STATE OF NEW HAMPSHIRE

HOUSE OF REPRESENTATIVES

Office of the Speaker

April 2, 2012

Michael A. Delaney, Attorney General
NH Department of Justice
33 Capitol Street
Concord, NH 03301

Dear Attorney General Delaney:

As you know, Governor John Lynch vetoed the House redistricting plan on March 23, 2012. In his veto address, the Governor made numerous, poorly informed objections regarding the constitutionality of the plan and urged the House to act quickly on his veto. State legislators did as the Governor requested and last week overrode the Governor's short-sighted veto in accordance with the procedures outlined in the New Hampshire Constitution. State legislators acted quickly in part because the enacted redistricting plan must be submitted to the United States Department of Justice for review under the Voting Rights Act and must be approved prior to the Fall election cycle. Nonetheless, opponents of the House redistricting plan and veto-override process cried foul based on their flawed understanding of the New Hampshire Constitution.

In taking up a gubernatorial veto, Part II, Article 44 of the New Hampshire Constitution requires the Governor to return the vetoed legislation along with his objections to the house in which the legislation originated. The house must then enter the Governor's objections "at large on their journal" and proceed to reconsider it. The House journal is the record kept during each House session; it is not the House calendar. Part II, Article 24 of the New Hampshire Constitution requires the House to keep such a journal which serves as the record of what happens on the House floor during a given House session, much like the minutes of a meeting serve as a record what happens at the meeting.

The House did precisely what Part II, Article 44 requires: it read the Governor's objections to the redistricting plan on the House floor, entered them into the House journal, and proceeded to the override the Governor's veto. Perceiving no constitutional infirmity with the House's veto-override process, the Senate subsequently voted to override the Governor's veto as well.

Opponents and critics of the House veto-override process apparently take the position that they or others would have shown up for work that day had they known that the House was going to take up the Governor's veto. Such an argument speaks for itself.

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The House redistricting plan is now a valid, constitutional enactment. Nevertheless, opponents and critics of the plan have vowed to challenge it in court based on the erroneous view that the state constitution somehow takes precedence over the requirements of the federal constitution. It has long been the law that under the Constitution of the United States of America that federal law is the supreme law of the land and any state law that conflicts with federal law is void. *See, e.g., McCulloch v. Maryland*, 17 U.S. 316 (1819); Federalist Papers No. 33, January 2, 1788, Alexander Hamilton; Federalist Papers No. 44, January 25, 1788, James Madison.

The redistricting process is highly complex in this regard. It requires the state legislature to balance the dominant federal-state principle of one-person-one-vote with any additional state constitutional requirements. The relationship between these competing principles is well-settled; additional state constitutional requirements are, in the words of the New Hampshire Supreme Court, "secondary to the overriding constitutional principle of one person/one vote." *Below v. Gardner*, 148 N.H.1, 9 (2002).

One such secondary state constitutional requirement is embodied in Part II, Article 11 of the New Hampshire Constitution. It requires that all towns and wards with a total population "within a reasonable deviation from the ideal population for one or more representative seats" have their "own district of one or more representative seats," unless such an apportionment would "deny any other town or ward membership in one non-floterial representative district."

Unfortunately, this secondary state constitutional requirement is not always compatible with the dominant federal-state principle of one-person-one-vote. The United States Supreme Court has stated that a redistricting plan with a statewide deviation of less than 10% is presumptively constitutional, while a redistricting plan with a statewide deviation of more than 10% is presumptively unconstitutional. *See, e.g., Brown v. Thomson*, 462 U.S. 835, 842-43 (1983).

While it has been suggested that the United States Supreme Court in *Brown v. Thomson*, 462 U.S. 835 (1983), held a redistricting plan with a total deviation of 89% constitutional, such a suggestion is contradicted by a close reading of the case. *See id.* at 846-47 (indicating that appellants did not raise the issue of whether Wyoming's policy of adhering to county lines justified a population deviation of 89%) (majority opinion); *id.* at 849-50 (O'Connor and Stevens, JJ., concurring) ("I have the gravest of doubts that a statewide legislative plan with an 89% maximum deviation could survive constitutional scrutiny despite 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 850 (Brennan, White, Marshall, Blackmun, JJ., dissenting) ("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.).

The Court in *Brown* was concerned with only one exceptional district, which received its own representative for an exceptional reason, and the effect that one district had on the voting power of the individual plaintiffs. *Id.* at 846 ("Appellants deliberately have limited their challenge to the alleged dilution of their voting power resulting from the one representative given to Niobrara County."). The Court made clear that the plaintiffs had not challenged the entire redistricting plan as unconstitutional. For this reasons, the United States Supreme Court has been careful to limit *Brown* to its unique facts and 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").

If Part II, Article 11 were applied in every possible instance, as the Governor has suggested it should be, the total statewide deviation for the House redistricting plan would be well outside the presumptively constitutional range and would undoubtedly be held unconstitutional. Such a strategy would not be in the best interest of New Hampshire's citizens. Moreover, the House does not believe that Part II, Article 11, or any other provision of the New Hampshire Constitution, compels it to create a redistricting plan that is presumptively unconstitutional under the federal and state constitutions.

It was the excessive effort by state governments to keep political subdivisions separate and provide each with its own representative that caused the United States Supreme Court to create the one-person-one-vote principle. *See Reynolds v. Sims*, 377 U.S. 533, 562 (1964) ("Legislators are elected by voters, not farms or cities or economic interests."). In this regard, the one-person-one-vote principle and the requirements of Part II, Article 11 stand in tension with one another.

Complicating the process is the fact in order to effectuate Part II, Article 11, floterial districts must be created. The United States Supreme Court in *Board of Estimate of New York v. Morris*, 489 U.S. 688, 702 (1989) and the New Hampshire Supreme Court in *Burling v. Chandler*, 148 N.H. 143 (2002) have strongly intimated that if a State chooses to use floterial or at-large districts, a method of calculating deviation known as the component method must be used. The House agrees with the reasoning of these opinions, but has found that the component method of calculating deviation is very difficult to use. Nonetheless, the House has used the component method to create constitutional floterials in many areas of the redistricting plan in order to effectuate Part II, Article 11 to the greatest extent possible.

For these reasons, the House believes that a redistricting plan with a statewide deviation of 9.9%, as close to 10% as possible, strikes the appropriate balance between the federal-state principle of one-person-one-vote and the additional requirements embodied in the New Hampshire Constitution. Such a redistricting plan maximizes the application of Part II, Article 11 without significantly diluting or diminishing any individual citizen's right to vote and is well within the legislature's discretion to enact.

The House also believes that those who support the application of Part II, Article 11 to the greatest extent possible should realize that a court-made plan will seek to minimize statewide deviation as much as possible and will likely result in the application of Part II, Article 11 in fewer instances. "Unlike legislatures, courts engaged in redistricting primarily view the task through the lens of the one person/one vote principle and all other considerations are given less weight." *Below*, 148 N.H. at 8. Thus, "[a]bsent persuasive justifications, a court-ordered redistricting plan of a state legislature must ordinarily achieve the goal of population equality with little more than *de minimis* variation." *Id.*; *see Connor v. Finch*, 431 U.S. 407, 417-18 (1977) ("The maximum population deviations of 16.5% in the Senate districts and 19.3% in the House districts can hardly be characterized as *de minimis;* they substantially exceed the "under-10%" deviations the Court has previously considered to be of prima facie constitutional validity only in the context of legislatively enacted apportionments.").

Opponents of the House redistricting plan have also criticized it on the ground that it combines towns and city wards. Such an argument is legally without merit. No provision of the federal or state constitution prevents the legislature from forming a representative district by placing a town and a city ward together. In fact, Part II, Article 11 expressly permits the legislature to combine towns and city wards into multi-member districts. Moreover, courts across the country have not only approved of, but have sometimes required, the combining of city wards with one or more towns. The combination of political subdivisions into multi-member districts is a cornerstone of modern redistricting jurisprudence. Without it, towns and city wards would have to be split in order to accommodate the one-person-one-vote requirement.

Others have criticized the House redistricting plan on the ground that they would prefer to see a different plan enacted. Such an argument is also without merit. Courts have consistently held that it is not sufficient to show that the legislature could have redistricted the state differently. *See, e.g., Gaffney v. Cummings*, 412 U.S. 735, 750-51 (1973); *In re Reapportionment of Towns of Hartland, Windsor, & West Windsor*, 624 A.2d 323, 327 (Vt. 1993).

Opponents have also argued that the House should have redistricted the State in a way that allows for weighted voting. The House reviewed this proposal when it first came up and rejected it. The text and legislative history of Part II, Article 11 make clear that the provision never contemplated the use of weighted voting. The use of weighted voting would render meaningless numerous provisions of Part II, Article 11 and would result in situations where a candidate could win the popular vote but lose the election. When voting on whether to amend Part II, Article 11, the public was not informed that a system of weighted voting would be used to effectuate the amendment.

A system of weighted voting is not simply a different method of calculating deviation in a redistricting plan—it is a fundamental and radical change to the way an individual citizen's vote is counted, the consequences of which are not yet fully understood even by the method's supporters. To our knowledge, weighted voting has never been used or practiced anywhere in

the United States. Thus, it is not only a novel notion, but nothing more than a notion since no other state has chosen to use it. Accordingly, the House made an informed policy decision to reject the weighted voting model.

The House redistricting plan has been drafted from the outset with extensive advice from outside legal counsel and with an eye toward potential litigation. Opponents and critics had vowed early on in the process, before a redistricting plan had even been created, to challenge any resulting plan in court. Such statements were not lost on the House. Legal challenges are expensive and divisive. Opponents and critics have raised many meritless arguments concerning the plan's legitimacy in the media and elsewhere. Nonetheless, if opponents and critics believe it is worth wasting taxpayer dollars to advance these claims in court, the House is prepared to defend against them.

The final redistricting plan took months to create, has been carefully crafted, and strikes a fair balance between the federal and state constitutional principles at issue. We know and understand that not everyone got what he or she wanted, but the nature of the law in this area simply does not permit such a result. The House has no doubt that the resulting redistricting plan is constitutional. The plan creates twice as many new districts as the old redistricting plan and makes New Hampshire politics more local than it has been for generations. The House is proud of what this redistricting plan accomplishes for New Hampshire and urges you to support it.

Very truly yours,

Edward C. Mosca
House Legal Counsel

ECM/sg
cc: Attorney David Vicinanzo
Attorney Jeffrey Meyers, Counsel to the Governor