

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
Northern District

SUPERIOR COURT

DOCKET # _____

Hon. Mary Jane Wallner, Hon. Harold V. Lynde, Jr., Hon. Thomas Katsiantonis,
Jean Sanders, Hon. Kathryn Miller, Patricia Martin, Joe Cicirelli, Hon. William Butynski, PhD
Petitioners

v.

William M. Gardner, in his official capacity
as Secretary of State of the State of New Hampshire,
Respondent

**VERIFIED PETITION FOR DECLARATORY AND INJUNCTIVE RELIEF
CHALLENGING THE CONSTITUTIONALITY OF THE HOUSE REDISTRICTING PLAN
AND REQUEST FOR EXPEDITED PRELIMINARY AND FINAL HEARINGS**

INTRODUCTION

The Petitioners respectfully challenge and seek to enjoin the unconstitutional House Redistricting Plan (Ch. 9, Laws of 2012) enacted over a veto of Governor John Lynch. The House Redistricting Plan violates of one of the two newest amendment to the State Constitution – adopted by the people of New Hampshire by overwhelming popular vote on November 7, 2006 – an amendment in which over 70% of the voters declared their preference for having as many House districts as possible for the citizens in every town and city subdivision with sufficient population to entitle those citizens to at least one full seat in the House. *See* NH Const. Part II, Art. 11.

There has not been, and the Petitioners do not expect there will be, any dispute regarding the House Redistricting Plan's substantive violations of Part II, Art. 11. The Plan's advocates have argued instead that the House Redistricting Plan was the only one possible that could contain acceptable deviations to perfectly equal legislative districts under the United States Constitution's command of "one person/one vote." That argument is simply not correct, as Petitioners will present plans that fully comply with the provisions of both constitutions; or that are less violative of the New Hampshire Constitution, while being no more problematic under the United States Constitution; or that fully comply with the United States Constitution and arguably run afoul of different provisions of the New Hampshire Constitution (provisions that are older and that many believe are anachronistic). As this Petition will show, it is possible for our citizen legislature to "respect federal law--at the same time we are construing our own organic constitutional commands." *Holt v. 2011 Legislative Reapportionment Commission*, ___ A.3d ___, 2012 WL 375298 (Pa. Feb. 3, 2012) at *40.

Accordingly, the Petitioners request that the Court enjoin implementation of the House Redistricting Plan and declare the Plan to be in violation of the New Hampshire Constitution. It is possible to honor the commands of both the Federal and State Constitutions, or at least do less damage to the stated will of the citizens of New Hampshire as so recently affirmed and enshrined in the New Hampshire Constitution, and the State should be required to do so.

PARTIES

1. The Petitioners seeking relief from this Court:

A. Petitioner the Honorable Mary Jane Wallner is an individual who resides at 4 Chestnut Pasture Road, in Ward 5 of Concord, which is the only ward in the Capital city to be carved out and combined with the Town of Hopkinton in the House Redistricting Plan.

Representative Wallner is the Deputy Democratic Leader of the New Hampshire House. She has served in the legislature since 1980 and is a former Majority Leader of the House.

B. Petitioner the Honorable Harold V. Lynde, Jr., is an individual who resides at 114 Jeremy Hill Rd, Pelham. Lynde is a former State Representative who served when Pelham elected three of its own State Representatives. Mr. Lynde currently serves on the Town of Pelham Selectboard.

C. Petitioner the Honorable Thomas Katsiantonis is an individual who resides at 45 Glen Bloom Drive, Manchester. He is a State Representative from Manchester Ward 8. Representative Katsiantonis is also a Manchester Alderman.

D. Petitioner Jean Sanders is an individual who resides at 1 Stonewall Terrace, Atkinson.

E. Petitioner the Honorable Kathryn Miller is an individual and resides at 27 Meredith Center Road, Meredith. Miller is a former State Representative.

F. Petitioner Patricia Martin is an individual who resides at 17 Farrar Road, Rindge.

G. Petitioner Joe Cicirelli is an individual who resides at 144 Back Canaan Road, Strafford.

H. Petitioner the Honorable William Butynski, PhD, is an individual who resides at 60 River Road, Hinsdale. He is a State Representative from Cheshire County District 4.

2. The Respondent William M. Gardner is the Secretary of State of the State of New Hampshire, with an office at 107 North Main Street, Concord, New Hampshire. He is named as a respondent in this action solely in his official capacity of Secretary of State of New Hampshire.

It is the Secretary of State's responsibility to administer the 2012 state primary and general elections that will elect the members of House of Representatives.

JURISDICTION AND VENUE

3. The Court has jurisdiction over this matter pursuant to RSA 491:7, RSA 498:1, and RSA 498:2.

4. Venue is proper in this Court under RSA 507:9, as Petitioner Thomas Katsiontonis is a resident of Manchester, New Hampshire, in Hillsborough County. Additionally, the subject matter of this petition, in part, is the unconstitutionality of certain Manchester House districts lines.

CONTROLLING FUNDAMENTAL LAW

5. Part II, Article 11, of the New Hampshire Constitution provides in full:

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.

6. The New Hampshire Supreme Court has declared that it is the responsibility of the judiciary to resolve disputes arising under the New Hampshire Constitution. *Petition of Below*, 151 N.H. 135, 139 (2004). The constitutional right to vote and the right to be elected are afforded the status of fundamental rights in this State. *See Akins v. Secretary of State*, 154 N.H. 67, 71 (2006).

HISTORICAL CONTEXT AND FACTS

7. 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 long tradition of enfranchising the cities and towns. The will towards broad representation predates the 1784 constitution. According to Susan Marshall's constitutional history, 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).

8. Through the years the people of New Hampshire have enacted measures to guarantee a broadly representative House. Prior to 1889, Part II, Article 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, Article 11, changed the law to ensure that towns with less than 600 people had proportional representation. Even until the 1960s, Part II, Article 11, required every town, regardless of how small it was, would have its own representative once every ten years.

9. The redistricting plan 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.

10. 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>.

11. 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.” *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.

12. Over 70 % of New Hampshire voters approved amending Part II, Article 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. This is the last time the voters have spoken on the design of their constitutional representation. The voters did so clearly.

13. The House Redistricting Plan challenged in this Petition does not comply with Part II, Article 11. There are at least 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 under the House Redistricting Plan.

14. The towns that are unconstitutionally denied their own district under the House Redistricting Plan and wards include, among many others, Atkinson, Pelham, Meredith, and

Strafford. Not only is Pelham denied its own representative district, it is made to share representation with the larger town of Hudson. Strafford is denied its own representative district and must share a representative with New Durham.

15. Concord's Ward 5, like the City's other nine wards, is large enough to constitute a representative district. Unlike the other nine wards, however, Ward 5 is separated from the City and is combined with the town of Hopkinton, which is larger than Ward 5, in a multi-member district. There are literally dozens of other towns and city wards that are large enough to constitute a representative district that are denied that right under the House Redistricting Plan.

16. The House Redistricting Plan was enacted over the veto of Governor Lynch. In his veto message, the Governor stated, "One of the unique advantages to living in New Hampshire is the ability of citizens to encounter his or her state representative in their daily activities – at the grocery store, in a house of worship, or walking main street. [The House Redistricting Plan] undermines that very special quality of life in New Hampshire and the critical component of representative local democracy that is expressed in a commonality of interest among a community's citizens."

17. In addition, the House Redistricting Plan carves up and dilutes representation in certain communities in a fashion that erodes commonality of interest among the voters in a single House district. The towns of Gilford and Meredith, for example, each of which is large enough to constitute its own representative district, are combined into a multi-member district, despite having no land border.

18. Wards 8 and 9 in Manchester are combined in a flatorial district with the town of Litchfield, despite the vast differences between the State's largest city and one of its many independent towns.

19. In his veto message, the Governor identified the problems created when one or two sections of a city are cut away from the rest of the City. “As the Board of Mayor and Alderman in Manchester has expressed, ‘this is not a partisan issue.’ ‘Local municipal budgets are separate, schools are in different districts, police officers and firefighters ... belong to different departments and station houses.’ The same is true in Pelham, Concord, Strafford and all of the towns and wards affected in this manner by [the House Redistricting Plan].”

20. Enacting a redistricting plan that contains so many violations of Part II, Article 11, was not necessary.

21. The full House or its Special Committee on Redistricting considered and rejected a number of alternatives that would have allowed more towns and wards to have their own districts.

22. At least one of those plans would have been fully compliant with both the State and Federal Constitutions.

23. In addition, there were plans that would be fully compliant with the United States Constitution and would create fewer problems under the State Constitution.

24. There are plans as well that would be fully compliant with the United States Constitution but might be in conflict with other provisions of the New Hampshire Constitution than Part II, Article 11.

25. Contrary to the position taken by House leadership, the Legislature can enact a House Redistricting Plan that conforms with both the Federal and State Constitutions. Federal law has evolved to permit flexibility in population deviation precisely for legitimate state objectives such as the local representation principle embodied in Part II, Article 11.

26. As the Pennsylvania Supreme Court held in February of this year, equality of population as an objective of federal law must be balanced against state Constitutional provisions:

To be sure, federal law remains, and that overlay still requires, as *Reynolds* taught, that equality of population is the ‘overriding objective.’ But, as later cases from the High Court have made clear, that overriding objective does not require that reapportionment plans pursue the narrowest possible deviation, at the expense of other, legitimate state objectives, such as are reflected in our charter of government. The law has developed to afford considerably more flexibility.

Holt v. 2011 Legislative Reapportionment Commission, ___ A.3d ___, 2012 WL 375298 (Pa. Feb. 23, 2012) at *41. *See also Gaffney v. Cummings*, 412 U.S. 735, 748-49 (1973) (“Fair and effective representation ... does not depend solely on mathematical equality among district populations. There are other relevant factors to be taken into account and other important interests that States may legitimately be mindful of.”); *Mahan v. Howell*, 410 U.S. 315, 329 (1973) (upholding deviations from ideal population equality as justified by rational policy of maintaining integrity of political subdivisions in Virginia state legislature).

27. This Petition presents four plans or broad approaches that would show due respect to both Constitutions:

Plan 1. Fixes to the Most Egregious Violations

28. 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 plan, for example, would have remedied the carve ups of certain Manchester wards, Concord’s Ward 5, and the splitting up of Franklin.

29. In addition, there are adjustments that could be made in some places that would have allowed other towns to be their own districts without increasing the span or range of

deviations in districts beyond the 10% boundary identified by the House Special Committee on Redistricting as being one of the targets for its work. Thus, for example, the town of Pelham could have been its own district with four representatives, instead of being combined with the far larger town of Hudson. This would have avoided the situation created by the last redistricting under which, for the last decade, almost no representatives have come from Pelham.

See **Exhibit 1 - Plan 1**.

Plan 2. Expansion of the Span of Deviation

30. The Legislature could have enacted a plan with an increased span of deviation which would meet the State and Federal Constitutions. The NH 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 10% deviation is often considered a legal “safe harbor” that ensure 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 Federal Constitution, with the burden on the plan’s proponents to justify the larger deviations. A state constitutional command is one such legitimate justification.

31. As such, the strict application of +5/-5 is unusual and 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) (early example of the United States Supreme Court upholding Virginia’s

redistricting plan which included a 16.4 percent total range of deviation for valid legislative reasons).

32. New Hampshire's 400-person legislative body is the most representative in the United States by a wide margin, and this, combined with other longstanding requirements, such as the constitutional requirement in Part II, Article 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 gerrymandered districts and restores local representation. The 14% plan allows an additional 31 towns and wards to constitute their own districts as they are entitled to be under the Part I, Article 11, of the New Hampshire Constitution, including the following communities: Manchester, Concord Ward 5, Pelham, Hudson, Plymouth, Atkinson, and Conway.

See **Exhibit 2 - Plan 2**.

Plan 3. Weighted Voting

33. The Legislature could have enacted a plan that would meet the State and Federal Constitutions by creating a system of weighted voting in floterial districts. A weighted voting proposal weighs the votes of towns in the floterial district so that they reflect the proportion of surplus voters that each town contributes to the floterial district. This weighing of votes occurs only within the floterials and results in a plan that both fully reflects the federal requirement of one person/one vote and the State requirement that towns and wards that are large enough should constitute their own districts to the fullest extent possible. Such a plan would meet the requirements of the State and Federal Constitutions and provide local representation to at least 62

towns and wards that are denied representation under the House leadership plan, including the following homes to Petitioners: Pelham, Concord Ward 5, Atkinson, Meredith, Rindge, Strafford, and Hinsdale, where some Petitioners reside, as well as other communities such as Wilton, Conway, Pembroke, Dover, Newport, Weare, and Loudon. The Legislature was presented with a plan that contained weighted floterials that also remained within the self-imposed stricture of an absolute deviation range of 10%. There is, however, no reason why weighted floterials could not be combined with an expanded ranged of deviation to allow even more towns and wards to constitute their own representative districts.

See **Exhibit 3 - Plan 3**.

Plan 4. 400 Single Member Districts

34. The Legislature could have enacted a plan which would meet the Federal Constitution by creating 400 single member districts. Such an approach would create the most local representation, close adherence to the 2006 amendment, and even closer compliance with the one person/one vote requirement of the Federal Constitution. The sponsors of the House Redistricting Plan stated that the only way to conform with the federal requirement of one person/one vote was to violate Part II, Article 11, of the New Hampshire Constitution. The Petitioners' fourth proposal is premised on the idea that if adherence to the Federal Constitution requires a violation of a state constitutional provision, it would be preferable not to disregard the one passed by an overwhelming proportion of the voters less that five years ago, but rather to depart from the more antiquated provision in part II, Article 9 that requires towns and city wards to remain whole in the creation of district lines. Thus the plaintiffs submit a plan that divides the state into 400 single member districts. All of the districts in the first instance are created wholly within town or ward boundaries -- only when necessary and to the extent necessary do districts

contain census tracks from two towns or wards. The 400 individual district plan provides the greatest possible direct local representation to voters, and avoids the situation of the last decade under which most representatives came from large multi-member districts which utterly failed to effectuate the policy choices made by the people when they set up a legislative body with 400 separate representatives. 400 single member districts would also present the virtues of being almost impossible to gerrymander and represent an almost insurmountable hurdle to control by limited special interest groups.

See **Exhibit 4 - Plan 4**. [Note – **this Plan will be filed as a supplemental exhibit**].

Count I – Violation of Part II, Article 11

35. Petitioners incorporate paragraphs 1 through 34 as fully set forth herein.

36. The House Redistricting Plan places many city wards and towns that have sufficient populations to justify being their own House districts in large combined districts.

37. The House Redistricting Plan thus does not comply with the explicit terms of Part II, Article 11, of the New Hampshire Constitution.

38. The House Redistricting Plan's advocates and defenders cannot show that they had no choice but to create districts that violate Part II, Article 11, as there are plans and approaches that would comply with all constitutional requirements; be less violative of the New Hampshire Constitution; or would violate different provisions of the New Hampshire Constitution, while being in full compliance with the United States Constitution.

WHEREFORE, the Petitioners ask this Court to declare that the House Redistricting Plan violates Part II, Article 11, of the New Hampshire Constitution.

Count II – Preliminary and Permanent Injunctive Relief

39. Petitioners incorporate paragraphs 1 through 34 as fully set forth herein.

40. If the House Redistricting Plan forms the basis for the election of Representatives in 2012, the election for the House will take place in unconstitutional districts.

41. The filing period for the 2012 primary is scheduled to open June 6, 2012.

42. The Court should preliminarily enjoin the Secretary of State from proceeding with the filing period using the House Redistricting Plan to allow time for expedited consideration of this constitutional challenge.

43. A preliminary injunction is warranted when there is (1) immediate danger of irreparable harm to the party seeking injunctive relief, (2) no adequate remedy at law, and (3) the party seeking the injunction is likely to succeed on the merits. *See, e.g., ATV Watch v. New Hampshire Dept. of Resources and Economic Development*, 923 A.2d 1061, 1065 (N.H. 2007).

44. In this case, there is an immediate danger of irreparable harm that can be avoided only by the issuance of a preliminary injunction because the Secretary of State would otherwise proceed to prepare for the primary and general election in accordance with the unconstitutional House Redistricting Plan. If the election proceeds, the voting rights of the Petitioners would be violated because they will not have the representation to which they are entitled. There is no adequate remedy at law because this Petition involves the right to vote and the right to be elected, the loss or denial of which cannot be remedied by money damages or otherwise. *See, also, Motion for Preliminary Injunction* filed along with this Petition that more fully sets forth the basis for a preliminary injunctive relief.

WHEREFORE, the Court should enter preliminary and permanent injunctive relief.

PRAYERS FOR RELIEF

WHEREFORE, the Petitioners respectfully request that the Court:

- A. Issue a preliminary injunction against the implementation of the House Redistricting Plan for the 2012 elections;

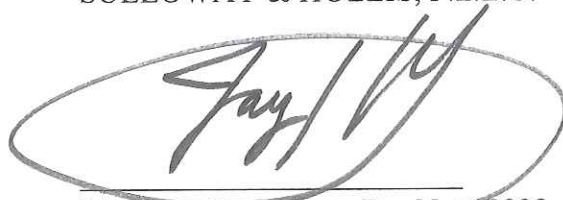
- B. Declare that the House Redistricting Plan violates Part II, Article 11, of the New Hampshire Constitution;
- C. Permanently enjoin the implementation of the House Redistricting Plan; and
- D. Grant such further and other relief as justice and equity may require.

Respectfully submitted,

HON. MARY JANE WALLNER
HON. HAROLD V. LYNDE, JR.
HON. THOMAS KATSIANTONIS
JEAN SANDERS
HON. KATHRYN MILLER
PATRICIA MARTIN
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Dated:

April 25th, 2012

FURTHER AFFIANT SAYETH NOT.

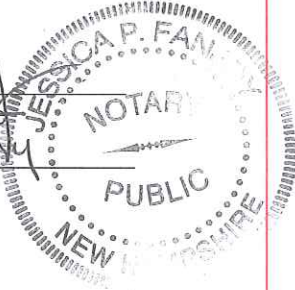
Dated: April 24 2012

By: Mary Jane Wallner
Hon. Mary Jane Wallner

State of New Hampshire
County of Merrimack

The above named Mary Jane Wallner subscribed and sworn to before me this 24th day of April 2012.

Jessica P. Fanning
Notary Public/Justice of the Peace
My Commission Expires: 7/14/14

A circular notary seal for Jessica P. Fanning, Notary Public, New Hampshire. The seal contains the text "JESSICA P. FANNING", "NOTARY PUBLIC", and "NEW HAMPSHIRE".