

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT
DOCKET #

Town of Canaan, Town of Enfield, Town of Litchfield, Town of Loudon,
Town of Weare, Town of Wilton, Honorable Ralph Boehm, Judith Finsterbusch,
Joseph Frazier, Honorable Gary Hopper, Honorable Loren Jean,
Honorable Neal Kurk, Anthony Lozeau, Honorable Roy D. Maxfield, and Ed Naile,
Petitioners

v.

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

**PETITION FOR DECLARATORY AND INJUNCTIVE RELIEF
WITH REQUEST FOR EXPEDITED PRELIMINARY AND FINAL HEARINGS**

Now come the Petitioners and complain against the Respondent and say the following:

NATURE OF THE CASE

- 1- The New Hampshire House of Representatives is the fourth-largest English-speaking legislative body in the world. The primary reason for its size is the historical New Hampshire principle that each and every community, no matter how small, should have the right to elect their representatives from within the town. Indeed, this principle predates the Constitution of 1784; it occurred first in early 1774. One of the chief complaints about New Hampshire's so-called "temporary constitution of 1776" was that it disenfranchised the seacoast and western towns. *See, e.g.,* Susan E. Marshall, *The New Hampshire Constitution* (Praeger, 2004) at 7-9.
- 2- The history of Part II, Article 11 of the New Hampshire Constitution is all about assuring that towns were appropriately enfranchised. For example, an amendment passed in 1942 required that every town, regardless of size, have its own representative in the House at

least once every 10 years. *See Marshall, supra*, at 133. The 1942 amendment of Part II, Article 11 repealed an 1889 constitutional amendment that for a 53-year period required New Hampshire House that towns of less than 600 inhabitants should be represented a proportional amount of time, instead of the annual rotation of representation that had been set forth in Part II, Article 10, which was repealed in 1889.

- 3- Unfortunately, in the course of creating the last two redistricting plans for the House this historical principle was largely forgotten. Many towns that qualified to elect their own representatives under applicable constitutional principles have been nonetheless placed within large, multi-town legislative districts. *See Burling v. Speaker of the House*, 148 N.H. 143, 157 (2002) (31 districts with more than four state representatives); *RSA 662:5*.
- 4- To remedy this deficiency, the New Hampshire Legislature enacted a Constitutional Amendment Concurrent Resolution (hereinafter referred to as “CACR”) that placed a proposed constitutional amendment (CACR 41) on the November, 2006 ballot through a ballot question that asked the voters of New Hampshire if they wanted to restore the historical prerogative and tradition of qualifying towns being guaranteed representation from within the town. *Appendix* at pages 16 through 18 (2006 Session CACR 41) and *Appendix* at pages 14 and 15 (2006 Voters’ Guide).
- 5- Despite significant media opposition and claims that the ballot question was confusing, New Hampshire voters overwhelmingly voted by an over 70% majority to amend Part II, Article 11 of the New Hampshire Constitution to accomplish this objective. *Appendix* at page 19 (STATE OF NEW HAMPSHIRE ELECTIONS DIVISION STATE GENERAL ELECTION – November 7, 2006).

- 6- As a result, the districts established by RSA 662:5 are unconstitutional because 106 qualified towns and cities, including Petitioner towns, are not guaranteed representation from within the town. *See RSA 662:5 and Appendix* at pages 1 through 13 (NH HOUSE – Analysis of Population-Appropriate Representation by House District)
- 7- Fifteen of these disenfranchised towns presently have no representatives from within the towns at all. *Appendix* at pages 1 through 13.
- 8- Despite two opportunities to do so, the current House has refused to remedy this constitutional infirmity by implementing Part II, Article 11. More specifically, a House-sponsored redistricting bill was defeated in 2007 and a Senate-sponsored redistricting bill went down to defeat in 2008. *See <http://www.gencourt.state.nh.us/ie/rollcall/rollcallsbyvotedetail.asp?sessionyear=2007&voteno=61&body=H>* (accessed May 1, 2008) (defeat of HB 687 by 283 to 72 roll call vote) and *House Journal 10* at 550 (defeat of SB 45 by voice vote).
- 9- Petitioners seek to have RSA 662:5 declared unconstitutional and to have the Respondent enjoined from conducting the 2008 primary and general election based on RSA 662:5.

THE PARTIES

- 10- Petitioner Town of Canaan is a political subdivision of the State of New Hampshire with offices at 1169, U.S. Route 4, Canaan, New Hampshire 03741. Under Part II, Article 11, it is guaranteed at least one seat in the New Hampshire House. Under RSA 662:5, it is grouped in a multi-legislator district with several other towns.
- 11- Petitioner Town of Enfield is a political subdivision of the State of New Hampshire with offices at 23 Main Street, Enfield, New Hampshire 03748. Under Part II, Article 11, it is

guaranteed at least one seat in the New Hampshire House. Under RSA 662:5, it is grouped in a multi-legislator district with four other towns.

- 12- Petitioner Town of Litchfield is a political subdivision of the State of New Hampshire with offices at 2 Liberty Way, Litchfield, New Hampshire 03052. Under Part II, Article 11, it is guaranteed at least two seats in the New Hampshire House. Under RSA 662:5, it is grouped in a multi-legislator district with Hudson and Pelham. Hudson has over three times the population of Litchfield, while Pelham is about one and one-half times as large. None of the current representatives in the district is from Litchfield.
- 13- Petitioner Town of Loudon is a political subdivision of the State of New Hampshire with offices at 29 South Village Road, Loudon, New Hampshire 03307. Under Part II, Article 11, it is guaranteed at least one seat in the New Hampshire House. Under RSA 662:5, it is grouped in a multi-legislator district with Andover, Boscawen, Canterbury and Salisbury. None of the current representatives in the district is from Loudon.
- 14- Petitioner Town of Weare is a political subdivision of the State of New Hampshire with offices at 15 Flanders Memorial Drive, Weare, New Hampshire 03281. Under Part II, Article 11, it is guaranteed at least two seats in the New Hampshire House. Under RSA 662:5, it is grouped in a multi-legislator district with Goffstown, which has more than double Weare's population.
- 15- Petitioner Town of Wilton is a political subdivision of the State of New Hampshire with offices at 42 Main Street, Wilton, New Hampshire 03086. Under Part II, Article 11, it is guaranteed at least one seat in the New Hampshire House. Under RSA 662:5, it is

grouped in a multi-legislator district with four other towns. None of the current representatives in the district is from Wilton.

- 16- Petitioner the Honorable Ralph Boehm is an individual and resides at 6 Gibson Drive, Litchfield, New Hampshire 03052. He is a former representative to the New Hampshire House from the town of Litchfield. He ran for reelection in 2006 and was defeated by candidates residing in Hudson. Mr. Boehm is currently an elected school board member.
- 17- Petitioner Judith Finsterbusch is an individual and resides at 33 Caleb Dyer Lane, Enfield, New Hampshire 03748. She currently serves as a member of Enfield's Budget Committee.
- 18- Petitioner Joseph Frazier is an individual and resides at 36 Sunset Lane, Canaan, New Hampshire 03741. He currently serves as a member of Canaan's Planning Board.
- 19- Petitioner the Honorable Gary Hopper is an individual and resides at 107 Buxton School Road, Weare New Hampshire 03281. He is currently a representative in the New Hampshire House from Hillsborough District no. 7.
- 20- Petitioner the Honorable Loren Jean is an individual and resides at 25 Charles Bancroft Highway, Litchfield, New Hampshire 03052. He is a former representative to the New Hampshire House from the town of Litchfield. He also is a former member of Litchfield's Planning Board and a former member of New Hampshire's Human Rights Commission.
- 21- Petitioner the Honorable Neal Kurk is an individual and resides at RR 1, Weare, New Hampshire 03281. He is currently a representative in the New Hampshire House from

Hillsborough District no. 7. He was the prime sponsor of CACR 41 in the 2006 General Court session. *Appendix* at page 16.

22- Petitioner Anthony Lozeau is an individual and resides at 177 Jones Hill Road, Enfield, New Hampshire 03748. He currently serves as a member of Enfield's Planning Board.

23- Petitioner the Honorable Roy D. Maxfield is an individual and resides at 7126 School Street, Loudon, New Hampshire 03307. He is a former representative to the New Hampshire House from the town of Loudon.

24- Petitioner Ed Naile is an individual and resides at 61 Tubbs Hill Road, Deering, New Hampshire 03244. He is a former member of the Board of Selectmen of the Town of Deering.

25- 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.

JURISDICTION AND VENUE

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

27- Venue is proper in this Court under RSA 507:9 because the Secretary of State has his office in Concord.

GOVERNING LAW

28- The New Hampshire Supreme Court has declared that it is the responsibility of the judiciary "in our co-equal, tripartite form of government to interpret the Constitution and

to resolve disputes arising under it.” *Petition of Below*, 151 N.H. 135, 139 (2004) (quoting *Monier v. Gallen*, 122 N.H. 474, 476 (1982)).

29- Additionally, the “judiciary has a responsibility to ensure that constitutional rights not be hollowed out.” *Londonderry v. State*, 154 N.H. 153, 162 (2006) (citing *Petition of Below*, *supra*).

30- In this state, both the right to vote and the right to be elected have been afforded the status of fundamental rights. See *Akins v. Secretary of State*, 154 N.H. 67, 71 (2006).

31- The fundamental rights to vote and to be elected are violated when elections are not conducted in accordance with constitutional guidelines on legislative redistricting.

BACKGROUND FACTS

32- A constitutional amendment, CACR 41, was introduced during the 2006 legislative session to restore the historical prerogative of qualifying towns to elect their own representatives to the House. *Appendix* at pages 16 through 18.

33- CACR 41 was submitted to the voters by the 2006 Legislature on votes of 256 to 55 in the House of Representatives and 16 to 7 in the Senate. See <http://www.sos.nh.gov/concon-2006.htm>.

34- The Voter’s Guide explained that the purpose of the amendment was 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 flatorial district.” *Appendix* at page 14.
- 35- The voters overwhelmingly expressed their approval of CACR 41 by a vote of 240,767 to 100,688, well in excess of two-thirds of the qualified voters present and voting on the subject as required by New Hampshire Constitution Part II, Art. 100. *See Appendix* at page 19.
- 36- The extant House districts do not comply with Part II, Article 11. There are 106 municipalities guaranteed the right to elect at least one representative from within the town that are now unconstitutionally grouped into multi-town, multi-legislator districts by RSA 662:5. *Compare RSA 662:5 and Appendix* at pages 1 through 13.
- 37- Fifteen of these disenfranchised towns presently have no representatives from within the town. *Id.*
- 38- Legislation was introduced in the House during the 2007 legislative session to implement amended Part II, Article 11. *See <http://www.gencourt.state.nh.us/legislation/2007/HB0687.html>* (accessed May 1, 2008); *Appendix* at pages 20 and 21 (2007 Session House Bill 687).
- 39- This legislation was defeated by a vote of 283 to 72. *See <http://www.gencourt.state.nh.us/ie/rollcall/rollcallsbyvotedetail.asp?sessionyear=2007&voteno=61&body=H>* (accessed May 1, 2008).

- 40- The House, in 2008, also defeated a bill passed by the New Hampshire Senate that would have implemented amended Part II, Article 11. *House Journal 10* at 550 (defeating SB 45 by voice vote).
- 41- As a result of the above actions, unless the relief requested in this Petition is granted, the 2008 election for the House will take place in unconstitutional districts. Filings for the 2008 primary under the districts established by RSA 662:5 are scheduled for June 4, 2008 to June 13, 2008. See <http://www.sos.nh.gov/spfile.htm> (accessed May 1, 2008).
- 42- Prompt judicial review is warranted due to the important constitutional issue presented and the proximity of the upcoming election.¹
- 43- The holding of the New Hampshire Supreme Court in *Petition of Below*, 151 N.H. at 149, to the effect that “when a Legislature once makes an apportionment following an enumeration no Legislature can make another until after the next enumeration,” does not preclude the remedy sought in this Petition for each and all of the following reasons:
- A. The above 2004 holding did not address the situation of a new constitutional apportionment requirement, such as the 2006 amendment to Part II, Article 11, coming into existence subsequent to a legislative apportionment following a decennial enumeration but before the next decennial enumeration.
- B. The exceptional circumstances of a new constitutional apportionment requirement that is not being fulfilled is similar to the exceptional circumstance of the General

¹ The right to a constitutional election would take precedent, of course, over adherence to the filing period presently established by the Secretary of State. Stated alternatively, the primary sign-up scheduled for June 4 to June 13, 2008 cannot act as a bar to the relief requested in this Petition. In 2002, for example, the filing was delayed until August in order to assure a constitutional election. See *Burling v. Speaker of the House*, 148 N.H. 143, 160 (2002) (injunction against House candidates filings in effect until July 31, 2002).

Court having failed to reapportion at the first regular session following the decennial census, which failure gave rise to the exception found in *Petition of Below* to its rule against subsequent redistrictings based on the same decennial enumeration. *Id.* at 148.

- C. The holding in *Petition of Below* is not applicable because New Hampshire voters have since passed a constitutional amendment that requires the Legislature to redistrict before the next decennial census, and the implementation of that amendment, and not the concern underling *Petition of Below*, of multiple redistrictings with the possibility of confusion and impermissible motivations, is the controlling issue in this action.
- D. The Constitutional requirement that all districts be apportioned in accordance with Part II, Article 11 supersedes the holding of the Court in *Petition of Below, supra*, to the extent that this subsequently enacted Constitutional provision and the *Below* holding are inconsistent.
- E. The holding in *Petition of Below* that once the General Court has fulfilled its constitutional duty to reapportion based on the last federal census, it may not reapportion again until the next federal census, *id.* at 146, was based in part on the Supreme Court's earlier holding in *Opinion of Justices*, 105 N.H. 125 (1963), wherein it was stated that "since the [New Hampshire] Constitution provides for no reapportionment during the ten-year period following [the first reapportionment following the last federal census], it is not "constitutionally competent" for the General Court to authorize an election of a representative [in a

district formulated since that reapportionment].” *Id.* at 128. In the instant case, the 2006 amendment to Article 11, Part II of the Constitution does provide such “constitutional competency.”

- F. The only additional citation of the Supreme Court in *Petition of Below* in holding a prohibition of mid-decennial apportionments was the 2000 decision of the South Dakota Supreme Court which opined that, “[o]nce the legislature has enacted a valid apportionment law, ‘no future [reapportionment] act may be passed by [it] until after the next regular apportionment period prescribed by the Constitution.’” *Certification of a Question of Law*, 615 N.W.2d 590, 595 (S.D. 2000). However, that South Dakota decision was explicitly based upon a provision of the South Dakota Constitution and not the New Hampshire Constitution. Nor did it examine the issue of reapportionment to accommodate a constitutional amendment enacted following an initial decennial apportionment, such as here; and it did not, either in language or in logic, prohibit mid-decennial apportionments required to comply with new constitutional language. The South Dakota decision dealt with a constitutional provision unique to that state’s apportionment scheme of explicitly vesting contingent reapportionment duties in its supreme court, an approach foreign to New Hampshire. It was the uniqueness of that joint legislature/court approach to redistricting that gave the South Dakota Court reason to prohibit mid-decennial Legislative reapportionments. *See id.* at 596 (“If the Legislature were free to apportion at any time, why transfer this duty

to the Court to be performed within a specific period of time in the event the Legislature fails to act?")

G. The *Petition of Below* decision was made prior to the holding of the U.S. Supreme Court in *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006), wherein it was held that the mere occurrence of a mid-decennial reapportionment is not sufficiently suspect so as to give rise to an actionable claim to void the reapportionment.

44- Reapportionment of the current state House of Representative districts is constitutionally mandated to achieve districts that comply with Part II, Article 11 of the Constitution as it has been amended in the last general election in November 2006. That constitutional requirement per force overrides any concerns relating to convenience, familiarity or simplicity.

45- The Legislature has had ample and repeated opportunities to meet its constitutional obligation to conduct redistricting prior to the upcoming primary and general election in compliance with the 2006 amendment to the Constitution, but has failed to do so.

COUNT I
DECLARATORY RELIEF

46- When interpreting a constitutional provision, the Court should “look to its purpose and intent,” and “give the words in question the meaning they must be presumed to have had to the electorate when the vote was cast.” *Opinion of the Justices*, 126 N.H. 490, 495 (1985).

- 47- The Supreme Court has instructed that it is the reviewing court's "duty ... to place itself as nearly as possible in the situation of the parties at the time the instrument was made, that it may gather their intention from the language used, viewed in the light of the surrounding circumstances." *Warburton v. Thomas*, 136 N.H. 383, 387 (1992) (quotation omitted).
- 48- "The language used ... by the people in the great paramount law which controls the legislature as well as the people, is to be always understood and explained in that sense in which it was used at the time when the constitution and the laws were adopted." *N.H. Motor Transport Assoc. v. State*, 150 N.H. 762, 765 (2004) (quotation and brackets omitted).
- 49- Here, under the circumstances of its passage, there can be no question what the electorate understood amended Part II, Article 11 to mean.
- 50- The Voter's Guide unambiguously explained that the purpose of the amendment was to "allow the legislature to create districts in the same manner that districts were drawn prior to 2002." *Appendix* at page 14.
- 51- More specifically, "[e]ach town or ward having enough inhabitants to entitle it to one or more representative seats in the Legislature shall be guaranteed its own district for the purposes of electing one or more representatives, unless such action prevented a neighboring town from being included in a single-representative district before it is part of a floterial district." *Id.*
- 52- The Voter's Guide as it informed the voters through the language quoted in the immediately preceding two paragraphs clearly provided that on passage of the proposed

constitutional amendment future elections to the New Hampshire House of Representatives would be in accordance with the new constitutional provision.

- 53- Contrary to the requirements of the New Hampshire Constitution, RSA 662:5 fails to provide that “[e]ach town or ward having enough inhabitants to entitle it to one or more representative seats in the Legislature” has its own representative.
- 54- As stated above, there are 106 towns and cities that are now constitutionally guaranteed the right to elect at least one representative from within the municipality but that, notwithstanding that constitutionally requirement, are grouped into multi-town, multi-legislator districts by RSA 662:5.
- 55- Fifteen of these disenfranchised towns presently have no representatives from within the town at all. *Compare RSA 662:5 and Appendix at pages 1 through 13.*
- 56- Accordingly, the Court should declare RSA 662:5 unconstitutional.

COUNT II
INJUNCTIVE RELIEF

- 57- A preliminary injunction should issue when there is an immediate danger of irreparable harm to the party seeking injunctive relief, there is no adequate remedy at law and 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).*
- 58- These conditions are all met.
- 59- In the instant 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 conduct the primary and general election in accordance with RSA 662:5, thus,

- A. violating in the upcoming primary and general election the fundamental voting rights of the individual Petitioners, and those in their circumstances, under the New Hampshire Constitution to elect residents of their municipalities to the New Hampshire House of Representatives, and
- B. violating in the upcoming primary and general election the fundamental rights of the individual Petitioners, and those citizens of New Hampshire in their circumstances, to not be unconstitutional constrained or burdened from being elected to the New Hampshire House of Representatives.

60- The Petitioner towns would be irreparably harmed because they and their inhabitants would be denied the right under Part II, Article 11 of the Constitution to have representation from within the town in the state House of Representatives.

61- Individual Petitioners would be irreparably harmed because their right to elect a representative from within their town or to be elected as a representative by the voters of their town would be denied.

62- 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 monetary damages.

63- There is no other adequate remedy for the reason that once there is a general election and qualification by the General Court of its members, the Court is without any authority to remove those members.

- 64- Petitioners are likely to succeed on the merits, based on the clear language of Part II, Article 11 of the Constitution.
- 65- The language in both the Voter's Guide and in the amendment to Part II, Article 11 itself is mandatory – the Legislature must redistrict the House based on the 2000 census in order to create House districts that conform to Part II, Article 11. A flawed election based on unconstitutional House districts must not be allowed to occur.

WHEREFORE, the Petitioners respectfully request that the Court:

- A. Schedule an expedited preliminary hearing;
- B. Issue a preliminary injunction enjoining the Secretary of State from conducting the 2008 election under RSA 662:5;
- C. Schedule an expedited final hearing;
- D. Declare RSA 662:5 to be unconstitutional;
- E. Enter the foregoing as permanent injunctive relief; and
- F. Grant such further and other relief as justice and equity may require.

Respectfully submitted,
The Petitioners, Town of Canaan, Town of Enfield,
Town of Litchfield, Town of Loudon, Town of
Weare, Town of Wilton, Honorable Ralph Boehm,
Judith Finsterbusch, Joseph Frazier, Honorable
Gary Hopper, Honorable Loren Jean, Honorable
Neal Kurk, Anthony Lozeau, Honorable Roy D.
Maxfield, and Ed Naile,
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APPENDIX

NH HOUSE – Analysis of Population-Appropriate Representation
by House District.....App. 1 – App. 13

Voter’s Guide.....App. 14 – App. 15

CACR 41App. 17 – App. 18

STATE OF NEW HAMPSHIRE ELECTIONS DIVISION STATE
GENERAL ELECTION – November 7, 2006 (<http://www.sos.nh.gov/general2006/sum-chesconcon06.htm>; accessed
May 1, 2008) App. 19

2007 Session House Bill 0687App. 20 – App. 21