

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

IN CASE NO. 2012-0338

NEW HAMPSHIRE  
SUPREME COURT  
RECEIVED

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Town of Gilford, Peter V. Millham and Leo B. Sanfacon

v.

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

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Interlocutory Transfer Pursuant to Rule 9

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PETITIONERS' RESPONSE BRIEF ON THE ISSUE OF STANDING

Town of Gilford, Peter V. Millham,  
and Leo Sanfacon

BY THEIR ATTORNEYS,

Wescott, Dyer, Fitzgerald & Nichols, P.A.

Peter V. Millham, Esq. (NH Bar No.1761)  
Matthew D. Huot, Esq. (NH Bar No. 19872)

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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?

## **STATEMENT OF THE CASE**

Section I of the Interlocutory Transfer Statement contains the Statement of the Case.

## **STATEMENT OF FACTS**

Section II of the Interlocutory Transfer Statement contains the Statement of Facts. Petitioners Town of Gilford, Millham, and Sanfacon have no further facts to allege that would aid the Court in its consideration of this Brief.

## **SUMMARY OF THE ARGUMENT**

The Town of Gilford has standing to seek declaratory relief from the Court in this case. The Court ought to permit Gilford's Petition to move forward on the merits.

The Intervenor takes great pains to classify Gilford (as well as the other municipalities that are parties to this matter) as "political subdivisions". However, it neglects to acknowledge that New Hampshire law recognizes towns as municipal corporations. Municipal corporations possess many of the same rights and remedies at law as their private counterparts, including the authority to sue (or be sued) in court, which is an authority expressly conferred by statute. As such, towns generally and Gilford specifically may file suit in any court in the State for any relief that court deems just and equitable.

Moreover, the Intervenor makes an impermissibly narrow interpretation of RSA 491:22, I in its objection to a town's standing to seek declaratory relief. The Court has previously held that individuals acting on behalf of others, individuals acting in their official capacity, and even interested corporations may possess standing to ask the Court for a declaratory judgment. The Court ought also consider that a "town" is an unique political creature, in that by its very definition the entire population of the town (who vote at town meeting) comprises its governing body's legislative branch. The Town and its voters, therefore, cannot be so easily distinguished for purposes of standing. This fact alone should persuade the Court to grant Gilford standing on public policy grounds.

Even if the Court declines to do so, Part II, Art. 11 specifically identifies towns as necessary and indispensable parties to any redistricting scheme the House of Representatives may enact. While voting is, as the Intervenor repeatedly mentions, a personal right, the mechanism by which voters are apportioned into representative districts by Part II, Art. 11 and RSA 662:5 would not be possible without considering towns, their population, and their geographic borders.

Finally, should the Court find that Gilford lacks the requisite standing to seek declaratory relief in this case, the Intervenor cannot dispute that Petitioners Millham and Sanfacon possess standing to challenge RSA 662:5 as it applies to each of them and to their fellow residents of Gilford, and therefore the Court ought to consider their answers to Questions "B" and "C" on the merits.

## ARGUMENT

- I. The Town of Gilford possesses the standing to seek a declaratory judgment in this matter.**

Under New Hampshire law, a claimant may seek a declaratory judgment if the claimant enjoys a present legal or equitable right or title that is being challenged by an adverse party's claim. RSA 491:22, I; *Jaskolka v. City of Manchester*, 132 N.H. 528, 531, 567 A.2d 549 (1989). The question currently before the Court is whether the Town of Gilford possesses a "present legal or equitable right or title" to challenge RSA 662:5 (the N.H. House of Representatives' Redistricting Plan) on the grounds that it violates Part II, Article 11 of the New Hampshire Constitution. A reading of the current legal landscape indicates that Gilford, as a municipal corporation, is on solid ground to contest the House Redistricting Plan as unconstitutional.

*A. The Town of Gilford is a Municipal Corporation with the Authority to Seek Redress in this Matter.*

The Intervenor is quick to characterize the Town of Gilford as a "political subdivision" of the State, and as such Gilford may only operate within the narrow confines afforded by its sovereign. This characterization only tells one-half of the story; in fact, the Town of Gilford (like all towns in New Hampshire) is more than merely a "political subdivision," it is a public corporation generally and a municipal corporation specifically, which endows it with certain rights and remedies at law.

Public corporations, like their private counterparts, are entities created and regulated by the State. *See* Loughlin, 14 New Hampshire Practice: Local Government Law, § 2.11 (3d ed. 2011). Unlike private corporations, though, public corporations' interest rest solely with the administration of political power. *Id.* (citing 1 E. McQuillin, *Municipal Corporations* § 2:02 (3d ed. 1987)). The Town of Gilford is a municipal corporation, and with all other municipal corporations it shares two fundamental characteristics: "[f]irst, each has a definite territory, assigned by special or general legislative act, which is its field for administrative action. Second, in order that administrative action

may be more convenient, each is given a corporate entity.” *Clough v. Osgood*, 87 N.H. 444, 441, 182 A. 169 (1935).

This corporate entity, charged with public administration over a defined geographic area, has a dual character. The first, as the Intervenor readily points out, is that municipal corporations are subdivisions of the State, and while they are endowed with certain police powers to protect the health and safety of their citizens, these powers to conduct their “prudential affairs” are not unfettered and do not exceed the scope of the authority conferred by the State. *See* RSA 31:39; *Piper v. Meredith*, 110 N.H. 291, 295, 266 A.2d 103 (1970). The Intervenor claims that the Town of Gilford (as well as all other political subdivisions) “exist to carry out the will of the State; they do not exist to interfere with the administration of state government.” Intervenor’s Brief at 10. As support for this assertion, the Intervenor cites *Bd. of Water Comm’rs, Laconia Water Works v. Mooney*, 139 N.H. 621, 660 A.2d 1121 (1995). In *Mooney*, the Court considered whether the actions of a municipal agency (the Board of Water Commissioners) exceeded the statutory authority afforded to the overarching municipality (the City of Laconia) in assessing a fee. 139 N.H. at 623-25. While the Court in *Mooney* cited the general proposition stated *infra* that municipalities cannot exceed the authority conferred upon them by the State, it seems a stretch to make the argument that *Mooney* supports the proposition that municipal corporations cannot take issue with a State action because the State does not expressly permit them to disagree.

Regardless, the Intervenor’s narrow definition of municipal authority is ultimately unpersuasive because the Town of Gilford also possesses an inherent power as a corporation as well as statutory authority to seek redress in court. The second element to the dual character of a municipal corporation is that municipal corporations are “corporate bodies, capable of much the

same acts as private corporations, and having the same special and local interests and relations, not shared by the state at large.” *Kardulas v. Dover*, 99 N.H. 359, 360, 111 A.2d 327 (1955) (internal quotations omitted). Indeed, it has been established that “[e]very town is a body corporate and politic, and by its corporate name may sue and be sued, prosecute and defend, in any court or elsewhere.” RSA 31:1.

In this case, the Town of Gilford, acting as a municipal corporation, and not merely as a “political subdivision,” has the authority to seek a declaratory judgment, and therefore the Court should hold that Gilford has standing to bring forth its Petition.

*B. Intervenor’s interpretation of RSA 491:22 as it pertains to towns is inconsistent with applicable case law and the interests of public policy.*

The Town of Gilford, as a municipal corporation, is well within its authority to seek a declaratory judgment under RSA 491:22, I, as the town has the same rights as an individual to seek relief before the Court.

The Intervenor contends that the Town of Gilford lacks standing because it lacks the right to challenge a statute based upon a violation of an individual’s constitutional rights. Intervenor’s Brief at 10 (*citing Appeal of Town of Exeter*, 126 N.H. 685, 495 A.2d 1288 (1985) (“*Exeter*”). The *Exeter* Court reiterated (without considering briefing from the parties) the general principle that towns cannot file suit based upon a violation the constitutional rights of individual persons. 126 N.H. at 688. This principle, relied upon so heavily by the Intervenor, necessarily implies that towns do not possess the constitutional rights of individual persons.

These two principles are no longer valid statements of the law. Gilford is a municipal *corporation*, and as a corporation it is afforded the equal protection and First Amendment rights the



*Exeter* Court expressly denied the town in that case. See *Citizens United v. Federal Election Comm'n*, 558 U.S. 50 (2010); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978). Therefore, the Court should not consider the Intervenor's argument that a municipal corporation cannot possess constitutional rights persuasive.

The Intervenor also contends that RSA 491:22, I should not permit the Town of Gilford to seek declaratory relief because that statute names "persons" as proper claimants, and since Gilford does not possess its own right to vote it cannot seek declaratory relief for those who do. This interpretation of RSA 491:22, I is impermissibly narrow. First, while Gilford concedes that it cannot vote for representatives to the House like its residents can, the town and its voters cannot be so easily distinguished as the Intervenor contends. Towns are unique political entities in New Hampshire; they are distinguished from cities and other municipal corporations by the fact that a town's entire population serves as the legislative branch of the town government through the town meeting process. See Loughlin, 13 New Hampshire Practice: Local Government Law § 2.14 (3d ed. 2011). As such, Gilford's residents, by and through its town government, is analogous to the New Hampshire House of Representatives, by and through its Speaker, and the Attorney General (on behalf of the Secretary of State) serving as parties to the same action.

Second, since RSA 491:22, I has been enacted, the Court has taken a more relaxed view as to who qualifies as a proper party to claim a "present legal or equitable right or title," particularly in cases involving public policy concerns. For example, in *New Hampshire Wholesale Beverage Association v. New Hampshire State Liquor Commission*, the Court held that individual taxpayers (who, it should be noted, were represented in the suit by an umbrella corporation) have the right to seek declaratory relief to ensure the proper administration of state government even before they

suffer an individual pecuniary loss. 100 N.H. 5, 6, 116 A.2d 885 (1955).

Also, in *O'Neil v. Thompson*, the Court permitted certain members of the General Court (as well as the State of New Hampshire Employees' Association, a corporation) to seek a declaratory judgment against certain Executive Orders of the Governor. 114 N.H. 155, 157, 316 A.2d 168 (1974). While it could not be disputed that each of the plaintiffs in that case had suffered or would suffer some individual and personal injury, the Court held that “[t]he plaintiffs in their several capacities have sufficient right and interest in the performance by public officers of their public duties and in the preservation of an orderly and lawful government to entitle them to maintain these proceedings.” *Id.* at 158-59.

Just as the taxpayers in *Beverage Association* and the public officers in *O'Neil* were acting not out of injury but in the interest of governmental integrity, the Town of Gilford is simply trying to act on behalf of its residents to ensure the Legislature acts in a manner that preserves an orderly and lawful government. In the cases mentioned above, it could hardly be said that the individuals and entities who brought suit were the ones who would be adversely affected by State's action. However, the Court determined that, as a matter of public policy, the claimants had a compelling interest in ensuring the individuals they represented (who would ultimately be harmed by the State's conduct) would be protected. That is precisely what Gilford is trying to do here; it does not want its voters to be unnecessarily disenfranchised by an unconstitutional redistricting plan.

Finally, as the Intervenor concedes, Part II Art. 11 specifically refers to towns in its text. The language the Legislature used in crafting Part II, Art. 11 is instructive: it refers to “the population of any town,” and “[t]he apportionment *shall not deny any other town*. . . membership in one non-floterial representative district.” NH. Cons. Part II, Art. 11 (emphasis added). Additionally, the

amendment states that “[w]hen any town. . . has fewer than the number of inhabitants necessary to entitle it to one representative. . .” and “[i]n forming the districts, the boundaries of towns. . . shall be preserved and contiguous.” *Id.* (emphasis added). The plain language of Part II, Art. 11 makes abundantly clear that the Legislature considers towns necessary and indispensable to the question of how representatives ought to be apportioned, regardless of who has the right to vote on those representatives. Thus, Gilford should be allowed to bring forth its Petition.

**II. Even if the Court holds that the Town of Gilford lacks standing, it is undisputed that Mr. Millham and Mr. Sanfacon possess the requisite standing for the Court to provide declaratory relief regarding the unconstitutionality of RSA 662:5 as it applies to the Town of Gilford.**

The Intervenor has not challenged the fact that Peter Millham and Leo Sanfacon are both registered voters and residents in the Town of Gilford and therefore possess the necessary standing to challenge the constitutionality of RSA 662:5. Even if the Intervenor had, it is well-settled that individual voters possess the necessary standing to challenge a redistricting plan that affects that voter’s district. *See Levitt v. Maynard*, 104 N.H. 243, 182 A.2d 897 (1962).

### CONCLUSION

For all the reasons stated above, the Town of Gilford (as well as Petitioners Millham and Sanfacon) possess the requisite standing to seek a declaratory judgment pursuant to RSA 491:22, I on the grounds that RSA 662:5 violates Part II, Art. 11 of the New Hampshire Constitution.

**REQUEST FOR ORAL ARGUMENT**

Petitioners Town of Gilford, Millham, and Sanfacon request permission of the Court to participate in oral argument.

Respectfully Submitted,

Town of Gilford,  
Peter V. Millham and  
Leo Sanfacon

By their Attorneys,

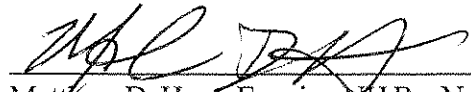
Dated: May 21, 2012



Peter V. Millham, Esquire, NH Bar No. 1761  
Matthew D. Huot, Esquire, NH Bar No. 19872

**CERTIFICATION**

I hereby certify that on this 21<sup>st</sup> day of May, 2012, a true and complete copy of the foregoing *Petitioners' Response Brief on the Issue of Standing* was electronically delivered to: John Safford, Clerk of Hillsborough County Superior Court, Northern District; Attorney General Michael A. Delaney; Anne M. Edwards, Associate Attorney General; Stephen G. LaBonte, Assistant Attorney General; Thomas J. Donovan, Esquire; Richard J. Lehmann, Esquire; David A. Vincinanzo, Esquire; Anthony J. Galdieri, Esquire; Danielle L. Pacik, Esquire; Martin P. Honigberg, Esquire; Jay Surdowski, Esquire; Tony F. Soltani, Esquire; Jason B. Dennis, Esquire; and Allan B. Krans, Sr., Esquire.



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