

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

IN CASE NO. 2012-0338

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

Interlocutory Transfer Pursuant to Rule 9

PETITIONERS' BRIEF IN SUPPORT OF DECLARATORY JUDGMENT

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

BY THEIR ATTORNEYS,

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New Hampshire Constitution, Part II, Article 11 2,3,4,6,7,8

“When the population of any town or ward, according to the last federal census, is within a reasonable deviation from the ideal population for one or more representative seats the town or ward shall have its own district of one or more representative seats. The apportionment shall not deny any other town or ward membership in one non-floterial representative district. When any town, ward, or unincorporated place has fewer than the number of inhabitants necessary to entitle it to one representative, the legislature shall form those towns, wards, or unincorporated places into representative districts which contain a sufficient number of inhabitants to entitle each district so formed to one or more representatives for the entire district. In forming the districts, the boundaries of towns, wards, and unincorporated places, shall be preserved and contiguous. The excess number of inhabitants of a district may be added to the excess number of inhabitants of other districts to form at-large or floterial districts conforming to acceptable deviations. The legislature shall form the representative districts at the regular session following every decennial census.” (*emphasis added.*)

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QUESTIONS PRESENTED FOR REVIEW

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

STATEMENT OF THE CASE

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.

To summarize the facts relevant to Gilford contained in Section II of the ITS, the redistricting plan adopted by the Legislature this year creates one district composed of the Towns of Gilford and Meredith. This district is assigned four representatives. Physically, the towns do not abut on land. The City of Laconia separates them so that the shortest distance between the town lines by road is about three miles. The Committee which created the district relied on the boundaries between the two towns which abut in the middle of Lake Winnepesaukee to justify their consolidation.

Gilford has a population of 7,126. The ideal population is 3,291 per representative. Gilford is therefore mathematically entitled to 2.16 representatives. Meredith has a population of 6,241, mathematically entitling it to 1.90 representatives. The Legislature has assigned the district four representatives. Neither town will have any representatives of their own. People in New Hampshire prefer to have representation from their own communities. Gilford and Meredith are two separate

and different communities. The Town of Gilford satisfies the criteria of the New Hampshire Constitution, Part II, Article 11, which entitles it to two representatives who are residents of Gilford and represent it exclusively.

SUMMARY OF ARGUMENT

The New Hampshire Constitution, Part II, Article 11 unquestionably provides that any town with a population that is within “a reasonable deviation” from the ideal population for a representative seat is entitled to that seat. The ideal population for a representative seat is 3,291. Gilford has a population of 7,126. Gilford clears the threshold to be apportioned its own representative, and in fact is entitled to two representatives (a two-representative district having an ideal population of 6,582) with an excess population of 544, or a deviation of 8.26%.

The town of Meredith has a population of 6,241. It, too, clears the threshold requirement to be apportioned its own representative. While Meredith does not have a sufficient population to meet the threshold for two representatives, awarding Meredith two representatives would result in a deviation of -5.18%. Prior to the State’s redistricting plan being enacted, Meredith was apportioned two representatives.

The State of New Hampshire, in enacting RSA 662:5, has combined the towns of Gilford and Meredith into a single legislative district, that will elect four representatives at-large to the New Hampshire House of Representatives. This is in violation of Part II, Art. 11 of the New Hampshire Constitution. Moreover, it defies common sense; Gilford and Meredith do not border one another in any meaningful way. The two towns share a border on the map, but this shared border runs

through Lake Winnepesaukee. In order to traverse between the two towns (and stay dry in the process), one has to drive through the city of Laconia.

The State claims it can violate Part II, Article 11 because allowing Gilford to have two representatives would create an impermissible deviation from the ideal population for a district, forbidden by federal law under the doctrine of “one person, one vote.” The deviations for Gilford and Meredith are neither impermissible nor unreasonable. Courts have roundly rejected the notion that deviation from the ideal population should be the sole determinant in apportioning representative districts, as this Court should do here.

Finally, the issue Gilford presents to the Court is severable from its fellow Petitioners’ claims. The legislative district concocted for Gilford and Meredith affects those two towns alone: thus, the Court could strike down RSA 662:5 as it pertains to Gilford, order the Legislature to re-apportion Gilford and Meredith separately the representative seats they deserve under Part II, Art. 11, and not adversely or otherwise affect any other city or town in Belknap County or elsewhere.

ARGUMENT

A plain reading of Part II, Article 11 establishes that there can be no other alternative than to give a town in Gilford’s position two representatives. The State’s redistricting plan fails to do so. As such, the plan must be declared unconstitutional as it applies to Gilford.

I. The State’s redistricting plan is unconstitutional as it applies to Gilford.

Part II, Art. 11 of the New Hampshire Constitution was amended in 2006 to ensure that every town with sufficient population would have at least one representative of its own. The State, in

crafting its redistricting plan, abrogated its duty to uphold the Constitution as it applies to Gilford (and, by extension, Meredith) by combining the two towns into one at-large, multi-member district.

A. *Gilford is entitled to its own representative district based upon the clear and unambiguous language of Part II, Art. 11.*

The overriding goal of any redistricting plan is to ensure a fair and just result. The U.S. Supreme Court has recognized that the achievement of “fair and effective representation for all citizens is. . . the basic aim of legislative apportionment.” *Reynold v. Sims*, 373 U.S. 533, 565-66 (1964). In enacting RSA 662:5, the State is entitled to the presumption of constitutionality at the outset. *See New Hampshire Ass’n of Counties v. State*, 158 N.H. 284, 288 (2009). However, this Court may strike down a statute any time a “clear and substantial conflict exists between it and the constitution.” *Id.* Consequently, it stands to reason, then, that Gilford has the burden of establishing that the redistricting plan violates Part II, Art. 11 of the NH Constitution, but upon establishing a *prima facie* case the burden shifts to the State to explain why the redistricting plan should stand contrary to the dictates of the state constitution. Also, in reviewing constitutional provisions, this Court should “view the language used in light of the circumstances surrounding its formation.” *Id.* (quoting *N.H. Munic. Trust Workers’ Comp. Fund v. Flynn*, 133 N.H. 17, 21 (1990)).

The people of the State have concluded, in amending Part II, Art. 11, that each town having a population within reasonable deviation of the ideal population (3,291) *shall* form its own district. N.H. Const. Part II, Art. 11. There is only one exception recognized by Article 11: “the apportionment shall not deny any other town or ward membership in one non-floterial representative district.” *Id.* In this case, awarding Gilford two seats does not deprive any other town membership in one non-floterial district. Meredith has a sufficient population to be entitled to one non-floterial

district and is within a reasonable deviation for having two seats apportioned to it. Its deviation for two representatives is only -5.18%.

Part II, Article 11 also makes sure that we appreciate that Gilford's excess population does not deprive Gilford of its two independent representatives. It provides, "the *excess* residents in 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." *Id.* (emphasis added). This clearly indicates that Gilford's 8.26% excess population can be combined to form a floterial district with the excess population of neighboring towns, but cannot be used to deprive Gilford of its representatives duly apportioned pursuant to Part II, Article 11.

B. The State's rationale for violating the New Hampshire Constitution is unpersuasive as it fails to account for its authority to consider rational state policies.

The State claims it had no alternative but to violate its own Constitution. We recognize that the U.S. Constitution trumps the New Hampshire Constitution, and that no redistricting scheme can undermine the Equal Protection Clause of the Fourteenth Amendment. However, the House imposed upon itself a much narrower deviation test than federal courts require.

Others involved in this case will surely address these issues in more detail, but it merits mentioning here that the federal courts allow more variation for state representatives than is allowed for the US House of Representatives. *Reynolds v. Sims*, 377 U.S. 533, 578 (1964). The reason for this, the *Reynolds* Court opined, is because states tend to have many more legislative seats to apportion than congressional districts, and therefore deviation on a congressional level would have a greater adverse impact for equal protection purposes than it would on the state level. *Id.* Put

another way, a five percent deviation in a legislative district of 5,000 people implicates equal protection issues for 250 voters; that same deviation in a congressional district of 500,000 people would impact 25,000 voters.

As has been noted by the Court in *Burling v. Chandler*, New Hampshire has the largest state legislature in the United States, and one of the lowest overall populations; this is one of the reasons why deviation from the ideal population should be considered in context, because a very small number of people can have a considerable impact on deviation. 148 N.H. 143, 157-58 (2002).

Moreover, federal courts allow greater deviation for attempts to follow the dictates of the state constitution, or where the deviation comports to further a rational state policy. In *Brown v. Thomson*, the Supreme Court recognized that “some deviations from population equality may be necessary to permit the States to pursue other legitimate objectives” like preserving the integrity of political subdivisions and “providing for compact districts of contiguous territory”. 462 U.S. 835, 842 (1983) (internal quotations omitted). Indeed, established federal precedent indicates that, contrary to the State’s assertion that it had no choice than to violate Part II, Art. 11, it had considerable flexibility to comply with our state constitution, it just failed to do so. See *Mahan v. Howell*, 410 US 315 (1973) (finding that Virginia did not violate the Constitution with deviations of 16.7 percent and 23.6 percent between districts); *Brown*; 462 US 835 (in which the Supreme Court upheld the decision that Montana was within reason with an 89 percent deviation); *Boyer v. Gardner*, 540 F.Supp. 624 (1982) (holding that a 13.74 percent variation in New Hampshire was held to be reasonable).

II. The issues raised in Gilford's petition are severable from the remaining issues before the Court.

Gilford's Petition involves the apportionment of representatives for two towns in Belknap County. If the Court were to rule favorably on Gilford's Petition, it would have no impact on any other district in Belknap County or elsewhere in the State. As such, the issues raised in Gilford's Petition are clearly severable.

A statutory provision is severable if what remains after severance "is fully operative as a law." *Champlin Refining Co. v. Corporation Comm'n*, 286 U.S. 210, 234 (1932). Additionally, this Court has previously held that "[i]n determining whether the valid provisions of a statute are severable from the invalid ones, we are to presume that the legislature intended that the invalid part shall not produce entire invalidity if the valid part may be reasonably saved." *Claremont School Dist. v. Governor*, 144 N.H. 210, 217 (1999). Moreover, the Court must determine whether the unconstitutional portion is so intertwined with the remainder of the statute that excising the unconstitutional portion would cause the remaining statute to unravel. *Id.*

Here, Gilford presents the Court with a problem that is serious in its constitutional implications but self-contained in its scope. If RSA 662:5 is declared unconstitutional as it pertains to Gilford, the district will invariably be tasked with re-drawing its district so that Gilford forms its own legislative district with its own representatives as required by Part II, Art. 11. Consequently, this would necessitate re-drawing Meredith's legislative district so that Meredith forms its own district with its own representatives. If the Legislature were to do so, no further re-apportionment would be necessary; as stated *infra*, Gilford and Meredith could form their own independent legislative districts in compliance with Part II, Art. 11 and within a reasonable deviation from the ideal population for their districts. While the Court has been presented many other instances in

which the State has violated Part II, Art. 11 relating to other towns and wards, the issues Gilford presents to the Court are severable; to cure the defect Gilford complains of would not necessarily cause RSA 662:5 to fall apart as a whole.

CONCLUSION

In this case, the State claims that giving Meredith and Gilford four representatives in one district (in clear violation of Part II, Art. 11) is acceptable, but giving the same four representatives in two separate districts is illegal. This just does not make sense. It is the result of too much arithmetic and too little common sense. The State has not established that its violation of the New Hampshire Constitution is absolutely necessary by any standard or stretch of the imagination. For all the reasons stated above, the Petitioners respectfully request that the Court provide the relief requested herein.

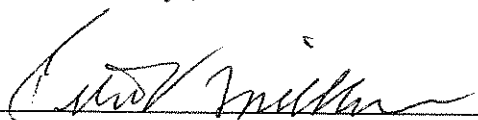
STATEMENT IN RE ORAL ARGUMENT

Petitioners desire to participate in oral argument.

Respectfully submitted,

Town of Gilford,
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Leo B. Sanfacon,
By their attorneys,

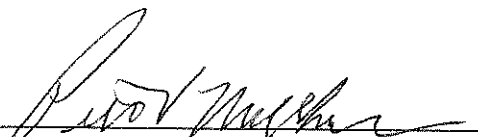
Dated: May 23, 2012



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CERTIFICATION

I hereby certify that on the 23rd day of May, 2012, a true and complete copy of the foregoing *Petitioners' Brief in Support of Declaratory Judgment* was electronically transferred 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; Allan B. Krans, Sr., Esquire; Christopher C. Buck, Esquire; and Philip T. McLaughlin, Esquire. [


Peter V. Millham