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' OPENING BRIEF

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ORAL ARGUMENT REQUESTED
Presenting: To be determined

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## QUESTIONS PRESENTED

1. Is RSA 662:5 unconstitutional under the Federal or State Constitutions?
2. If part of RSA 662:5 is determined to be unconstitutional, is that part severable from the remaining parts of the statute?

## CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

N.H. CONST. Part I, Articles 1, 2, 11 and Part II, Articles 9 and 11. Set forth in Iapp. at 1-3.

RSA 662:5 (2012). Set forth in Iapp. at 100-106.

## STATEMENT OF THE CASE

Section I of the Interlocutory Transfer Statement sets forth the Statement of the Case. Interlocutory Transfer Statement at 2.

## STATEMENT OF THE FACTS

This Statement of Facts briefly sets forth the State Constitutional provision at issue, relevant census figures, circumstances of the decennial apportionment process to-date, and the petitioners in the Wallner suit. The facts contained within the interlocutory appeal transfer statement are also incorporated herein by reference.

**Part II, Article 11**

Part II, Art. 11, of the New Hampshire Constitution was passed by the voters of New Hampshire on November 7, 2006. The amendment states:

> 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.

**The 2010 Census and RSA 662:5 – The House Redistricting Plan**

Following the 2010 census, the Legislature undertook decennial reapportionment. The apportionment plan for the House of Representatives relies upon the 2010 Census figures for municipalities and for city wards set forth in Iapp. pp. 6 and 41. The 2010 Census determined that the population of New Hampshire was 1,316,470. *Id.* The Census also determined the population of each city and town in New Hampshire. *Id.* The population figures are found at Iapp p. 6.

RSA 662:5 sets the size of the New Hampshire House of Representatives at 400 members. Iapp at p. 50.[1] Based on the constitutional mandate that "representation [in the House] be as equal as circumstances will admit" (N.H. CONST. Part II, Art. 9), the ideal number of inhabitants for each district is 3,291 people. *See* Agreed Facts at 10. RSA 662:5 is the enacted House redistricting plan. RSA 662:5 is composed of 204 districts. *Id.* at 11. A chart showing the number of single-town, multi-town and floterial districts and seats is attached at Iapp. p. 88.

In reviewing reapportionment plans for the House of Representatives, the House considered the positive or negative percentage deviation of any district from the ideal population of 3,291 per representative. *Id.* at 17. In the end, the Legislature rejected plans that increased the total range of deviation above 10 percent (+/- 5% in either direction) or that used the

[1] Under Part II, Art. 9, the size of the House of Representatives "shall be not less than three hundred seventy-five or more than four hundred."

aggregate method to calculate the amount of deviation in floterial districts. *Id.* RSA 662:5 has a total statewide range of deviation of 9.9%. *Id.*

**The Petitioners**

The Wallner Petitioners hail from towns or wards that have been deprived of their own representatives pursuant to Part II, Art. 11. These communities include Pelham, Atkinson, Sunapee, Concord's Ward 5, Meredith, Rindge, Strafford, Hinsdale, Gilmanton,[2] Henniker, Greenland, Bow, Northfield, Dover Wards 5 and 6, Tilton, Auburn, Newmarket, Loudon, Hudson, Hillsborough, and Canaan.

[2] In the interlocutory transfer statement, Mr. Donovan, who lives in Gilmanton, was incorrectly identified as a resident of Gilford. The undersigned counsel was responsible and apologizes for the error.

## SUMMARY OF ARGUMENT

RSA 662:5 – the House Redistricting Plan – violates one of the two newest amendments to the State Constitution. That amendment was adopted by the people of New Hampshire by overwhelming popular vote on November 7, 2006. Under that amendment, every town and city ward with sufficient population shall receive at least one full seat in the House. *See* NH CONST. Part II, Art. 11. RSA 662:5 does not honor the promise of Part II, Art. 11. In fact, it denies a dedicated representative district to 375,284 people in 62 New Hampshire communities. Each of those communities has enough inhabitants to constitute its own representative district under Part II, Art. 11 of the New Hampshire Constitution. *See* Iapp. At 6-40; 50-65. The Petitioners filing this brief are from towns and wards that should have constitutional districts under Part II, Article 11. They include Mr. Lynde from Pelham, which has a population of 12,897, enough to constitute a district with four representatives and a minimal deviation of 2%. Agreed Facts at 4. They also include Ms. Gottling from Sunapee, population 3,365, enough inhabitants for one representative district with a minimal deviation of 2.3%, *Id.* at 6; and Ms. Sanders from Atkinson, which has a population of 6,751, the size of a two-seat district with a minimal deviation of 2.6%. *Id.* at 4.

Put into numeric terms, the unconstitutionality is stark and the magnitude of the potential fixes is dramatic. The numbers underscore just how much RSA 662:5 deviates from the command of Part II, Art. 11. As noted above, 375,284 people in 62 towns and wards are denied the representative districts to which they are entitled. This is more than a quarter of New Hampshire's population, or 28.5% of Granite Staters. As explained below, the Legislature's departure from the requirements of Part II, Art. 11, was totally unnecessary. First, each of the fixes to the most egregious problems with RSA 662:5 that the House considered and rejected

would have improved State constitutional compliance considerably in some fashion. Second, expanding the permissible range of deviation to 14%, a miniscule shift, for example, would allow 24 more compliant districts and give 172,971 more people their own district over the House plan in communities whose populations warrant it. 172,971 people is equal to 13.13% of the State population. Third, a weighted voting approach would add 51 additional seats over RSA 662:5 and achieve representation for 307,074 people above RSA 662:5. Finally, the 400 District approach would go the furthest in effectuating the original intent of a large legislature with maximum local representation pursuant to Part II, Article 11.

The four maps that follow demonstrate this constitutional deficit in the House plan. **Fig. 1** shows towns and cities that are entitled to their own representative(s) under Part II, Art. 11 because they have the sufficient population of at least 3,291 inhabitants. Such communities appear in white. Communities that do not deserve their own representatives because they (or their subdivisions) are too small, appear in black in all four figures. **Fig. 2** represents RSA 662:5. The communities in red are those deserving of their own representatives who are accorded districts under RSA 662:5. The communities in white are denied their own representative in **Figs. 2, 3,** and **4**. **Fig. 3** shows a slight increase in permissible deviation to 14% (a miniscule shift of 66 people in either direction) and the corresponding right to representation of additional communities. Additional communities in red indicate greater compliance with Part II, Art. 11. **Fig. 4** shows the weighted voting approach, with even greater gains in constitutional compliance, again, appearing in red. The 400 single member district approach is not depicted, but its affect of maximum local representation is obvious. These approaches and plans confirm that substantially greater compliance with the commands of *both* constitutions may be achieved with no or little disruption to the constitutional balance.

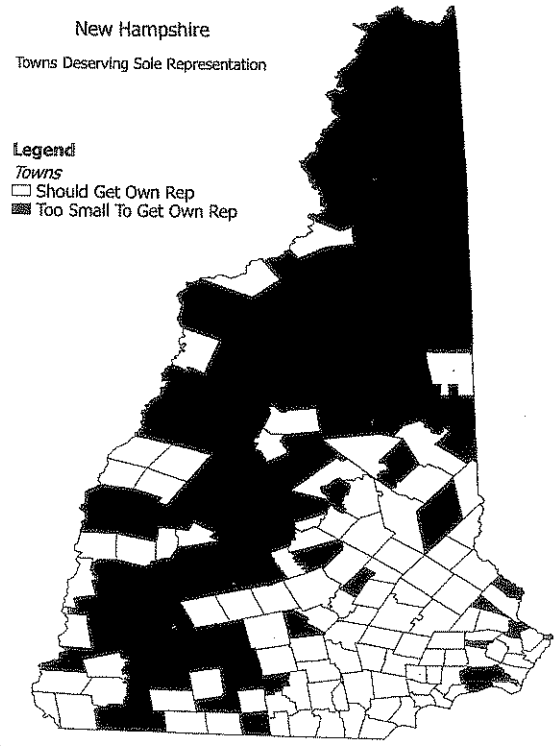


Fig. 1. Communities deserving representation

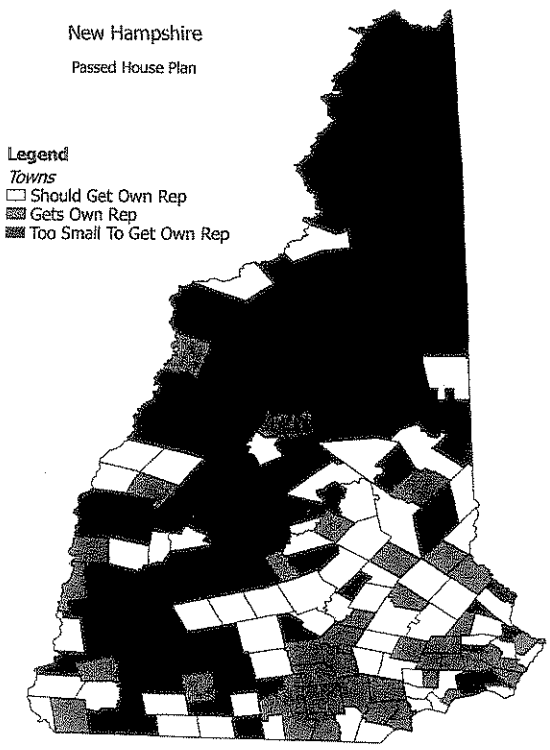


Fig. 2. RSA 662:5

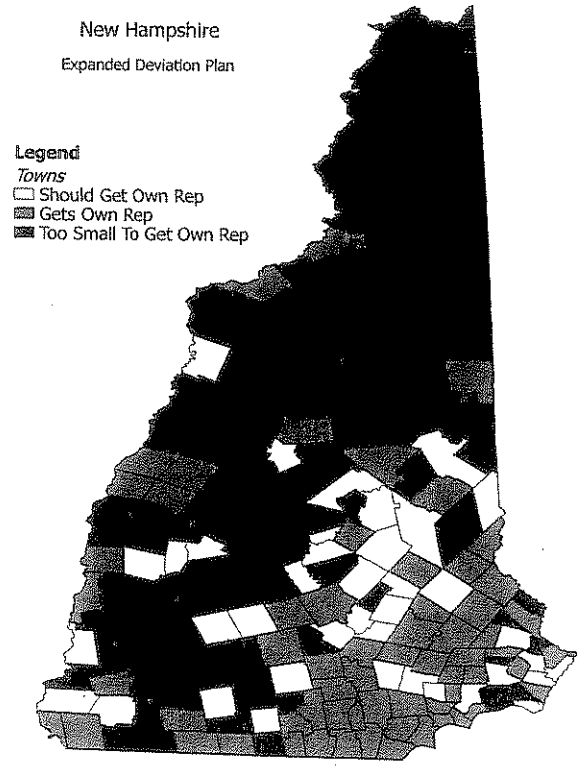


Fig. 3. Expanding permissible deviation to 14%

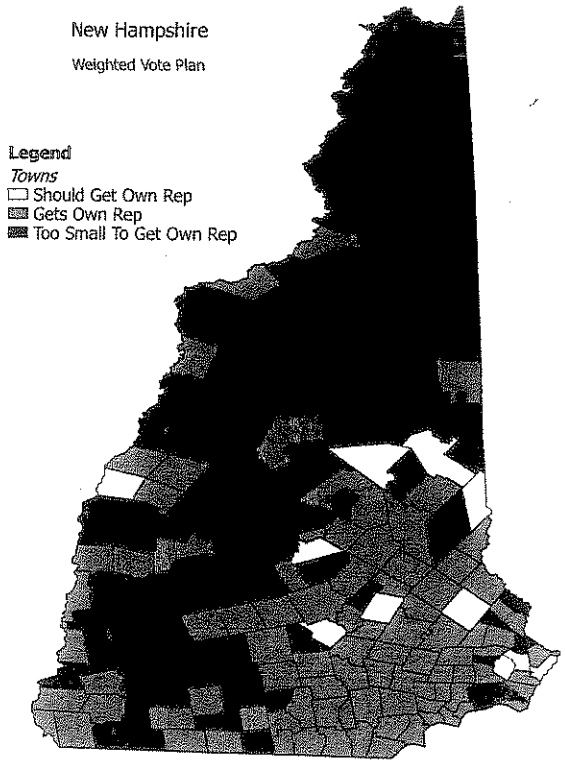


Fig. 4. Weighted voting approach

As this brief will show, it is easily possible for the Legislature to "respect federal law – at the same time we are construing our own organic constitutional commands," as the Supreme Court of Pennsylvania aptly stated in a similar, recent case. *Holt v. 2011 Legislative Reapportionment Commission*, ___ A.3d ___, 2012 WL 375298 (Pa. Feb. 3, 2012) at *40.

This brief will also show that RSA 662:5 is not severable. The Legislature would not have intended for the House Redistricting plan to be individually broken apart – it is one whole whose unconstitutionality is so pronounced, no individual parts may be saved. Respectfully, RSA 662:5, is, therefore, unconstitutional and the Court should enjoin it in its entirety.

## ARGUMENT

### I. STANDARD OF REVIEW

**RSA 662:5 is Presumptively Unconstitutional Because, on its Face, it Denies a Dedicated Representative District to 375,284 People in 62 New Hampshire Communities, Each of Which Has Enough Inhabitants to Constitute its Own Representative District Under the State Constitution**

RSA 662:5 should be presumed to be unconstitutional under the New Hampshire Constitution because it denies a dedicated representative district to 375,284 people in 62 New Hampshire communities, each of which has enough inhabitants to constitute its own representative district under Part II, Art. 11 of the New Hampshire Constitution. The Petitioners recognize that, in most cases, the Court presumes a statute to be constitutional and "will not declare it invalid except upon inescapable grounds." *New Hampshire Ass'n of Counties v. State*, 158 N.H. 284, 288 (2009). A statute will be held unconstitutional when a "clear and substantial conflict exists between it and the constitution." *Id.*

In this case, however, RSA 662:5 does not merit a presumption of constitutionality because on its face it represents a "clear and substantial conflict . . . between it and the constitution." *Id.* The burden should be on the State to justify such a substantial departure from the constitutional mandate passed by the voters in 2006.

### II. RSA 662:5 VIOLATES PART II, ART. 11 OF THE NEW HAMPSHIRE CONSTITUTION.

#### A. New Hampshire's Tradition of Local Representation: Historic Context and the 2006 Amendment

From the earliest days of New Hampshire's history, the Legislature was designed to give representation to as many communities as possible, no matter how small. The Constitution long honored commonality of community interest in drawing legislative lines. This principle is the reason why the New Hampshire House is so large. 400 members is an effort to honor the

tradition. The will towards broad representation of local communities goes so far back it even predates the 1784 Constitution.

According to Susan Marshall's constitutional history of New Hampshire, the 1776 Constitution was much-maligned because the seacoast and western towns did not receive adequate representation. Susan E. Marshall, THE NEW HAMPSHIRE CONSTITUTION 7-9 (2004). As early as July 31, 1776 – the same month the Declaration of Independence was signed – Dartmouth faculty members in Hanover "attacked the apportionment plan because it did not allow at least one representative for each incorporated town." *Id.* at 8. Indeed, so dissatisfied were citizens in the western part of the State, they joined Vermont "which had adopted a new constitution guaranteeing each town at least one representative." *Id.* at 9. The desire for local representation in New Hampshire is thus as old as the United States itself.

Through the centuries the people of New Hampshire have enacted myriad, and sometimes highly creative measures to guarantee a broadly representative House. Prior to 1889, Part II, Art. 10, rotated representatives in the smallest of communities to ensure every town, no matter how small, had a dedicated representative for some period of time. An 1889 amendment to Part II, Art. 11, changed the law to ensure that towns with less than 600 people had proportional representation. Even until the 1960s, Part II, Art. 11, provided that every town, regardless of how small it was, would have its own representative once every ten years.[3] *Id.* at 21. As Susan Marshall has explained, "[t]he town was the traditional unit of local government,

[3] This practice ended with the advent of one person, one vote – in fact, one of the most cited examples of inequality in representation that led to the Supreme Court establishing one person, one vote was a Northern New Hampshire town with three voters, one of whom got to sit in the legislature for two years every decade. Congressman Morris Udall, *Reapportionment: One Man, One Vote...That's All She Wrote*! accessed at: http://www.library.arizona.edu/exhibits/udall/congrept/88th/641014.html

and townspeople wanted to have direct representation in state government." *Id.* at 20. From the advent of one person, one vote, until 2002, New Hampshire made extensive use of floterial districts as a means of honoring the people's desire to have as many districts as possible and from municipalities large enough to have a district of at least one seat.

The redistricting plan reluctantly crafted for the House by the New Hampshire Supreme Court in 2002 represented a shift away from the principle that a community large enough to have at least one representative should have its own district. The Court's plan established many large, multi-town legislative districts. See *Burling v. Speaker of the House*, 148, N.H. 143 (2002).

A constitutional amendment, CACR 41, was adopted by the Legislature in 2006 by the required supermajorities to give the voters the chance to restore the historical prerogative of qualifying cities and towns to elect their own representatives to the House. With 60% of the full membership required, the New Hampshire House passed CACR 41 on a 256 to 55 vote and the Senate passed it 16-7. *See http://www.sos.nh.gov/concon-2006.htm.*

The intent of the amendment was explained in the Voters Guide as being to "allow the Legislature to create districts in the same manner that districts were drawn prior to 2002.... **Each town or ward having enough inhabitants to entitle it to one or more Representative seats in the Legislature shall be guaranteed its own district for the purposes of electing one or more representatives**, unless such action prevented a neighboring town from being included in a single-representative district before it is part of a floterial district." (Emphasis added). Certified Record at CHR-00807: *2006 Voters Guide*. That intention was confirmed by the Chair of the House Special Committee on Redistricting in letters he sent to various cities that were redrawing ward lines following the 2010 census. Certified Record at CHR-001000.

Over 70% of New Hampshire voters approved amending Part II, Art. 11. The vote was 240,767 to 100,688, far in excess of two-thirds vote required by New Hampshire Constitution Part II, Art. 100.

RSA 662:5 does not comply with Part II, Art. 11. There are 62 towns or city wards guaranteed the right to their own districts, and thus to elect at least one representative from within that community, which are unconstitutionally grouped into multi-town, multi-legislator districts by RSA 662:5. RSA 662:5 defies history and violates the recently amended State Constitution. Some of many examples are towns and wards in which Wallner Petitioners reside, including, among others: Pelham, Atkinson, Sunapee, Concord Ward 5, Meredith, Strafford, Henniker, Bow, Northfield, Dover Wards 5 and 6, Loudon, Hudson, Hillsborough, and Canaan.

### B. U.S. Supreme Court Jurisprudence Allows Reasonable Deviations from Perfection for Legitimate State Objectives Including State Constitutional Commands Such as Part II, Art. 11.

For decades the United State Supreme Court has upheld the use of deviations greater than 10% in state legislative redistricting when necessary for permissible countervailing reasons of legitimate state policy. Indeed, the Court has never held that a plan must stay within a 10% deviation. "[D]eviations from population may be necessary to permit States to pursue other 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). The overriding command of one person, one vote of the Federal Constitution "does not require that reapportionment plans pursue the narrowest possible deviation, at the expense of other, legitimate state objectives...." *Holt*, ___ A.3d ___, 2012 WL 375298 at *41; *see also Mahan v. Howell*, 410 U.S. 319-28 (1973) (constitutionality of Virginia redistricting plan with a total deviation of 16.4% upheld to protect political subdivisions); *Brown*, 462 U.S. 837-48

(constitutionality of Wyoming redistricting plan with a total deviation of 60% upheld to respect state objective allowing each county its historic representation); *Abate v. Mundt*, 43 U.S. 182, 184-87 (1971) (constitutionality of a New York County legislature with a total deviation of 11.9% upheld allowing each town within the county its historic representation). As the Supreme Court noted in *Abate*, the "particular circumstances and needs of a local community as a whole may sometimes justify departures from strict equality." *Id.* The Legislature has ignored this jurisprudence and enacted a plan that does not respect "our own organic constitutional commands" while simultaneously complying with the Federal constitution. *Holt*, ___ A.3d ___, 2012 WL 375298 at *40.

As the Supreme Court held in *Mahan*, "broader latitude" may be permissible in state apportionment matters when countervailing state constitutional provisions such as those protecting historic political subdivisions are at issue. *Mahan*, 410 U.S. at 322, 327. In *Mahan*, the Court described the justification for the "relatively minor" deviation of 16.4% as "insuring some voice to political subdivisions, as political subdivisions." *Id.* at 321. The Court explained the legitimacy of a Legislature seeking to be solicitous of political subdivisions:

> Several factors make more than insubstantial claims that a State can rationally consider according political subdivisions some independent representation in at least one body of the state legislature, as long as the basic standard of equality of population among districts is maintained. Local governmental entities are frequently charged with various responsibilities incident to the operation of state government. In many States much of the legislature's activity involves the enactment of so-called local legislation, directed only to the concerns of particular political subdivisions. And a State may legitimately desire to construct districts along political subdivision lines to deter the possibilities of gerrymandering.

*Id.* at 321-322 (quotation omitted). As the Court held in *Gaffney v. Cummings*, 412 U.S. 735, 749 (1973), "[w]e doubt that the Fourteenth Amendment requires repeated displacement of otherwise appropriate state decision-making in the name of essentially minor deviations from

perfect census-population equality that no one, with confidence, can say will deprive any person of fair and effective representation in his state legislature."

Finally, the Supreme Court has noted that "[i]ndiscriminate districting, without any regard for political subdivisions or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering." *Reynolds v. Sims*, 377 U.S. 533, 578-79 (1964). The Federal case law overlay permits the Legislature to reapportion in a way that embodies New Hampshire's historic tradition, affirmed in the organic law of New Hampshire by the voters in 2006 when they overwhelmingly approved Part II, Art. 11.

### C. RSA 662:5 is Overly Restrictive with regard to the Permissible Deviations and Needlessly Violates the State Constitution

By staying within a narrow range of 10% total statewide deviation, the Legislature too-narrowly structured RSA 662:5 and thus violated the State Constitution. Such a violation is unnecessary. The 10% presumption is simply that – a presumption. Under the U.S. Supreme Court jurisprudence outlined above, the presumption can and should give way to countervailing and reasonable State Constitutional objectives that are objective and non-discriminatory. No better example of such an objective is the clear verdict of the voters of New Hampshire in 2006 when they expressed a preference for as broad representation of local communities of interest as possible. The Legislature artificially limited its options and in so doing has violated the State Constitution by not expanding the permissible deviation or exploring other options which would respect the commands of both constitutions to a far greater degree.

**D. The New Hampshire Constitution Demands Greater Compliance with its Terms and There are at Least Four Plans or Approaches to Achieve Greater Constitutionality under the State Constitution that the Legislature May Pursue for Substantial Constitutional Compliance.**

The New Hampshire Constitution demands greater compliance by the plain terms of Part II, Art. 11. There are at least four plans or approaches to achieve greater constitutionality under the State Constitution that the Legislature may pursue. As some of the appellants argued in *Holt* when seeking to vindicate a State constitutional command relative to political subdivisions, the Legislature "could have easily achieved a substantially greater fidelity to all of the mandates" of Part II, Art. 11. In *Holt*, the appellants challenged the constitutionality of a legislative redistricting plan in Pennsylvania which did not honor commands of the Pennsylvania Constitution relative to the integrity of political subdivisions. The Pennsylvania Supreme Court rejected an attempt to prevent consideration of arguably more compliant alternatives. "In the ordinary case, there would be no reason or logic why the Court would not be permitted to look at such material in discharging its constitutional duty to pass upon an appeal. Indeed, legal challenges in general . . . commonly involve an offering of alternatives." *Holt*, ___ A.3d ___, 2012 WL 375298 at *12-13. The same is true here. In demonstrating that RSA 662:5 is unconstitutional, alternative approaches or plans are appropriate for the Court's review.

After considering the alternatives, the Court in *Holt* found the redistricting plan at issue unconstitutional because it did not respect the State Constitution's requirements. The Court noted, in light of the Supreme Court jurisprudence outlined above, that the competing Federal and State Constitutional commands were not "at war." *Id.* at 41. The Court concluded on the possibility of balance, "[t]o be sure, federal law remains, and that overlay still requires, as *Reynolds* taught, that equality of population is the 'overriding objective.' But, as later cases from the High Court have made clear, that overriding objective does not require that reapportionment

plans pursue the narrowest possible deviation, at the expense of other legitimate state objectives, such as are reflected in our charter of government." *Id.*

Similarly, in *Hellar v. Cenarussa*, 682 P2d 524 (1984), the Idaho Supreme Court held that the state legislature could choose to violate state constitutional provisions in order to comply with the Reynolds mandate of one person, one vote only where there were no alternatives that met the requirements of both constitutions. The legislature in *Hellar* had passed a redistricting plan that admittedly violated a provision of the state constitution that held that the boundaries of counties should not be crossed in redistricting. The trial court in *Hellar* had, however, come up with an obvious plan that the Supreme Court held followed both federal and state constitutional mandates. Since there was a fully constitutional alternative available, the *Hellar* Court invalidated the legislative plan and entered an order that allowed the legislature the opportunity to decide whether to adopt the District Court plan or to enact some other plan that was likewise fully compliant with both federal and state constitutions.

The unconstitutionality of RSA 662:5, and the magnitude of the potential fixes is dramatic. As noted above, 375,284 people in 62 towns and wards are denied the representation to which they are entitled. This represents more than a quarter of New Hampshire's population, or 28.5%. Each of the fixes to the most egregious problems with RSA 662:5 that the House considered and rejected would have reduced that number in some fashion. Expanding the permissible range of deviation slightly to 14%, would allow 24 more compliant districts and give 172,971 additional people their own district whose towns deserve it, on top of RSA 662:5. This substantial increase is equal to 13.13% of the State population. Such a minuscule shift of 66 persons in either direction yields a substantially more compliant plan. Still more compliant, the weighted voting approach adds 49 additional representative districts over RSA 662:5 and

achieves representation for 307,074 more people, or 23.33% of the State's population. The 400 District approach would go the furthest in effectuating the original intent of a large legislature with maximum local representation pursuant to Part II, Article 11.

Another way to look at it, 46% of the 375, 284 people who are deprived of their proper representation under RSA 662:5 would be aided by the expanded deviation approach if the deviation is set at 14% (a shift in either direction of 2%, or approximately 66 people). The weighted voting plan would give 82% of these people the representation they are due. The 400 District Plan would also provide a significant level of representation to these communities. The alternatives represent substantial remedies which honor Part II, Art. 11. The details of each of these plans or approaches are as follows:

### 1. Fixes to the Most Egregious Violations

The Legislature could have enacted a plan that would have fixed some of the most egregious problems in the House Redistricting Plan. Some of those fixes were advanced by, among others, Republican Representative Steven Vaillancourt of Manchester. Representative Valliancourt's plans, for example, would have remedied the carve ups of certain Manchester wards, Concord's Ward 5, and the splitting up of Franklin. See Iapp. at 114-118. Specifically, the House considered and rejected the fixes which would have brought greater compliance with the State Constitution in the form of the following floor amendments: 2012-0218h, Rep. Doherty et al., attached at Iapp. p. 112; 2012-0248h, Rep. Cohn et al., attached at Iapp. p. 114; 2012-0246h, Reps. Cohn & Vaillancourt, attached at Iapp. p. 116; 2012-0156h, Rep. Vaillancourt, attached at Iapp. p. 118; 2012-0243h, Rep. Leishman, attached at Iapp. p. 120. While the Wallner petitioners believe the plans and approaches that follow provide even greater

constitutional compliance than these amendments, these amendments that were considered and rejected at least moved in the "right direction" of greater compliance with Part II, Art. 11.

### 2. Expansion of the Permissible Span of Deviation

The Legislature could have enacted a plan with a slightly increased span of deviation which would meet the State and Federal Constitutions. The New Hampshire House Special Committee on Redistricting imposed a strict interpretation of allowable deviation, limiting districts to 10% deviation and within a +5/-5 range only. While a 10% deviation is sometimes erroneously called a "safe harbor" for the purposes of adherence to the constitutional principle of one person, one vote, the true significance of the 10% range is that it establishes a rebuttable presumption. Plans with deviation ranges below 10% are presumed not to be in violation of the Federal Constitution's one person, one vote requirement, with the burden on a plan's challengers to prove that the plan is unconstitutional. Plans with deviations above 10% are presumed not to comply with the Federal Constitution, with the burden on the plan's proponents to justify the larger deviations. A state constitutional command is one such legitimate justification, as the cases cited in II, B above hold.

As such, the strict application of +5/-5 is more restrictive than necessary. Courts have accepted deviations outside of the 10% range in situations where such deviations made sense for important and legitimate state objectives. *See, e.g., Mahan v. Howell*, 410 U.S. 315 (1973) (Virginia redistricting plan upheld with a 16.4 percent total range of deviation).

New Hampshire's 400-person legislative body along with the relatively small overall state population operate to create the most representative legislative body in the United States by a wide margin, and this, combined with other longstanding requirements, such as the constitutional requirement in Part II, Art. 9 that city wards and towns not be divided and the non-

constitutional requirement that districts must be wholly contained within one county, create an appropriate situation where expanded deviation should be considered to ensure the closest adherence to the Federal and New Hampshire Constitutions. In this regard, Petitioners herein submit a plan with a deviation of 14% that fixes many of the unconstitutional districts and restores local representation. The 14% plan allows an additional 24 towns and wards to constitute their own districts as they are entitled to be under the Part I, Art. 11, of the New Hampshire Constitution. This addition represents the proper representation of 172,971 more people than RSA 662:5. Given that there is a legislative seat for every 3,291 persons—a degree of representation far in excess of any other state – a minor increase in the range of deviation results in miniscule differences in the population of districts. Thus, the 14% deviation results in an increase of only 66 voters on each end of the range – a number that is truly tiny in comparison to the range in any other state, and, a number of absolutely no significance either constitutionally or functionally.

### 3. Weighted Voting

The House considered and ultimately rejected a proposal for weighted voting in floterial districts which would have fully complied with both the Federal requirement of one person, one vote and been substantially more compliant with the State constitutional mandate of Part II, Article 11 to provide each town or ward with sufficient population with its own representative to the greatest extent possible. The weighted vote proposal first submitted to the legislative committee by a citizen group, America Votes, and later filed as an amendment by Rep. David Pierce, is derived in a straightforward manner from the requirement of federal cases that voters in differing political subdivisions that make up floterial districts must each have overall voting weight proportional to their numbers. Floterials themselves were instituted to deal with the

tension between the requirement of one person, one vote and the value of political subdivisions of a state such as towns, wards and counties. The leading authority on floterials has described their utility as follows:

> The floterial district is intended to provide additional representation for two or more electoral districts that are otherwise underrepresented. For example, consider the case in which the ideal population for apportionment of the state legislature is 100,000 persons per district and in which districts dl and d, each have a population of 150,000. If each district is allocated just one seat, it will be underrepresented from the ideal; if each district is allocated two seats, it will be overrepresented from the ideal. One solution to this problem is to allocate to each district, dl and d, one seat, and to allocate one additional seat to the two districts combined. In essence, a third district, comprising dl and d, is created. This third district, d, is a floterial district, so called because it "floats" over the two smaller districts....A floterial allows political subdivisions to remain intact while a state pursues the goal of creating equipopulous districts.

Gary F. Moncrief, *Floterial Districts, Reapportionment, and the Puzzle of Representation*, XIV LEGISLATIVE STUDIES QUARTERLY 250-52 (May 1989).

The major difficulty occasioned by the use of floterials in redistricting derives from situations where there is a marked disparity in the populations of the base districts that contribute to the floterials. This is easily seen in the following example—assume two towns in a state that requires one representative per three thousand persons. Town A has 9500 persons (or enough population for 3 dedicated representatives with a surplus of 500 people) and town B has 5500 persons (or enough for 1 dedicated representative with a surplus of 2500). While the total of the surplus populations of the two towns is the ideal 3000 needed for a representative, the towns cannot simply be placed in a floterial district, because there would be a marked difference in the voting power accorded persons in each of the towns. Voters in Town A, whose population should entitle them to 3 and 1/6 (or 3.17 ) representatives, would instead get three whole votes (for the 3 representatives elected in the base district of Town A) plus would contribute 9500/15000 or 63% of the votes for the floterial for a total of 2.55 representatives. Voters in

Town B whose population of 5500 should entitled them to one whole representative with a surplus of 2500 or 5/6$^{th}$ (83%) of the number needed for a representative, would instead get only one dedicated representative plus 5500/15000 (37%) of the votes for the floterial, or a total of 1.46 representatives. Of course in the real, non mathematical world, the situation would be likely to be even more unfair to the citizens of Town B. Given that towns often represent communities of interest and that in low information elections (like that for a 400 member House) voters are likely to choose those whom they either know or share a community of interest, it is far more likely that a candidate from Town A would win, even though the town is contributing only 1/6 of the population needed for the floterial district, while candidates from Town B, which is contributing 5/6 of the floterial population, would be in most cases simply out of luck, thus depriving their town's voters their fair share of representation.

If votes in floterials are counted on an un-weighted basis, simply aggregating the total populations of the contributing towns and wards without regard for the prior allocation of delegates to base districts, the resulting deviations in voting power will be unavoidable except in limited situations where the towns total populations are roughly proportional to the percentage of surplus population that they submit to the floterial. It is this factor that severely limits the number of towns that get their own representatives under the plan passed by the Legislature and it is this factor that is eliminated by the use of weighted voting in floterials.

The weighted vote plan is simple and straightforward. In the base districts, votes are calculated in the normal fashion. In floterials, the vote totals of each town are multiplied by the percentage of the votes that the town contributes to the floterial and these results are then added together to determine the winner(s) of the floterial seat(s). Using the example given above, and for the purpose of illustration assuming that there is a Candidate A from Town A and a

Candidate B from Town B, each voter in Town A would vote for three base district representatives and for a member in the floterial district. At the end of the voting, the votes in Town A in the floterial seat election would be multiplied by the percentage of votes that Town A contributes to the floterial (1/6 or 17%). Likewise voters in Town B would vote for their one base representative and one floterial representative, with the floterial votes being multiplied by the percentage of votes the town contributed to the floterial (5/6 or 83%). This would result in each voter in each town getting exactly the voting power that the town's population warrants, without double-counting the base district votes. Thus Town A voters would get 3.17 votes (which is exactly what they are entitled to with a population of 9500 people); voters in Town B would get 1.83 votes, exactly what their population of 5500 entitles them to have.

The factors by which votes in floterials are multiplied need only be determined once per decade by the Secretary of State based upon Census results. No voter or local official need be involved in the calculation (just as no voter or local official now calculates who is the overall winner in any multi-town district).

While citizens in different towns would indeed have different numbers of votes, this is in fact the situation that occurs today and will occur under any plan that has multi-member districts. The method adopted by the NH Supreme Court in its redistricting plan in 2002 and by the legislature in the subsequent redistricting of 2004 is itself a form of weighted voting—the number of votes each citizen had was proportionally weighted in whole number terms to the population of the electoral district in which she lived. Thus a person living in Sunapee, a single town district with a total population of 3055, had one vote for one representative while another citizen living in Salem (population 28,112) found themselves in a district that also included Windham (population 10,709). The citizens of Salem and Windham each had thirteen votes

which they were able to use in choosing 13 representatives. The number of votes each citizen got was thus multiplied by the result of dividing the population of the district by the number needed to warrant a representative. The only difference under the weighted vote system is that in the places that are part of floterials the voters will get a whole number of base votes plus a fractional vote in the floterial.

The weighted voting plan effectuates the will of the people to a far greater extent than the plan adopted by the legislature. The weighted vote plan only leaves thirteen towns that would not receive its own representatives despite having sufficient population under the 2006 Amendment, each representing a situation where doing so would have left another town in an "orphan status" with no base representatives. The House plan, in contrast, deprives 62 towns or wards of their right to their own districts in purposeful and knowing violation of the rights afforded them and their citizens under the 2006 Amendment. The unconstitutionality of the House plan, and the contrasting constitutional compliance of the weighted voting plan, are starkly and directly presented by a comparison of maps presented in the Summary of Argument above which show a plethora of towns unfairly and unnecessarily deprived of their right to dedicated representatives by the House plan while there is a minimal scattering of such towns under the weighted vote plan.

### 4. 400 Single Member Districts

Perhaps the simplest method of meeting the federal requirement of one person, one vote is to just carve a state into the desired number of single member districts of equal population. Since historically established political subdivisions do not come in neatly packaged units of equal population however, this method does not allow a state to create districts that fully respect and reflect the community of interests inherent in individual wards, towns, and counties.

Accordingly some states have opted for plans that create equal districts, but do so in the manner that keeps districts within historical political subdivisions to the greatest extent possible. The Wallner Petitioners have provided an example of such a plan that creates 400 single member districts which are in the first instance created wholly within existing counties, towns and wards and which cross the lines of towns and wards only when necessary. Such a plan would provide the smallest possible districts – each almost exactly the precise number needed for representatives. Once the maximum number of districts have been carved out within the towns and wards, some districts then are created with adjoining towns and wards.

This proposal to that extent violates the provision of the Article 11, which states, "[I]n forming the districts, the boundaries of towns, wards and unincorporated places shall be preserved and contiguous." The House has instead chosen to violate a provision enacted in 2006 by an overwhelming number of voters because of a perceived conflict with the Federal Constitution. If indeed there were an unavoidable conflict between the State and Federal constitutions, it would make far more sense to accommodate the federal mandates by relaxing to the minimal extent needed the vestigial prohibition on crossing boundaries, rather than choosing to trample upon the recently overwhelmingly enacted value choice made by the voters when they demanded local representation in 2006.

Courts routinely have to reconcile conflicts both within and between constitutional provisions. Justice Souter eloquently discussed this topic at his address to the 2010 Harvard Commencement:

> The Constitution contains values that may well exist in tension with each other, not in harmony .... The Constitution is a pantheon of values, and a lot of hard cases are hard because the Constitution gives no simple rule of decision for the cases in which one of the values is truly at odds with another. Not even its most uncompromising and unconditional language can resolve every potential tension of one provision with another, tension the Constitution's Framers left to be resolved another day; and another day after

> that, for our cases can give no answers that fit all conflicts, and no resolutions immune to rethinking when the significance of old facts may have changed in the changing world.

See, http://news.harvard.edu/gazette/story/2010/05/text-of-justice-david-souters-speech/

Today, the modern values of one person, one vote and local representation are in conflict with the vestigial mandate to never cross town or ward lines, which was enacted when it was towns themselves that were represented in the legislature and not voters. The Legislature chose to engage in widespread violation of the 2006 Amendment's mandate of dedicated local representatives while invariably following the ban against crossing political boundaries. This Court may well conclude that a better choice is to give greater weight to the more recently enacted provision of the 2006 Amendment, while adhering to the ban against crossing lines to the greatest extent possible. The 400 single member plan appended by the Wallner Petitioners is an example of such an effort to maximize equal voting and local representation. It is thus another example of alternatives that were and are available to the legislature instead of a wholesale violation of the 2006 Amendment.

## III. RSA 662:5 IS NOT SEVERABLE

RSA 662:5 is not severable because the unconstitutional provisions of the act may not be rejected without a domino effect rendering the whole plan unconstitutional. "In determining whether the valid provisions of a statute are severable from the invalid ones" the Court is "to presume that the legislature intended that the invalid part shall not produce entire invalidity if the valid part may be reasonably saved." *Claremont Sch. Dist. v. Governor*, 144 N.H. 210, 217 (1999). The Court also determines "whether the unconstitutional provisions of the statute are so integral and essential in the general structure of the act that they may not be rejected without the result of an entire collapse and destruction of the structure." *Id.* "While there is a presumption in favor of severability, the principle is not to be applied if it gives a statute meaning the legislature

did not intend, either by addition or subtraction from its terms." *Woolf v. Fuller*, 87 N.H. 64, 69, 174 A. 193, 196 (1934).

The unconstitutionality of portions of RSA 662:5 would necessarily implicate the constitutionality of the whole plan. As reapportionment consists of drawing district lines between contiguous communities across the whole state, the constitutional infirmity of one part of the map would have a ripple effect on others. Reapportionment is like a Rubik's Cube with many small twists of the puzzle affecting all others. Accordingly, the "unconstitutional provisions of the statute are so integral and essential in the general structure of the act that they may not be rejected without the result of an entire collapse and destruction of the structure." *Claremont*, 144 N.H. at 217. RSA 662:5 is not severable.

## CONCLUSION

RSA 662:5 is unconstitutional because it denies a dedicated representative district to 375,284 people in 62 New Hampshire communities, each of which has enough inhabitants to constitute its own representative district under the State Constitution. In 2006, the voters of New Hampshire vindicated a centuries old tradition of local representation by enacting Part II, Art. 11 to give as many towns and city subdivisions with sufficient population their own dedicated representative. The House Redistricting plan passed by the Legislature is overly restrictive with regard to permissible deviations from the Federal Constitution's command of one person, one vote. As a result, RSA 662:5 does not comply with this newest amendment to the State Constitution and should be struck down based upon the "clear and substantial conflict" that exists between it and the constitution." *New Hampshire Ass'n of Counties*, 158 N.H. at 288. This brief demonstrates not only the magnitude of the unconstitutionality of the House Redistricting Plan, but also positively that the Legislature can and should pursue far greater

constitutional compliance by (1) Fixing the most egregious violations; (2) a modestly expanding the span of deviation two percent in either direction (approximately 66 people); (3) adopting a weighted voting approach; or (4) enacting 400 single member districts. Respectfully, RSA 662:5 should be struck down.

Respectfully submitted,

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Dated: May 23rd, 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 and Appendices 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 Vicinanzo, 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 23rd, 2012

Jay Surdukowski