8
Ward 1	4,991	-0.1%
Ward 2	5,074	+1.5%
Ward 3	5,028	+0.6%
Ward 4	5,134	+2.7%
Ward 5	4,773	-4.5%
Ward 6	4,987	-0.2%
TOTALS	29,987	Range: 7.2%

All of these deviation numbers are erroneous because the ideal population for a legislative district is a function of the number of people in the State as a whole and the number of legislative districts. See Burling, 148 N.H. at 153 ("The ideal population for a multi-member district is expressed as a multiple of the ideal population for a single-member district. In New Hampshire, the ideal population for a district

with three representatives is 3,089 multiplied by 3, or 9,267."). The ideal population for a State legislative district has nothing to do with the number of wards in a city.

Therefore, without any regard as to how a particular district should have been drawn, the starting figures the Legislature should have worked with, not just for Dover but for all cities (and potentially every community), were severely misrepresentative of the actual deviations. In the example of Dover, the correct figures for deviation (with respect to an ideal population of 3,291) should have been:

Ward	Population	Deviation from 3,291
Ward 1	4,991	+51.65%
Ward 2	5,074	+54.18%
Ward 3	5,028	+52.78%
Ward 4	5,134	+56.00%
Ward 5	4,773	+45.03%
Ward 6	4,987	+51.53%
TOTALS	29,987	Range: 10.97%

Not only would the actual deviations for each ward be intolerable, but the range of deviation for the City is beyond the threshold for *prima facie* compliance with the State Constitution. The actual deviations suggest Dover's wards would have to be combined into multi-member districts, since any individual ward would be well beyond the tolerable threshold for deviation as a single-member district. As in Burling, the State's plan "miscalculates the deviation for [the districts]" and "necessarily miscalculate[s] their range of deviation." Id. at 153.

B. The Redistricting Statute Impermissibly Uses the Aggregate Method to Calculate the Deviation in Each Floterial District. The New Hampshire Supreme Court Has Already Found this Calculation Method Wanting with Respect to Floterial Districts.

In Burling, all of the plans necessarily miscalculated the range of deviation for New Hamsphire's communities because they "rel[ied] upon floterials and use[d] the aggregate method to calculate the deviation of the floterials. The aggregate method is appropriate for multi-member districts, but is not appropriate for the floterials in the parties' plans because it masks substantial deviation from the one person/one vote principle." Burling, at 154. Thus, whereas the example above shows that the Legislature simply used the wrong number for the ideal population, the Burling decision also makes clear that the aggregate method applied to floterials will result in distortions that make the deviations for legislative districts appear falsely miniscule, compared to their true deviations:

> For example, in the plan submitted by the house, the towns of Epping (population 5,476) and Fremont (population 3,510) are combined in a floterial with one representative. Each town also constitutes a single-member district and thus each town has its own representative. The plan calculates the deviation as if all three representatives represents both towns together (-3.03%). In fact, each town is represented by one representative as well as a floterial representative. . . Thus, treating this floterial as if it were simply a three-member district is misleading. Id.

According to the Court, "the aggregate method obscures substantial deviations from the one person/one vote principle." Id.

In exactly the same fashion as the court identified in Burling, the present reapportionment scheme also "masks substantial deviation from the one person/one vote principle." As the comparison of deviation methods below demonstrates, depending on which method is used to calculate deviation, the deviations of the Strafford County 19, 20 and 21 districts can either be +1.94%, +2.93% and +82.72% respectively, or they can be +205.83%, +208.78%, and +630.87% respectively. Whether the aggregate method is used or not makes all the difference, and it impermissibly hides the true deviations from the citizens. Where methods of calculating deviations for legislative districts are misleading, it is impossible to discern whether such redistricting schemes actually serve a compelling State interest.

A. Application of the Component Method of Calculating Deviations from the Ideal Legislative Population Leads to Absurd Results and Unconstitutionally Deprives Residents of Cities of Equal and Adequate Representation in the Legislature.

1. Application of the Component Method Increases the Deviation for Floterial Districts.

As the Burling Court rightly observes, application of the aggregate method for calculating the deviations of floterial districts leads to inaccurate and misleading results. Burling, at 154. The aggregate method essentially lumps floterial districts together with other districts that include the same ward or town. If Dover Ward 1, for instance, is part of a floterial district with Dover Ward 2, and there is only one Representative allotted to the floterial district, the aggregate method will consider Dover Ward 1's single-member district, and Dover Ward 2's single member district, for purposes of calculating deviation.

The alternative method, called the "component" method, looks at the makeup of the floterial district alone, and evaluates whether the deviation in that district is tolerable. As the Court articulated in Burling:

> Another method for calculating the deviation for a floterial is the same as the method for calculating the deviation for a single-member district; this method results in exceptionally high deviations. Under this method, the ideal population (3,089) is subtracted from the floterial population and the result is divided by the ideal population. For example, a floterial that has a population of 10,000--and there are many this size or larger in the plans submitted--would have a deviation of 223%.
>
> Burling, 148 N.H. at 155 (2002).

In the example above, both Dover's Ward 1 and 2 are entitled to a single-member district, as they both have more than the 3,291 population required for single-member districts. The use of the aggregate method of calculating deviation will count the total population of Dover Wards 1 and 2, and for Ward 1, would divide the population by 3 representatives (since there are 3 districts that overlap the floterial district in Dover Ward 1 and 2, including the floterial district) to arrive at the actual population per Representative. The use of the component method would divide the population of the entire floterial district by only 1 representative. The deviation for the floterial district will therefore be at least twice as high when using the component method as compared to the aggregate method.[1] The difference is a

[1] Aggregate Method = ((4,991 + 5,074)-(3,291 x 3))/(3,291 x 3) = +1.94%. Component Method = ((4,991 + 5074) - 3,291)/3,291 = 205.83%.

margin of 203.89%, with +1.94% according to the aggregate method and 205.83% according to the component method.

2. A Comparison of Multi-Member, Aggregate and Component Calculations.

The disparity between different methods of calculating legislative population deviations is most apparent when considering the three primary ways that deviation (for multiple ward districts) can be calculated: the multi-member district, floterial (aggregate) and floterial (component) methods. The calculations below show Somersworth Districts 17 through 21. Districts 17 and 18 calculate deviation using the multi-member district method, since they are not floterial districts due to the multiple Representatives assigned to them. A *bona fide* floterial district is one which has a single member, but encompasses multiple "subdivisions" (for lack of a better word), at least one of which would ordinarily be entitled to a single-member Representative. All population figures are derived from the statute's notes (at Concord, Exhibit E, *supra*) or the latest 2010 Census (available at Census.gov).[2]

a. Multi-Member Districts:

District 17:	Dover Ward 5, Dover Ward 6, Somersworth Ward 2	3 Reps
Ideal Population	3,291 * 3 = 9,873	9,873
Actual Population	4773 + 4987 + 2315 = 12075	12,075
Deviation from Ideal	(12,075 - 9,873)/9875 = 0.223	+22.3%

District 18:	Rollinsford, Somersworth 1, Somersworth 2, Somersworth 4, Somersworth 5	3 Reps
Ideal Population	3,291 * 3 = 9,873	9,873
Actual Population	2,527 + 2,496 + 2,315 + 2,353 +	11,766

[2] Further examples of floterial districts are available in the next section of this brief.

	2,075 = 11,766	
Deviation from Ideal	(11,766 - 9873)/9873 = 0.1917	+19.17%

b. Floterial Districts (Aggregate):

District 19:	Dover Ward 1, Dover Ward 2	1 Rep for District; 2 other Reps covering same wards
Ideal Population	3,291 * 3 = 9,873	9,873
Actual Population	4,991 + 5,074 = 10,065	10,065
Deviation from Ideal	(10,065 - 9,873)/9,873 = 0.0194	**+1.94%**

District 20:	Dover Ward 3, Dover Ward 4	1 Rep for District; 2 other Reps covering same wards
Ideal Population	3,291 * 3 = 9,873	9,873
Actual Population	5,028 + 5,134 = 10,162	10,162
Deviation from Ideal	(10,162 - 9,873)/9,873 = 0.0293	**+2.93%**

District 21:	Dover Ward 5, Dover Ward 6, Rollinsford, Somersworth 1, Somersworth 2, Somersworth 3, Somersworth 4, Somersworth 5	1 Rep for District; 3 other Reps covering same wards (no other reps for Somersworth 3)
Ideal Population	3,291 * 4 = 13,164	13,164
Actual Population	4,773 + 4,987 + 2,527 + 2,496 + 2,315 + 2,527 + 2,353 + 2,075 = 24,053	24,053
Deviation from Ideal	(24,053 - 13,164)/13,164 = 0.8272	**+82.72%**

c. Floterial Districts (Component):

District 19:	Dover Ward 1, Dover Ward 2	1 Rep for District; 2 other Reps covering same wards
Ideal Population	3,291 * 1 = 3,291	3,291
Actual Population	4,991 + 5,074 = 10,065	10,065
Deviation from Ideal	(10,065 - 3,291)/3,291 = 2.0583	**+205.83%**

District 20:	Dover Ward 3, Dover Ward 4	1 Rep for District; 2 other Reps covering same wards
Ideal Population	3,291 * 1 = 3,291	3,291
Actual Population	5,028 + 5,134 = 10,162	10,162
Deviation from Ideal	(10,162 - 3,291)/3,291 = 2.0878	**+208.78%**

District 21:	Dover Ward 5, Dover Ward 6, Rollinsford, Somersworth 1, Somersworth 2, Somersworth 3, Somersworth 4, Somersworth 5	1 Rep for District; 3 other Reps covering same wards (no other reps for Somersworth 3)
Ideal Population	3,291 * 1 = 3,291	3,291
Actual Population	4,773 + 4,987 + 2,527 + 2,496 + 2,315 + 2,527 + 2,353 + 2,075 = 24,053	24,053
Deviation from Ideal	(24,053 - 3,291)/3,291 = 6.3087	**+630.87%**

C. Floterial Districts are Unconstitutional in All but the Rarest Situations, Because they Will Foreseeably Conflict with the Fundamental Principle of "One-Person, One-Vote" and Part II, Article 9's Requirement that "Representation be as Equal as Circumstances Will Admit."

1. Floterial Districts Will Nearly Always Deviate from the Ideal Representative Population.

Floterial districts were only first considered in depth in the Burling case, and the decision in that case is widely regarded as one of the reasons for the 2006 amendment to Part II, Article 11 to permit the use of floterial districts in reapportioning the House of Representatives. As the Court said, "A third method of representation used in a very few States, including New Hampshire within the last few decades, is a 'floterial.'. . . A floterial has been described as a district that 'floats above' several distinct districts. Floterials, as constructed in New Hampshire, have led to unusual results and voting right inequities." Burling, at 150-51 (internal citations omitted).

Thus, a floterial district is necessarily comprised, at least in part, of districts that would be wholly supportive on their own of a State Representative. These districts "float above" such boundary lines, however, and include other subdivisions of the state, such as towns and/or wards. The Court's example in Burling demonstrates exactly how such "inequities" can occur:

> Carroll County District 3, a floterial, consisted of six communities: Bartlett (population 2,290), Chatham (population 268), Conway (population 7,940), Hale's Location (population 0), Hart's Location (population 36), and Jackson (population 678). Using 1990 census figures, the combined population of the six communities in District 3 was 11,212. The floterial representative covered all six communities in District 3. Additionally, four of the six communities in District 3 (Bartlett, Chatham, Hart's Location and Jackson with a combined total population of 3,272) were also in District 1, a single-member district; the other two communities in District 3 (Conway and Hale's Location with a combined total population of 7,940) were in District 2, a multi-member district with two representatives. The result of this configuration was that voters in Hart's Location, population 36, voted for the same number of representatives as the voters in Bartlett, population 2,290.

Burling, at 151 .

It is various Petitioners' assertion, as well as *Amici*, that "unusual results and voting right inequities" such as this not only can occur, but will occur, with nearly every application of a floterial district.

Because the first criterion of a floterial district is that there be at least one sub-district within it that should be entitled to its own Representative, but the floterial does not respect such a distinction and "floats above" such district lines, floterial districts will nearly always violate the principle of one-person, one-vote, as well as Part II, Article 9 of the State Constitution. This is because, in all but the rarest cases, they will substantially deviate from the ideal population for such districts. Dover's Ward 5 is a perfect example, with a 2010 population of 4,773. Clearly, the ward qualifies for its own Representative, and it already deviates from the ideal population by 45% (4,773 minus 3,291, divided by 3,291). Any additional district added to it as a floterial (without adding another Representative to create a multi-member district) would only exacerbate the deviation, sending it near or over 100%, potentially into multiples of 100% deviations, much like what actually occurred with the 2012 redistricting. The only rare exception to a floterial thus exceeding the bounds of tolerability is when a district of nearly 3,291 would be combined

with an extremely small political subdivision like Hart's location (population approx. 36). In reality, in New Hampshire, there are unlikely to be any scenarios where the component method of calculating deviation would not lead to intolerable results. This much seems to be recognized by the Court in expressing that it selected Carroll County "as an example because it best illustrates that floterials are usually complicated and often confusing. . . Moreover. . . when the towns within a floterial have vastly different populations, the use of the floterial can cause substantial deviations from the one person/one vote principle." Burling, at 151-52. A floterial district may be a fine thing in theory, but it will always deny equal representation to at least one political subdivision that deserves it.

2. Floterial Districts Can Be Excessively Burdensome for Cities

Interestingly, Part II, Article 11, illustratively entitled "Small towns; Representation by Districts," now specifically contemplates floterial districts, but it appears primarily designed to mitigate the outcome of communities like Hart's Location having their own Representative. The floterial is necessary, in these instances, to combine very low population communities with larger population subdivisions to attempt to achieve the ideal 3,291 people per district. What is not clear is whether it was ever the intent of this Constitutional provision to have relatively large cities sharing wards in floterial districts under the same rationale. Unfortunately, the Constitution is silent on the "rights" of cities to have representation solely within their own borders. If towns and wards are reasonably close to the 3,291 ideal population, they should be apportioned a single-member representative, but no such assurance is granted to cities as a whole.

For cities like Portsmouth, Rochester, and Nashua, the question of whether Part II, Article 11 applies to cities is purely academic, since these cities do not share any district with any other town or city. For cities like Manchester and Concord, the question is more relevant, since at least one of their wards shares a district with a neighboring town. Only Dover and Somersworth are in the unique position of sharing representatives with another city. Only Dover gives up the right to have a non-floterial

Representative for Wards 5 and 6, even though Wards 5 and 6 have sufficient population to qualify for a single-member district. And only Somersworth, from among New Hampshire's 13 cities, has all of its wards lumped into floterial or multi-member districts.

For the residents of Dover Ward 5, Dover Ward 6, and all of Somersworth, this means that they will never truly enjoy the equal protection of the laws. For each of Dover's wards, the residents will not be able to speak to a Representative that serves anywhere close to the ideal 3,291 residents. For Somersworth, it means that not a single citizen in the city will be able to rely on a commonality of interest with their Representatives when discussing such important matters as education funding, taxation, and public works projects. Floterial districts may be a necessary evil, but the application and drawing of floterial districts in the Somersworth situation is excessively evil, because it puts the residents on an unequal footing with respect to the State's other 12 cities, Dover included. Every other city may have at least one, usually several Representatives, that caters exclusively to the needs of residents of the city. Only Somersworth is so disadvantaged as to share all of its representative power with neighboring communities.

3. Floterial Districts are Not Required by the State Constitution, and Thus, Must Comport with Other Provisions of the State Constitution, Particularly, the One Person, One Vote Principle.

For many of the reasons stated above, and others not considered in this brief, the Burling Court "reject[ed] floterials as an unsound redistricting device." Burling, at 158. The Burling decision has been acknowledged as one of the reasons the 2006 Amendment to Part II, Article 11 was enacted. See e.g., Town of Canaan, 157 N.H. at 797 ("[The Constitutional Amendment] is likely a response to our decision in Burling, where we declined to employ 'floterial' redistricting schemes within the 2002 court-ordered reapportionment."). As a result, Part II, Article 11 was amended to allow the use of floterials, but that fact does alone not decide the question of whether floterials are Constitutionally permissible, in light of their foreseeably severe deviations to the ideal legislative population. The Legislature apparently wanted the option of using floterials in appropriate situations, which is why the language of Part II, Article 11 is

permissive. But where floterial districts actually exceed the bounds of what is Constitutionally permissible, because they deviate excessively from the tolerable limits of alignment with the ideal population, the mere fact that they are permitted cannot remove their other Constitutional deficiencies. A floterial that conforms to the State Constitution may be like King Arthur's mythical white stag - one can imagine its existence, but the chances of ever seeing it are slim.

Once a legislative district is identified as a floterial, it should immediately become Constitutionally suspect, since the Burling court previously rejected the floterial as an "unsound redistricting device." Burling, at 158. Moreover, the prime objective of strict scrutiny is to determine whether there is substantial equality of representation, in other words, whether the statute comports with "one person/one vote." If it does not, the statute must serve a compelling state interest, and the deviation must not be intolerable. As the Federal District Court in Maine recently said, "only small deviations may be justified and the greater the deviation, the more compelling the justification must be." Desena v. Maine, 793 F.Supp.2nd 456, 461 (D.Me. 2011). Where floterials exceed 200% deviation, there is not a court in the United States that would consider such deviations "tolerable," nor likely any justification "compelling."

Part of the problem of floterial districts is the underlying assumption, which is that there is somehow an "excess" population that can be shifted to other political subdivisions (towns and wards). As the Court in Town of Canaan took note, the CACR 41 Voter Guide suggested that there would be "excess population" in various districts: "Excess population in one or more contiguous districts may be combined to allow for additional at-large or floterial representatives." Town of Canaan, 157 N.H. at 797 (quoting the CACR 41 Voter Guide) (internal citation omitted).

This is fine in theory, but in practice there is no guidance for the Legislature to determine which population should count as "excess." Since wards cannot be divided, except by their own petition, the entire district is usually lumped together with other subdivisions. In practice, then, it is not the "excess population" that is combined with another district to create a floterial, it is the entire district, because of the necessary indivisibility of districts. A perfect example is found in the City of Dover.

Dover Ward 5 and Ward 6 do not have any "excess number of inhabitants," that is, inhabitants beyond the amount necessary to form a non-floterial district, because such non-floterial districts were impermissibly denied to the resident of both Ward 5 and Ward 6. If Ward 5, for example, had its own representative district, then presumably there would be an "excess number of inhabitants" of 4,773 minus 3,291, or 1,482. These nearly fifteen hundred people could be "added" to the "inhabitants of other districts" to form a floterial district. Ideally, there would be 1,809 people in the other districts to equal the ideal population of 3,291. In practice, Dover Ward 5's entire population is added to over 20,000 residents from neighboring wards and cities (in Strafford District 21), to form a floterial district with a component deviation of 630.87%. There is simply no "excess population" that can be partitioned from the rest of the ward in any rational way, nor in a way which does not violate Part II, Article 11-a, which requires that wards petition to be divided. Without division of Ward 5, where is the "excess" to be "added" to another political subdivision?

The primary flaw of the current reapportionment scheme is that it ignores the concept of "excess" inhabitants and arbitrarily adds Dover's Wards 5 and 6 into other districts that deviate heavily from the ideal or even acceptable levels of representation. The State's first error, then, is to deny Dover's Wards 5 and 6 their own non-floterial Representative, which is necessary to calculate the "excess." The State's second error is to disregard the requirement of "acceptable deviations."

D. The Redistricting Statute is Unconstitutional, Because it Places Greater Value on the Petition Signatures of Different Communities. This is a Violation of the One Person, One Vote Principle.

RSA 655:40 and :42 allow for signatures to be gathered to support a candidate's petition to be placed on the ballot, if the candidate does not participate in a primary contest. RSA 655:40 provides, in relevant part, that:

> As an alternative to nomination by party primary, a candidate may have his or her name placed on the ballot for the state general election by submitting the requisite number of nomination papers.

RSA 655:42, II provides, in relevant part, that:

> It shall require the names of 1,500 voters registered in the district to nominate by nomination papers a candidate for United States representative; 750 to nominate a candidate for councilor or state senator; and 150 to nominate a candidate for state representative or county officer.

The question of whether the relative ease of obtaining signatures depending on which district a candidate lived in was a violation of "one-person, one-vote" was considered by the Federal District Court of Rhode Island in McCarthy v. Garrahy, to wit:

> Under Section 17-16-8, a candidate must obtain signatures from .09% (25 out of 28,092) of the voters in Bristol County, but need obtain signatures from only .008% (25 out of 331,744) of the voters in Providence County. Therefore, the signature of a voter in Bristol, the least populous county, is worth ten times more than the signature of a voter in Providence. Such an inequality appears to violate the one man, one vote principle. . .
>
> McCarthy v. Garrahy, 460 F.Supp. 1042, 1047 (D.R.I. 1978).

In that case, the court permanently enjoined the state from enforcing the petition statute because it "quantitatively dilute[d] votes" and it could be "upheld only by a showing that [the statute] promotes a compelling state interest." Id. at 1050. Interestingly, in that case, as here, "the defendants. . . offered no justification at all for the distribution requirement" and so the measure was held not to promote a compelling state interest.

In this case, the State Legislature has offered no coherent reason, no compelling state interest for why one person's vote (or signature) should be worth more or less than another's. Rather, the Speaker has explicitly referred to less than compelling reasons for the dilution of the fundamental right to vote, reasons related to "various subordinate state constitutional requirements and policy goals." City of Concord v. Gardner, "Emergency Motion to Intervene", --- N.H. --- (Merrimack Super. Ct., Apr. 26, 2012) (emphasis added). Where an interest is admittedly subordinate to the prime principle of one-person, one-vote, such cannot be the basis for upholding an otherwise repugnant reapportionment scheme under the State Constitution.

IV. The Redistricting Statute is Unconstitutional, Because it Arbitrarily Allows Floterial Districts to Exceed a Reasonable Deviation, and Creates the Possibility of "Super-Districts."

A. Somersworth Ward 2 is an Unconstitutional "Super-District," Because it is Arbitrarily Awarded a Disproportionately Greater Number of Representatives than Are Justified by Its Population.

Dover's Wards 5 and 6 are both impermissibly deprived of their own non-floterial districts, and are combined with a floterial district comprising Somersworth Ward 2, which has a disproportionate share of influence, which cannot be justified under any "compelling state interest" theory. Somersworth Ward 2 demonstrates the *reductio ad absurdum* aspect of the Legislature's argument, if the only "rules" of redistricting are that:

1) A town or ward with more than 3,291 should have its own non-floterial district, subject to "subordinate" state interests and policy goals;

2) Wards that are substantially larger than 3,291 residents may be deprived of single-member or multi-member representation altogether and combined into floterial districts;

3) Residents of cities have no right to single-member districts;

4) Legislative districts do not have to be contiguous by land (e.g., Gilford/Meredith); and,

5) There is no upper limit on the deviation allowed for floterial districts, especially when the "aggregate method" of calculating deviation is employed.

Such rules (i.e., the status quo) allow for absurd outcomes like city wards receiving and giving a disproportionately large number of representative votes. Somersworth Ward 2 is a super-district, because there would be 7 Representatives to serve the ward, when only 3.5 representatives should be allocated to the entire city. In fact, there is no limitation within the letter of Part II, Article 11 that prohibits the formation of "super-districts" like Somersworth, Ward 2. There is no reason why Concord, for instance could not be joined with such "contiguous" towns as Franklin, Boscawen, Pembroke and Hooksett through the Merrimack River. The pending case of Gilford/Meredith (joined only by a lake) demonstrates that the first tumble down this slippery slope is not unthinkable.

There is simply no justification for the disproportionate representation the voters of Somersworth Ward 2 would enjoy under the current unconstitutional redistricting scheme. In 2010, for example,

Dover's Ward 5 population was 4,773. Were the new apportionment scheme to be used in a State election today, the residents of Dover's Ward 5 would elect 4 Representatives (along with Dover Ward 6 and Somersworth Ward 2). Concord, Exhibit E. This would translate into a single Representative for every 1,193 people.

Contrast that with Somersworth Ward 2, which in 2010 had a population of 2,315. Id. Despite having a population of nearly half that of Dover's Ward 5, the residents of Somersworth would today enjoy access to 7 Representatives in all. This would translate into a single Representative for every 331 people. This outcome clearly translates into superior voting strength for the people of Somersworth Ward 2, even in relation to the other Somersworth wards, let alone Dover's wards. It surely would be a perversion to justify this outcome under the guise of "one-person, one-vote," which is meant to suggest an equal level of access to representation, not simply a minimum level of access.

The outcome is even more absurd considering that Somersworth's new population only supports 3.575 Representatives for the City. Id. Prior to 2010, the City elected 5 Representatives at-large. With the new redistricting plan, there will inexplicably be 7 Representatives elected in whole or in part by residents of Somersworth, and every single one of these districts encompasses Ward 2. Somersworth Ward 3, for example, only has access to one Representative and that Representative is shared with Dover Ward 5, Dover Ward 6, Rollinsford, Somersworth Ward 1, Somersworth Ward 2, Somersworth Ward 4, and Somersworth Ward 5. Id. No explanation has been given by the Legislature or its Speaker, other than an attempt to balance the "one-person, one-vote" principle with other "subordinate" policy concerns, as to why such special access to representation should be conferred on a single ward within a city.

In Black Political Task Force v. Connolly, the Federal District Court of Massachusetts questioned whether "intramunicipal deviations" were justified by a compelling state interest:

> [T]hese intramunicipal deviations clearly are not the result of adherence to a state policy of respect for political subdivision boundaries. The existence of the deviations suggests that something other than the state's articulated public policy considerations is animating the division of districts because these deviations occur entirely within the relevant political subdivision, i.e., the City of Boston.

Black Political Task Force, at 129, n. 22. Similarly, the Dover/Somersworth scenario highlights several instances of intramunicipal deviations between wards that cannot be justified by "respect for political subdivision boundaries," which is an interest that is already subordinate to "one-person, one-vote."

In this vein, the new Strafford 21 district violates the New Hampshire Constitution, Part II, Article 11, insofar as floterial districts must also conform to acceptable deviations," to wit:

> The excess number of inhabitants of a district may 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 (as amended, Nov. 6, 2006) (emphasis added).

Disregarding, for the sake of argument, the fact that Dover Wards 5 and 6 are populous enough to deserve their own wards, the redistricting statute violates a basic tenet of Part II, Article 11 by giving Somersworth Ward 2 so much of an excess representation that it is presumptively unconstitutional, and is likely to fail the reasonableness test articulated in Brown v. Thompson, *infra*. Somersworth Ward 2's 7 Representatives also suggests that there is an ideal population for the ward of 23,037 people (7 times 3,291). See Burling, at 153 ("The ideal population for a multi-member district is expressed as a multiple of the ideal population for a single-member district. In New Hampshire, the ideal population for a district with three representatives is 3,089 multiplied by 3, or 9,267."). In fact, the Ward's population of 2,315 is a -895.55% deviation from the 23,037 population predicted ((2,315 - 23,037)/2,315). See Id. at 153 ("Once the ideal population is calculated, it is then possible to determine the extent to which a given district population deviates from the ideal. Relative deviation is the most commonly used measure and is derived by dividing the difference between the district's population and the ideal population by the ideal population."). Some Courts have suggested that a 16.5% deviation is the upper limit of what is "tolerable," so a nearly nine hundred percent deviation is presumptively invalid. See Black Political Task Force, at 123; Burling, at 158 ("The range of deviation for the 1992 plan, using the 1990 census figures, was at least 49.7%. Deviations in this range are too high to be justified by any state interest.").

Severe deviations from the ideal representation may be tolerated, but only if there is a rational basis for such deviation. As the United States Supreme Court noted, "[P]articularly where there is no taint of arbitrariness or discrimination. . . substantial deference is to be accorded." Brown v. Thompson, 462 U.S. 835, 836 (1983). In this case, the legislature has not explained why Somersworth Ward 2, and not Somerworth Ward 3, should have the same level of representation at the expense of Dover's Wards 5 and 6 as if it had 20,684 more residents. Absent some rational explanation for this favored treatment, it would appear to bear the "taint of arbitrariness" and cannot stand without violating the State Constitution.

Dissimilarly, the Town of Gilford's claim that deviation beyond 10% should be allowed can be based on a reasonable argument that there is a compelling state interest in not having political boundaries arbitrarily crossing large bodies of water. Such would actually be a "respect for political subdivision boundaries" within the meaning of Black Political Task Force, *supra*.

Interestingly, the Dover/Somersworth situation is probably an anomaly that is not likely to be repeated in other areas. Somersworth is the only city in New Hampshire that does not have a single ward sufficient to constitute a single-member district, and which directly abuts one of the most populous cities in the State. Because Part II, Article 11 addresses the electoral makeup of towns and wards, not cities, Somersworth is in a sort of "no man's land," where it can be deprived of even a single, non-floterial district, despite having a total population in excess of 11,000. Dover has the misfortune (with respect to the recent drawing of the electoral map only) to sit right next to Somersworth and to have approximately three times as many people. This may be a reason why Part II, Article 11 does not address the electoral makeup of cities, perhaps because so few cities in New Hampshire are actually contiguous to each other, and so the obvious complications of drawing floterial districts between them are so rarely encountered.[3]

[3] Another explanation for the lack of clarity about the status of cities is that the impetus for the original Part II, Article 11 was to ensure representation to any incorporated place (e.g., town), as opposed to unincorporated places. "Under the 1961 law, the smallest of these towns elected a representative to only one out of the five legislatures to be called in the decade, and the largest of these towns elected a representative to four out of the five legislatures to be called in the decade. Inhabitants of unincorporated places had no representation. Thus, before 1964, representation in the house was essentially based upon a principle of one town/one vote, not one person/one vote." Burling v. Chandler, 148 N.H. 143, 148 (2002).

B. The One Person, One Vote Requirement as an Egalitarian Principle (versus a Limiting Principle).

The distinction that ought to be drawn between the Petitioners' position and the Respondents' position is between the one-person, one-vote standard as an egalitarian principle versus a limiting principle. The limiting principle only ensures, as the current statute ensures, that each Representative shall represent no less than 3,291 people. A lower limit, or "floor," is put on the acceptable number of people that a State Representative can represent.

Alternatively, the State could and should look at the maxim of one-person, one-vote as an egalitarian principle. This would bring the State's approach more into conformity with the approach of the New Hampshire Supreme Court, the United States Supreme Court, and various other federal courts that have considered the requirements of "one-person, one-vote." See, e.g., Desena v. Maine, 793 F.Supp.2nd 456, 459 (D.Me. 2011) ("While absolute equality is not required. . . the state must seek 'to achieve precise mathematical equality. . .' The goal is that 'as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's.' The goal, then, is to make congressional districts within the state as nearly equal as is practicable under all the circumstances."). As in Black Political Task Force:

> Reynolds v. Sims taught nearly a quarter century ago that "[w]hatever the means of accomplishment, the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is *approximately* equal in weight to that of any other citizen in the State." The Massachusetts Constitution mandates that "each representative will represent an equal number of inhabitants, *as nearly as may be*...." But the acceptance of approximation is not an invitation to disregard what it is that must be approximated. Approximation is mandated to secure effective electoral equality among voters in various districts; it is not meant to provide an excuse for testing the limits of tolerable inequality.

See also Burling, at 144 ("We hold, therefore, that the current method of creating districts fails to insure that 'every voter is equal to every other voter' in this State"); Id, at 149. ("When it reconvened, the convention resolved to amend Part II, Article 9 to state that the house of representatives was "founded on principles of equality" and to require that representation in the house be "as equal as circumstances will admit."); Below v. Gardner, 151 N.H. at 136. ("[T]he overriding objective [of legislative apportionment]

must be substantial equality of population among the various [legislative] districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State.")

The defining characteristic of the one-person, one-vote standard as an egalitarian principle is that it ensures all citizens will be represented by approximately the same number of Representatives. Thus, it can be seen as setting a "ceiling" or a cap to the number of Representatives a citizen may call his own, and in New Hampshire it sets as an equation the ideal that one Representative should equal three thousand, two hundred and ninety one (3,291) people.

The Dover/Somersworth situation is not unlike the "the Alabama scheme" considered in Below. In Alabama, "some towns with more than 40,000 inhabitants were given one seat in the legislature, while other towns with fewer than 20,000 inhabitants were given two representatives. Alabama's apportionment scheme was 'signally illustrative and symptomatic of the seriousness of this problem in a number of the States.'" Below, at 148 (internal citations omitted). An inequality in representative strength can therefore be calculated either by asking "do every 3,291 persons have at least on Representative?" or "do certain towns and cities enjoy arbitrarily more representative strength?" In this case, Dover Ward 5, with a population of 4,773 is apportioned a grand total of 4 Representatives in the Legislature, and Somersworth Ward 2, with a population of 2,315 is apportioned a grand total of 7 Representatives in the Legislature.

It is for this reason, to avoid absurd outcomes where relatively small population areas have disproportionately large representative strength, that the principle of "one person, one vote" exists in the first place. Respondents make a great deal over their intent to ensure that as far as practically possible, each person has at least the minimum representation to which they are entitled. But the Legislature ignores the complementary principle that no subdivision of the State should have, for completely arbitrary reasons, a disproportionately large representation. Such a division of political power creates winners and losers in the redistricting game, and clearly makes it more attractive for residents of Dover Ward 5 to move to Somersworth Ward 2, politically speaking.

V. Conclusion

The redistricting statute, RSA 662:5, infringes on a fundamental interest, the right to vote, and is admitted by all parties to have Constitutional deficiencies. The redistricting statute fails the strict scrutiny test, because no compelling state interest for the intolerable disparities in voting strength have been articulated. Furthermore, even if such compelling state interests were to be articulated, the deviations from the Constitutionally mandated ideal districts exceed 200% in many cases, and are therefore presumptively intolerable.

Because the Legislature has failed to act in a Constitutionally permissible manner, this Court must take up the unfortunate task, as it did in Burling, of redrawing the State's electoral districts based on sound Constitutional principles. In that regard, it is a settled matter of law in this State that the prime Constitutional standard in ensuring electoral fairness is "one-person, one-vote." The principle of "one-person, one-vote" requires as equal representation as possible. It is an overriding egalitarian principle, and does not yield to subordinate state policy goals.

Floterial districts, as recently applied by the Legislature in RSA 662:5, violate the principle of one-person, one-vote. It is possible to imagine a situation where a floterial district would not intolerably deviate from the ideal legislative population, but in practice, nearly all of the floterial districts of the 2012 reapportionment result in absurd and unjustifiably disproportionate districts. For cities, the disparities in voting strength are particularly egregious, because the Legislature interprets the Constitution to permit greater voting dilution in cities as opposed to towns.

When crafting a more appropriate reapportionment plan, this Court should take notice of the principle that wherever possible, single-member districts are preferred. "The plan we establish restores as nearly equal weight as possible to the votes of the people of New Hampshire. We do this by eliminating floterials and creating as many single-member districts as possible, with as few multi-member districts as necessary." Burling, at 145. See also Black Political Task Force, at 121 ("single-member districts are to be preferred in court-ordered reapportionment plans").

Finally, the Court must observe tolerable limits for the deviation of any district from the ideal legislative district. Deviations above 10% have been widely regarded as presumptively unconstitutional, with an additional burden being placed on substantially larger deviations. The greater the deviation, the more compelling the purported state interest must be, but there is also a level beyond which no compelling state interest can be articulated to justify the disparity in voting strength.

Because the Legislature has failed to act, this Court must remedially redraw the legislative lines in this State, with a preference for single-member and multi-member districts (i.e., non-floterial districts) and contiguous boundaries, with a healthy Constitutional suspicion of floterial districts (despite their being permissibly authorized by the Constitution), and keeping districts as equal in population as circumstances will admit.

Respectfully submitted,

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