

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

WALLNER PETITIONERS' RESPONSE BRIEF

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INTRODUCTION

The Wallner Petitioners hereby respond to the Intervenor's arguments that were raised in its brief. As shown in the Wallner Petitioners' Opening Brief and below, RSA 662:5 violates the New Hampshire Constitution. The procedural and evidentiary arguments made by the Intervenor should be rejected.

ARGUMENT

I. **The Touchstone for the Court's Review is Compliance with the State Constitution not the Artificial Principles the Legislature Used When Adopting RSA 662:5**

The burden on the Petitioners is to show "inescapable" and "clear and substantial" conflict with the State Constitution, not that a substantially more compliant plan can be achieved using the constricted rubric the Legislature followed in adopting its plan. *New Hampshire Ass'n of Counties v. State*, 158 N.H. 284, 288 (2009). The Intervenor asserts, without valid basis in New Hampshire law, that no plan may be considered by this Court unless it uses "the same methods and standards and same approximate range of deviation as the Legislature and substantially improves on the enacted plan without violating other federal or state constitutional requirements." Intervenor's Brief at 8. Contrary to the Intervenor's argument, it is the New Hampshire Constitution that is the standard, not legislative principles adopted by a legislative committee. RSA 662:5 must be measured against the State Constitution.

The Wallner Petitioners and the Intervenor agree that *Holt v. 2011 Reapportionment Commission*, __A.3d __, 2012 WL 375298 (Pa. Feb. 3, 2012), should aid this Court's analysis. The Intervenor relies on *Holt* for the purported proposition that parties challenging a redistricting plan under a state constitution bear an exceptionally "heavy burden" and must work within the Legislature's own rubric of redistricting when trying to prove unconstitutionality. In fact, *Holt* does not stand for that proposition. Instead, the Pennsylvania Supreme Court used the

Pennsylvania Constitution as the yardstick in evaluating alternative plans offered to it as evidence of the challenged plan's unconstitutionality. When comparing the adopted plan and the petitioners' alternatives, the *Holt* Court did not mandate that alternatives be constrained by the Legislature's artificial parameters. Rather, the Court looked at the state constitutional requirement of not splitting political subdivisions and noted that the chief alternative plan of the appellants provided numerically greater, substantial compliance with that constitutional command. *Id.* at *35. As the Court noted, "the most convincing point is the raw number difference in subdivision splits" – which was a consideration of a state constitutional command:

In the House, the alternative plan splits seven fewer counties, 81 fewer municipalities, and 184 fewer wards [W]ith regard to political subdivisions that were split at least once, the Holt plan created: in the House: 39 fewer county fractures, 186 fewer municipality fractures, and 228 fewer ward fractures In total, for the House, 184 fewer subdivisions were divided, and 453 fewer fractures were established....

Id. The Court, weighing the numbers, concluded, "[a] concrete showing has been made that political subdivisions were split, even where . . . a division was avoidable; and that the number of fractures across the Commonwealth was considerably higher in the Final Plan than the Holt plan proved was easily achievable. This powerful evidence, challenging the Final Plan as a whole, suffices to show that the Final Plan is contrary to law." *Id.* at *37. That the alternative plan considered in *Holt* maintained a similar deviation to that employed by the Pennsylvania legislature was incidental to the constitutional analysis and was not a requirement set forth by the Court. *Id.* at *35. Here, as in *Holt*, the State Constitution is the yardstick when comparing alternative plans, and RSA 662:5 does not measure up.

In this case, the Court should apply the same rubric the *Holt* court used for purposes of determining whether RSA 662:5 complies with Part II, Art. 11, of the New Hampshire Constitution. If the Court does that, it will likely determine that hundreds of thousands of people

are denied the promise of Part II, Art. 11, by RSA 662:5 – a statute in “clear and substantial conflict” with the New Hampshire Constitution. The main state constitutional focus should be on how many residents, towns, and city subdivisions obtain the representative district Part II, Art. 11, says they “shall” have. The mandatory quality of this constitutional provision distinguishes Part II, Art. 11, from the Massachusetts Constitution construed in *Mayor of Cambridge v. Commonwealth*, 765 N.E.2d 749 (Mass. 2002), and relied upon heavily by the Intervenors. The 2006 amendment to the New Hampshire Constitution placed primacy on the integrity of town and ward lines in crafting districts in order to vindicate a uniquely New Hampshire tradition of local representation. *See* Petitioners’ Opening Brief at 8-11.

As in *Holt*, “the raw number difference” is the most convincing evidence. RSA 662:5 fails to comply with Part II, Art. 11, because 62 communities – 40.8% of those eligible – do not receive their rightful representation. This figure represents 375,284 inhabitants, or 28.5% of the New Hampshire population. The Legislature could easily craft a more compliant plan by slightly increasing the permissible deviation under federal law, which would offer 24 more towns or wards the representation to which they are entitled, thus affording the promise of Part II, Art. 11, to 172,971 more people than the enacted House Plan. Still another approach using the weighted voting method would give 49 more towns their constitutional representation, providing relief to 307,074 additional people. Other fixes proposed by the Petitioners and legislators – both local (such as those proposed for Concord Ward 5, Meredith and Gilford, Manchester Wards 8 and 9, and Dover Wards 5 and 6) and global – work greater constitutional compliance. As with the numeric evidence in *Holt*, this Court should conclude that the Petitioners’ alternatives, measured against Part II, Art. 11, are “powerful evidence indeed” that RSA 662:5 falls far short of what is required by the New Hampshire Constitution.

Taken to the extreme, should the Court adopt the Intervenor's conception of the burden, unconstitutional principles of the Legislature would be unassailable and supreme to constitutional commands. The Legislature could have set forth principles that plainly ignored a number of the other requirements set forth in Part II, Art. 11, such as the mandates that town and ward boundaries remain undivided and that districts use contiguous territories. The Intervenor's position taken to the extreme would be that such a plan is unassailable even though it is patently unconstitutional. The Petitioners' have a right to challenge constitutional compliance by showing its stark deficits by offering alternative options using different guidelines, and demonstrating how the Legislature can achieve more substantial compliance with the mandates set forth in Part II, Art. 11.

The Petitioners recognize that, in performing its duties with respect to redistricting, the Legislature must exercise discretion in various matters. The Intervenor takes this argument one step further, however, and appears to suggest that the Legislature has unbridled discretion to make decisions regarding methods and standards to use, and what range of deviation to achieve, for purposes of redistricting. *Intervenor's Brief* at 10-14. That argument is incorrect.

Part II, Art. 11 of the New Hampshire Constitution places limitations on the Legislature's discretion. This constitutional provision requires that towns and wards with an adequate population shall have their own district of one or more representative seats. Contrary to the implication of the Intervenor's argument, this constitutional provision is a restriction on the Legislature's discretion, not a grant of unfettered discretion. The Legislature can exercise discretion to the extent it is not limited by the Constitution or statute, but "it does not have the discretion to exceed the limits imposed by either the Constitution or statute." *Twin Falls County*

v. Idaho Commission on Redistricting, 271 P.3d 1202, 1207 (Idaho 2012). Legislative discretion must yield to the plain text of the Constitution when analyzing whether the plan is constitutional.

In summary, that the legislative majority chose to violate the New Hampshire constitution in a narrow way does not mean it can force Petitioners to similarly adopt an unconstitutional framework when making a constitutional challenge – that would be too heavy a burden. The State Constitution is the applicable standard and the burden is well-established. The numerous violations of RSA 662:5 and the magnitude of the simple fixes to it both, local and global, demonstrate “inescapable conflict” with the State Constitution.

II. Legislative Redistricting is an Appropriate Subject for this Court’s Review and the Stipulated Facts in the Record are Sufficient to Determine the Unconstitutionality of RSA 662:5

The Intervenor argues that the Petitioners’ should not prevail because they chose to forgo an evidentiary hearing, and that correct deviations are impossible to glean without expert testimony and fact-finding. Intervenor’s Brief at 21-24. The Intervenor is not correct. As an initial matter, the plans submitted by Petitioners are being used solely to demonstrate that the Legislature had options that would have resulted in significantly more compliance with Part II, Article 11. It is presumably undisputed that these other options would have increased the number of towns and wards with an adequate population to have their own representative. Moreover, the deviations associated with a redistricting plan are based purely on mathematics. The raw numbers and the formulas for calculating deviations are already in the agreed-upon record. Interlocutory Transfer Statement ¶ 64; Iapp. pp. 107-111 (formulas for calculating deviations); Interlocutory Transfer Statement ¶ 56; Iapp. pp. 6-49 (town and ward populations). This case is well suited for review as a matter of law because the parties do not dispute the limited universe of material facts in this case, which are:

1. The ideal number of inhabitants for a legislative district (3,291).
2. The populations of towns or city subdivisions.

The only variable is the boundaries of the districts. Calculating the amount of deviation in given plans is a function of computing how far a plan deviates from perfection: 3,291 inhabitants per seat. The stipulated record thus contains all the variables necessary to determine whether any plan that results from different twists of the redistricting “Rubik’s Cube” is more or less constitutionally compliant under the State and Federal Constitution. No evidentiary hearing or expert testimony is needed on populations or the ideal number.

To expand upon the Rubik’s Cube analogy both the Wallner Petitioners and the Intervenor have adopted: an expert does not need to opine on the colors of the Rubik’s cube. The variables are set and not in dispute. *Id.* It is this Court’s constitutional prerogative to determine whether the combinations – the different twists the Legislature chose – fit together to make a constitutional whole. Central to the analysis is whether the Petitioners have shown a substantially better way to tackle the Federal-State law puzzle. The Petitioners have shown that RSA 662:5 is not constitutional as a matter of law using the basic and undisputed facts noted above which all parties stipulated to with ease and in an expedited fashion.

The Petitioners have offered multiple complete redistricting plans that, as explained in their Opening Brief, are substantially more compliant with the State Constitution while being well within what has been accepted under the Federal Constitution. The Petitioners’ 14% deviation plan is consistent with the many decisions in the last 40 years that have recognized that it is permissible to go beyond the 10% range of deviation for valid, “legitimate objectives such as maintaining the integrity of various political subdivisions and providing for compact districts of contiguous territory.” *Brown v. Thomson*, 462 U.S. 835, 842 (1983); *see also* Petitioners’ Opening Brief at 11-16 and cases cited therein. There are any number of other combinations,

including the possibility of combining the slightly increased deviations and weighted voting in floterial districts that could achieve almost perfect compliance with the State Constitution.¹

III. Petitioners have an Explicit Constitutional Right to their Own Legislative District

Contrary to the Intervenor's argument, each Petitioner is not required to prove any actual impairment or prejudice to his or her ability to elect one or more representatives from his or her own political subdivision in order to prevail. Intervenor's Brief at 20. *Sirrell v. State*, 146 N.H. 364 (2001), regarding the statewide property tax, simply does not apply to the redistricting situation. It may be true that actual prejudice is sometimes relevant to challenges brought under the federal Voting Rights Act for issues relating to when majority-minority districts are required and similar nuances. *Voinovich v. Quilter*, 507 U.S. 146, 153 (1993) (explaining that Section 2 of the Voting Rights Act prohibits any practice or procedure that impairs the ability of a protected class to elect its candidate of choice on an equal basis with other voters). No redistricting case Petitioners are aware of, however, grafts such an evidentiary standard onto a State constitutional challenge, and the Court should not impose such an obstacle to a citizen asserting his or her rights under the State Constitution.

The Intervenor's analogy to the reapportionment of the State Senate is particularly inapt. While it is true that Senate districts can combine city wards with surrounding towns, there are two obvious problems with the analogy. First, as bicameral legislature, the Senate and House are

¹ That the 14% deviation plan submitted with the Interlocutory Transfer Statement contained minor typographical errors that do not change the underlying calculation of the permissible deviation is not grounds for an evidentiary hearing. In a rush to forge an agreed-upon record on the variations possible to hundreds of house districts, typos happen. Indeed, the plans considered in 2002 by this Court all contained typos. The corrections to the 14% plan have been provided to all parties and are appended to this reply. The corrections demonstrate, in fact, that the 14% plan does not represent a 50% deviation, as the Intervenor argued in reliance upon typos. Intervenor's Brief at 24. Indeed, the Petitioners note that they are not asking that the 14% plan or any other plan be ordered by the Court. That more constitutionally compliant alternatives are possible is no more, but also no less, than evidence that RSA 662:5 is unconstitutional.

comprised of vastly different numbers – 24 versus 400 – so that one reflects more regional interests while the other reflects intensely local interests. N.H. CONST., pt. II, arts. 25 26.² Second, while Part II, Art. 26, dealing with Senate apportionment has some elements in common with Part II, Art. 9, dealing with House apportionment, the Senate has no equivalent to the requirement in Part II, Art. 11, that there be individual town and ward representation when the population is sufficient.

CONCLUSION

Respectfully, the central question before this court is whether the Legislature followed the commands of Part II, Art. 11, when it structured RSA 662:5 so narrowly to the detriment of the New Hampshire Constitution. The Intervenor has asserted procedural barriers of every stripe which distract from that basic question. The Petitioners have offered multiple approaches that yield more compliance with the State Constitution. It is this Court's task to determine whether in compromising between the dictates of the State and Federal Constitution, the Legislature compromised too much when in the process it denied dedicated representative districts to 375,284 inhabitants in 62 communities. Federal decisions cited in detail by the Petitioners plainly allow the Legislature to honor a valid State Constitutional command, and the Petitioners submit that the plan enacted did not do so. The Petitioners respectfully urge the Court not to find the New Hampshire Constitution's most recent amendment on the design of our government a dead letter the first time it has been construed. It is possible and necessary for the Legislature to honor the commands of the State and Federal Constitutions to vindicate a uniquely New Hampshire will for local representation.

² The history of the Senate and House constitutional provisions are different. The Senate was previously apportioned on the basis of taxes, rather than population. *In re Below*, 151 N.H. 135, 144-45 (2004).

Respectfully submitted,

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Dated:

May 29th, 2012



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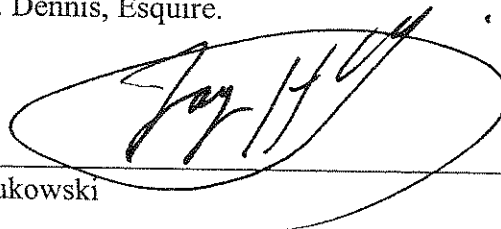
CERTIFICATION AND STATEMENT OF COMPLIANCE

Pursuant to Rule 26(7) of the Supreme Court Rules, I hereby certify that:

Two copies of this Brief have been served upon the following parties to this matter by first class mail, postage prepaid: Anne M. Edwards, Associate Attorney General, Stephen LaBonte, Assistant Attorney General, Richard Lehmann, Esquire, David Vicinanza, Esquire, Anthony Galdieri, Esquire, Peter V. Millham, Esquire, Matthew Huot, Esquire, Thomas J. Donovan, Esquire, Tony Soltani, Esquire and Jason B. Dennis, Esquire.

Date:

May 29th, 2012



Jay Surdukowski