# THE STATE OF NEW HAMPSHIRE

SUPREME COURT

NO: 2011-0662

Honorable Marshall Lee Quandt, et al
v.
William Gardner, in his official capacity as Secretary of State of the State of New Hampshire

Rule 9 Interlocutory Transfer without Ruling

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## BRIEF OF PETITIONERS L. QUANT, SOLTANI, M. QUANT, PEPINO, BROWN, VAILLANCOURT, MESSIER, PILLIOD, MACKAY, MORAN-SIUDUT, BERGERON, PIERCE, LEISHMAN, LAVASSEUR, DOHERTY and SCHMIDT on QUESTIONS B and C

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether RSA 662:5 is unconstitutional under the Federal or State Constitutions?

2. 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 AND FACTS

Section I and II of the Interlocutory Transfer Statement set forth the Statement of the Case and Agreed Statement of Facts. Additional procedural and factual history is set forth in the multiple briefs on Question A.

## SUMMARY OF THE ARGUMENT

RSA 662:5, as enacted over the Governor's veto, is clearly unconstitutional under NH Const. Part II, Art. 11, which was passed by over 70% of New Hampshire voters and amended in 2006. The statute clearly tramples on New Hampshire's unique, proud, and representative legislative tradition; and it directly violates the New Hampshire constitutional mandates of Part II, Art. 11 that i) "[w]hen the population of any town or ward, according to the last federal census, is within a reasonable deviation from the ideal population for one or more representative seats, the town or ward **shall** have its own district of one or more representative seats and ii) "[i]n forming the districts, the boundaries of towns, wards, and unincorporated places **shall be preserved and contiguous**." (Emphasis added.)

Because i) 62 out of the 152 (40.8% of the total) towns and wards in New Hampshire that qualify for their own representative are denied their own seat in the House and ii) RSA 662:5 breaks up cities, towns, and wards and establishes representative districts without contiguous borders, Part II, Art. 11 of the New Hampshire Constitution has clearly been violated. RSA

662:5, as enacted over the Governor's veto, is unconstitutional and cannot even pass the straight face test.

Other than retaining RSA 662:5's introductory language ("The state is divided into districts for the choosing of state representatives, each of which may elect the number of representatives set forth opposite the district, as follows:"), there is no workable way to severe any part of the statute without aggravating its unconstitutionality. From a common sense, practical perspective, severance of any part of RSA 662:5 would result in the severance of some subdivision of the electorate. Any severed subdivision of the electorate would, thereafter, not only be denied its own representative district, as is guaranteed by NH Const. Part II, Art. 11, but would denied any representation at all. Such wholesale disenfranchisement would, incontrovertibly, violate both the Federal and State constitutions.

## STANDARD OF REVIEW

The New Hampshire Supreme Court is the "final arbiter of State constitutional disputes." In re Below, 151 N.H. 135, 139 (2004) The Supreme Court examines "the language of the relevant constitutional provisions." Id. The Court will look to purpose and intent, but gives "the words in question the meaning they must be presumed to have had to the electorate when the vote was cast." Id.

## ARGUMENT

### I. RSA 662:5 IS UNCONSTITUTIONAL UNDER THE STATE CONSTITUTION

#### *A. 62 Qualifying Towns Are Denied Their Own Representative District In Direct Violation Of Part II, Article 11 Of the New Hampshire Constitution.*

One of the unique advantages to living in New Hampshire is the ability of citizens to encounter his or her state representative in their daily activities - at the grocery store, in a house of worship, or

> walking main street. [RSA 662:5] undermines that very special quality of life in New Hampshire and the critical component of representative local democracy that is expressed in a commonality of interest among a community's citizens.

Governor Lynch's March 23, 2012 Veto Message of HB 592, *available at http://www.governor.nh.gov/media/news/2012/032312-hb592-sb201.htm* (last accessed May 22, 2012). With these words, among others, see *infra*, Governor Lynch, vetoed HB 592 (now codified as RSA 662:5).

The unique, important, proud, and representative legislative history and tradition highlighted by Governor Lynch in his veto message is embodied in Part II, Article 11 of the New Hampshire Constitution (as amended in 2006). In pertinent part, NH Const. Part II, Art. 11 states "[w]hen the population of any town or ward, according to the last federal census, is within a reasonable deviation from the ideal population for one or more representative seats, the town or ward **shall** have its own district of one or more representative seats. (Emphasis added.) NH Const. Part II, Art. 11 was amended in 2006 after a vote of 240,767 to 100,688 (70.5%). The amendment note summarizes the purpose of the amendment to NH Const. Part II, Art. 11: "Amended November 7, 2006 to enable towns with sufficient population to have their own representative district and permits the use of floterial districts."

This Court, in Town of Canaan v. Secretary of State, 157 N.H. 795, 797 (2008), cited to the voter guide for further explanation of the amendment:

> The Constitution does not guarantee that each town or ward having enough inhabitants to entitle it to one representative seat in the Legislature shall have its own district. The Constitution permits the Legislature to form multi-town and multi-ward districts for electing state representatives, but does not expressly permit or prohibit the Legislature to form so-called "floterial" or at-large districts using excess inhabitants from one district to create a representative seat in those towns and wards that do not have enough inhabitants to

> form a district.
>
> ....
>
> [If adopted, t]his amendment will allow the legislature to create districts in the same manner that districts were drawn prior to 2002. It will increase the total number of districts and therefore increase the probability that the people of a town will be represented by a member of their own community.
> Each town or ward having enough inhabitants to entitle it to one or more representative seats in the Legislature shall be guaranteed its own district for the purposes of electing one or more representatives, unless such action prevented a neighboring town from being included in a single-representative district before it is part of a floterial district. Where a town, ward or unincorporated place does not have enough inhabitants necessary for a representative seat, the Legislature shall form multi-town or multi-ward districts, to qualify for one or more representative seats. Excess population in one or more contiguous districts may be combined to allow for additional at-large or floterial representatives.

The 2006 amendment to NH Const. Part II, Art. 11 was the last time New Hampshire voters have collectively spoken regarding the structuring of their rights to franchise and representation. The voters' collective voice was loud and clear; and there is no colorable, good faith argument as to the language of the constitutional provision at issue. The New Hampshire electorate knew it was casting a vote for or against guaranteeing towns and wards with "sufficient population to have their own representative district" and to have their own, local, representatives.

Based on the 2010 census, and under NH Const. Part II, Art. 11, 152 towns and wards in New Hampshire qualify for their own representative. Of the 152 towns and wards that qualify, 62 (or in other words 40.8%) are denied a representative under RSA 662:5. "This is completely contrary to what the citizens of New Hampshire called for in the state constitutional amendment adopted in 2006." Governor's Veto Message, available at *http://www.governor.nh.gov /media/*

*news/2012/032312-hb592-sb201.htm.*

The locations being denied their right to their own representative are Alton, Atkinson, Auburn, Bow, Brookline, Canaan, Candia, Chester, Chesterfield, Concord, Conway, Deerfield, Dover(x2), Durham, Epsom, Gilford, Gilmanton, Greeland, Hampstead, Hanover, Henniker, Hillsborough, Hinsdale, Hopkinton, Hudson, Jaffrey, Kingston, Lancaster, Lebanon(x3), Littleton, Loudon, Meredith, Milton, Moultonborough, New Boston, New Ipswich, New London, Newmarket, Newport, Northfield, Nottingham, Ossipee, Pelham, Pembroke, Pittsfield, Plaistow, Plymouth, Rindge, Rye, Sandown, Seabrook, Strafford, Sunapee, Swanzey, Tilton, Wakefield, Walpole, Weare, and Wilton.

By ignoring and violating NH Const. Part II, Art. 11, RSA 662:5 quashes fundamental rights of both voters and potential candidates. It is well established that both the right to vote and the right to be elected are fundamental constitutional rights in the State of New Hampshire. See Akins v. Secretary of State, 154 N.H. 67, 71 (2006). RSA 662:5, as enacted over the Governor's veto, infringes on the rights of both the electorate and those seeking to be elected as the legislative representatives of the people located throughout the State of New Hampshire.

There is no mathematical formula that can substantiate any conclusion other than the conclusion that 62 towns and wards in the State of New Hampshire, with sufficient population under NH Const. Part II, Art. 11, are, by RSA 662:5, denied the right, as guaranteed by NH Const. Part II, Art. 11, to have their own representative district. As such, RSA 662:5 is unconstitutional.

*B. RSA 662:5 Impermissibly Manipulates The Boundaries Of Towns, Wards, And Unincorporated Places.*

In addition to guaranteeing that towns and wards with sufficient population shall have their own district of one or more representative seats, NH Const. Part II, Art. 11 states that:

> 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**.

(Emphasis added.) The language is clear and unambiguous. By way of further linguistic assistance, Black's Law Dictionary (Eighth Ed. at 338) defines contiguous as "[t]ouching at a point or along a boundary. It is undisputed that RSA 662:5 i) breaks up certain cities, town, and wards; and ii) devises multi-member districts with no land borders (in other words, **not** contiguous). By way of example, as stated in the Governor's Veto Message:

> For example, in Manchester, the state's largest city, [RSA 662:5] combines Wards 8 and 9 with the town of Litchfield. Pelham will again share its representatives with Hudson. Strafford will share a representative with New Durham. And Concord's Ward 5 will now be made part of a district that includes the Town of Hopkinton.

Additionally, the towns of Gilford and Meredith, which do not touch at any point (and are each large enough to constitute its own representative district) are combined into a multi-member district.

For these violations of NH Const. Part II, Art. 11, RSA 662:5 is unconstitutional.

C. *The Legislature Must Be Permitted To Work With More Than A 10% Deviation.*

Floterial districts, which "as constructed in New Hampshire, have led to unusual results and voting right inequities, see Burling v. Chandler, 148 N.H. 143, 151 (2002), are expressly permitted under NH Const. Part II, Art. 11. In Burling v. Chandler, the first (and last) time this Court conducted a substantive and mathematical analysis of the "process of apportioning the people's right to vote in the election of representatives," Burling v. Chandler at 144, it ruled that the aggregate method of calculating deviation of floterials is not appropriate. Id. at 154. Further, this Court concluded that calculating the deviation for a floterial using the same method as calculating the deviation for a single-member district "results in exceptionally high deviations." Id. As a practical consideration, if the proponents of a redistricting plan need to be justify the plan by calculating which of multiple mathematical formulas producing the most constitutionally inoffensive deviation numbers should be applied, then perhaps that plan has too great of a "calculated partisan political consequence[]." *Cf.* Burling v. Chandler, at 156 (citation omitted).

If floterial districts are used, in order to account for deviation, a weighted voting plan, as referenced at pp. 13-14 of the Quandt, et al Petition and pp. 11-12 of the Wallner, et al Petition (and included as Exhibit 3 to both), could be used to account for the mathematical problem electorate proportionality surplusage. Such a weighted plan is viewed by some as the appropriate panacea for the mathematical problems inherent in redistricting; however the weighted method would at least arguably be violative of the "one person, one vote" doctrine.

In any event, in order for the legislature to best satisfy both Federal and State constitutional principles, the absolute straightjacket of an effectively unworkable 9%-10% deviation, see Burling at 157, needs to be removed. As reasoned by the United States Supreme

Court:

> History indicates [] that many States have deviated, to a greater or lesser degree, from the equal population principle in the apportionment of seats in at least one house of their legislatures. So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, **some deviations from the equal population principle are constitutionally permissible** with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature.

Reynolds v. Sims, 377 U.S. 533, 579 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) (emphasis added).

In upholding a Commonwealth of Virginia General Assembly reapportionment plan with a "16-odd percent maximum deviation," the United States Supreme Court reasoned that "[n]either courts nor legislatures are furnished any specialized calipers that enable them to extract from the general language of the Equal Protection Clause of the Fourteenth Amendment the mathematical formula that establishes what range of percentage deviations is permissible, and what is not." Mahan v. Howell, 410 U.S. 315, 329 93 S.Ct. 979, 35 L.Ed.2d 320 (1973). The Supreme Court explained that "Application of the absolute equality test . . . to state legislative redistricting may impair the normal functioning of state and local governments." Id. at 323.

Further, the Commonwealth of Virginia's justification for its 16.4% deviation, maintenance of traditional county and city boundaries, which is very similar to the constitutional guarantee of NH Const. Part II, Art 11, was upheld as a rational state consideration, and the necessity test applied by the lower court was patently rejected: "the proper equal protection test is not framed in terms of governmental necessity, but instead in terms of a claim that a State may rationally consider. Mahan v. Howell, 410 U.S. 315, 326 93 S.Ct. 979, 35 L.Ed.2d 320 (1973).

Several states have followed Mahan's lead. Recently The Supreme Court of Hawaii has

upheld a plan of the County of Hawaii 2001 Reapportionment Commission resulting in a total deviation of 10.89%. See Citizens for Equit. & Resp. Gov't v. County, 108 Hawai'i, 120 P.3d 217, 108 Hawai'i 318 (Hawaii 2005).

Michigan has adopted the 11.9% and 16.4% deviation "limits" of Abate v. Mundt, 403 U.S. 182, 91 S.Ct. 1904, 29 L.Ed.2d 399 (1971) and Mahan v. Howell. See In re Apportionment of Tuscola County Bd. of Commissioners 2001, 644 N.W.2d 44, 46 466 Mich. 78 (Mich. 2002).

When analyzing six separate reapportionment challenges, the Supreme Court of Vermont did not find the deviations of House plan with an overall deviation of 17.6% or a Senate plan with an overall deviation of 16.4% to be unconstitutional. In re Reapportionment of Towns of Hartland, Windsor and West Windsor, 624 A.2d 323, 160 Vt. 9 (Vt. 1993).

Maine has upheld an enacted apportionment plan for Maine's House of Representatives with an aggregate deviation of 12.79%. In re 1983 Legislative Apportionment of House, Senate, and Congressional Districts, 469 A.2d 819, 828-9 (Me. 1983).

Though it did not make any specific determination as to any specific deviation number, the Supreme Court of Illinois stated that the United States Supreme Court cases of Reynolds v. Simms, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964); Mahan v. Howell, 410 U.S. 315, 93 S.Ct. 979, 35 L.Ed.2d 320 (1973); Gaffney v. Cummings, 412 U.S. 735, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973); and White v. Regester, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973) "have recognized the need to consider these other interests to obviate the potential for gerrymandering present in blind adherence to the standard of equality of population." Schrage v. State Bd. of Elections, 430 N.E.2d 483, 491, 88 Ill.2d 87, 58 Ill.Dec. 451 (Ill. 1981).

In February of this year the Pennsylvania Supreme Court held that the 2011 Legislative

Reapportionment Plan devised by the 2011 Pennsylvania Legislative Reapportionment Commission was, primarily (an notably) as a result of the plan's impact on political subdivisions, contrary to law. Holt v. 2011 Legislative Reapportionment Com'n, 38 A.3d 711 (Pa. 2012). In the section of the Holt opinion entitled "Additional, Prospective Guidance for Remand," the Pennsylvania Supreme Court advised

> we take this opportunity to reaffirm the importance of the multiple commands in Article II, Section 16 [of the Pennsylvania Constitution], which [similar to Part II, Article 11 of the New Hampshire Constitution] embrace contiguity, compactness, and the integrity of political subdivisions, no less than the command to create legislative districts as nearly equal in population as practicable. Although we recognize the difficulty in balancing, we do not view the first three constitutional requirements as being at war, or in tension, with the fourth. To be sure, federal law remains, and that overlay still requires, as Reynolds taught, that equality of population is the overriding objective. But, as later cases from the High Court have made clear, that overriding objective does not require that reapportionment plans pursue the narrowest possible deviation, at the expense of other, legitimate state objectives, such as are reflected in our charter of government. See, e.g., Gaffney, 412 U.S. at 748-49, 93 S.Ct. 2321 (Fair and effective representation ... does not depend solely on mathematical equality among district populations. There are other relevant factors to be taken into account and other important interests that States may legitimately be mindful of.); Mahan, 410 U.S. at 329, 93 S.Ct. 979 (upholding deviations from ideal population equality as justified by rational policy of maintaining integrity of political subdivisions in Virginia state legislature). The law has developed to afford considerably more flexibility.

Holt v. 2011 Legislative Reapportionment Com'n, 38 A.3d 711, 760-1 (Pa. 2012) (quotations omitted).

It is clear that some measure of flexibility is warranted when there are "legitimate considerations incident to the effectuation of a rational state policy." Reynolds at 579, *supra.*

New Hampshire's policies, as embodied in NH Const. Part II, Art 11, which was popularly passed and amended in 2006 to afford all towns and wards with sufficient population their own representative district and to preserve traditional political subdivision boundaries are both time honored, see generally Susan E. Marshall, The New Hampshire Constitution (2004), and rational.

## II. NO PART OF RSA 662:5 CAN BE SEVERED SO AS TO BRING IT INTO ACCORD WITH EITHER THE FEDERAL CONSTITUTION OR THE NEW HAMPSHIRE CONSTITUTION

As of the 2010 Census, New Hampshire's population of 1,316,470 ranks 42nd in the country, see Guide to State and Local Census Geography - New Hampshire, *available at http://www.census.gov/geo/www/guidestloc/st33_nh.html* (last accessed May 22, 2012). The New Hampshire has one of the smallest state populations in the country, it has the largest state house of representatives in the country. As recognized by this Court in Burling v. Chandler at 157, the disproportionally large house of representatives means it "takes very few people to affect deviation substantially." This means that severing any constitutionally repugnant part of RSA 662:5 will have a substantial impact on the deviation from the ideal district population.

From a practical perspective, if any part of RSA 662:5 is severed, that part would necessarily include either an entire county, and entire representative district, or, at the very least, some city, town, ward, or unincorporated place. If any such subdivision of the electorate is excised from RSA 662:5, then that subdivision would be denied even the scantiest of floterial representation, let alone its own representative district. There is simply no method of severing any part of RSA 662:5 without exacerbating its constitutional repugnancy. Regardless of what part may be severed, RSA 662:5 will remain unconstitutional under the New Hampshire Constitution.

If any part is severed in any way, RSA 662:5 will also become definitively repugnant to the Federal Constitution for, as Daniel Webster once said, and as this Court opened it's opinion in Burling v. Chandler, the "right to choose a representative is every man's portion of sovereign power." Burling at 144, citing Luther v. Borden 48 U.S. (7 How.) 1, 30, 12 L.Ed. 581 (1849) (statement of counsel). As the United States Supreme Court has worded it, in a case cited by all fifty states and the District of Columbia, "[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." Reynolds v. Sims, 377 U.S. 533, 579 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). There would certainly be no equality among districts, when certain districts are denied the right to any representative whatsoever. Any attempt to severe any part of the unconstitutional RSA 662:5 would ensure its unconstitutionality under both the Federal and State Constitutions.

## CONCLUSION

For the reasons discussed above, this Court should declare RSA 662:5, as enacted over the Governor's veto, unconstitutional.

SUPREME COURT RULE 16(10) COMPLIANCE

The undersigned certifies that this brief was, by agreement, served on all parties of record by electronic filing or first class maile on this this 23rd day of May, 2012.

The petitioners wish to be heard orally.

Respectfully submitted,

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