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

Interlocutory Transfer Pursuant to Rule 9

BRIEF FOR THE INTERVENOR

Respectfully Submitted,

The New Hampshire House of
Representatives, through its Speaker
By its Attorneys,
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ORAL ARGUMENT REQUESTED

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QUESTIONS PRESENTED

A. Whether the petitioners lack standing, thereby depriving the court of subject matter jurisdiction to decide the constitutionality of RSA 662:5?[1]

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

C. If part of RSA 662:5 is determined to be unconstitutional, whether that part is severable from the remaining parts of the statute?

[1] Question A has been addressed in the Intervenor's brief on the issue of standing.

STATEMENT OF THE CASE

Section I of the Interlocutory Transfer Statement ("ITS") contains the Statement of the Case. The ITS also includes the ITS Appendix ("Iapp") and incorporates the certified legislative record ("Leg. Rec."), which includes the Certified House Record ("CHR") and the Certified Senate Record ("CSR"). In addition to the information contained in the ITS, the following also constitutes the Statement of the Case.

The Legislature enacted RSA 662:5 on March 28, 2012. The first lawsuit filed to enjoin RSA 662:5 from being implemented was *City of Manchester v. Gardner*, Docket No. 2012-cv-0338, filed on April 23, 2012. Numerous other lawsuits seeking temporary and preliminary injunctive relief followed. On May 3, 2012, all of the petitioners had a temporary hearing in Superior Court. At the hearing, the petitioners requested that the Superior Court send this case to this Court on interlocutory transfer. The House objected believing an evidentiary hearing was required on petitioners' requests for preliminary injunctive relief. The petitioners disagreed and requested the matter be transferred to this Court for it to decide the issues presented on the merits. The House agreed to proceed to this Court on the merits only if the record remained closed after the interlocutory transfer statement was completed and submitted. The petitioners, the Attorney General's Office, and the Superior Court agreed to interlocutory transfer on this basis.

STATEMENT OF THE FACTS

The 2010 decennial census conducted by the federal government determined that the population of New Hampshire was 1,316,470. (Legislative Record ("Leg. Rec."), Apportionment of House Seats, CHR-000943.) The New Hampshire House of Representatives consists of 400 members. *Id.* Thus, the ideal population for every House district in the state is 3,291 people. *Id.*

The legislature is required to redistrict the House of Representatives every ten years in accordance with the last federal census. N.H. Const. Pt. II, Art. 9. In order to help fulfill this obligation, the House of Representatives created a Special Committee on Redistricting. (*See* Interlocutory Transfer Statement ("ITS") at ¶46.) The committee held public hearings, took public testimony, and accepted and reviewed numerous proposals and draft redistricting plans. *Id.* at ¶¶48, 51-52. The committee also adopted certain methods and standards regarding how it should proceed in redistricting the State. (Iapp. at 3.) The committee summarized how it proceeded in accordance with these guidelines when it reported HB 592, which has now been enacted as RSA 662:5, to the full House:

> This bill is the culmination of months of research, public input, and discussion concerning how to appropriately apportion New Hampshire House seats according to the 2010 census while complying with the federal and state constitutional requirements.
>
> In addition to the Committee and Subcomittee meetings held throughout the year, and consideration of a variety of redistricting proposals submitted along the way, in October, the committee held ten public hearings across the state to gather public input on redistricting. The House Redistricting Subcommittee then held subsequent work sessions that allowed for further submission of plans and ideas by the public as well as members of the House. After considering all proposals and suggestions brought before it, the Subcommittee approved a redistricting plan and presented it to the whole Committee. The full Committee then held a public hearing on the proposal that was recommended by the Subcommittee. The hearing lasted 5 ½ hours, during which the Committee heard yet again from many members of the House and the public. The full Committee considered all of this input in proposing the plan that it now recommends to the House.

> It is important to know that as a prerequisite, the new redistricting plan had to conform to provisions of both the U.S. Constitution and the Constitution of the State of New Hampshire and further, that House Counsel advised that the U.S. Constitution's 14th Amendment's requirements concerning one-person-one-vote must take precedent over relevant provisions of the New Hampshire Constitution. Subject to that constraint, the Redistricting Committee endeavored to implement Part II, Article 11 of the NH Constitution to the greatest degree possible without violating the one-person-one-vote requirements of the U.S. Constitution. The proposed redistricting plan for the House does exactly that.
>
> Most importantly, the plan falls within the deviation parameters established in federal case law establishing the rules for complying with the 14th Amendment's proportionality requirements. The plan's statewide deviation falls within 10% overall, which means according to this case law that the proposed redistricting plan is 'prima facie constitutional' under the federal constitution. Having first met the federal criteria for statewide deviation, the plan next applies the New Hampshire Constitution's Part II, Article 11 requirements to the maximum extent possible. Meeting both criteria has constituted an extremely arduous and difficult task. Currently there are 103 House districts. The proposed plan creates 200 new districts consisting of 158 underlying districts and 42 floterial districts. . . . . The Committee understands that the intent of the 2006 amendment was to create as many small representative districts as possible, without violating the requirements of Federal case law, in order to ensure the greatest degree of local representation for the voters of New Hampshire. The plan provides for 86 single-town/ward districts. Members elected in single-town/ward districts will occupy 184 seats. Of the 42 floterial districts just 49 members will represent floterial districts.
>
> Members from the Minority of the Committee proposed an alternative redistricting plan prepared by a Virginia-based organization. That plan wanders from the intent of the voters who approved the 2006 amendment to the state constitution. This out-of-state plan relies on a new, untested, and controversial method of weighting individual votes. Weighted voting would require the imposition of a complex system of percentages and formulas that would mandate that a ballot cast count only for a fraction of a vote. It appears very likely that under weighted voting, a candidate could receive a majority of individual votes and still lose the election once the weighted formula for counting town and district votes was applied. For this reason, the Majority believes imposition of a weighted voting scheme for electing representatives to the NH House would be terrible public policy. . . . .

(Leg. Rec., Majority Committee Report, CHR-000005-7.)

As demonstrated above, the committee had to balance the predominant federal-state principle of one person, one vote with the other state constitutional requirements, and had to

balance the other state constitutional requirements with themselves. The committee considered and balanced all of these requirements, adopted a redistricting plan, and sent the plan to the full House as HB 592. The full House debated HB 592 and offered several amendments to it, some of which were implemented. On January 18, 2012, the House passed HB 592. (ITS, at ¶55.) The Senate passed HB 592 on March 7, 2012. *Id.* On March 26, 2012, Governor John Lynch vetoed HB 592. *Id.* On March 28, 2012, the Legislature overrode Governor Lynch's veto. *Id.* Thereafter, HB 592 became law and repealed and reenacted RSA 662:5 (2012).

RSA 662:5 nearly doubles the number of House districts in New Hampshire from 103 to 204. (*Compare* Iapp. at 50-88, *with* Iapp. at 100-06.) With a total statewide deviation of 9.9%, (ITS, at ¶65.), RSA 662:5 stretches the statewide range of deviation to its presumptively constitutional limit under the federal-state one person, one vote requirement. RSA 662:5 maximizes the use of this 9.9% range in order to implement other state redistricting requirements including that: (1) the inhabitants of every town or ward within a reasonable deviation of the ideal population receive their own district with their own representatives, N.H. Const. Pt. II, Art. 11; (2) districts remain contiguous, N.H. Const. Pt. II, Article 11; (3) boundaries of towns, wards, and unincorporated places remain preserved, N.H. Const. Pt. II, Arts. 9 & 11; (4) towns, wards, and unincorporated places are not divided unless their inhabitants request such division by referendum, N.H. Const. Pt. II, Art. 11-a; and (5) county lines are kept intact, a traditional redistricting requirement followed in order to preserve New Hampshire's statutory form of county government, *see* RSA 24:1 ("The county convention consists of the state representatives of the representative districts of the county."). In this way, RSA 662:5 strikes an appropriate balance between the one person, one vote principle and the other competing state redistricting principles.

SUMMARY OF THE ARGUMENT

As an enacted statute, RSA 662:5 is presumptively constitutional. Because RSA 662:5 has a total statewide range of deviation of 9.9%,[2] it is also presumptively constitutional under the one person, one vote principle. Accordingly, the petitioners bear a heavy burden of proving that RSA 662:5 is unconstitutional.

The petitioners' primary argument in this case is that the Legislature should have created a redistricting plan that is presumptively unconstitutional under the federal Equal Protection Clause and Part II, Articles 9 and 11 of the New Hampshire Constitution. The petitioners assert that this Court should force the Legislature to create widespread voter inequality across the State in order to give each of them their own district with their own representatives under Part II, Article 11. The Pennsylvania Supreme Court has expressly rejected similar arguments under the Pennsylvania Constitution because they "disregard[] the critical fact that adherence to a percentage deviation that is at the outside limits of constitutionality cannot be squared with the overriding constitutional objective of 'substantial equality of population' among districts. . . . . [T]he clear constitutional directive is that reapportionment shall strive to create districts as equal, not as unequal, as possible." *In re Reapportionment Plan*, 442 A.2d 661, 667 (Pa. 1981). The New Hampshire Constitution is no different; it requires the creation of House districts "as equal as the circumstances will admit," N.H. Const. Pt. II, Art. 9.

The legislative record indicates that the House balanced the following principles in order to create RSA 662:5: (1) the predominant federal-state principle of one person, one vote; (2) Part II, Article 11's own-district, own-representatives requirement; (3) the requirement that the

[2] "[O]ne can calculate the [statewide] range of deviation by adding the largest positive deviation and the largest negative deviation [across the entire plan] without regard to algebraic sign." *Burling v. Chandler*, 148 N.H. 143, 153 (2002). In RSA 662:5, the largest positive deviation is 5% and the largest negative deviation is -4.9%. Accordingly, the statewide range of deviation is 9.9%.

boundaries of all towns, wards, and unincorporated places be preserved and contiguous; and (4) the requirement that county lines be preserved. (Iapp. at 3; Leg. Rec., Majority Committee Report, CHR-000005-7.) The Legislature balanced these principles and created and enacted RSA 662:5, which doubles the number of House districts and still achieves a statewide range of deviation of less than 10%—a remarkable feat given the competing redistricting principles involved and the number of times the House had to turn the redistricting Rubic's cube.

Because RSA 662:5 has a total statewide range of deviation of 9.9%, in order to challenge RSA 662:5 as unconstitutional under the one person, one vote principle, a petitioner must show that the redistricting process was tainted by arbitrariness or discrimination. On the undisputed record before the Court, the petitioners cannot do this.

The petitioners also cannot show that RSA 662:5 is unconstitutional under Part II, Article 11's own-district, own-representatives requirement. This requirement protects a citizen's ability to vote for and elect one or more representatives from her political subdivision. Thus, in order for the petitioners to succeed on these claims, each petitioner must first prove that RSA 662:5 actually impairs her ability to vote for and elect one or more candidates from her political subdivision. After making this showing, each petitioner must then prove that, using the same methods and standards and the same approximate range of deviation as the Legislature, RSA 662:5 can be substantially improved without violating any other federal or state constitutional redistricting requirements. On the undisputed record in this case, none of the petitioners can make these highly factual showings.

A petitioner challenging an enacted redistricting plan bears a heavy burden of proof that he cannot satisfy merely by asserting that the Legislature deviated from a specific constitutional redistricting requirement. This is because the predominant federal-state principle of one person,

one vote stands in tension with the other subordinate state redistricting requirements embodied in Part II, Articles 9 and 11. The task of making the compromises necessary to effectuate these state standards within federal constitutional limits falls primarily on the Legislature because such decisions are particularly legislative in character.

An enacted redistricting plan is not rendered unconstitutional because someone could have drawn a better plan. The federal and state constitutions do not require the Legislature to adopt the best plan possible. Accordingly, the Court's inquiry is limited to whether RSA 662:5 is constitutional. Under this standard, alternative redistricting plans may constitute evidence that an enacted plan is unconstitutional if they use the same methods and standards and same approximate range of deviation as the Legislature and substantially improve on the enacted plan without violating other federal or state constitutional or statutory requirements.

It is apparent from the undisputed facts in this case that the petitioners have not met their heavy burden of demonstrating that their proposed alternative redistricting plans (1) achieve the same approximate range of deviation as RSA 662:5, (2) rely on the same methods and standards as RSA 662:5, and (3) substantially improve upon RSA 662:5. In fact, the precise range of deviation and the specific methods and standards used to create these plans cannot be gleaned reliably from the face of them. Moreover, according to the limited review the House has been able to perform based on the face of the plans, none of the plans come close to meeting the above standard.

Also, the petitioners have not shown that Part II, Article 11 prohibits the Legislature from joining towns and city wards into multi-member and floterial districts.

The petitioners' claims that Gilford and Meredith and Strafford and New Durham are not contiguous under Part II, Article 11 must also fail. This Court has held that contiguous territory

is territory that "touches, adjoins or is connected . . . ." *Below v. Gardner*, 148 N.H. 1, 9-10 (2002). Gilford and Meredith share a border through Lake Winnipesaukee. Courts have held that political subdivisions that share a border only through water are contiguous for redistricting purposes. Furthermore, the fact that Strafford and New Durham touch each other at a single point is of no consequence; contiguous territory is territory that touches. Accordingly, the petitioners' contiguity claims must fail.

Additionally, no "community of interest" right exists in the New Hampshire Constitution. Even if it did, the petitioners have not met their heavy burden of showing that the Legislature did not take community of interest factors into account in the redistricting process. The Legislature held numerous public hearings and public listening sessions to gain input from citizens in every county regarding the redistricting process. (Leg. Rec., Minutes from public hearings held through State, CHR – 000331-527; CDs and DVDs of public hearings.) Accordingly, none of the petitioners can show that RSA 662:5 is unconstitutional because the Legislature failed to consider community of interest factors

Finally, if this Court holds that RSA 662:5 is unconstitutional in part, it should hold that the statute is severable by county. In order to demonstrate that RSA 662:5 is unconstitutional in in part, the petitioners must show that, using the same methods and standards and the same approximate range of deviation as the Legislature, one or more counties can be substantially improved without violating other federal or state constitutional requirements elsewhere on the map. Presumably, if the petitioners can meet this heavy burden, they will have shown that any defects in the enacted plan are localized and can be fixed without affecting the other surrounding districts within and outside of their county. Accordingly, in the event that part of RSA 662:5 is held unconstitutional in part, RSA 662:5 is severable.

ARGUMENT

I. THE PETITIONERS HAVE NOT MET THEIR HEAVY BURDEN OF SHOWING THAT RSA 662:5 IS UNCONSTITUTIONAL UNDER THE FEDERAL OR STATE CONSTITUTIONS.

"'Reapportionment is primarily a matter of legislative consideration and determination.'" *Below v. Gardner*, 148 N.H. 1, 5 (2002) (quoting *Monier v. Gallen*, 122 N.H. 474, 476 (1982)). "'[A] state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality.'" *Id.* (quoting *Connor v. Finch*, 431 U.S. 407, 415 (1977)). "[T]he difficult task of making the compromises necessary to best effectuate state standards within the constitutional limitations imposed by federal law falls primarily on the Legislature." *In re 1983 Legislative Apportionment of House, Senate, & Congressional Districts*, 469 A.2d 819, 827 (Me. 1983) (hereinafter *In re 1983 Legislative Apportionment*). The Legislature is best suited to make such compromises because those compromises are "peculiarly legislative in character." *Id.* at 827. Thus, it is the Legislature's obligation to resolve the tension that exists between the one person, one vote requirement and the other state constitutional redistricting requirements. *Id.*

"So long as the Legislature took 'reasonable efforts to conform to the requirements of the Constitution,' [the Court] will uphold the Legislature's redistricting plan." *Mayor of Cambridge v. Commonwealth*, 765 N.E.2d 749, 755 (Mass. 2002). "The Legislature must consider each of the Federal and State requirements, but is not required to demonstrate explicitly how the plan meets each of these requirements." *Id.*

Moreover, a duly enacted redistricting plan is not rendered unconstitutional because someone could have drawn a better plan. *In re 1983 Legislative Apportionment*, 469 A.2d at 828; *see Gaffney v. Cummings*, 412 U.S. 735, 750-51 (1973) (holding that a redistricting plan is not unconstitutional simply because some "resourceful mind" has come up with a better one). "The

Constitution does not require that the Legislature adopt the best plan possible." *Mayor of Cambridge*, 765 N.E.2d at 756. "If [the court] required such a determination, any redistricting plan would be subject to endless attack by those who are later able to devise what they contend is a superior plan that may indeed more closely approximate the constitutional requirements." *Id.*

RSA 662:5 is, like any other enacted statute, presumed constitutional. *See, e.g., Gen. Elec. Co., Inc. v. Comm'n, Dept. of Rev. Admin.*, 154 N.H. 457, 466 (2006) ("[S]tatutes are presumed constitutional, and they will only be declared invalid upon inescapable grounds.") (internal quotation omitted); *Parella v. Montalbano*, 899 A.2d 1226, 1240 (R.I. 2006) (holding in challenge to constitutionality of redistricting plan that "courts will make every reasonable intendment in favor of the constitutionality of a legislative act, and so far as any presumption exists it is in favor of so holding.") (internal quotations omitted); *In re Senate Bill 177*, 294 A.2d 653, 654 (Vt. 1972) ("Reapportionment is, in the first instance, a legislative responsibility. The actions of the General Assembly are entitled to the presumptions of justification and regularity accorded regular statutory enactment.").

The Court will not declare a statute unconstitutional "except upon inescapable grounds." *State v. Ploof*, 162 N.H. 609, 614 (2011). "'In other words, [the Court] will not hold a statute to be unconstitutional unless a clear and substantial conflict exists between it and the constitution.'" *Id.* (quoting *State v. Hynes*, 159 N.H. 187, 199-200 (2009)). "'When doubts exist as to the constitutionality of a statute, those doubts must be resolved in favor of its constitutionality.'" *Id.* (quoting *Bd. Of Trustees, N.H. Judicial Ret. Plan v. Sec'y of State*, 161 N.H. 49, 53 (2010)).

Additionally, an enacted redistricting plan with a total statewide deviation of less than 10% is afforded an extra layer of protection under the federal-state principle of one person, one vote principle. *See Brown v. Thomson*, 462 U.S. 835, 842-43 (1983). A redistricting plan with a

statewide range of deviation of less than 10% in population among legislative districts is *prima facie* constitutional under the federal Equal Protection Clause. *Brown*, 462 U.S. at 842-43; *Connor*, 431 U.S. at 418; *White v. Regester*, 412 U.S. 755, 765 (1973) (holding that State did not need to justify total statewide range of deviation of 9.9%). "Th[is] formulaic threshold is not an absolute determinant." *Moore v. Itwamba County, Mississippi*, 431 F.3d 257, 259 (5th Cir. 2005). "Rather, it effectively allocates the burden of proof." *Id.* "With a deviation less than ten percent, a plaintiff must prove that the redistricting process was tainted by arbitrariness or discrimination." *Id.* This Court has held that Part II, Articles 9 and 11 of the New Hampshire Constitution "are at least as protective of a citizen's right to vote as the federal constitutional standard of one person/one vote." *Burling*, 148 N.H. at 149.

Accordingly, there is "a heavy burden of proof on those who allege that a redistricting plan violates the Constitution." *Davis v. Bandemer*, 478 U.S. 109, 185 (1986) (Powell, J., concurring in part and dissenting in part); *see Ploof*, 162 N.H. at 614 ("[T]he party challenging a statute's constitutionality bears the burden of proof."); *MacPherson v. Weiner*, 156 N.H. 6, 11 (2008) ("A party challenging a statute . . . bears a heavy burden of proof in view of the strong presumption in favoring a statute's constitutionality.") (internal quotations omitted). A petitioner cannot satisfy this heavy burden by merely alleging that a redistricting plan is unconstitutional because it appears to deviate from one or more constitutional requirements. *See, e.g.*, *Fonfara v. Reapportionment Commission*, 610 A.2d 153, 165 (Conn. 1992) ("Courts in other jurisdictions have uniformly required a petitioner to make a prima facie showing of some evidence inconsistent with the state's faithful discharge of its constitutional responsibilities before they have countenanced . . . shifting . . . the burden of proof."); *In re 1983 Legislative Apportionment*,

469 A.2d at 831 (requiring petitioner to demonstrate that redistricting plan can be redrawn without creating constitutional violations elsewhere in order to meet burden of proof).

Nor can a petitioner satisfy his burden of proof by merely alleging that other redistricting plans could be drawn or by producing a marginally better plan. *See Gaffney*, 412 U.S. at 750-51. The United States Supreme Court explained the reasoning for this rule in *Gaffney* when it inquired:

> And what is to happen to the Master's plan if a resourceful mind hits upon a plan better than the Master's by a fraction of a percentage point? Involvement like this must end at some point, but that point constantly recedes if those who litigate need only produce a plan that is marginally 'better' when measured against a rigid and unyielding population-equality standard.
>
> The point is, that such involvements should never begin. We have repeatedly recognized that state reapportionment is the task of local legislatures or of those organs of state government selected to perform it.

Id. Relying on this language, the Pennsylvania Supreme Court in *In re Reapportionment Plan*, 442 A.2d 661, 665 (Pa. 1981) (hereinafter *In re 1981 Plan*) held that "to prevail in their challenge to the final reapportionment plan, appellants have the burden of establishing not, as some of the appellants have argued, that there exists an alternative plan which is 'preferable' or 'better,' but rather that the final plan filed by the Pennsylvania [Legislative] Reapportionment Commission fails to meet constitutional requirements." The Pennsylvania Supreme Court recently reaffirmed that holding in *Holt v. 2011 Legislative Reapportionment Comm'n*, 2012 WL 375298 (Pa. Feb. 3, 2012); *see also Mayor of Cambridge*, 765 N.E.2d at 755 ("Although the plaintiffs have presented three alternatives to the redistricting statute, whether any of these plans is potentially superior to the redistricting statute is not determinative of the question we must decide.").

"In order to establish improper judgment on the part of the Legislature . . . , a challenger at the very least must show that [the enacted redistricting plan] could be substantially improved without creating constitutional violations elsewhere . . . ." *In re 1983 Legislative Apportionment*, 469 A.2d at 831. The petitioners may make such a showing through the submission of alternative redistricting plans; however, only the presentation of alternative redistricting plans that, using the same methods and standards and same approximate range of deviation as the Legislature, substantially improve on the enacted plan without violating other federal or state constitutional requirements constitute the type of objective evidence that may indicate that the Legislature's plan is unconstitutional. *See, e.g.*, *Holt*, 2012 WL 375298, at *35-36 (holding that petitioner's alternative plan constituted evidence that the enacted plan was "contrary to law" because it "show[ed] that a redistricting map could readily be fashioned which maintained a roughly equivalent level of population deviation . . . , while employing significantly fewer political subdivision splits with respect to both Chambers of the General Assembly); *In re 1983 Legislative Apportionment*, 469 A.2d at 831.

The reason for this is plain: decisions regarding what methods and standards to use and what range of deviation to achieve are legislative policy decisions. Thus, so long as the Legislature's methods and standards are constitutional and the range of deviation achieved strikes a reasonable, nondiscriminatory balance between the goals of substantial equality among voters and the other state constitutional redistricting requirements, the Legislature's decisions will be afforded substantial deference and upheld. *See Mayor of Cambridge*, 765 N.E.2d at 757 ("The population equality and territorial integrity requirements necessarily conflict, and the Legislature has the discretion to determine the extent to which either of these requirements shall yield to the other.") (internal quotations omitted); *State ex. rel Cooper v. Tenant*, 2012 W. Va.

LEXIS 77, at *17-18 (W. Va. Feb. 13, 2012) (explaining with regard to redistricting plan that "courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches. . . . . Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary"). Thus, "[i]n the absence of any finding of a constitutional or statutory violation . . . , a court must defer to the legislative judgments the plans reflect, even under circumstances in which a court order is required to effect an interim legislative apportionment plan." *Upham v. Seamon*, 456 U.S. 37, 40-41 (1982).

Accordingly, in order to constitute evidence of unconstitutionality, a challenger's alternative plans must demonstrate that "the same basic considerations that the [Legislature] says powered and justified its decisions . . . could easily be accommodated with far less violence [to federal and state constitutional and statutory requirements]." *Holt*, 2012 WL 375298, at *34.

A. The petitioners have not met their heavy burden of showing that RSA 662:5 is unconstitutional under the predominant federal-state principle of one person, one vote.

State legislative reapportionment plans are subject to the one person, one vote principle set out in the United States Supreme Court's seminal opinion in *Reynolds v. Sims*, 377 U.S. 533 (1964). In *Reynolds*, the United States Supreme Court confronted a situation in which many of Alabama's counties were provided with one House representative regardless of population, resulting in substantial population-variance ratios between electoral districts. *Id.* at 542, 569. In *Reynolds*, the United States Supreme Court held that the Equal Protection Clause required the seats in both houses of a bicameral state legislature to be apportioned on a population basis, not on a political subdivision basis. *Id.* at 568. The Supreme Court explained that "[t]o the extent that a citizen's right to vote is debased, he is that much less a citizen. The fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his

vote." *Id.* at 567. The Court further explained that the right to vote is personal in nature, *id.* at 561-62, and that "[l]egislators represent people, not trees or acres." *Id.* at 563; *see id.* ("Legislators are elected by voters, not farmers or cities or economic interests.").

Accordingly, the Supreme Court held that the Equal Protection Clause of the United States Constitution requires States to "make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable." *Id.* at 577. Mathematical exactness is not required, *id.*, and no one methodology for drawing districts is proscribed, *id.* at 579. "Whatever the means of accomplishment, the overriding objective [is] substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." *Id.*

Consistent with this discretionary standard, the United States Supreme Court has held that a State redistricting plan that has a total statewide range of deviation of less than 10% in population among legislative districts is *prima facie* constitutional under the Equal Protection Clause. *Brown*, 462 U.S. at 842-43; *Connor*, 431 U.S. at 418; *White*, 412 U.S. at 765 (holding that State did not need to justify statewide range of deviation of 9.9%). "If the maximum deviation is less than 10%, the population disparity is considered *de minimis* and the plaintiff cannot rely on it alone to prove invidious discrimination or arbitrariness . . . the plaintiff would have to produce further evidence to show that the apportionment process had a taint of arbitrariness or discrimination." *Daly v. Hunt*, 93 F.3d 1212, 1220 (4th Cir. 1996) (internal quotation omitted).

"At the same time, a deviation in population equality greater than ten percent establishes a *prima facie* case of discrimination and shifts the evidentiary burden to the state, requiring justification for the deviation." *Moore*, 431 F.3d at 259; *see Brown*, 462 U.S. at 843; *Mahan v.*

Howell, 410 U.S. 315, 325 (1973). The maximum deviation the United States Supreme Court has tolerated is 16.4% in the *Mahan* case nearly forty years ago. 410 U.S. at 319, 329. The United States Supreme Court has uniformly held redistricting plans with total deviations in excess of 16.4% unconstitutional even if justified by a rational state policy. *See, e.g.*, *Whitcomb v. Chavis*, 403 U.S. 124 (1971) (invalidating plan with total deviation of 24.78%); *Swann v. Adams*, 385 U.S. 440 (1967) (invalidating plan with total deviation of 25.65%); *Kilgarlin v. Hill*, 386 U.S. 120 (1967) (invalidating plan with total deviation of 26.48%).

While it has been suggested that the United States Supreme Court in *Brown* found a reapportionment plan with a total deviation of 89% constitutional, such a suggestion is contradicted by a close reading of the case. *See Brown*, 462 U.S. at 846-47 (indicating that appellants did not raise the issue of whether Wyoming's policy of adhering to county boundaries justified a population deviation of 89%) (majority opinion)). Justice O'Connor concurred in *Brown* specifically to highlight the narrow issue the Court addressed:

> [I]n this case we are not required to decide whether, and do not suggest that, 'Wyoming's nondiscriminatory adherence to county boundaries justifies the population deviations that exist throughout Wyoming's representative districts.'. . . I have the gravest doubts that a statewide legislative plan with an 89% maximum deviation could survive constitutional scrutiny despite the presence of the State's strong interest in preserving county boundaries. I join the Court's opinion on the understanding that nothing in it suggests that this Court would uphold such a scheme.

Id. at 849-50 (O'Connor and Stevens, JJ., concurring). And Justice Brennan seized on Justice O'Connor's concurrence stating:

> Although I disagree with today's holding, it is worth stressing how extraordinarily narrow it is, and how empty of likely precedential value. The Court goes out of its way to make clear that because appellants have chosen to attack only one small feature of Wyoming's reapportionment scheme, the Court weighs only the *marginal* unequalizing effect of that one feature, and not the overall constitutionality of the entire scheme.

Id. at 850 (Brennan, White, Marshall, and Blackmun, JJ., dissenting). The United States Supreme Court has been careful to limit *Brown* to its narrow holding since it was issued. *See Bd. of Estimate of New York v. Morris*, 489 U.S. 688, 702 (1989) (citing *Brown* and stating "[w]e note that no case of ours has indicated that a deviation of some 78% could ever be justified.").[3]

Part II, Articles 9 and 11 of the New Hampshire Constitution are "at least as protective of a citizen's right to vote as the federal constitutional standard of one person/one vote." *Burling*, 148 N.H. at 149. Under this standard, the New Hampshire Supreme Court has held that "a deviation range of approximately 9% achieves 'substantial equality.'" *Id.* at 157 (quoting *Reynolds*, 377 U.S. at 579).[4] The New Hampshire Supreme Court has also indicated that statewide deviations of 40.4%, 37.2%, and 28.4% constitute "impermissible deviations," *id.* at 155, and that a statewide range of deviation of 49.7% was "too high to be justified by any state interest," *id.* at 158.

In *Burling*, this Court also criticized the way certain redistricting plans used floterial districts[5] primarily because those plans relied on the aggregate method to calculate deviation in

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[3] Consistent with these standards, forty-five states in the Union had enacted House redistricting plans with total statewide ranges of deviation under 10% in the previous decade. (Leg. Rec., National Conference of State Legislatures, *Redistricting Laws of 2010* 47-48 (Nov. 2009), CHR – 000574-75.) Twenty-four of those states had in place House redistricting plans with total statewide ranges of deviation between 9.2% and 9.99%. *Id.* Three states had enacted House redistricting plans with a total statewide range of deviation of between 10% and 12.46%. *Id.* Only two states, Hawaii and Vermont, had House plans with deviations above 16.4%. *Id.*

[4] While this Court in *Burling* appeared to indicate that higher deviations from substantially equality may be permitted in States with smaller populations and more representative districts, 148 N.H. 157-58, the United States Supreme Court has indicated that the opposite may be true. *See Chapman v. Meier*, 420 U.S. 1, 25-26 (1975). In *Chapman*, the United States Supreme Court explained that sparse population is "not a legitimate basis for a departure from the goal of equality." 420 U.S. at 25-26. The Court stated that "in a State with a small population, each individual vote may be more important to the result of an election than in a highly populated state." *Id.* at 26. This is especially true in New Hampshire House districts where a small number of votes has a greater chance of tipping the scales of an election because of the relatively small population of each individual district.

[5] "The term 'floterial district' is used to refer to a legislative district which includes within its boundaries several separate districts or political subdivisions which independently would not be entitled to additional representation, but whose conglomerate population entitles the entire area to another seat in the particular legislative body being apportioned." *Davis v. Mann*, 377 U.S. 678, 686 n.2 (1964). "[T]he floterial district is a concept devised to equalize representation while preserving political boundaries." *Boyer v. Gardner*, 540 F. Supp. 624, 629 (D.N.H. 1982).
(Footnote continued on next page)

those districts. *Id.* at 154-55. The Court held that "[t]he aggregate method is appropriate for multi-member districts, but is not appropriate for . . . floterials . . . because it masks substantial deviation[s] from the one person/one vote principle." *Id.* at 154. The Court explained that floterial districts are fundamentally different than multi-member districts, *id.*, and pointed out that in *Morris*, 489 U.S. at 700-02, 702 n.9, the United States Supreme Court appeared to require the use of the component method where voters in single-member districts also voted for at-large representatives. *Burling*, 148 N.H. at 155. Thus, as this Court observed in *Burling*, while there are some instances when use of the aggregate and component methods will yield the same or substantially similar deviations, if the component method is not used, substantial deviations in population equality will likely be overlooked. *See id.* at 154-55; (Leg. Rec., G. Moncrief & R. Joula, *When the Courts Don't Compute: Mathematics and Floterial Districts in Legislative Reapportionment Cases*, 4 J.L. & Pol. 737, 743-45 (1988), CHR – 000771-773.) Accordingly, the House used only the component method to calculate deviation in floterial districts.

To the extent the petitioners have challenged RSA 662:5 as violating the predominant federal-state principle of one person, one vote, they have not met their heavy burden proof. Because RSA 662:5 has a total statewide deviation of 9.9%, it is presumptively constitutional under the one person, one vote requirement. Accordingly, in order to demonstrate that RSA 662:5 is unconstitutional under this principle, the petitioners must show that the redistricting process was tainted by arbitrariness or discrimination.

The petitioners can point to no facts in the undisputed record demonstrating that the redistricting process was tainted by arbitrariness or discrimination and none of the petitioners

"[F]loterial districts are not in themselves unconstitutional, apart from inequalities in representation that they may create." *Id.* at 626.

have even alleged as much in their petitions. Accordingly, the petitioners have not met their heavy burden of proof of showing that RSA 662:5 is unconstitutional under the federal or state constitutions because it violates the predominant federal-state principle of one person, one vote.

B. The petitioners have not met their heavy burden of showing that RSA 662:5 is unconstitutional under Part II, Article 11 because it impairs their ability to vote for and elect one or more representatives from their own political subdivision.

Part II, Article 11 seeks, in part, to ensure that the inhabitants of every town or ward with sufficient population receive their own district of one or more representative seats. In this way, Part II, Article 11 seeks to protect a citizen's ability to vote for and elect one or more representatives from the political subdivision in which she resides.

In *Reynolds*, the United States Supreme Court recognized that a State may have a legitimate interest in aligning some representation with political subdivisions; however, the Court cautioned that "permitting deviations from population-based representation does not mean that each local governmental unit or political subdivision can be given separate representation, regardless of population." 377 U.S. at 581. The Court noted that "[c]arried too far, a scheme of giving at least one seat in one house to each political subdivision . . . could easily result, in many States, in a total subversion of the equal-population principle in that legislative body." *Id.* Carried too far, Part II, Article 11's own-district, own-representatives requirement would do just that; it would totally subvert the one person, one vote principle.

Thus, in order to demonstrate a violation of Part II Article 11's own-district, own-representatives requirement, each petitioner bears a heavy burden of first proving that RSA 662:5 actually impairs her ability to vote for and elect one or more representatives from the political subdivision in which she reside. *See Sirrell v. State*, 146 N.H. 364, 373 (2001) ("Thus, to prevail upon their declaratory judgment petition, the plaintiffs were required to establish they were

harmed by the practical operation of the statewide property tax."). Once each petitioner is able to demonstrate this, each petitioner bears a heavy burden of proof of showing that, using the same methods and standards and same approximate range of deviation as the Legislature, RSA 662:5 can be substantially improved without violating other federal or state constitutional redistricting requirements elsewhere on the map.[6] As the House will explain below, the petitioners have not, and cannot, meet this heavy burden.

1. The petitioners have not met their heavy burden of showing that RSA 662:5 has actually impaired their rights under Part II, Article 11.

In order to prove that RSA 662:5 is unconstitutional under Part II, Article 11, each petitioner must prove that RSA 662:5 actually impairs or prejudices her ability to vote for and elect one or more representatives from her political subdivision. This is a highly factual, statistical inquiry that, depending on the facts and circumstances of a given district, would likely require expert testimony to prove. *See Laramie v. Stone*, 160 N.H. 419, 427 (2010) ("Expert testimony is required when the subject presented is so distinctly related to some science, profession or occupation as to be beyond the ken of the average layperson.").

For example, Petitioner David Pierce, a Hanover resident, appears to be challenging his new House district as unconstitutional because it allegedly impairs his ability to vote for and elect three representatives from Hanover. Hanover has a total population of 11,260. (Iapp at 19.) Under Part II, Article 11, Hanover's inhabitants would be entitled to their own district with

[6] To the extent the petitioners might be mounting a facial challenge to RSA 662:5 under Part II, Article 11's own-district, own-representatives requirement, they would have to show "'that no set of circumstances exists under which [RSA 662:5] would be valid.'" *See State v. Furgal*, 161 N.H. 206, 210 (2010) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). Given the fact that the one person, one vote requirement stands in tension with Part II, Article 11's own-district, own-representatives requirement, and that the Legislature is afforded substantial discretion to compromise competing redistricting principles, it is hard to imagine how the petitioners could ever show that no set of circumstances exists under which RSA 662:5 would be valid. To be sure, the petitioners cannot make this showing by merely asserting that the inhabitants of numerous towns and wards with sufficient population did not receive their own district with their own representatives because such a theory would run afoul of the one person, one vote requirement.

three of their own representatives. Under RSA 662:5, V, however, Hanover shares a four-representative multi-member district with Lyme (District No. 12). (Iapp. at 56.) Lyme has a total population of 1,716 residents. (Iapp. at 20.) Thus, in order for Mr. Pierce to succeed on his Part II, Article 11 claim, he would have to prove, at the very least, that RSA 662:5 will more likely than not impair or prejudice his ability to vote for and elect three representatives from Hanover. Given the relatively large population of Hanover and the relatively small population of Lyme, it is highly unlikely that Mr. Pierce could ever prove such impairment.

Moreover, on the undisputed factual record, none of the petitioners, including Mr. Pierce, have made this highly factual, individualized showing with respect to their House districts. Accordingly, because none of the petitioners can demonstrate on the undisputed record that their ability to vote for and elect one or more representatives from their political subdivisions has been impaired or prejudiced by RSA 662:5, all of their claims under Part II, Article 11's own-district, own-representative requirement must fail.

2. The petitioners have not met their heavy burden of showing that RSA 662:5 can be substantially improved without violating other federal or state constitutional redistricting requirements.

After demonstrating an impairment, the petitioners must demonstrate that, using the same methods and standards and same approximately range of deviation as the Legislature, RSA 662:5 can be substantially improved without violating other federal or state constitutional redistricting requirements. *Holt*, 2012 WL 375298, at *35-36. The petitioners allege that numerous proposed floor amendments to HB 592 and two other redistricting plans that they created constitute evidence that RSA 662:5 is unconstitutional. In pressing these claims, the petitioners appear to rely primarily on *Holt*.

In *Holt*, numerous petitioners aggrieved by Pennsylvania's final redistricting plan appealed their claims to the Pennsylvania Supreme Court. *Id.* at *7-9. The *Holt* petitioners'

primary argument was that the final redistricting plan split more political subdivisions than was "absolutely necessary" and was therefore "contrary to law," two requirements unique to Pennsylvania's Constitution. *Id.* at *8. In support of this argument, the *Holt* petitioners provided an alternative redistricting plan that, using the same methods and standards and the same approximate range of deviation as the redistricting commission, demonstrated that the commission could have split political subdivisions substantially fewer times. *Id.* at *35-37. The Pennsylvania Supreme Court held that this alternative redistricting plan demonstrated that the commission's plan was contrary to law because it showed that the commission's policy decisions could be accommodated with far less violence to the constitutional requirement that political subdivisions not be split unless absolutely necessary. *See id.* at *37 ("It is enough that the *Holt* plan here overwhelmingly shows that the 2011 Final Plan made subdivision splits that were not absolutely necessary, and certainly could not be justified on the population equality or other grounds proffered.").

Thus, in order to constitute evidence that RSA 662:5 is unconstitutional, an alternative redistricting plan must (1) employ the same methods and standards the Legislature used, (2) result in the same approximate range of deviation as the Legislature's plan, and (3) substantially improve upon the enacted redistricting plan without creating other federal or state constitutional violations elsewhere on the map. *See Holt*, 2012 WL 375298, at *35-36. Unfortunately for the petitioners, the precise range of deviation and the specific methods and standards used to create these plans cannot be gleaned reliably from the face of them. In order to ensure that each plan meets these standards, the petitioners would have likely needed to have a preliminary injunction hearing in the trial court where expert testimony could have been presented regarding each plan, as the House suggested. Having decided to waive such a hearing so they could proceed directly

to this Court on a closed record, however, the petitioners have forfeited their opportunity to elicit these facts and make this showing.

Moreover, the House disputes the allegation that the petitioners' alternative redistricting plans constitute evidence that RSA 662:5 is unconstitutional. According to the limited review the House has been able to perform based on the face of the plans, all of the alternative redistricting plans submitted suffer from significant, material deficiencies, some which would likely render the entire alternative redistricting plan unconstitutional.

For example, many of the alternative plans expand the total statewide range of deviation substantially above 10%, beyond the reaches of presumptive constitutionality. *See In re 1981 Plan*, 442 A.2d at 667 (holding that the Pennsylvania Constitution does not require the redistricting commission to expand the statewide range of deviation into presumptively unconstitutional territory to accommodate other state redistricting requirements). In fact, according to the House's calculations, the petitioners' Expanded Deviation Redistricting Plan has a total statewide range of deviation in excess of 50%. Floor Amendments 2012-0218h and 2012-0248h would increase the total statewide deviation range of the enacted plan to 16.5%.

Some of the alternative plans also employ materially different and constitutionally suspect methods of creating floterial districts or counting votes in floterial districts. (Iapp. at 114, 116, & 122.) For example, Floor Amendments 2012-0248h and 2012-0246h rely upon a method of creating floterial districts that is contrary to the plain language of Part II, Article 11 and the intent of those who passed it. Instead of placing only "excess" inhabitants into floterial districts, Floor Amendments 2012-0248h and 2012-0248h place excess inhabitants plus an additional representative's worth of inhabitants into one or more floterial districts in order to manipulate the deviations in those districts. Part II, Article 11 specifies how floterial districts may and may not

be used and only permits the Legislature to place "excess" inhabitants into them. Part II, Article 11 does not appear to allow the Legislature to manipulate floterial districts in the way Floor Amendments 2012-0248h and 2012-0246h manipulate them.

Floor Amendment 2012-0252h relies on a system of weighted voting to count votes in floterial districts. Putting aside the question of whether weighted voting is in fact constitutional, no petitioner has argued that using the component method to calculate deviation in floterial districts, as the House did, is unconstitutional. *See Burling* 148 N.H. at 154-55. Rather, they argue that the Legislature should have made a different policy decision and should have implemented a weighted voting scheme in floterial districts instead. Such an argument misses the point. It is not this Court's role to inquire into whether the Legislature could have made different policy decisions during the redistricting process. This Court's role is solely to determine whether RSA 662:5 is constitutional.

Weighted voting is not a different method of calculating deviation; rather, it is a way of weighting each individual vote cast. Such a method would constitute a significant departure from the way a citizen's vote has been counted in elections for the New Hampshire House of Representatives. Whether to employ a system of weighted voting in this State is a legislative policy decision, one the Legislature chose to reject during the redistricting process. (*See* Leg. Rec., Majority Committee Report, CHR-000005-7.) Moreover, to the extent the petitioners argue that Part II, Article 11 requires the Legislature to employ a system of weighted voting, the text of Part II, Article 11, the legislative history to CACR 41, and the 2006 Voters Guide are devoid of any reference to weighted voting. (*See* Leg. Rec., Legislative History, CHR 000579-616.) Also, it is impossible to tell from the face of Floor Amendment 2012-0252h what the statewide range of deviation for the entire plan actually is.

Many of the alternative plans also swap one constitutional violation for another or, in some cases, swap one constitutional violation for many constitutional violations. For example, Floor Amendment 2012-0156h deprives Boscawen and Allenstown of their own district with their own representatives in order to give Concord Ward 5 its own district with its own representatives under Part II, Article 11 and increases the statewide range of deviation to 10.2%. Floor Amendment 2012-0246h deprives Litchfield of its own district with its own representatives in order to give Pelham its own district with its own representatives under Part II, Article 11. Such results demonstrate precisely the type of impermissible ripple effect that is created when one attempts to satisfy Part II, Article 11's own-district, own-representatives requirement within the confines of the other federal and state redistricting requirements. *See, e.g.*, *Mayor of Cambridge*, 765 N.E.2d at 756; *In re 1983 Legislative Apportionment*, 469 A.2d at 831.

Additionally, the petitioners' 400 single-member district plan departs substantially from the methods and standards the Legislature used. This Court has expressly held in *Burling* that although such a plan "would . . . result[] in little or no deviation, such a radical restricting of the house [i]s not only not required by the one person/one vote principle, but would contravene other State constitutional imperatives." 148 N.H. at 159.

In the end, none of the petitioners' alternative plans are sufficient to meet their heavy burden of proof. Many are likely unconstitutional and, those that are not, merely reflect the fact that the Legislature could have made different policy decisions during the redistricting process. Accordingly, on the undisputed record of this case, the petitioners cannot prove that their alternative redistricting plans actually constitute competent, reliable evidence that RSA 662:5 is unconstitutional.

C. The petitioners have not shown that RSA 662:5 is unconstitutional because it joins towns and city wards into multi-member and floterial districts.

Part II, Article 11 expressly contemplates that the Legislature may join towns, wards, and unincorporated places into multi-member districts. It provides in relevant part:

> 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.

This Court has held that the reference to "those towns, wards, or unincorporated places" in Part II, Article 11 was not meant to limit the Legislature's discretion in forming multi-member districts. *See Burling*, 148 N.H. at 149 ("The reference to 'those towns, wards or unincorporated places' was not intended to limit the legislature's discretion as to how to form multi-member districts."). In accordance with this holding, this Court joined numerous cities with neighboring towns and cities to form multi-member districts in 2002. (Iapp. at 89-99.)

Moreover, the express language of Part II, Article 11 allows the Legislature to place the excess inhabitants of formed districts with the excess inhabitants of other formed districts into floterial districts conforming to constitutional deviations. Part II, Article 11 does not differentiate between town districts and city ward districts.

Although Part II, Article 26 applies only to the Senate, Part II, Article 26 employs language substantially similar to Part II, Article 11. Part II, Article 26 provides:

> And that the state may be equally represented in the senate, the legislature shall divide the state into single-member districts, as nearly equal as may be in population, each consisting of contiguous towns, city wards and unincorporated places, without dividing any town, city ward or unincorporated place. The legislature shall form the single-member districts at its next session after approval of this article by the voters of the state and thereafter at the regular session following each decennial federal census.

Relying on this language, this Court in 2002 joined Manchester Wards 5, 6, 7, 8, and 9 with the town of Litchfield to form Senate District 17. *Below v. Gardner*, 148 N.H. 1 (2002) (Appendix C). This Court also joined Nashua Wards 1, 2, 3, and 7 with the towns of Brookline, Hollis, and Mason to form Senate District 11. *Id.* This Court also joined Manchester Wards 1, 2, and 12 with the towns of Bow, Dunbarton, Candia, and Hooksett to form Senate District 15. *Id.* This Court also joined Manchester Wards 2, 4, 10, and 11 with Goffstown to form Senate District 19. *Id.* Presumably, if the language of Part II, Article 26 forbid the Legislature from joining towns and city wards together to form Senate districts, this Court would have said as much in *Below* and would have refrained from creating such districts in its Senate plan.

Part II, Article 11 contains nearly identical language to Part II, Article 26 regarding the formation of towns, wards, and unincorporated into districts and does not restrict the Legislature from joining such political subdivisions into multi-member or floterial districts. Accordingly, the petitioners' claims that RSA 662:5 is unconstitutional because it makes such unions must be rejected.

D. The petitioners have not met their heavy burden of showing that RSA 662:5 is unconstitutional because it joins towns that share a border through water or touch at a single point.

In creating districts, Part II, Article 11 requires that "the boundaries of towns, wards, and unincorporated places [remain] preserved and contiguous." This Court has held that "contiguous territory is territory that touches, adjoins or is connected, as distinguished from territory that is separated by other territory." *Below*, 148 N.H. at 9. "[T]he contiguity requirement is intended to prevent partisan gerrymandering." *Id.* "Political gerrymandering is 'the practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition's voting strength.'" *Id.* (quoting BLACK'S LAW DICTIONARY 696 (7th ed. 1999)).

1. Gilford and Meredith

In this case, the petitioners from Gilford and Meredith argue that their House district is not contiguous because Gilford and Meredith share a boundary through Lake Winnipesaukee. Such an argument should be rejected. Political subdivisions that share a boundary only through water are generally referred to as shore-to-shore contiguous. *See Parella v. Montalbano*, 899 A.2d 1226, 1254-55 (R.I. 2006). Courts in other jurisdictions have examined shore-to-shore contiguity and have determined that such towns are contiguous regardless of whether those towns are actually connected by land or by a bridge. *See, e.g., id.* (discussing shore-to-shore contiguity and listing cases); *In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d 819, 827-28 (Fla. 2002), *superseded by statute on other grounds*, (establishing shore-to-shore contiguity in district with Lake Okeechobee, with no connecting territory on northern or southern shores); *Wilkins v. West*, 571 S.E.2d 100, 109-10 (Va. 2002) (upholding district with shore-to-shore contiguity and no bridge connecting land); *Jones v. Falcey*, 222 A.2d 101, 106 (N.J. 1966); *Lamson v. Sec'y of the Commonwealth*, 168 N.E.2d 480 (Mass. 1960); *Mader v. Crowell*, 498 F. Supp. 226 (D. Tenn. 1980).

In fact, this Court in 2002 joined numerous towns that shared a border only through water. For example, this Court joined Merrimack and Litchfield into a multi-member district. Merrimack and Litchfield share a border with the Merrimack River. (Iapp. at 89-99.) No bridge connects these towns. Additionally, this Court joined New Castle and Rye into a district. *Id.* New Castle and Rye are separate by the Atlantic Ocean. This Court also joined Northfield, Canterbury, and Loudon with Boscawen, Salisbury, and Andover even though the Merrimack River separates Boscawen, Salisbury, and Andover from Northfield, Canterbury, and Loudon. *Id.*

Forbidding shore-to-shore contiguity would prove unworkable in New Hampshire. Many towns and wards are separated from each other by waterways. It would make little sense to hold

that these towns and wards could not be joined into multi-member or floterial districts simply because the Merrimack River or another waterway divides them.

Thus, because Gilford and Meredith are shore-to-shore contiguous[7], the petitioners from Gilford and Meredith have not met their heavy burden of showing that RSA 662:5 is unconstitutional.

2. Strafford and New Durham

The petitioner from Strafford argues that his House district is not contiguous with New Durham because it touches only at a single point. This Court has defined contiguous territory as territory that touches. *Below*, 148 N.H. at 9. The purpose behind the contiguity requirement is to protect against political gerrymandering. The petitioner from Strafford has not made a political gerrymandering claim in this case and cannot otherwise show that Strafford and New Durham were joined for any other reason but to achieve the goals of substantial equality while attempting to provide the inhabitants of towns and wards with sufficient population, such as Farmington, with their own districts and their own representatives. Accordingly, the petitioner's claim that Strafford and New Durham are not contiguous must fail.

E. No "community of interest" requirement exists in the New Hampshire Constitution.

No "community of interest" requirement exists in the New Hampshire Constitution, and this Court should not read one into it. Such a concept is nebulous and unworkable and admits of no reasonably discernable or justiciable standards. *See Baker v. Carr*, 369 U.S. 186, 198 (1962) (defining justiciability as turning on "whether the duty asserted can be judicially identified and

[7] In fact, Lake Winnipesaukee is dotted with islands that belong to Meredith and Gilford. Governor's Island, for example, is very close to the Meredith-Gilford border and is part of the town of Gilford.

its breach judicially determined, and whether protection for the right asserted can be judicially molded").

Nonetheless, assuming such a requirement exists, the petitioners have not met their heavy burden of showing that the Legislature did not take community of interest factors into account. The Special Committee on Redistricting spent months holding public hearings and listening to the feedback and input from the public regarding how the public believed certain towns and counties should be redistricted. (Leg. Rec., Minutes from public hearings held throughout the State, CHR – 000331-527; CDs and DVDs of public hearings.) The petitioners have pointed to no evidence indicating that the committee did not take the information it received at these hearings into account when it redistricted the state.[8] Thus, assuming a penumbral "community of interest" requirement exists, the petitioners have not shown that the Legislature failed to take such a requirement into account during the redistricting process.

II. IN THE UNLIKELY EVENT THAT ONE OR MORE OF THE PETITIONERS MEETS HER HEAVY BURDEN OF PROOF, RSA 662:5 IS SEVERABLE.

"'In determining whether the valid provisions of a statute are severable from the invalid ones, [the Court must] presume that the legislature intended that the invalid part shall not produce entire invalidity if the valid part may be reasonably saved.'" *Associated Press v. State*, 153 N.H. 120, 141 (2005) (quoting *Claremont Sch. Dist. v. Governor (Statewide Property Tax Phase-In*, 144 N.H. 210, 217 (1999)). "'[The Court] must also determine, however, whether the unconstitutional provisions of the statute are so integral and essential in the general structure of

[8] To the extent the *City of Manchester* petitioners rely on data that is not derived from the 2010 United States Census to advance their community of interest claims, they cannot show that the Legislature was required to take such data into account when it redistricted the State. *See McGovern v. Sec'y of State*, 138 N.H. 128, 131 (1993) ("Our State Constitution establishes only one yardstick as a legislative guide in making an apportionment. That yardstick is the last general census of the inhabitants of the state taken by authority of the United States or of this state.").

the act that they may not be rejected without the result of an entire collapse and destruction of the structure.'" *Id.* (quoting *Claremont Sch. Dist.*, 144 N.H. at 217).

In order to meet their burden of proof, the petitioners will have to show that, using the same methods and standards and same approximate range of deviation as the Legislature's plan, RSA 662:5 can be substantially improved without violating other federal and state redistricting requirements. Assuming one or more of the petitioners can meet this heavy burden, they will likely have shown that a particular county within RSA 662:5 can be substantially improved in a way that affords him or her relief. In such a case, the other counties that are not affected would not have to be redistricted and their districts could remain in place.

Such a result would avoid the need for the Legislature to redraw the entire redistricting plan. It would also avoid the need for this Court to redraw the entire redistricting plan if the Legislature could not enact a new plan and get it pre-cleared under the Voting Rights Act by the United States Department of Justice in time for the September primary.

The primary deadline is September 11, 2012. Under the federal Uniform and Overseas Citizens Absentee and Voting Act, ballots must be mailed out 45 days prior to the primary, 42 U.S.C. §§ 1973ff-1(a)(8)(A) & (g), bringing the deadline to have an enacted plan in place to July 27, 2012. Due to the large number of House candidates, the Secretary of State has estimated that it will take him approximately two weeks to print the ballots, pushing the deadline back to July 13, 2012. Because the names for House candidates come from the Town Clerks who need to confirm each candidate's residency and transmit that information to the Secretary of State, the Secretary of State estimates that this process will take about an additional week, pushing the deadline for a valid House redistricting plan to be in place back to July 6, 2012. The filing

period for House candidates is statutorily set, RSA 655:14, and opens on June 6, 2012, the day of oral argument in this case.

If the Court holds the entire plan or any part of it unconstitutional, this leaves less than a month for the Legislature to create a new plan, send it through the legislative process, and have it pre-cleared by the United States Department of Justice. Such a timeline would be difficult, if not impossible, for the Legislature to meet if it. Thus, if one or more of the petitioners actually meets their burden of proof in this case, invalidating RSA 662:5 and enjoining it on a county by county basis would significantly ease the burden on the Legislature, the Secretary of State, and the public if the infirmity in RSA 662:5 is isolated to one or more counties.[9]

Accordingly, for the above reasons, this Court should hold that RSA 662:5 is severable by county to the extent one or more of the petitioners can meet their heavy burden of proving that a particular county can be substantially improved in accordance with the applicable standard of review.

CONCLUSION

In sum, RSA 662:5 is constitutional under the predominant federal-state principle of one person, one vote. None of the petitioners have met their heavy burden of showing that RSA 662:5 is unconstitutional under Part II, Article 11's own-district, own-representatives requirement for the following reasons. First, none of the petitioners have shown that RSA 662:5 actually impairs or prejudices their ability to vote for and elect one or more representatives from her political subdivision. Second, none the petitioners have shown that their alternative redistricting plans (1) use the same methods and standards as the Legislature, (2) achieve the

[9] It bears noting that even if this Court declares the smallest part of RSA 662:5 unconstitutional and sends it back to the Legislature, there is no guarantee that the Legislature will be able to fix RSA 662:5 and get it through the legislative process in time for the primary election. If that happens, the task of fixing that portion of RSA 662:5 will inevitably fall to this Court. *See Burling v. Chandler*, 148 N.H. 143 (2002).

same approximate range of deviation as the Legislature, and (3) substantially improve on RSA 662:5 without creating other federal or state constitutional violations elsewhere on the map.

Also, none of the petitioners have met their heavy burden of showing that RSA 662:5 is unconstitutional because it joins towns and city wards into multi-member and floterial districts. Additionally, the petitioners from Gilford, Meredith, and Strafford have not met their heavy burden of showing that their House districts violate Part II, Article 11's contiguity requirement. All of the petitioners have also failed to meet their heavy burden of showing that the Legislature did not take community of interest factors into account during the redistricting process.

Finally, RSA 662:5 is severable by county. Assuming one or more of the petitioners can meet their heavy burden of proof, they will have necessarily shown that one or more counties can be substantially improved and that the unconstitutional portions are severable.

REQUEST FOR ORAL ARGUMENT

The Intervenor respectfully requests oral argument to be presented by David A. Vicinanzo.

Respectfully Submitted,

The New Hampshire House of
Representatives, Through Its Speaker

By Its Attorneys,
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Date: May 23, 2012

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CERTIFICATE OF SERVICE

I hereby certify that a copy of forgoing *Brief for the Intervenor* was served on this 23rd day of May, 2012, by electronic mail to Jason B. Dennis, Esquire; Tony F. Soltani, Esquire; Jason M. Surdukowski, Esquire; Martin P. Honigberg, Esquire; Danielle L. Pacik, Esquire; Thomas J. Donovan, Esquire; Peter V. Millham, Esquire; Matthew D. Huot, Esquire; Anne M. Edwards, Esquire; Stephen G. LaBonte, Esquire; and Richard J. Lehmann, Esquire; counsel of record.

Anthony J. Galdieri, Esquire