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THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

Docket No. 2012-0338

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City of Manchester, Barbara E. Shaw and John R. Rist, et al.  
Petitioners,

v.

Secretary of State  
Respondent.

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Interlocutory Transfer without Ruling

BRIEF OF PETITIONERS CITY OF MANCHESTER,  
BARBARA E. SHAW AND JOHN R. RIST CONCERNING  
CONSTITUTIONALITY OF RSA 662:5 (2012)

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*To Be Argued By:* To be Determined

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## **QUESTIONS PRESENTED FOR REVIEW**

Whether RSA 662:5 (2012) is unconstitutional under N.H.CONST. Part I, Art. 1, 2 and 11 and Part II, Art. 9 and 11, and if so, may any part of it be severed.

## **CONSTITUTIONAL PROVISIONS AND STATUTES**

### **New Hampshire Constitution**

#### **Part I**

**Article 1. [Equality of Men; Origin and Object of Government.]** All men are born equally free and independent; therefore, all government of right originates from the people, is founded in consent, and instituted for the general good.

**[Art.] 2. [Natural Rights.]** All men have certain natural, essential, and inherent rights - among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, in a word, of seeking and obtaining happiness. Equality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, sex or national origin.

**[Art.] 11. [Elections and Elective Franchises.]** All elections are to be free, and every inhabitant of the state of 18 years of age and upwards shall have an equal right to vote in any election. Every person shall be considered an inhabitant for the purposes of voting in the town, ward, or unincorporated place where he has his domicile. No person shall have the right to vote under the constitution of this state who has been convicted of treason, bribery or any willful violation of the election laws of this state or of the United States; but the supreme court may, on notice to the attorney general, restore the privilege to vote to any person who may have forfeited it by conviction of such offenses. The general court shall provide by law for voting by qualified voters who at the time of the biennial or state elections, or of the primary elections therefor, or of city elections, or of town elections by official ballot, are absent from the city or town of which they are inhabitants, or who by reason of physical disability are unable to vote in person, in the choice of any officer or officers to be elected or upon any question submitted at such election. Voting registration and polling places shall be easily accessible to all persons including disabled and elderly persons who are otherwise qualified to vote in the choice of any officer or officers to be elected or upon any question submitted at such election. The right to vote shall not be denied to any person because of the non-payment of any tax. Every inhabitant of the state, having the proper qualifications, has equal right to be elected into office.

#### **Part II**

**[Art.] 9. [Representatives Elected Every Second Year; Apportionment of Representatives.]** There shall be in the legislature of this state a house of representatives, biennially elected and founded on principles of equality, and representation therein shall be as equal as circumstances will admit. The whole number of representatives to be chosen from the towns, wards, places, and representative districts thereof established hereunder, shall be not less

than three hundred seventy-five or more than four hundred. As soon as possible after the convening of the next regular session of the legislature, and at the session in 1971, and every ten years thereafter, the legislature shall make an apportionment of representatives according to the last general census of the inhabitants of the state taken by authority of the United States or of this state. In making such apportionment, no town, ward or place shall be divided nor the boundaries thereof altered.

**[Art.] 11. [Small Towns; Representation by Districts.]** 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 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 federal census.

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#### **2012 Laws, Chapter 9**

9:1 State Representative Districts. RSA 662:5 is repealed and reenacted to read as follows:  
662:5 State Representative Districts. 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:...

9:2 Application. The changes in state representative districts established by this act shall not affect constituencies or terms of office of representatives presently in office. The state representative districts established by this act shall be in effect for the purpose of electing representatives at the 2012 state general election. If there shall be a vacancy in a state representatives district for any reason prior to the 2012 state general election, the vacancy shall be filled by and from the same state representative district that existed for the 2010 state general election. No provision of this act shall affect in any manner any of the proceedings of the membership of the house of representatives of the general court that assembled for a biennial session in January 2011.

9:3 Ward Boundaries; Legislative Districts. Ward boundaries adopted as of January 17, 2012 shall be the ward boundaries used to determine state legislative districts beginning with the November 2012 state general election.

9:4 City of Portsmouth; Wards....

Effective Date. This act shall take effect upon its passage.

Approved: Enacted in accordance with Part II, Article 44 of N.H. Constitution, without the signature of the governor, March 28, 2012.

## **STATEMENT OF THE CASE**

Section I of the Interlocutory Transfer Statement sets forth the Statement of the Case. The Two parties have filed briefs defending the constitutionality of RSA 662:5, the Attorney General and the Intervenor, denominated as "New Hampshire House of Representative, by and through Representative William O'Brien, in his official capacity as Speaker of the House of Representatives of the General Court of the State of New Hampshire" ("Speaker O'Brien").

## **STATEMENT OF FACTS**

Section II of the Interlocutory Transfer Statement sets forth the Statement of the Facts. Of particular relevance to Petitioners City of Manchester, Barbara E. Shaw and John R. Rist ("Manchester Petitioners") are the following facts as numbered in Section II:

3. The City of Manchester ("Manchester") is a municipality with a total population, according to the 2010 Decennial Census conducted by the United States Department of Commerce Bureau of the Census (the "Census"), of 109,565. Manchester has divided itself into twelve wards of roughly equal population based on 2010 Census block data. The population of those wards according to the 2010 Census is as follows:

- a. Manchester Ward 1 - 9,121;
- b. Manchester Ward 2 - 9,219;
- c. Manchester Ward 3 - 9,113;
- d. Manchester Ward 4 - 9,115;
- e. Manchester Ward 5 - 9,250;
- f. Manchester Ward 6 - 9,260;
- g. Manchester Ward 7 - 9,178;
- h. Manchester Ward 8 - 9,135;

- i. Manchester Ward 9 – 9,169;
  - j. Manchester Ward 10 – 9,012;
  - k. Manchester Ward 11 – 8,991;
  - l. Manchester Ward 12 – 9,002.
4. The Honorable Barbara E. Shaw is an individual who resides at 45 Randall Street in Ward 9 in Manchester, New Hampshire.
5. John R. Rist is an individual who resides at 192 Mammoth Road in Ward 8 in Manchester, New Hampshire.
68. Regarding the City of Manchester, RSA 662:5, VI (2012) gives each Manchester ward its own district with its own two representatives. It then places the excess inhabitants of each ward into the following floterial districts:
- a. Manchester Wards 1, 2, and 3 - two representatives (Hillsborough County, District No. 42);
  - b. Manchester Wards 4, 5, 6, and 7 – three representatives (Hillsborough County, District No. 43);
  - c. Manchester Wards 8, 9, and Litchfield – two representatives (Hillsborough County, District No. 44);
  - d. Manchester Wards 10, 11, and 12 – two representatives (Hillsborough County, District No. 45).
98. Using the component method of deviation, and accounting for the floterial seats shared with Litchfield, Manchester as a whole has a surplus of 3,287 inhabitants above the ideal of 3,291 inhabitants per representative.



99. Manchester has found no record of it sharing a representative with a surrounding town since its incorporation as New Hampshire's first city in 1846.
100. Demographically, Manchester and Litchfield are different communities. As to housing, according to the 2010 Census, Manchester has 21,661 owner occupied units (47%) compared with 2,528 for Litchfield (89%). Manchester has 24,105 renter occupied units (53%) compared with 300 for Litchfield (11%). See, <http://www.nh.gov/oep/programs/DataCenter/2010Census/index.htm> (demographic\_profile 7.xls)
101. According to the 2010 Census, Manchester has 89,893 Non-Hispanic/Non-Latino White inhabitants (82%) compared with 7,871 (95%) for Litchfield. Manchester has 18,672 Hispanic/Latino and Non-white inhabitants (18%) compared with 400 for Litchfield (5%). See, <http://www.nh.gov/oep/programs/DataCenter/2010Census/index.htm> (demographic\_profile 7.xls).
102. According to the United States Census Bureau American Community Survey (5 year average 2006 – 2010), the median household income in Manchester is \$53,377 and in Litchfield \$100,051. See, [http://www.nh.gov/oep/programs/DataCenter/ACS/municipal\\_data.htm](http://www.nh.gov/oep/programs/DataCenter/ACS/municipal_data.htm) (Seq53 (1).xls).
103. According to the New Hampshire Department of Revenue Administration 2011 Property Tax Tables, tax assessment data showed the following values for commercial/industrial buildings: Statewide:\$18,539,477,102; Manchester:\$2,361,516,527 (13% of statewide); and Litchfield \$18,376,200 (.01% of statewide). See, [http://www.revenue.nh.gov/munc\\_prop/documents/tbc-alpha.pdf](http://www.revenue.nh.gov/munc_prop/documents/tbc-alpha.pdf).
104. According to data maintained by the New Hampshire Department of Education, in 2011 there were 6780 Manchester students eligible for free or reduced priced meals out of 14,268

students in grades 1 through 12, or 48%. The comparable data for Litchfield show 149 students eligible out of 1418 students, or 11%. See, <http://www.education.nh.gov/data/attendance.htm> (lunch\_school11\_12 (1).xls). Manchester's Bakersville School serves students in the northern portion of Ward 9. The same data show that for grades 1 through 5, 212 out of 256 students (83%) are eligible for free or reduced price meals. Southside Middle School serves students in Wards 8 and 9 and other areas. For grades 6 through 8, 425 out of 820 students (52%) are eligible for free or reduced price meals. See, <http://www.education.nh.gov/data/attendance.htm> (lunch\_school11\_12 (3) .xls) The data also show that for the 2011 – 2012 year, the maximum income level for a student in a family of four for free meals is \$29,055 and for reduced price meals is \$41,348. [http://www.education.nh.gov/program/nutrition/documents/nslp\\_app\\_attach\\_n.pdf](http://www.education.nh.gov/program/nutrition/documents/nslp_app_attach_n.pdf).

105. According to data maintained by the New Hampshire Department of Education, as of October 1, 2011, the Manchester school enrollment of Hispanic and non-white students was 4,989 out of 15,536 total enrollment (32%). The comparable number in Litchfield was 116 out of 1,501 total enrollment (8%). See, <http://www.education.nh.gov/data/attendance.htm> (race11\_12 (2).xls) The data for Bakersville School (October 1, 2010) showed that out of 368 students, 222 are Hispanic or non-white, i.e. 60%. See, <http://my.doe.nh.gov/profiles/profile.aspx?oid=9099&s=&d=&year=2011&tab=student>. The data also shows that for Southside Middle School (October 1, 2010) out of 861 students, 301 are Hispanic or non-white, i.e. 35%. See,

<http://my.doe.nh.gov/profiles/profile.aspx?oid=9317&s=&d=&year=2011&tab=student>.

106. The New Hampshire Department of Education also maintains data concerning students eligible to receive services for limited English proficiency services. For Manchester, as of

October 1, 2010, there are 1,732 eligible students out of 15,732 total enrollment (11%). See, <http://my.doe.nh.gov/profiles/profile.aspx?oid=27667&s=&d=&year=&tab=student>. The comparable figures for Litchfield are 0 out of 1,580 total enrollment (0%). See, <http://my.doe.nh.gov/profiles/profile.aspx?oid=27656&s=&d=&year=2011&tab=student>. Out of 368 students at Bakersville School, the data showed that there were 115 students eligible to receive services for limited English proficiency, or 31%. See, <http://my.doe.nh.gov/profiles/profile.aspx?oid=9099&s=&d=&year=2011&tab=student>. Out of 861 students at Southside Middle School, there were 65 students receiving services for limited English proficiency, or 8%. See, <http://my.doe.nh.gov/profiles/profile.aspx?oid=9317&s=&d=&year=2011&tab=student>.

107. Manchester and Litchfield do not share municipal services in common. Manchester is a member of the Southern New Hampshire Regional Planning Commission, which also serves Londonderry, Derry, Candia, Deerfield, Hooksett, Auburn, Bedford, Goffstown, New Boston, Raymond, Chester and Weare. Litchfield is a member of the Greater Nashua Regional Planning Commission. Manchester Water Works also serves parts of Hooksett, Auburn, Goffstown, Auburn, Derry and Londonderry. Manchester Environmental Protection Division (waste water treatment) also serves parts of Bedford, Goffstown, and Londonderry. Manchester School District also educates high school students from Auburn, Candia and Hooksett and provides career training services to students from Goffstown and Londonderry. Litchfield has an entirely separate school system.

108. Manchester has specific interests in dealing with state legislation. Manchester received from the state this fiscal year \$56,761,000 of annual education adequacy grants under a formula that currently targets additional funding based upon the number of English language learners, special education participants and free and reduced lunch. RSA 198:40-a and 41. Under the

state budget, Manchester received from the state this fiscal year \$4,894,000 in revenue sharing from rooms & meals tax receipts. Since 90% of that revenue is obligated to bond repayment on the city-owned Verizon Wireless Arena, reduction or elimination of that revenue sharing would cause technical default of the bond covenants. A large portion of Manchester's budget comes from its receipt of federal contracts that pass through state government agencies, including public health, human services, education and refugee resettlement.

### **SUMMARY OF ARGUMENT**

Manchester is entitled to receive 33 to 34 of its own representatives based upon population, yet RSA 662:5 afforded it only 31, plus two seats shared with Litchfield. N.H.CONST. Part II, Art. 9 and 11 require that Manchester, as well as many more towns around the state, receive one or more of their own representatives. Any order that requires Pelham to have its own representative requires development of a new plan for Manchester.

The history of N.H.CONST. Part II, Art. 9 and 11, combined with the mandates of the bill of rights, N.H.CONST. Part I, Art. 1, 2 and 11, require that apportionment of the House of Representatives respect the wholeness of towns, wards and cities, especially where a demonstrated community of interest exists and there is sufficient population to permit it. Federal constitutional law permits the consideration of communities of interest and other states have adopted it, either by statute, constitution, or constitutional interpretation.

### **ARGUMENT**

#### **I. RSA 662:5 IS UNCONSTITUTIONAL UNDER PART II, ART. 9 and 11 OF THE NEW HAMPSHIRE CONSTITUTION BECAUSE IT FAILS TO PROVIDE A SUFFICIENT NUMBER OF TOWNS AND WARDS WITH THEIR OWN REPRESENTATIVE DISTRICTS**

The Manchester Petitioners adopt the arguments of the City of Concord and the Wallner Petitioners that RSA 662:5 is unconstitutional because it fails to provide a sufficient number of

towns and wards with their own representative districts. The Manchester Petitioners also adopt the Wallner petitioners' proposed remedies one and two.

In addition, the Manchester Petitioners note that RSA 662:5 provides Manchester with 31 of its own representatives (and two more are shared in a floterial district with Litchfield). The 2010 population of Manchester was 109,565. Interlocutory Transfer Statement, ¶3. Based upon the ideal population of 3,291 inhabitants per representative statewide (Interlocutory Transfer Statement, ¶98), one could expect mathematically that Manchester would receive 33 to 34 of its own representatives. Manchester alone has more inhabitants than six of New Hampshire's ten counties. Appendix to Interlocutory Transfer Statement ("IApp.") pp. 6 – 40.

While the focus of other Petitioners has been on affording at least one representative to certain districts, N.H.CONST. Part II, Art. 11 does not limit itself to one. It reads in part:

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. (emphasis added)

With twelve wards of roughly equal population (*see*, Interlocutory Transfer Statement, ¶3), Manchester could receive two seats for each ward, plus nine or ten seats arranged in three or four floterial districts, for a total of 33 or 34 seats, and achieve representation close to the ideal. *See also*, N.H.CONST. Part II, Art. 9 ("principles of equality" and "no town, ward or place shall be divided"). Those simple solutions within acceptable deviation ranges appeared in defeated floor amendments to HB 592, which became RSA 662:5. *See*, Amendments to HB 592 No. 2012-0248h (Rep. Cohn et al.); No. 2012-0246h (Reps. Cohn & Vaillancourt); No. 2012-0156h, (Rep. Vaillancourt). IApp. pp. 114, 116 and 118.

Finally the town with which Manchester Wards 8 and 9 were joined into a floterial district, Litchfield, would likely need to share a floterial district with Hudson should this Court

determine that Pelham, with 12,897 inhabitants (and ideally entitled to 3.92 representatives) must constitutionally be apportioned its own representatives (it now shares all representatives with Hudson). Therefore, apart from the merits of Manchester's own constitutional challenge, any order from this Court that affects Pelham will reverberate to Litchfield and Manchester, and will require a redrawing of their representative districts.

## **II. RSA 662:5 IS UNCONSTITUTIONAL UNDER THE NEW HAMPSHIRE CONSTITUTION FOR FAILING TO CONSIDER COMMUNITY OF INTEREST FACTORS**

Like most states, New Hampshire employs various constitutional and statutory considerations for the apportionment of representation for its elected officials. They have evolved over time, by New Hampshire constitutional amendment, by the judicially expanded requirements of the Fourteenth and Fifteenth Amendments to the United States Constitution and by the Voting Rights Act, 42 U.S.C. §1973 et seq. Where there is tension between the state and federal requirements, community of interest factors become the lubricant that allows a state to fulfill its own constitutional imperative yet still follow federal law. At least in the case of Manchester, RSA 662:5 fails miserably by any measure of community of interest.

### **A. New Hampshire's Constitutional Framework for Community of Interest**

From 1784, New Hampshire's Constitution provided that the House of Representatives would be apportioned based upon population and something more, and tied into town or city boundaries. At first, Part II, Art. 9 and 11 provided that each town with 150 "ratable polls" received a representative; additional representatives would be allocated after 300 additional polls. *Petition of Below*, 151 N.H. 135, 141 (2004). After the 1876 Constitutional Convention, those provisions were amended to make the operative term "inhabitants", and the threshold for representatives became 600 and 1,200. For towns with fewer than 600 inhabitants, they received representation a proportionate part of the time. *Id.* In 1941, the Constitutional Convention

eliminated the fixed population thresholds and instead set the number of seats at between 375 and 400. The seats would be allocated by population, but the amendment kept the practice of making the population threshold for the first seat per town or ward half of what it would be for all additional seats. The amendment also guaranteed small towns part time representation, according to population, with a seat allocated to that town no less than once per decade. And the amendment prevented the division of any town or ward. *Id.*, p. 142.

The 1964 Constitutional Convention corresponded with the release of the landmark “one person one vote” decision, *Reynolds v. Sims*, 383 U.S. 579 (1966), which required that equal population be the controlling – but not only – determination in apportionment of state legislatures. As a result, Part II, Art. 9 and 11 were quickly amended to eliminate both the guaranteed periodic representation of small towns and the requirement of twice the population for additional representatives. *Id.* pp. 142 – 144.

The next amendment to Part II, Art. 11 occurred in 2006. It sought to give legislators the constitutional responsibility in apportioning the House of Representatives to limit representative districts to the confines of towns or wards to the extent possible. The voter’s guide explained that if the constitutional amendment were adopted, “[e]ach 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. . . .” Certified House Record, CHR-000807 (emphasis added), attached at Addendum, p. 22).

Respondent William Gardner, Secretary of State, testified in support of the constitutional amendment because it protected a town’s right to have representation, which he stated is a guarantee “rooted in colonial times.” Certified House Record, CHR-000797, attached at Addendum, p. 27. He explained that the amendment “. . . brings us back to the founders and

what the idea here was that the towns would have. When the towns came together, they gave up certain rights to be part of the state and they did that before we were a state. . . . The idea, at the provincial level, was to try to make sure that they were given back as much as possible and that was their representation, that was their opportunity to have someone in the assembly or now someone in the Legislature.” *Id.* at CHR-000797.

The current version of Part II, Art. 11, therefore, makes it the policy of the state for each town or ward to have one or more seats in the House of Representatives. It also requires that districts which cross ward or town lines must be contiguous, and town and ward boundaries must be preserved. *See also*, N.H.CONST., Part II, Art. 9 (“no town, ward or place shall be divided”).

The New Hampshire Constitution does not just require local (i.e. town and ward based) representation in the House of Representatives. The Constitution also gives each person the equal right to participate fully in state government. They appear in our Bill of Rights, Part I, Art. 1, 2 and 11:

All men are born equally free and independent; therefore, all government of right originates from the people, is founded in consent, and instituted for the general good.

All men have certain natural, essential, and inherent rights - among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, in a word, of seeking and obtaining happiness. Equality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, sex or national origin.

All elections are to be free, and every inhabitant of the state of 18 years of age and upwards shall have an equal right to vote in any election. Every person shall be considered an inhabitant for the purposes of voting in the town, ward, or unincorporated place where he has his domicile... Voting registration and polling places shall be easily accessible to all persons including disabled and elderly persons who are otherwise qualified to vote in the choice of any officer or officers to be elected or upon any question submitted at such election. The right to vote shall not be denied to any person because of the non-payment of any tax. Every inhabitant of the state, having the proper qualifications, has equal right to be elected into office.



While reasonable equality of population is the most important factor in apportioning seats in the 400 seat House of Representatives, recognition of the importance given to town and ward based representation, recognition of the equality of inhabitants based upon where they live, recognition of their equality despite differences in race, creed, color, sex or national origin, and recognition of their equality founded on their consent are all factors of constitutional significance. Together, these constitutional mandates require that the apportionment of the House of Representatives be based in part upon communities of interest.

**B. The Development of Community of Interest Factors in Redistricting**

A concise definition of community of interest is the following:

A community of interest is a group of people concentrated in a geographic area who share similar interests and priorities – whether social, cultural, ethnic, economic, religious, or political. Communities of interest are at the heart of what many consider to be the point of districts designed to have different character, and behind many of the other redistricting rules: a decision to keep a city together, or to keep a compact group of voters together, is often a proxy for ensuring that people with common interests are grouped within the same district. Explicit state requirements to keep communities together attempt to go beyond the proxies, and look for shared interests even if they spread over county or city lines, or follow housing patterns that are geometrically complex. The factors contributing to any particular community of interest can – and should – vary throughout the jurisdiction, because different interests will be more or less salient in different geographic regions.

Levitt, A Citizen's Guide to Redistricting (Brennan Center for Justice 2010) p. 56, found at [www.brennancenter.org/content/resource/a\\_citizens\\_guide\\_to\\_redistricting\\_2010\\_edition](http://www.brennancenter.org/content/resource/a_citizens_guide_to_redistricting_2010_edition).

Until fifty years ago, redistricting plans for state and local offices around the United States may have employed community of interest in redistricting by simply respecting town or county lines, albeit with some inequality of population. That changed with the famous “one person one vote” decision in *Reynolds v. Sims*, which imposed the priority of population equality over all other redistricting criteria. In the decades since, federal and state courts and legislatures have felt their way toward reconciling traditional redistricting criteria while

respecting the holding of *Reynolds v. Sims*. That task was complicated by the Voting Rights Act of 1965 which encompassed the seemingly contradictory goals of eliminating racial factors in elections while paying more attention to race and minority status in redistricting.

It fell to the United States Supreme Court to articulate some balance. In *Miller v. Johnson*, 515 U.S. 900, 916 (1995), that court cited with approval “traditional race neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests.” In tune with that case, consideration of a community of interest has increasingly become an important tool for state legislatures. Various bodies, including that National Conference of State Legislatures, regularly train their members in how to use census and reliable statistical data to develop models for communities of interest. See, Notes on the American Community Survey Data, NCSL Seminar #5 (2011), attached at Addendum, p. 29. The Certified House Record contains another redistricting training document from NCSL, Redistricting Law 2010. CHR-000547.

According to the Brennan Center for Justice, 24 states explicitly require consideration of community of interest factors in their redistricting analysis. See, Brennan Center for Justice, Communities of Interest (2010), attached at Addendum, p. 38. Many more states use town or county lines or “compactness” requirements as proxies for community of interest. *Id.* Apart from provisions dealing with town or county lines or compactness, 23 states explicitly include community of interest in their constitution or in statutes or in legislative rules dealing with redistricting. In the 24<sup>th</sup> state – North Carolina – its supreme court found community of interest to be an inherent constitutional redistricting criterion. Because North Carolina’s experience may be instructive here, it bears further analysis.

Like New Hampshire, North Carolina courts have dealt with repeated challenges to legislatively enacted redistricting plans. All of the challenges seem to have focused on at least one of three different priorities: one person one vote, the policies of the Voting Rights Act, and the dictates of North Carolina's so-called "Whole County Provision" of its constitution, which prohibits the division of any county in the apportionment of either house of its legislature. N.C. Const. art. II, §§ 3(3), 5(3). Because all three priorities could not be fully satisfied, the North Carolina Supreme Court interpreted its constitution to require the legislature to employ community of interest factors as a substitute for the Whole County Provision where the latter could not be fully achieved. *Stephenson v. Bartlett*, 562 S.E.2d 377, 396 -- 98 (N.C. 2002), *stay denied*, 535 U.S. 1301 ("the intent underlying the [Whole County Provision] must be enforced to the maximum extent possible... and communities of interest should be considered in the formation of compact and contiguous electoral districts."). *See also*, *Stephenson v. Bartlett*, 582 S.E.2d 247 (N.C. 2003) (affirming original opinion). While there has been criticism of the *Stephenson* series of opinions as politically motivated and overreaching in applying community of interest redistricting criteria within county lines, the Court did successfully juggle state and federal requirements and definitively solved a seemingly intractable problem in legislative redistricting. *See*, *Pender County v. Bartlett*, 649 S.E.2d 654 (N.C. 2007), *affirmed sub nom. Bartlett v. Strickland*, 556 U.S. 1 (2009) (upholding North Carolina court's subsequent application of *Stephenson* I and II approach). *See also*, Whittaker, State Redistricting Law: *Stephenson v. Bartlett* and the Judicial Promotion of Electoral Competition, 91 U.Va.L.Rev. 203 (2005).

**C. RSA 662:5 Fails to Address Community of Interest Factors with Respect to Manchester**

RSA 662:5 is unconstitutional because it created an unnecessary floterial district encompassing Litchfield and Manchester Wards 8 and 9, two communities not sharing a community of interest. The facts contained in the Interlocutory Transfer Statement, ¶¶ 100 – 108 highlight just how different Manchester and Litchfield are in terms of race, ethnicity, English language skills, home ownership, income, business focus and connection with state government programs. Those facts, compiled from the 2010 Census, the United States Bureau of the Census American Community Survey, and the New Hampshire Departments of Education and of Revenue Administration, show that:

- Manchester is a community where incomes average about half that of Litchfield;
- Manchester's housing stock is predominantly rental, unlike Litchfield's high percentage of home ownership;
- half of Manchester's school children are income eligible for free or reduced meals (83% in a school serving Ward 9 children), unlike about 10 percent in Litchfield;
- 11% of Manchester school children are eligible for services due to a lack of English language proficiency (38% in a school serving Ward 9 children), unlike the absence of any such children in Litchfield;
- about 32% of Manchester school children are either non-white or Hispanic (60% in a school serving Ward 9 children), unlike 8% in Litchfield;
- about 18% of Manchester residents overall are either non-white or Hispanic, unlike 5% in Litchfield;
- Manchester's commercial and industrial tax base represents 13% of the entire state's valuation in that category, unlike a negligible percentage in Litchfield;

The Interlocutory Transfer Statement ¶107 demonstrates how Manchester is connected with every community around it – except Litchfield – with respect to education, water supply, waste water treatment and regional planning. Paragraph 108 demonstrates that Manchester has specific interests to be addressed with state government, including the almost \$57 million it receives annually in education adequacy grants, the \$5 million it receives

annually in rooms and meals tax revenue sharing (used to pay the bonds on the Verizon Wireless Arena) and the many other grants and contracts it receives from the state to address everything from public health to social services to refugee resettlement.

These facts, based upon easily available data sources, demonstrate precisely the absence of a community of interest as RSA 662:5 applies to Manchester. Manchester and Litchfield share little in common in terms of their ethnic, income, industrial or housing makeup. They also do not share services, which is unlike Manchester's relationship with every other town in its region. For Manchester Wards 8 and 9 to share two representatives with Litchfield – especially where there are clear alternatives – badly dilutes and diminishes the voting strength of the inhabitants of Manchester to express their unique community of interest and their unique legislative interest.

Since 1784, and as reinforced by the recent amendment to N.H.CONST. part II, art. 11, New Hampshire has organized its extremely large House of Representatives with the express intent that it represent the inhabitants of each town and ward (and city). That formulation is the most local and uses existing structured communities. *See also*, N.H.CONST, part II, art. 9. It is therefore the best embodiment (or proxy) for communities of interest. It also reinforces the mandates of inclusion, non-discrimination, consent and public participation found in N.H. CONST. part I, art. 1, 2 and 11. Given the large number of representatives that Manchester is entitled to receive, given the available redistricting plans that keep all Manchester districts entirely within the city, and given Manchester's unique community of interest, any redistricting plan that does not keep Manchester whole violates the constitutional rights of the Manchester Petitioners. This outcome is much more easily reached than the one arrived at by the court in *Stephenson*, because here the lines of towns and wards can be fully respected,

whereas in North Carolina county lines had to be breeched and a further methodology developed to assure representation from communities of interest.

**III. BECAUSE THE UNCONSTITUTIONALITY OF RSA 662:5 RESULTS IN WIDESPREAD CONSEQUENCES, THIS COURT MAY NOT SEVER PARTS OF IT, OR AT LEAST MUST SEVER IT AT THE COUNTY LEVEL**

If this Court finds that RSA 662:5 failed to afford enough towns and wards with their own representatives as required by N.H.CONST. part II, art. 11, then the Court should not attempt to salvage any part of it. Because one required change to a district will affect others throughout a county, severability is not possible. *See, Claremont School Board v. Governor*, 144 N.H. 210, 217 (1999). The General Court still has the opportunity in June to enact a constitutional plan in time for candidates to submit nomination petitions for the September primary.

Even if this Court determines generally that RSA 662:5 is constitutional, it should find that it is unconstitutional as to Manchester, either because Manchester failed to receive one or more representative seats as required by N.H.CONST. part II, art. 9 and 11 or because the plan failed to keep Manchester whole in light of its community of interest. In that event, this Court must declare unconstitutional the plan for all of Hillsborough County, because of the resulting need to reapportion several districts.

**CONCLUSION**

This Court should declare RSA 662:5 unconstitutional and fully enjoin its enforcement because it fails to afford enough towns and wards with their own representative districts and because it fails to provide Manchester with enough of its own representative seats as a whole and without sharing them with Litchfield.

**REQUEST FOR ORAL ARGUMENT**

Manchester Petitioners request oral argument. The petitioners in the consolidated cases will notify the Court as to how they will allocate oral argument.

Respectfully submitted,

CITY OF MANCHESTER  
BARBARA E. SHAW and JOHN R. RIST

By their Attorneys:

McLANE, GRAF, RAULERSON & MIDDLETON,  
PROFESSIONAL ASSOCIATION

Date: May 23, 2012

By: 

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**Certificate of Service**

I hereby certify that on May 23, 2012, I served the foregoing Brief by electronic mail upon Jason B. Dennis, Esq., Tony F. Soltani, Esq., Jason M. Surdukowski, Esq., Martin P. Honigberg, Esq., Danielle L. Pacik, Esq., Peter V. Millham, Esq., Matthew D. Huot, Esq., Anne M. Edwards, Esq., Stephen G. LaBonte, Esq., Richard J. Lehmann, Esq., David A. Vicinanza, Esq. and Anthony L. Galdieri, Esq., pursuant to the Court's May 14, 2012 scheduling order.

  
Thomas J. Donovan

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*IF THE AMENDMENT IS ADOPTED:*

This 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 flotal 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 flotal representatives.

2006  
**VOTERS' GUIDE**

**EXPLAINING  
TWO AMENDMENTS  
TO THE  
NEW HAMPSHIRE  
CONSTITUTION  
PROPOSED BY THE  
LEGISLATURE**

**TO THE VOTERS OF NEW HAMPSHIRE:**

At the November 7, 2006 general election, your ballot will include two questions which propose amendments to the New Hampshire Constitution. If *two-thirds* of the people who vote on either question vote YES, then the Constitution will be amended as indicated in the question.

Each question has been proposed by the New Hampshire Legislature which has the authority to consider and recommend changes to our constitution. This Voters' Guide was prepared at the direction of the Speaker of the House and the President of the Senate with the approval and assistance of the appropriate policy committees of both houses of the Legislature and the Joint Committee on Legislative Facilities.

The Guide includes the constitutional amendment question exactly as it will appear on the ballot, and it explains the effects of the proposed amendments. Each of the issues presented by Questions 1 and 2 are important and deserve your study and vote.

## QUESTION NO. 1

### EMINENT DOMAIN

1. "Are you in favor of amending the first part of the constitution by inserting a new article 12-a to provide that property can only be taken as follows:

[Art.] 12-a [Power to Take Property Limited.] No part of a person's property shall be taken by eminent domain and transferred, directly or indirectly, to another person if the taking is for the purpose of private development or other private use of the property."

#### *AT THE PRESENT TIME:*

Under Part 1, Article 12, and current law, a person's property may not be taken by eminent domain or otherwise without the owner's consent unless the taking is necessary to meet a specific public use. However, the United States Supreme Court has recently defined "public use" to permit the government to take private property for the purpose of promoting economic development through the resale of the property to private parties.

#### *IF THE AMENDMENT IS ADOPTED:*

While preserving those rights already stated in the Constitution, this amendment will, in addition, expressly prohibit the government from taking a person's property for either private development or any other private use of the property.

## QUESTION NO. 2

### REPRESENTATION BY TOWN AND WARD

2. "Are you in favor of amending the second part of the Constitution by amending article 11 to read as follows:

[Art.] 11. [Small Towns; Representation by Districts.] 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 federal census."

#### *AT THE PRESENT TIME:*

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.

Senator Peter E. Bragdon, D. 11: Secretary of State Bill Gardner, who will testify and also tell us a story, something about the king.

Secretary of State Bill Gardner: Well, the reason that we have the four hundred member House goes back to the colonial times. The royal governor used to decide what towns could send members to what was called then the Assembly. The royal governor liked to grant new towns because he could give land to his friends and supporters. The only reason that there is a Vermont today is because, Vermont is really part of New York and should be because it was part of the grant to New York.

But, the royal governor went across the Connecticut River, granted towns in Vermont and eventually those towns didn't want to be part of the New Hampshire government and they didn't want to be part of New York and that led to the creation of Vermont. They have had celebrations where the legislature has actually met across the Connecticut River and when they were having the anniversary, the now governor of Vermont, Jim Douglas, who was then Secretary of State of Vermont, and the two of us went from town to town giving lectures about the history of how this happened and when the governor and council met and at what time.

The royal governor had that right and at times the royal governor would take it away. If you didn't produce the proper number of white pines that they wanted in Portsmouth for the ships, the royal governor could say, "For the next two years, you have no representation". The towns, one by one, would fall into that and there was a lot of controversy.

For years, our provincial assembly tried to get a resolution passed to get the royal governor to agree to it to let this happen so that they could set a number. The idea was to have as many towns as possible have a member of the provincial assembly so that at town meeting they could talk about what was happening at the provincial assembly. So, they finally reached a point twelve years before the Declaration of Independence, when the royal governor wanted something from the assembly. They made this agreement and they ended up agreeing that every town, that the royal governor would no longer have the right to make that decision and that the towns would have representation without being denied by the royal governor. The royal governor agreed to it. It passed the assembly and the royal governor agreed to it.

Everything in those days had to be sent to the king. We have the document and I brought it over to the House committee. That resolution was vetoed by the king, but it was several years later. It took time because the king had sort of like a cabinet and it was the Earl of Rockingham. Some of our county

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names were based on the individuals who actually were part of making this decision with the king. It came back, we have that document at the state archives, vetoed.

So, every colony had certain issues that led to the revolution and one of the issues in New Hampshire was this representation issue that you should have the right to have representation and not have the royal governor decide whether you were good enough or deserved representation. So, when the king said, "No, I'm not going to let my royal governor who I appointed lose this authority", they were determined to change that.

The very first time that they were able to do it, they created, in the first written document that was the governing words of the time during the revolution, they set it at a hundred individuals who were able to vote. When it came time to actually of moving what we consider our first constitution ratified by the people, our first constitution in January of 1776 was not ratified by the people, but it was our governing document. The first constitution said a hundred and fifty eligible voters and that was the way it was and that continued until the 1870s when they then included women and children, everybody over the age of, everyone.

Originally, it was just men who were eligible to vote were included in the first number, the hundred and then the hundred and fifty. Now, to have a second representative, you have to have double that. So, you had to have a hundred and fifty for the first one. But, the second one, you had to have three hundred more than the hundred and fifty. So, you had to have the hundred and fifty and then three hundred on top of that and then three more hundred and three more hundred and three more hundred. Then, when it was changed, instead of just the eligible voters, to anyone alive that it was raised to six hundred. But, the argument was that six hundred, including women and everyone else, when you take what the average age would be at that time, was about the same a hundred and fifty. That continued through World War II.

When the Supreme Court's decision came down in Reynolds v. Sims, New Hampshire could have taken the position that the one man/one vote principle does not apply because our governing document predated. They could have taken this position. Predated the federal constitution.

It is like what happens, we have a state now that has four hundred thousand people and another state that has eight hundred and fifty thousand, but they both only have one Representative in the United States House of Representatives. We don't have one man/one vote principle when it comes to members of the House because you can have two states where one state has

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two and a half to three times the population of another, but they have equal representation in the House. We know that you can have equal representation in the Senate. There is that argument that is California compared to us. Because this was in the Constitution before, you can't go back because it was, at the same time, set up that way.

Well, our constitution was set up the way it was. But, we didn't go that route. We decided to apply by the one man/one vote principle and that began the redistricting in New Hampshire. Before that, it was in the constitution and it was automatic. Every town that had this population automatically got representation. What the Legislature had to deal with was those communities that didn't have enough and then they decided whether they would pool them, put them together. Some towns decided to share. If there were three towns, they would send one for two months, another for two months, and another one for two months. Some towns actually decided to send two and the two would have a half a vote. So there were different ways that the towns dealt with this in the older centuries.

So, what does this have to do with all of this? Well, this amendment doesn't prohibit the towns now. If Bedford wanted us to divide into six individual districts for purposes of representation, Bedford could still do it. And, your town, Exeter, could still do it under this proposal. What this does is say that any town in the state or ward that has enough population for at least one representative would be entitled to that representative unless a town surrounding it, bordering it, did not have enough people for their own. So, the Legislature would have to make that decision whether to add a town that didn't have town to which town around it. It would be constrained by the counties.

There are some examples in this state that have always been thorny during redistricting. The Legislature will still have that. But, if you take to Manchester to Nashua and down the Merrimack River to the Massachusetts line and you go east, you have to go pretty far to get a town that doesn't have enough for its own representative. So, what this would do, for instance, right now we have Litchfield, Hudson and Pelham. They are all big enough to have at least two representatives of their own, but they run at large, thirteen of them. This would say that Litchfield would get the two. Hudson would be guaranteed. If Hudson had enough for 6.4, they would get their six. If Pelham had enough for 3.3, they would get their three. Then, the Legislature would decide how to create a floterial district for those towns. What it would do is it would guarantee that all of those towns, and if you keep going east, you go from Pelham, to Salem, to Atkinson and you go from Litchfield to Londonderry, Derry, Windham, and then you keep going farther, Hampstead, Plaistow. They are all big enough that they would have their own, be

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guaranteed by this constitutional amendment, that they would have their own representation. So, they would always have that whereas, in the example I gave you, the thirteen member district, some towns at some point may not have representation. But, this way it brings it back to the original idea that if we're going to try to have as many towns and wards as possible to have their own representation in the House. It doesn't affect the Senate; it is the House.

That brings us back to the founders and what the idea here was that the towns would have. When the towns came together, they gave up certain rights to be part of the state and they did that before we were a state. When Portsmouth and Exeter and Dover and Hampton came together, they were willing to give up a little bit to form their rights and the towns have done that. The idea, at the provincial level, was to try to make sure that they were given back as much as possible and that was their representation, that was their opportunity to have someone in the assembly or now someone in the Legislature.

My guess is this will reduce the redistricting by at least half because there's going to be certain areas that it is all automatic. So, the Legislature and the decisions the Legislature will have to make in the future, will be much less than they have had to make in the past. In the past, since the 1960s, we have had the courts making the decision on more than one occasion instead of the Legislature. This way, that right will be given to the people of the state by their constitution that if they live in a community that is big enough for one, they will have that one and then be part of, once they decide how to group them together.

That was a very unique piece of New Hampshire history where that feeling in New Hampshire came to head because it was the royal governor. Remember, the only person that they could elect in those days was their member of the assembly. No one else was elected; everyone else was appointed by someone else. So, that issue, they had the tea party, the Stamp Act controversy in Massachusetts. In this state, for those dozen years before the Declaration of Independence that this issue was fermenting, they were determined when the people here had the right to write their first document, that this protect the towns by putting in a specific number.

We could have taken that gamble in the '60s and said, "Wait a minute. We're going to keep our system. Keep everybody at a hundred and we're going to double that for the second one". But, the decision was not to do it and this is what it led to. I think that this makes sure that there wasn't some unintended consequence; that there was not some town that somehow would get left out and, on the House side, the chairman of the House committee

made a valuable addition to this because of the specific area in the county that he lived in and that is why the town that doesn't have enough for their own, the Legislature will have to decide where the link is.

In your town in Exeter, there are some towns to the south that might not have enough. So, Exeter might have to, instead of Exeter, Stratham and North Hampton and all those towns that are big enough to have their own, they would all have their own and then, instead of having eight at large, you might have one at large. But, the Legislature could decide not to have those three; they could decide some other linkage. But, everyone would know that their House membership was guaranteed so long as everyone around them had numbers equal to what was necessary.

Senator Peter E. Bragdon, D. 11: Questions for the Secretary of State? Seeing none, I have one or two. Would you characterize yourself as being in favor of this or not in favor?

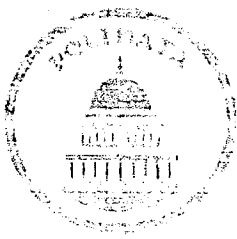
Secretary Gardner: Yes.

Senator Peter E. Bragdon, D. 11: You didn't really say and I didn't know if you were purposely not saying.

Secretary Gardner: Yes. I'm very much in favor of this and I think it goes back, as I said, to the very beginning. What was the intent here? The intent was to have as many towns as possible have someone who is in the Legislature or who was in the assembly back then who could come back and talk about what was happening at the state level and to spread that around as much as possible. That's why we have the four hundred member House because it was set up. The number was really small and they deliberately said, for the first representative, the number would be much smaller and would be double to have your second. That was an attempt to make sure that as many towns would have the representation. This just goes back to that same idea.

Senator Peter E. Bragdon, D. 11: You heard Senator Burling's opinion on what the court said about floterial districts. What's your opinion of what they said?

Secretary Gardner: My opinion is that what they said, they said that there were unsound. They didn't say that they were unconstitutional. It was extra language in that decision. The federal lawsuit, Boyer v. Gardner, Boyer was the chairman of the Democratic State Committee in 1981 and that lawsuit went from the District Court in Concord to the Federal Court of Appeals in Boston all the way to Justice William Brennan on the Supreme Court. He



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## Notes on the American Community Survey Data

NCSL Redistricting Seminar #5; Washington, DC; January 2011

The American Community Survey (ACS) is the replacement for the so-called long form of previous censuses and is the new source for demographic characteristic information. In previous cycles this type of information was not generally available until after most plans had been drawn. Therefore, a threshold consideration for the redistricting cycle of 2011-2012 is what use can be made of the ACS data for plan preparation and review?

There are several reasons why ACS data might be useful for the redistricting community. Perhaps the most important reasons are: a) for the first time, we will be able to see demographic characteristics, other than race and Hispanic origin, that are relatively current for many levels of census geography, including the current districts; and b) the ACS forms the basis for the citizen voting age population data (CVAP) which may be relevant with respect to the Voting Rights Act (VRA).

**ACS Data Collection and Release.** The ACS program began following the 2000 census and the full-scale data collection has been on a continuous basis since the beginning of the 2005 calendar year. The ACS data do differ from the long-form data in the sense that they are not a snapshot in time but are based upon all persons in the ACS survey universe for selected periods of time. For example, the first release was in 2006: the 2005 1-year release which combined the information from all respondents collected during calendar year 2005.

The release of the 2009 5-year data in December 2010 was the 7th release of this demographic characteristic data collected from an approximate sample of 3 million addresses each year. This is also the first release of data representing a 5-year timeframe (all respondents from the 2005, 2006, 2007, 2008, and 2009 survey universes). As such, it represents the largest sample to date in the short history of the ACS. Because the sample is larger, estimates of the characteristics are reported for many more geographic areas, and summary levels, than any of the previous 1-year or 3-year releases.

The 5-year release is the first to provide characteristics for census tracts and block groups, though not all tables are released for block groups, and the geography is still

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that from the 2000 census. For these two low levels of census geography (only the census block is lower) the 5-year releases will be the only source of characteristics.

It is also the first release to provide complete coverage for the higher-levels of the census hierarchy, notably, counties. While it is not the first to contain data for congressional districts (CDs), it is the first to contain data for state legislative districts (SLDs). In addition, it is the first release to contain data for all 25,000 Places (cities, towns, and census designated places) and 21,000 minor civil divisions (MCDs) in selected states.

There is an important caveat for all releases through the 2009 collection year: they are generally based upon the 2000 census geography<sup>1</sup> (at least for the lower levels) and are controlled for the population from the 2000 census. For the vast majority of geographic areas at the higher level of geography this will not be much of a problem. At the lower levels, census tracts are designed to be more or less comparable over time but block groups are not.

**ACS Release Options.** The current plan is that for each subsequent year of the ACS, there will be three types of release: thus this 2009 5-year release completes the rollout of the three types (1-year, 3-year, and 5-year release).

Given the availability of three types of ACS releases through 2009 (the 2009 3-year release was released earlier this month), which of the three does the researcher use? Perhaps the most important considerations are a) the level of geography for which the information is needed; b) when it is needed; c) the level of accuracy required; and d) the currency of the data.

Generally, the 1-year release has been released earlier in the year than the 3-year or 5-year releases<sup>2</sup>. However, the 1-year release, while the most current, has the smallest sample size and is only available for geographic areas that have a base population of 65,000 or more. The 3-year release has a larger sample size but is available for more geographic areas: those with a base population of 20,000 or more. The 5-year release has the largest sample and is available for all geographic areas and most levels of census geography: it also covers the longest period of time in the pooled universe.

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<sup>1</sup> "Census tracts and block groups used to tabulate and present 2005-2009 ACS 5-year data are those used for Census 2000 data products. Inadvertently, 26 counties use 2010 Census boundaries for tabulation and presentation of census tracts and block groups in the ACS 5-year data. These census tracts and block groups were included in the version of the Census Bureau's geographic database (TIGER) used to produce geographic area information for the 2005-2009 ACS 5-year data." [http://www.census.gov/acs/www/data\\_documentation/geography\\_notes/](http://www.census.gov/acs/www/data_documentation/geography_notes/)

<sup>2</sup> For example the releases for the 2007 ACS were made available in September (1-year) and October (3-year) of 2008.

The 1-year release has a median currency of approximately 6 months plus the number of months before it is released in the following year; the 3-year release would have a median currency of approximately 1 year and 6 months plus those preceding its release; the 5-year release would have a median currency of approximately 2 years and 6 months plus those preceding its release. For the sake of simplicity, if we assume that all releases were made in December, the 1-year would have a median 'age' of about 17 months (6+11); the 3-year would have a median 'age' of 29 months (6+12+11); and the 5-year release would have a median 'age' of 41 months (6+12+12+11).

If currency isn't the biggest concern and geography is more paramount, your choices are merely what is included in each release. If you want to compare states, you could use any release but to compare all counties, you would need the 5-year release. The choice of which to use is thus a balancing test between factors.

**Accuracy of the Data.** As with most data collections program of the Bureau of the Census, the ACS data are the result of estimations from survey responses and are thus subject to both sampling error<sup>3</sup> and non-sampling error<sup>4</sup>. Due to the nature of sampling, the point estimate provided in one ACS release may differ greatly from previous, or subsequent, releases. The data releases include the margin of error with each data release<sup>5</sup>. Understanding these is one reason that the technical documentation is an important part of the research. For example, a 5 percentage point increase in a demographic characteristic may, or may not, mean there was an actual increase in the variable for the geographic area of interest. The Bureau documentation provides a discussion of how a comparison of estimates can be tested to determine if the change is statistically significant<sup>6</sup>.

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<sup>3</sup> "The data in the ACS products are estimates of the actual figures that would have been obtained by interviewing the entire population using the same methodology." Accuracy of the Data (2005)

<sup>4</sup> "For example, operations such as data entry from questionnaires and editing may introduce error into the estimates." Accuracy of the Data (2005)

<sup>5</sup> "Margin of Error - Instead of providing the upper and lower confidence bounds in published ACS tables, the margin of error is provided instead. The margin of error is the difference between an estimate and its upper or lower confidence bound. Both the confidence bounds and the standard error can easily be computed from the margin of error. All ACS published margins of error are based on a 90 percent confidence level. Standard Error = Margin of Error / 1.65. Lower Confidence Bound = Estimate - Margin of Error. Upper Confidence Bound = Estimate + Margin of Error." Accuracy of the Data (2005)

<sup>6</sup> "Significant differences - Users may conduct a statistical test to see if the difference between an ACS estimate and any other chosen estimates is statistically significant at a given confidence level. 'Statistically significant' means that the difference is not likely due to random chance alone." [The only items needed to determine this are the two estimates and the two standard errors (which can be calculated from the margin of error).] "Any estimate can be compared to an ACS estimate using this method, including other ACS estimates from the current year, the ACS estimate for the same characteristic and geographic area but from a previous year, Census 2000 100% counts and long form estimates, estimates from other Census Bureau surveys, and estimates from other sources. Not all estimates have sampling error - Census 2000 100% counts do not, for example, although Census 2000 long form estimates do - but they should be used if they exist to give the most accurate result of the test." Accuracy of the Data (2005)

**Means of Access.** There are two main means of access to the ACS data.

- 1) The primary means is interactively via the Census web site, either generically via [www.census.gov](http://www.census.gov) or directly via [factfinder.census.gov](http://factfinder.census.gov). There is also a main page just for the ACS at [www.census.gov/acs](http://www.census.gov/acs). This allows for interactive selection of a) dataset (year and period for the survey, e.g., 2009 5-year); b) geography (from the nation down to the lower, but not the lowest, levels of the census hierarchy); and c) subject matter by choosing a single table or multiple tables. After selection the data may be viewed, printed, or downloaded for further use. This is a probably a good way to review customized searches for a handful of tables for a limited set of geographic units.
- 2) The secondary means is by downloading the raw data files so that they might be imported into a spreadsheet or into a relational database system. This requires a bit more effort but if the researcher only needs a few tables, but for multiple geographic units, this is the preferred option. There are two ways to import the data into readily-available software: a) via the Bureau's new Excel-based import tool<sup>7</sup> or b) by using either statistical or relational database software (such as SPSS or SAS or FoxPro or Oracle). Using Excel is a simple choice and fills the middle of the technical spectrum. Using database software involves both knowledge of that specialized software and considerably more effort to manipulate the data files.

The important differences between these two means are, at least, the following: a) the interactive tool is preferable for ease of use and customized searches but the database download is clearly preferable for experienced users who will need to integrate data for many areas of geography or many subject tables; and b) not all tables are available via the interactive American Fact Finder. Some tables, and some levels of geography are only available by downloading the summary files and this is what will be discussed in the following section.

**General Notes on the Summary Files.** The ACS database for each release is delivered in formats similar to those used in previous censuses to deliver the Summary (Tape) Files (formerly STF, now SF). These files create a virtual record/row for each summary level of geography with every field/column being a discrete value, e.g., number of males from age 35 to 44. In order to make file manipulation a bit more understandable and to accommodate readily-available legacy database software, the virtual record is broken into separate files of record segments, with each file containing no more than 256 fields/columns horizontally, though there is no limit on the number of records/rows that are in each record segment (aside from the levels of geography available). The tables are more or less arranged by subject matter so some researchers may be lucky

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<sup>7</sup> There are actually two Excel-based tools: a retrieval tool and an import tool. The retrieval tool downloads the data files and allows for some minimal options. The import tool provides the 'headers', or field definitions of each raw data file that the researcher has downloaded previously.

enough to only need a few files to cover the appropriate record segments: if this is so, consider using the Excel-import tool first.

The summary files can be downloaded directly from the web via your web browser (e.g., Internet Explorer) or via FTP. These include a geography file that contains the basic information for the geographic area and a relational link (LOGRECNO) into the other record segment files. All files are plain text files and all record segment files are delimited by commas. However, to account for missing data and a few other aspects of the data, not all fields are actually numbers.

The geography file is also a text file but it is a 'flat' non-delimited file and thus requires a data structure indicating the field lengths. Unfortunately, this appears to be available only as a listing in the documentation. Fortunately, the only recent change in the geography structure from previous releases relates to a change in one variable (SUBMCD: the length has increased from 2 to 5) and a few other fields that have been designated as "Reserved or Blank" for now. Each record segment file of the characteristic data has a separate data structure.

**Documentation.** The Bureau has compiled quite a bit of documentation, ranging from quite technical to more database oriented. For the ACS the Bureau has prepared the so-called Compass guides<sup>8</sup> that give a higher-level focus to the ACS and uses for the data. Appendix material gives a readable summary of the statistical concepts involved without overwhelming the researcher. The technical documentation is useful for both describing the Excel-import tool and the database structure.

The first step is to obtain the technical documentation which is a 20-page document with a 51-page appendix<sup>9</sup>. Aside from the 71-page printed format, there is an Excel version of the data tables and cells included in the database. This is what used to be called the Merge\_5\_6 file that now has the more understandable name of the Sequence and Table Number Lookup file<sup>10</sup>. N.B., that the file names for some files may not include any designation for the year/period release, e.g., a Merge\_5\_6 may be provided in each folder.

The Bureau does provide some detailed documentation in the nature of "Product Changes" or so-called crosswalk tables. None have been provided for the 2009 5-year release because it is a new product.

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<sup>8</sup> Compass guides: [http://www.census.gov/acs/www/guidance\\_for\\_data\\_users/handbooks/](http://www.census.gov/acs/www/guidance_for_data_users/handbooks/)

<sup>9</sup> Technical documentation: [http://www2.census.gov/acs2009\\_5yr/summaryfile/](http://www2.census.gov/acs2009_5yr/summaryfile/). The year/period may be edited for easy access via the URL address window.

<sup>10</sup> Excel table: [Sequence Number and Table Number Lookup.xls](#). Note the lack of a year/period indicator in the file name.

### Miscellaneous Notes on the Structure of the Summary Files.

1. The files are all text files (i.e., visible in any text editor) and, with the exception of the geography file, are all delimited by a comma between each field/variable. Therefore, they may be easily imported to database software once the structure for each file segment is designated.
2. The file structure can be, with some minor modifications, created from the record layout file provided by the Bureau (the so-called Sequence Number and Table Number Lookup file, hereinafter generally referred to as the Data Dictionary).
3. There are two components to the field name: a TABLEID and an ORDER identifier. The concatenation of these two fields may result in a unique identifier that is longer than 10 characters; such field names are not unique at only 10 characters, as required for some legacy software that include a 10-character uniqueness rule.
4. The TABLEID may consist of the following parts: a) prefix for type of table, i.e., "B" for base table or "C" for collapsed table; b) core table number, e.g., 07101, in which the first two identify the primary subject of the table; c) suffix for race/Hispanic Origin breakouts; and d) an alternative geo-suffix if the table contains responses only for Puerto Rico. (See attachment.)
5. The ORDER identifier is generally blank for the table name or indication of the universe. This field may also include several values with a decimal point: such records do not represent fields and are for documentation purposes only. Most tables contain from a handful of cells to several dozen, though one set of tables (B24121-B24126 relating to OCCUPATION) contains 499 cells in each table.
6. Due to the sampled nature of the ACS, margins of error exist, and are provided for each table, though in a separate data file. The ACS estimates are in the "e" files; the margins are in the "m" files. The old Standard Error information of the "s" files has been eliminated. The format for the "e" and "m" files is the same so either parallel files must be maintained or field names must be modified to merge the data into one dataset.
7. Due to the sampling, the estimation value provided may be non-numeric. These values generally relate to either data that are either missing or suppressed for privacy concerns though a few other reasons are discussed in the documentation.

8. For the inclusion of the data for the levels of Tract and Block Group (only available in the 5-year releases), there are additional raw data files. N.B., these files have the same name as the files for the upper-level geography: be sure to unzip them to a separate folder/directory. They must be appended separately.
9. Some tables are included in the data files even though they contain data only collected for Puerto Rico; such fields are still included in the data structure even though they will be blank for areas other than Puerto Rico. These Puerto Rico-only tables appear in record segments 108 to 117. N.B., that the TABLEID in the Data Dictionary does not always contain the geo-suffix of "PR" (e.g., B05003 in segment 0017 and B05003 in segment 0110).
10. As the virtual record is broken into segments, if there is a problem in a dataset structure, it will only affect the tables in that file segment.
11. The subject tables are of two basic types: "B" and "C". The "B" tables are what most researchers would normally think of: they contain each discrete data cell for a table and may contain over 100 cells. The "C" tables are collapsed versions, e.g., combining several "B" cells into one "C" cell. There are no "A" tables and there need not be a "B" table if there is a "C" table or vice-versa.
12. The tables included in each ACS release may differ, both by the type of release (e.g., 1-year versus 5-year) and because the questions asked on the survey are different: questions may be added or deleted and cells within tables may be modified.
13. For the 2009 5-year release there are 117 file segments, substantially fewer than the 158 provided for the 2008 3-year release and the 153 provided for the 2007 3-year release. While there has been some revision in the tables since that time, the main reason is due to the absence of many of the "C" tables from earlier releases. It is unclear whether the researcher can rely upon the existence of a "C" table in one release being available in subsequent releases.

Attachments:

1. Table Numbers Explained

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## American Community Survey (ACS) Table Numbers Explained

An ACS Detailed Table number consists of:

- An initial character which is usually B, but sometimes C.  
 B is used for the basic or base tables that provide the most detailed estimates on all topics and for all geographies. These tables are the source for many of the other tables such as Data Profiles, Subject Tables, etc.  
 C is used for a collapsed version of a B table. A C table is very similar to a B table with the same number (e.g., C07001 and B07001), but two or more lines from the B table have been collapsed to a single line in the C table. For example, the lines "75 to 79 years", "80 to 84 years" and "85 years and over" from a B table may be collapsed to a single line of "75 years and over" in a C table. Not every B table has a collapsed version.
- The next two characters identify the primary subject of the table.
  - 01 = Age and Sex
  - 02 = Race
  - 03 = Hispanic or Latino Origin
  - 04 = Ancestry
  - 05 = Foreign Born; Citizenship; Year of Entry; Nativity
  - 06 = Place of Birth
  - 07 = Residence 1 Year Ago; Migration
  - 08 = Journey to Work; Workers' Characteristics; Commuting
  - 09 = Children; Household Relationship
  - 10 = Grandparents; Grandchildren
  - 11 = Household Type; Family Type; Subfamilies
  - 12 = Marital Status
  - 13 = Fertility
  - 14 = School Enrollment
  - 15 = Educational Attainment
  - 16 = Language Spoken at Home and Ability to Speak English
  - 17 = Poverty
  - 18 = Disability
  - 19 = Income (Households and Families)
  - 20 = Earnings (Individuals)
  - 21 = Veteran Status
  - 22 = Food Stamps
  - 23 = Employment Status; Work Experience
  - 24 = Industry; Occupation; Class of Worker
  - 25 = Housing Characteristics
  - 26 = Group Quarters Population
  - 27 = Health Insurance Coverage
  - 98 = Quality Measures
  - 99 = Imputation table for any subject
- The next three digits are a sequential number, such as 001 or 002, to uniquely identify the table within a given subject.
- For select tables, an alphabetic suffix follows to indicate that a table is repeated for the nine major race and Hispanic or Latino groups:
  - A = White Alone
  - B = Black or African American Alone
  - C = American Indian and Alaska Native Alone
  - D = Asian Alone
  - E = Native Hawaiian and Other Pacific Islander Alone
  - F = Some Other Race Alone
  - G = Two or More Races

H = White Alone, Not Hispanic or Latino

I = Hispanic or Latino

- For select tables, a final alphabetic suffix "PR" follows to indicate a table used for Puerto Rico geographies only. These Puerto Rico-specific tables exist because for some geography-based subjects, the wording of the Puerto Rico Community Survey questionnaire differs slightly but significantly from the American Community Survey questionnaire. The matching table used for United States geographies has the same ID but without the trailing "PR" (e.g., B06014 and B06014-PR).



## COMMUNITIES OF INTEREST

Several redistricting criteria — like following county or municipal lines, or drawing districts that are compact — are in some ways proxies for finding communities of common interest. These are groups of individuals who are likely to have similar legislative concerns, and who might therefore benefit from cohesive representation in the legislature. Twenty-four states address these communities of interest directly, asking redistricting bodies to consider various types of communities in drawing district lines. Those provisions — some found in the state constitution, some in state statute, and others simply adopted as guidelines by the bodies conducting redistricting — follow.

Source		Provision	
AK	Constitution	"Each house district shall be formed of contiguous and compact territory containing as nearly as practicable a relatively integrated socio-economic area."	
AL	Legislative guidelines	"The integrity of communities of interest shall be respected to the extent feasible. For purposes of these Guidelines, a community of interest is defined as an area with recognized similarities of interests, including but not limited to racial, ethnic, geographic, governmental, regional, social, cultural, partisan, or historic interests; county, municipal, or voting precinct boundaries; and commonality of communications. It is inevitable that some interests will be recognized and others will not, however the legislature will attempt to accommodate those felt most strongly by the people in each specific location."	*
AZ	Constitution	"District boundaries shall respect communities of interest to the extent practicable."	*
CA	Constitution	"The geographic integrity of any city, county, city and county, neighborhood, or community of interest shall be respected to the extent possible . . . . Communities of interest shall not include relationships with political parties, incumbents, or political candidates."	*
CO	Constitution	"[C]ommunities of interest, including ethnic, cultural, economic, trade area, geographic, and demographic factors, shall be preserved within a single district wherever possible."	
HI	Constitution	"Where practicable, submergence of an area in a larger district wherein substantially different socio-economic interests predominate shall be avoided."	*
ID	Statute	"To the maximum extent possible, districts shall preserve traditional neighborhoods and local communities of interest."	*
KS	Legislative guidelines	"There should be recognition of similarities of interest. Social, cultural, racial, ethnic, and economic interests common to the population of the area, which are probable subjects of legislation . . . should be considered. While some communities of interest lend themselves more readily than others to being embodied in legislative districts, the Committee will attempt to accommodate interests articulated by residents."	*
ME	Statute	"The commission shall . . . give weight to the interests of local communities . . . ."	
MN	Joint resolution	"The districts should attempt to preserve communities of interest where that can be done in compliance [with other] . . . standards."	*

\* Applies to congressional districts and to state legislative districts.

	Source	Provision	
MO	Commission guidelines	"Preserves long-standing communities of interest based on social, cultural, ethnic, and economic similarities."	
MT	Commission guidelines	"The commission will consider keeping communities of interest intact. Communities of interest can be based on trade areas, geographic location, communication and transportation networks, media markets, Indian reservations, urban and rural interests, social, cultural and economic interests, or occupations and lifestyles."	
NC	Court	"[C]ommunities of interest should be considered in the formation of compact and contiguous electoral districts."	
NM	Legislative guidelines	"To the extent feasible, districts shall be drawn in an attempt to preserve communities of interest . . ."	*
OK	Constitution	"In apportioning the State Senate, consideration shall be given to . . . economic and political interests . . . to the extent feasible."	
OR	Statute	"Each district, as nearly as practicable, shall . . . [n]ot divide communities of common interest."	*
SC	Legislative guidelines	"Where practical, legislative and congressional districts should attempt to preserve communities of interest."	*
SD	Statute	"[T]he following principles are of primary significance: . . . Protection of communities of interest by means of compact and contiguous districts."	
VA	Legislative guidelines	"Districts shall be based on legislative consideration of the varied factors that can create or contribute to communities of interest. These factors may include, among others, economic factors, social factors, cultural factors, geographic features, governmental jurisdictions and service delivery areas, political beliefs, voting trends, and incumbency considerations. . . . Local government jurisdiction and precinct lines may reflect communities of interest to be balanced, but they are entitled to no greater weight as a matter of state policy than other identifiable communities of interest."	*
VT	Statute	"The . . . districts shall be formed consistent with the following policies insofar as practicable: . . . recognition and maintenance of patterns of geography, social interaction, trade, political ties and common interests."	
WA	Statute	"District lines should be drawn so as to coincide with . . . areas recognized as communities of interest."	*
WI	Statute	"[T]he districts] reflect a good faith effort to apportion the legislature giving due consideration to the need for . . . the maintenance of . . . communities of interest . . ."	
WV	Statute	"[T]he Legislature, in dividing the state into senatorial districts . . . , has: . . . [a]lso taken into account in crossing county lines, to the extent feasible, the community of interests of the people involved."	
WY	Legislative guidelines	"Election districts should . . . reflect a community of interest."	

\* Applies to congressional districts and to state legislative districts.