THE STATE OF NEW HAMPSHIRE
SUPREME COURT

CASE NO. 2012-0338

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

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

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

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

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

Interlocutory Transfer Pursuant to Rule 9

REPLY BRIEF FOR THE INTERVENOR

Respectfully Submitted,

The New Hampshire House of
Representatives, through its Speaker
By its Attorneys,
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ORAL ARGUMENT REQUESTED

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STATEMENT OF THE FACTS

The Statement of the Facts is contained in Section II of the Interlocutory Transfer Statement as well as in the Brief for the Intervenor.

ARGUMENT

I. THE PETITIONERS' ALTERNATIVE REDISTRICTING PLANS DO NOT CONSTITUTE EVIDENCE THAT RSA 662:5 IS UNCONSTITUTIONAL.

The petitioners primarily argue that this Court should force the legislature to create a redistricting plan that is presumptively unconstitutional under the one person, one vote requirement to accommodate the other subordinate state redistricting requirements. The petitioners have not, and cannot, cite to a single federal or state case where a court has invalidated a presumptively constitutional redistricting plan and ordered the legislature to create a presumptively unconstitutional redistricting plan. Such an anomalous case likely does not exist because it is the legislature's role to balance competing redistricting principles, not the court's role.[1] The petitioners also have not, and cannot, cite to a single federal or state case where a court has required a legislature to swap one constitutional method of creating districts or calculating deviation for another constitutional or constitutionally suspect method of creating districts or calculating deviation. Nonetheless, this is precisely the relief the petitioners have requested.

The petitioners' reliance on *Holt v. 2011 Legislative Reapportionment Commission*, 2012 WL 375298 (Pa. Feb. 3, 2012), for the proposition that any alternative redistricting plan

[1]Some of the petitioners appear to rely on *Hellar v. Cenarussa*, 682 P.2d 524 (Idaho 1984) to support some of their positions. It bears noting that *Hellar* appears to be bad law in light of the United States Supreme Court's opinion in *Board Of Estimate of New York v. Morris*, 489 U.S. 688, 701-02 n.9 (1989) (holding that at-large representatives had to be taken into account in the one person, one vote analysis and relying on a version of the component method to do so). Besides employing the now-discredited aggregate method to calculate deviation in floterial districts, *Hellar* also appears to rely on an erroneous interpretation of *Brown v. Thomson*, 462 U.S. 835 (1983) to justify a 41.3% deviation in a court-drawn plan. These holdings appear to put *Hellar* at odds with United States Supreme Court precedent and this Court's holdings in *Burling v. Chandler*, 148 N.H 143 (2002).

constitutes evidence that an enacted plan is unconstitutional evidences a superficial reading of the case. As explained in petitioners' brief on Question B and C, the petitioners in *Holt* submitted an alternative redistricting plan that, using the same methods and standards and the same approximate range of deviation as the redistricting commission, substantially improved on the enacted plan without violating other federal or state constitutional requirements. *See Holt*, 2012 WL 375298, at *35 ("This [Holt] plan shows that a redistricting map could readily be fashioned which maintained a roughly equivalent level of population deviation–the [commission's] primary justification for the numerosity of political subdivisions it divided–as the Final Plan, while employing significantly fewer political subdivision splits . . . .") (emphasis added). In fact, the challengers' plan in *Holt* had deviations that were smaller than the deviations in the enacted plan. *Id.* As the House will explain below, the petitioners' alternative plans do not achieve anything close to what the *Holt* plan achieved.

1.) **Floor Amendment 2012-0218h**, (Iapp. at 112), redistricts only Hillsborough County. It would give the inhabitants of Hudson their own district with their own representatives (District No. 37). It would then create the following floterial districts: (1) Manchester Wards 8 and 9 (District No. 45); and (2) Litchfield and Hudson (District No. 47). Using the component method to measure deviation in floterial districts, as the legislature did in this case, this amendment would result in Manchester Ward 8 having a total deviation of 11.1%, Manchester Ward 9 having a total deviation of 11.4%, and Litchfield having a total deviation of 11.6%. These presumptively unconstitutional deviations would result in a total countywide range of deviation of 16.2%. If this floor amendment were incorporated into RSA 662:5, the statewide range of deviation would jump to 16.5%, beyond the range of deviation the United States Supreme Court has found tolerable, *see Mahan v. Howell*, 410 U.S. 315, 319, 329 (1973), and

nowhere near the 9.9% range of deviation the legislature decided achieves substantial equality among voters. Accordingly, Floor Amendment 2012-0218h does not constitute evidence that RSA 662:5 is unconstitutional.

2.) Floor Amendment 2012-0248h, (Iapp. at 114), only redistricts Hillsborough County and appears to rely on a method of creating floterial districts that is contrary to the plain language of Part II, Article 11. Part II, Article 11 requires the legislature to provide the inhabitants of towns or wards with sufficient population their own district with their own representatives, unless such apportionment would deny a town or ward membership in one non-floterial representative district. It then provides that "[t]he 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 (emphasis added). Part II, Article 11 is the result of a compromise between legislators who, on the one hand, believed that floterial districts were being manipulated in ways that violated the one person, one vote principle and who, on the other hand, believed that floterial districts were an important tool to help create single-member districts in accordance with one person, one vote. (*See* Leg. Rec., Legislative History of CACR 41, CHR – 000579-616.)

The use of the term "excess" in this context is not coincidental. (*See, e.g.*, Leg. Rec., G. Moncrief & R. Joula, *When the Courts Don't Compute: Mathematics and Floterial Districts in Legislative Reapportionment Cases*, 4 J.L. & Pol. 737, 743-45 (1988), CHR – 000771-773 (explaining that "[p]roponents of the equal population to representative ratio view and the aggregate method of computation would conclude that the floterial representative represents the 30,000 people . . . who are 'excess' over the ideal.") (emphasis added)). In fact, the late

Representative Michael D. Whalley illustrated what the term "excess" meant when he explained how the 2006 amendment to Part II, Article 11 operated:

> I guess I will go to the member from Weare's situation. Goffstown and Weare together have eight [representatives], I believe. The situation is Weare, in present population, should have two; Goffstown should have, I believe, five; and then there is a population that is surplus from that amount that should be formed for an additional seat. Now, it could be that we will have an immensely popular person from Weare, even though it is a smaller town, and they may be elected. But, it is probable that it is a five to two probability that the member will be elected from Goffstown. But, it is still a better situation than potentially having all eight elected from Goffstown.

(Leg. Rec., Legislative History of CACR 41, CHR-000596.) (emphasis added). Moreover, the term "excess" means "an amount or quantity greater than is necessary, desirable, useable" and "the amount or degree by which one thing exceeds another." WEBSTER'S NEW WORLD COLLEGE DICTIONARY 495 (4th Ed. 2000). Accordingly, in the context of Part II, Article 11, the "excess" are those inhabitants who remain after the inhabitants of a particular town or ward are given their own district with the maximum number of representatives to which they are entitled.

Floor Amendment 2012-0248h does not create floterial districts solely from excess inhabitants. Instead, it manipulates the population in floterial districts by placing more than the excess inhabitants into some of those districts. For example, the town of Merrimack has a total population according to the 2010 federal census of 25,494, (Iapp. at 24), and is within a reasonable deviation of the ideal population for eight of its own representatives without any excess inhabitants leftover. Thus, under Part II, Article 11, the inhabitants of Merrimack are entitled to their own district with their own eight representatives. Floor Amendment 2012-0248h would alter this result by providing Merrimack with only seven representatives (District No. 14). (Iapp. at 114.) It would then take an entire eighth-representative's worth of inhabitants and put them into a floterial district with Amherst (District No. 5), *id.*, thereby depriving Merrimack's

inhabitants of a House seat to which they are constitutionally entitled.[2] Floor Amendment 2012-0248h would do the same to Hudson (District No. 46), depriving Hudson's inhabitants of one of their representatives to manipulate the deviation in the overlaid floterial district. (Iapp. at 115.)

Manipulating floterials districts in this way is contrary to the plain language of Part II, Article 11 and the intent of the legislators and voters who passed it. (*See* Leg. Rec., Legislative History, CHR 000579-616.) Moreover, manipulating floterials in this way in some instances and not in others would be arbitrary and—taken to its logical conclusion—would create a situation where the legislature could give the inhabitants of a town who are entitled to eight representatives of their own with only one representative and put the other seven representatives into a floterial district with other towns and wards. Those who drafted and voted for the 2006 amendment to Part II, Article 11 never intended this result. The potential for abuse is plain. Accordingly, Floor Amendment 2012-0248h does not constitute evidence that RSA 662:5 is unconstitutional.[3]

3.) **Floor Amendment 2012-0246h**, (Iapp. at 116) only redistricts Hillsborough County and appears to rely on the same unconstitutional method of creating floterial districts as Floor Amendment 2012-0248h. Floor Amendment 2012-0246h utilizes this unconstitutional method of creating floterial districts to deprive Merrimack of one of its eight representatives (District No. 14) in order to create a floterial district with Amherst (District No. 5). (Iapp. at 116.) Floor Amendment 2012-0246h also deprives the inhabitants of Litchfield of their own district under Part II, Article 11 (District No. 45) in order to give Pelham its own district (District

[2] The inhabitants of the town of Merrimack appear to be victimized by this unconstitutional method of creating floterial districts in numerous other alternative plans including Floor Amendment 2012-0246h and the Petitioners' Expanded Range of Deviation Plan.

[3] If Floor Amendment 2012-0248h created floterial districts consistent with Part II, Article 11, Floor Amendment 2012-0248h would have a total statewide range of deviation of 16.5%.

No. 46). (Iapp. at 117.) Accordingly, Floor Amendment 2012-0246h does not constitute evidence that RSA 662:5 is unconstitutional.

4.) Floor Amendment 2012-0156h, (Iapp. at 118) only redistricts Merrimack County and deprives the inhabitants of Boscawen and Allenstown of their own district with their own representatives under Part II, Article 11 (District Nos. 7 and 24) in order to give Concord Ward 5 its own district (District No. 13). (Iapp. at 118-19.) Such a result demonstrates precisely the type of impermissible ripple effect that is created when one attempts to selectively satisfy Part II, Article 11's own-district, own-representatives requirement within the requirements of the federal-state one person, one vote principle. *See, e.g., Mayor of Cambridge v. Sec'y of Commonwealth*, 765 N.E.2d 749, 756 (Mass. 2002); *In re 1983 Legislative Apportionment of House, Senate, & Congressional Districts*, 469 A.2d 819, 831 (Me. 1983). Depriving the inhabitants of two towns of their own district with their own representatives under Part II, Article 11 in order to give the inhabitants of one ward their own district with their own representatives does not substantially improve upon RSA 662:5. Rather, it merely demonstrates that the legislature could have made different policy decisions.[4] Accordingly, Floor Amendment 2012-0156h does not constitute evidence that RSA 662:5 is unconstitutional.

5.) Floor Amendment 2012-0243h, (Iapp. at 120) only redistricts Hillsborough County and is identical to the enacted redistricting plan in all respects except that it deprives the inhabitants of Peterborough of their own district with their own representatives under Part II, Article 11. Such a plan does not substantially improve upon RSA 662:5 and merely demonstrates that the legislature could have made different policy decisions. Accordingly, Floor

[4]Additionally, Floor Amendment 2012-0156h would expand the total statewide deviation of the enacted plan to 10.2%, making the plan presumptively unconstitutional under the federal and state constitutions.

Amendment 2012-0243h does not constitute competent evidence that RSA 662:5 is unconstitutional.

6.) **Floor Amendment 2012-0252h,** (Iapp. at 122) redistricts the entire state, but relies on a method of weighted voting in floterial districts instead of calculating deviation in floterial districts under the component method. Substantial doubt exists regarding whether a system of weighting votes is constitutional. *See Morris*, 489 U.S. at 689 (affirming ruling that weighted voting model was not appropriate way of resolving equal protection issues in redistricting cases and relying instead on the approach reflected in the *Reynolds v. Sims* line of cases); *Reynolds v. Sims*, 377 U.S. 533, 563 (1964) ("Weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable."). However, even assuming such a system is constitutional, no petitioner has argued that using the component method to calculate deviation in floterial districts is unconstitutional. The court's role is solely to determine whether RSA 662:5 is constitutional. The Legislature rejected weighted voting believing that it would make terrible public policy primarily because a candidate could win the popular vote, but lose the election. Such a decision is legislative in character and entitled to deference. Accordingly, Floor Amendment 2012-0252h does not constitute evidence that RSA 662:5 is unconstitutional.

7.) **The Petitioner's Expanded Range of Deviation Plan ("ERD Plan"),** is unreliable and likely unconstitutional. (Iapp. at 142-52.) First, it is impossible to tell how the plan calculates deviation in districts. Second, it appears that the plan relies on the same unconstitutional method of creating floterial districts as Floor Amendments 2012-0248h and 2012-0246h. Third, utilizing the aggregate method to calculate deviation in single-member and

multi-member districts and the component method to calculate deviation in floterial districts, the plan appears to have an overall deviation in excess of 50%.

The ERD Plan does not redistrict Belknap or Sullivan counties any differently than RSA 662:5. In Coos County, the plan omits the town of Whitefield from the redistricting map entirely.[5] In Grafton County, District No. 19 places Canaan into a floterial district with other districts that are not contiguous with Canaan. *See* N.H. Const. Pt. II, Art. 11 ("In forming the districts, the boundaries of towns, wards, and unincorporated places shall be preserved and contiguous."). In Hillsborough County, District No. 24 appears to have a total deviation using the aggregate method of 51.6%. *See Burling*, 148 N.H. at 155 (indicating that deviation of 28.4% in district was "impermissible"). Also, Hillsborough County is reconfigured to deprive the inhabitants of Peterborough of their own district with their own representatives. In Hillsborough County, District No. 30, the same unconstitutional method for creating floterial districts as used in Floor Amendments 2012-0248h and 2012-0246h has been used to deprive the inhabitants of Merrimack of two representatives to which they are entitled under Part II, Article 11.

In Merrimack County, District No. 21 (a floterial district), Hopkinton (District No. 5) appears to have a total deviation of 26.4% and the towns of Salisbury, Warner, Bradford, and Henniker (District No. 4) appear to have a total deviation of 22.4%. Also, District No. 22 (a floterial district), appears to result in the following deviations for Concord Wards 1-10: (1) Concord Ward 1, 22.8%; (2) Concord Ward 2 , 20.7%; (3) Concord Ward 3, 19.4%; (4) Concord Ward 5, 13.1%; (6) Concord Ward 6, 15.3%; (7) Concord Ward 7, 17.5%; (8) Concord Ward 8, 14.7%; (9) Concord Ward 9, 19.8%; and (10) Concord Ward 10, 21.4%. Merrimack County is

[5]Such an error would likely render the entire redistricting plan, or, at the very least, the entire Coos County redistricting plan, unconstitutional as it completely deprives Whitefield's inhabitants of their equal protection and voting rights.

also reconfigured to deprive the inhabitants of Boscawen and Allenstown of their own district with their own representatives under Part II, Article 11, a privilege the inhabitants of those towns enjoy under RSA 662:5. In Rockingham County, District No. 30, the petitioners' have used the same unconstitutional method for creating floterial districts as used in Floor Amendments 2012-0248h and 2012-0246h to deprive the inhabitants of Salem of a representative to which they are entitled under Part II, Article 11 in order to manipulate the deviation in District No. 35 (a floterial district). Rockingham County, District No. 5 appears to have a deviation of -10.2% and District No. 36 (a floterial district) appears to produce a deviation of -8.5% in District No. 29.

Based on the above, it is impossible for the House to accurately calculate the deviation in the ERD Plan. However, adding the highest positive deviation, which appears to be 51.6%, to the lowest, negative deviation, which appears to be -10.2%, yields a statewide range of deviation of 61.8%, not taking into account the fact that Whitefield is entirely without representation.

Nonetheless, even if this Court accepted the figures on the face of the ERD Plan as accurate, the plan would still utilize an unconstitutional method of creating floterial districts and have a presumptively unconstitutional range of deviation of 14.2%. Moreover, the plan would still deprive the inhabitants of numerous towns that currently have their own districts with their own representatives under RSA 662:5 of that privilege. Accordingly, the ERD Plan achieves far less than the *Holt* plan and does not constitute evidence that RSA 662:5 is unconstitutional.

Additionally, the House objects to any attempt by the petitioners to submit a new alternative plan in their reply brief. The petitioners agreed to close the record upon completion of the interlocutory transfer statement. The Superior Court agreed to interlocutory transfer on that basis. The petitioners are not permitted to submit new evidence at this late hour.

CONCLUSION

Thus, for the above reasons, none of the petitioners' alternative plans demonstrates that, using the same methods and standards and the same approximate range of deviation as the legislature, RSA 662:5 can be substantially improved without creating federal or state constitutional violations elsewhere on the map. Accordingly, this Court should hold that RSA 662:5 is constitutional.

REQUEST FOR ORAL ARGUMENT

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

Respectfully Submitted,

The New Hampshire House of
Representatives, Through Its Speaker

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Date: May 29, 2012

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CERTIFICATE OF SERVICE

I hereby certify that a copy of forgoing *Reply Brief for the Intervenor* was served on this 29th day of May, 2012, by electronic mail to Jason B. Dennis, Esquire; Tony F. Soltani, Esquire; Jason M. Surdukowski, Esquire; Martin P. Honigberg, Esquire; Danielle L. Pacik, Esquire; Thomas J. Donovan, Esquire; Peter V. Millham, Esquire; Matthew D. Huot, Esquire; Anne M. Edwards, Esquire; Stephen G. LaBonte, Esquire; and Richard J. Lehmann, Esquire; counsel of record.

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