NEW HAMPSHIRE SUPREME COURT

Case No.

2021 TERM

FALL SESSION

DANIEL RICHARD

V.

SHERMAN PACKARD AND CHUCK MORSE

RULE 7 APPEAL OF FINAL DECISION OF MERRIMACK COUNTY SUPERIOR COURT

BRIEF OF APPELLANT

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ISSUES PRESENTED FOR REVIEW

1. Whether the Trial Court Order is a material and substantive judicial error of law by denying Petitioner's Writ of Mandamus. (Petitioner's challenge of the constitutionality of the Speaker of the House and the President of the Senate exercising the powers of the Legislature.) (See Exhibit A.)
2. Whether the Trial Court Judge (Kissinger) demonstrated political bias by self-determining and denying the Plaintiff's Motion to Recuse, which questioned Judge Kissinger's pattern of discrimination against Citizens of this State v. Matters involving the State, as evidenced by the opinion of this Court in *Burt v. Speaker of the House of Representatives*. 173 N.H. 522, 525, which reversed and remanded said case.[1]

QUESTIONS FOR THE COURT

The Constitution of New Hampshire, Part I, Bill of Rights, Art. 1, Art. 2, Art. 7, Art. 8., Art. 10, Art. 12, Art. 14, Art. 15, Art. 29, Art. 30, Art. 31, Art. 32, and Art. 38 are still some of the laws of the land and, since Oct. 31, 1783, they have never been repealed.

1. May the Speaker of the House or the President of the Senate, with no authority to do so, exercise the powers and discretion of the Legislature?
2. Does the legislature still have exclusive jurisdiction to repeal unjust laws under Art. 29?

[1] Motion to dismiss was filed in this case on April 20, 2020, when Judge Kissinger was assigned as the Judge to this case, as he has established a pattern of bias in matters involving *Citizens v. State.*

3. Do the rights to freedom of deliberation, speech, and debate in either house of the legislature under Art. 30 still apply?
4. Does the legislature still have the mandatory obligation, under Art. 31, to assemble for redress of public grievances?
5. Does the right, under Art. 32, to assemble with the legislature to consult upon the common good still exist?
6. Does the right, under Art. 32, to "give instructions to their representatives" still apply?
7. Are the Art. 32 Instructions to Representatives still binding upon them as they once were?
8. Does the right, under Art. 32, to request of the legislative body by way of petition or remonstrance to redress of wrongs done them and of the grievances they suffer still apply?

STANDARD OF REVIEW

Petitioner appeals the denial of his Petition for a Writ of Mandamus. The Court may issue a writ of mandamus for two reasons: "*First, they may use it to* '*compel a public official to perform a ministerial act that the official has refused to perform*.'" Appeal of Morrissey, 165 N.H. 87, 93-94 (2013). "*The second way a petitioner may use a writ of mandamus is to vacate the result of a public official's act that was performed arbitrarily or in bad faith. In either case, whether the claim involves mandatory decision making or bad faith. . .."*

A writ of prohibition, another "extraordinary" writ, prohibits action, In re CIGNA Healthcare, Inc. Such writs are used "to prevent subordinate courts or other courts or other tribunals, officers or persons from usurping or

exercising jurisdiction which they are not vested." (Judge Kissinger's Order pg. 5-6; See Exhibit A)

STATEMENT OF FACT

Precedent of this Court

"*The legislature may not, even in the exercise of its "absolute" internal rulemaking authority, violate constitutional limitations*. *Id*. at 284, 288. *Indeed, "[n]o branch of State government can lawfully perform any act which violates the State Constitution*." *LaFrance*, 124 N.H. at 176. *Therefore, "[a]ny legislative act violating the constitution or infringing on its provisions must be void because the legislature, when it steps beyond its bounds, acts without authority.*" *Id*. at 177. *Burt v. Speaker of the House of Representatives*. 173 N.H. 522, 525

The written statements below were made by Atty. Cianci on February 27, 2020, in his answer to the Legislative Ethics Committee complaint (See Exhibit L) over concealing said Remonstrance from the houses of the legislature.

"*On May 20, 2019, the Complainant filed a remonstrance with the House and Senate Clerks and the Secretary of State, at which time the House Clerk discussed at length the nature of the remonstrance and explained that 'There was no process under House Rules by which the House of Representatives could consider the remonstrance.'"*

"On July 23, 2019, the House Clerk, the House Chief of Staff, and the House Legal Counsel met with the Complainant, Representatives Richard Marple, Raymond Howard, and three of the Complainant's colleagues to discuss the remonstrance. It was again explained that there was no process under House Rules by which the House of Representatives could consider

the remonstrance and, to the extent that he wished the House to consider the subject matter of the remonstrance, the proper avenue was through legislation."

Judge Kissinger states, on Pg. 5 of his Order, "*The Court finds the controversy here justiciable."* (Emphasis added.) (See Exhibit A)

ARGUMENT

The right to redress of grievances is so vital and important that, when the people are deprived of it, revolutions are started, and wars are fought over it.

> *The right of petitioning is an ancient right. It is the cornerstone of the Anglo-American constitutional system. Petitioning is the likely source of the other expressive rights—speech, press, and assembly. The development of petitioning is inextricably linked to the emergence of popular sovereignty. Under Magna Carta, the Nobility used petitioning to secure their rights against the King. Under the Petition of Right, parliament used petitioning to gain popular rights from the King. Finally, in the struggle over the Kentish petition, the people used petitioning as the means to secure their own rights against parliament. The critical importance of the right of petition in our constitutional scheme cannot be fully appreciated without an awareness of its extraordinarily rich history.*
>
> *The Petition of Right of 1628 is reminiscent of Magna Carta; it resulted from a constitutional crisis and embodied personal rights that have become central to the Anglo-American system. Also, like*

Magna Carta, the Petition of Right contained a royal guarantee issued in response to a petition.

The first statute of England to recognize petitioning as a fundamental right: "[I]t is the Right and Privilege of the Subjects of England, to present unto the Parliament their just Grievances, by Way of Petition, in a due Manner; and they shall be always ready to receive such Petitions."

A convention of the peers and representatives of the realm resolved on January 28-29, 1689, that James II had broken the "original contract between the King and people. The crown was offered to William and Mary upon the condition that they accept the Declaration of Rights; acceptance was given on February 13, 1689. The Declaration of Rights provided "that it is the right of the subjects to petition the King, and all commitments and prosecutions for such petitioning is illegal. The Convention declared itself to be Parliament and enacted the declaration in its statutory form, the Bill of Rights. The statute's expressed purpose manifest that the law declared in the Case of the Seven Bishops had rejected.

The Kentish petition and "Legion's Memorial" represented the triumph of the people over parliament, just as the Petition of Right had marked the ascendancy of Parliament over the King.

F*rom 1780 on, petitioning became more and more frequent. The House of Commons passed a resolution in 1780 that its duty was "to provide, as far as may be, an immediate and effectual redress or the abuses complained of in the petitions…*

Chronologically, the adoption of the Body of Liberties by the Massachusetts Bay Colony Assembly in 1642 was the first significant event touching upon the rights of expression in America. The resulting body of 100 laws codified for the first time in any legal system the right to petition:

> *[E]very man whether Inhabitant or Foreigner, free or not free, shall have liberty to come to any public Court, Council or Town meeting, and either by speech or writing, to move any lawful, seasonable or material Question, or to present any necessary Motion, Complaint, Petition, Bill or Information, whereof that Meeting hath proper cognizance, for it be done in convenient time, due Order and respective Manner.*

*Declarations of rights by state conventions, including Pennsylvania (1776), Delaware (1776) North Carolina (1776) Vermont (1777)129 Massachusetts (1780), and New Hampshire (1783), expressly included the right to petition. Except for North Carolina, Pennsylvania, and Vermont, which included no restrictions whatever upon the right to petition, these declarations qualified the right by specifying that it must be exercised in an "orderly and peaceable manner. (*Norman B. Smith L.L.B., *Shall Make No Law Abridging…: An Analysis of the Neglected, but Nearly Absolute, Right of Petition.* Harvard Law School, 1965).

This case revolves around the evolution of Magna Carta in New Hampshire. Magna Carta, Chapter 61, establishes the principle that no one

is above the law: no king, no president, no executive is above the law. Everyone is answerable for their actions in court. We are all entitled to justice. Over the centuries the pursuit of Rights and Justice has led to the evolution of our rights, which have come to be established by our current Constitutions—State and Federal.

During the American Revolution, John Adams frequently referred to Magna Carta, and it was even in the Massachusetts seal. The 1784 New Hampshire Constitution was modelled after the Massachusetts Constitution. The principles of Magna Carta are found throughout the Constitution of New Hampshire, Part I, Bill of Rights, Art. 29, Art. 30, Art. 31, and Art. 32, and are a rightful remedy of the sovereign people to redress unjust laws that are repugnant or contrary to the Constitution. Part I, Art. 14 and Art. 15 protects this due process.

Part I, Art. 7 declares that the people are sovereign and that every right and/or power not delegated to the government is retained by the people and, when the State fails or refuses to obey the laws of the land and all effective means of redress are ineffectual, we the people may and of right ought to reform the old or establish a new government. (Part I, Art. 10, Mason's Legislative Manual, Chapter 8 § 73, 2: Power of Courts over Legislative Bodies Generally: 2. *While the people of the state have vested in them sovereign authority, their representatives in the legislature have only such authority as is delegated to them by the constitution.)*.

The Plaintiff (the beneficiary of the trust) is exercising his unalienable rights, protected and enforceable under the Constitution, Part I, Art. 12*:*

> *Every member of the community has a right to be protected by "it"* [the Constitution, the trust indenture] *in the enjoyment of his life,*

> *liberty, and property; he is therefore 'bound to contribute his share' in the 'expense of such protection',...* [prefatory clause] '*But no part of a man's property shall be taken from him,' or applied to public uses, 'without his own consent,' or 'that of the representative body of the people.' 'Nor are* [operative clauses] *'the inhabitants of this State' 'controllable by any other laws' than those to 'which they', or that of 'their representative body,' 'have given their consent.'* (See James Madison Federalist Papers (March 29, 1792), Definition of "Property" 14:266—68; cited in Remonstrance P. 2., See Exhibit K; emphasis added).

"That clause [Part II, Art. 5] which confers upon the 'general court' the authority 'to make laws, provides at the same time, that they must not be 'repugnant or contrary to the Constitution . . .'' Id. 210., *Merrill v Sherburne* in 1 N.H. 199 (1818).

The Constitution of New Hampshire (Part I, Art. 8) establishes that all magistrates and officers of government are trustees. The *1786* Vermont Constitution, version of Part I, Article 8, is almost identical. Chapter I, *A Declaration of the Rights of the Inhabitants of the State of Vermont*; Article 6th, states

> *that all power being derived from the people, therefore, all officers of government, whether legislative or executive, are their trustees and servants; and at all times, in a legal way, accountable to them*. (Emphasis added.)

Having run for such leadership position and being elected to perform the duties required of the them by accepting the positions of the Speaker of the House of Representatives and the President of the Senate, The Defendants

(the trustees) have sworn an oath to "*faithfully and impartially discharge and perform all the duties incumbent on them, to the best of their abilities, agreeably to the rules and regulations of this constitution, and the laws of the State of New Hampshire*" (Emphasis added). The Defendants have accepted consideration; therefore, they have an obligation as representatives of the people and the leaders of the legislature to call for an assembly of the body of the whole, as 'only the legislature is delegated such authority' to hear and consider the remonstrances of the people to repeal unjust laws—not the Speaker of the House, the President of the Senate, or the Judiciary. Under House Rule 1, the Speaker is delegated the responsibility to call the body to order, and, under House Rule 4, the responsibility to refer all legislative business to the appropriate body. (See Exhibit B, original Petition for Writs, p.5, by Plaintiff, citing the first recorded remonstrance by the New Hampshire Legislature, the Repeal of the Navigation and Commerce Act of 1786, Exhibit I, Early State Papers, UNH Law School Library, p.491, Exhibit I, and See Exhibit J, a certified archived copy of the original Remonstrance filed with the General Court, Mason's Legislative Manual, Chapter 2, *Constitutional Rules Governing Procedure*.) According to Mason's Legislative Manual, Constitutional Requirements Concerning Procedure must be complied with:

> *Being organic in character, constitutional provisions stand on a Higher plane than statutes and are mandatory. Constitutional provisions prescribing exact or exclusive time or methods for certain acts are mandatory and must be complied with*. (§ 7, Number 1; emphasis added).

Part I, Art. 14 and Art. 15 protect Due Process. Article 14 declares that 'Every subject of the State [prefatory clause] is entitled to a 'certain remedy,' [operative clause]. By having "recourse" to the laws, the prefatory clause continues: "for 'all injuries' he may receive in his 'person,' 'property,' or 'character' [operative clauses] 'to obtain right' and 'justice freely' without being obliged to purchase it "completely," "without any denial," "promptly," "without delay," and "conformably to the laws." (Ratified on Oct. 31, 1783; emphasis added).

In his Order on Page 10, Judge Kissinger states, "The New Hampshire Constitution establishes that No subject shall be ... deprived of his property, immunities, or privileges, put out of "the protection of the law," exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land ...." N.H. CONST. pt. I, art 15. "Law of the land in this article means due process of law." Veale, 158 N.H. at 636, 972 A.2d 1009 (quotation omitted). (Emphasis added, See Exhibit A).

Part I, The Bill of Rights, is a declaration of thirty-nine enumerated rights belonging to every Citizen of this State and defined by Part II, Art. 101 as part of the laws of the land. Therefore, the Speaker of the House and/or the President of the Senate (State Government) have a sworn a duty to uphold those laws and protect all the rights incorporated into the Constitution (the Trust). Should the rights thus be construed as they were perceived when the article and its amendment were enacted? This conclusion would be consistent with New Hampshire's approach to constitutional interpretation[2]

[2] Claremont Sch. Dist. v. Governor,138 N.H. 183, 186, 635 A.2d 1375, 1377–78 (1993) (quotations omitted, alterations in original): In interpreting an article in our constitution, we will give the words the same meaning that

and would fit neatly with the New Hampshire Supreme Court's 1888 pronouncement concerning the relationship between constitutional rights and the preexisting common law—That a bill of rights . . . is a reservation and not a grant was a point on which there could be no difference of opinion.[3]

Judge Kissinger's Order is a material and substantive judicial error for the following reasons:

1. Judge Kissinger's Order is a material error of law, as it ignored the opinion of this Court in *Burt v. Speaker of the House of Representatives* (173 N.H. 522, 525). (See Exhibit A).
2. Judge Kissinger's Order is a substantive error of law, as it ignored the Plaintiff's evidence. (See Exhibit F, Redress of Grievances Analysis, by former Associate Justice of this Court, Atty. Charles Douglas, acting as Legal Counsel of the House in 2015, who reaffirmed the State precedence of more than 18,000 petitions and the exercise of these rights in the General Court for over 184 years). The source for the evidence is House Counsel Atty. Cianci's defense of the Speaker of the

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they must have had to the electorate on the date the vote was cast. In doing so, we must place [ourselves] as nearly as possible in the situation of the parties at the time the instrument was made, that [we] may gather their intention from the language used, viewed in the light of the surrounding circumstances.

[3] Wooster v. Plymouth, 62 N.H. 193, 200 (1882). The court continued: It was universally understood by the founders of our institutions that jury trial, and the other usual provisions of bills of rights, were not grants of rights to the public body politic, but reservations of private rights of the subject, paramount to all governmental authority; and this constitutional principle has never been abandoned. Id. 141.

House, Stephan Shurtleff, in his answer to the Plaintiff's felony criminal complaint against the Speaker on March 27, 2020, with the Legislative Ethics Committee, for concealing the Plaintiff's Remonstrance of May 20, 2019 from the General Court (See Exhibit L). Atty. Cianci used it in his defense of the Speaker of the House, Stephan Shurtleff. Atty. Cianci withheld exculpatory evidence from the Plaintiff until a Right to Know request (RSA-91a) was filed and answered. Only then was the Plaintiff able to have discovery (Defense answers). The Plaintiff's evidence (the analysis by the legislature's own legal scholar) establishes the historical facts, precedence, custom, usage, and function of the Redress of Grievance before the legislature in New Hampshire, as written by the framers and ratified by the Inhabitants on Oct. 31, 1783. (See Exhibit F)

Atty. Douglas's analysis makes the point that, although the legislative process evolved as a result of the institutional changes of the legislature, such changes led to the demise of the practice of citizens petitioning the legislature. As Atty. Cianci stated in his answer to the Legislative Ethics Committee, these rights simply fell out of favor. "Simply fell out of favor" is not a Constitutional amendment. More importantly and still true today is the fact that Atty. Douglas, in his 2015 opinion, states that "The constitutional articles, of course, still remain."

The analysis explains and verifies the custom and usage of people exercising their rights, as well as the legislature's quasi-judicial function as a General Court in 1783, until the Merrill Court opinion of 1818 (*Merrill v Sherburne* 1 N.H. 199). Under the Separation of Powers doctrine, the Court issued the following opinion, which changed the separation of powers between the court and the quasi-judicial function of the legislature from its

colonial period to the second Constitutional period (1784- 1818). The difference between the legislature and the judicial tribunals from this point on would be defined by the Merrill Court:

> *[A] marked difference exist between the employment of judicial and legislative tribunals. The former decide upon the legality of claims and conduct; the latter makes rules, upon which, in connexion with the constitution, those decisions should be founded. It is the province of judicial power also, to decide private disputes 'between or concerning persons,' <u>but of the legislative power to regulate publick concerns and to 'make laws' for the benefit and welfare of the State</u>.* (Id. 204, <u>*Merrill v Sherburne*</u> 1 N.H. 199; emphasis added).

The above case still stands, and Part I, Art. 29 is still the law of the land. The right to a remedy (Part I, Art. 14) and the Articles cited by the Plaintiff must be understood no differently than in a court today. Every member of the community is bound to contribute his share in the expense of such protection (Part I, Art. 12); therefore, the right to file a complaint (petition the General Court) with the clerks of the legislature requires the due process of the legislature to hear, consider, and judge the grievance and remedy the complaint according to the law. Such is the process that is due under the laws of the land in 1783 and should remain so today.

The jurisdiction of the legislature is proper (<u>*Merrill v Sherburne*</u> 1 N.H. 199), as only the legislature is delegated the authority to repeal unjust laws that are repugnant or contrary to the Constitution—not the Judiciary. A Remonstrance to repeal a law that is repugnant or contrary to the Constitution (See Exhibit J, certified archived copy of first Remonstrance,

filed on the First Wednesday of Feb.,1786), based on custom and usage, should begin with the consent and discretion of the legislative body of the whole as to whether a law should be repealed as a result of a Remonstrance. The framers delegated to the legislature the power to repeal laws in Part I, Art. 29. Article 31 authorizes the legislature the ability to correct, strengthen, and confirm the laws or to make new laws (in 1784) under the authority of Part II, Art. 5: "*Constitutional rights are enumerated in order to be protected, not merely to be weighed against competing interests*."[4] This right further establishes the obligation on the legislature under Part II, Art. 90 [Existing Laws Continued if Not Repugnant]:

> '*All the laws' which have heretofore been adopted, used, and approved, 'in the Province, colony, or State of New Hampshire*,' and usually practiced on in the Courts of Law, 'shall remain and be in full force', until 'altered and repealed by the Legislature'; "*such parts thereof only excepted, as are repugnant to the rights and liberties contained in this Constitution*:" (Emphasis added.)

As enacted in 1783, Part I, Art. 29 is a right protecting the people from the previous abuse of kings, who had repeatedly broken the *"original contract between the King and people."* By ignoring or repealing laws, the New Hampshire Constitution provides that only the legislature has such power.

> "*The Power of suspending the laws" or the 'execution of them'* [prefatory clauses] *"ought to never" be "exercised but by the Legislature," or "by authority derived therefrom," "to*

[4] See id.; Wooster v. Plymouth, 62 N.H. 193, 200 (1882) (quoted supra note 118)

> *be exercised in such particular cases only as the Legislature shall expressly provide for"* [operative clauses] (Part I, Art. 29; emphasis added).

Part I, Art. 29 establishes the jurisdiction of the legislature. The "authority derived therefrom" [prefatory clause] is the authority of the people *to be exercised in such particular cases only as the Legislature shall expressly provide for [operative clause] (emphasis added).* Part I, Art. 31 establishes the obligation of the legislature to assemble and to provide a remedy, as provided for by Article 32 ("Redress" of the wrongs done them and of the grievances they suffer) and, as such, is protected by Part I, Art. 14 and Art. 15 (due process). (See Exhibit F, Analysis by Atty. Douglas and Exhibit J, 1786 Remonstrance.) These laws of the land (due process) are what the voters agreed to on Oct. 31, 1783. They have never been repealed; therefore, they mean the same thing today—despite the Defense's argument that these rights simply fell out of favor:

> *The scope of these rights and the mechanism by which they are implemented by the legislature has evolved over time. In New Hampshire, petitions for redress and remonstrance, while once common in the early part of the state's history, fell out of favor by the middle of the 19th Century. . .' (Atty. James Cianci,* (See Exhibit L and Exhibit B, Plaintiff's Petition for Writs, Pgs. 6-8; emphasis added).

"Fell out of favor" is not a constitutional amendment and is an attempt to mislead the Legislative Ethics Committee, as is the statement that *"There*

was no process under House Rules by which the House of Representatives could consider the remonstrance."

Atty. Rick Lehmann currently represents Senate President Morse. Now the Defense argues before the Kissinger Court that the rule-making power delegated to the legislature by the Constitution in Part II, Art. 22 and Part II, Art. 37 somehow authorizes either the Speaker of the House or the President of the Senate the discretion as to whether or not the grievances of the people may be presented to the legislature, whether or not they will call the legislature to assemble for redress so that a Remonstrance may be heard, and whether or not it will be considered. In his Motion to Dismiss and in his oral arguments, Atty. Lehmann argues that the legislature has met its obligations under Part I, Art. 32 to provide a remedy to the Plaintiff by not retaliating against him for filing a Remonstrance (Retaliation Clause, Part I, Art. 30). Freedom from retaliation presumes that the Plaintiff has been given the opportunity to address the legislature, as the Freedom of Deliberation, Speech, and Debate clauses protect the people in *either house of the legislature.*

*The Defense has misle*d the Court by stating that the rule-making authority of Part II, Art. 22 and Part II, Art. 37 grants to either the Speaker of the House or the President of the Senate the discretionary power of the legislature. First, no such rule exists. Any such rule would be repugnant and contrary to the following:

> *Burt v. Speaker of the House of Representatives,* 173 N.H. 522, 525 (2020), Part I, Art. 8., non-delegation doctrine, and Mason's Legislative Manual, Chapter 45, § 517: *Action Must Be Within Power or Vote Is Ineffective,* 1. *"No motion or measure is in order*

that conflicts with the constitution of the state or the constitution of the United States or with treaties of the United States, and if such motion or measure be adopted, even by a unanimous vote, it is null and void." 2: "*No rule that conflicts with a rule of a higher order is of any authority. Thus, a legislative rule providing for the suspension, by general consent, of an article of the constitution would be null and void."*

Chapter 45, § 518, *A Legislative Body Cannot Delegate Its Powers*, 1. *The power of any legislative body to enact legislation or to do any act requiring the use of discretion cannot be delegated to a minority, to committee, to officers or members or to another body*.

The Defense has confessed that they have denied the Plaintiff of his due process rights protected by the laws of the land: Part I, Art. 1, Art. 2, Art. 7, Art. 8, Art. 12, Art.14, Art. 15, Art. 29, Art. 30, Art. 31, Art. 32, and Art. 38. (Mason's Legislative Manual, Chapter 2, § 21, *Rules Must Conform to the Constitutional and Statutory Provisions*). There are no constitutional, statutory, or legislative rules delegated to either the Speaker of the House or the President of the Senate to exercise the discretionary powers of the legislature to judge for the benefit and welfare of this State. The Defense has intentionally misled the Court, as the current House rules, sources of authority for the legislature, establish the following:

(a) Constitutional Provisions

(b) Rules of the New Hampshire House

(c) Custom, Usage, and Precedent

(d) Adopted Parliamentary Manual (Mason's Manual of Legislative Procedure 2020)

(e) Statutory Provisions

(a) Constitutional Provisions. The Constitution always comes first. (Mason's Legislative Manual, Chapter 2, Constitutional Rules Governing Procedure, §7, *Constitutional Requirements Concerning Procedure Must Be Complied With.*)

(b) Rules of the New Hampshire House. (Mason's Legislative Manual, Chapter 2, § 21, *Rules Must Conform to the Constitutional and Statutory Provisions.*)

(c) Custom, Usage, and Precedent. In the absence of any Constitutional requirement or House rules, custom, usage, and precedence would guide the legislature. Atty. Cianci, having knowledge of the Redress of Grievances Analysis by Atty Douglas, ignores the Constitutional provisions of his own evidence of custom, usage, and precedence when he states to the Plaintiff and the Legislative Ethics Committee that there are no rules under which the Plaintiff's Remonstrance may be considered.

(d) Adopted Parliamentary Manual. Defense Atty. Cianci misled the Legislative Ethics Committee by his written answer to the Committee. Atty. Cianci's statement that there is no process under House rules by which the House of Representatives could consider the Remonstrance so that it may be heard or considered is misleading. (Mason's Legislative Manual, Chapter 8, § 73*, Powers of the Courts over the legislative Bodies Generally, 3. The legislature cannot do by indirection what it cannot do directly*.)

(e) Statutory Provisions. There are no statutory provisions that grant the Speaker of the House and the President of the Senate authority to exercise the discretionary powers of the legislature.

Judge Kissinger's Order is a substantive error of law, as he ignores the laws of the land cited by the Plaintiff. Part I, Art 8, Art 12, Art. 14, Art. 29, Art. 30, Art. 31, Art. 32, and Art. 38 are constitutional rights the government must protect. Each Article of the Constitution may stand on its own merits, but the government must protect all the rights belonging to the Plaintiff at all times. Under Part II, Article 100 of the New Hampshire Constitution (the laws of the land), the Constitution may only be amended, altered, or repealed by the inhabitants of this State. Therefore, under Part II, Art. 90, all the laws, the common law and its precedence, customs, and usage shall remain in full force and effect until repealed by the legislature of this State.[5] Judge Kissinger's Order on Page 3 (See Exhibit A) is a substantive error of law, as his statement is sophistry: "Mr. Richard filed this complaint on March 25, 2021, "requesting" (1) a writ of mandamus…" (emphasis added) The application of the words "request" or "petition" used by the courts today is in the same context as the founders used, as evidenced by the quasi-judicial function of the legislature in 1783. A request is a written statement of petition to the legislature; therefore, the word "request" means

[5] Wooster v. Plymouth, 62 N.H. 193, 200 (1882). The court continued: It was universally understood by the founders of our institutions that jury trial, and the other usual provisions of bills of rights, were not grants of rights to the public body politic, but reservations of private rights of the subject, paramount to all governmental authority; and this constitutional principle has never been abandoned. Id. 141.

the same thing today as it did in 1783 (Part I, Art. 32), due process before the legislature—not before the Speaker or President.

The Defendants ignored their own recognized legal scholar (See Exhibit F) and, with no delegated authority, did exercise the discretion of the legislature. Now they look to the Petition Clause of the Federal First Amendment case law. Judge Kissinger's Order is a substantive error of law, as he quotes *State v. Ball* out of context, which first looks to the State Constitution for protection: "*We hereby make clear that when this court cites federal or other State court opinions in construing provisions of the New Hampshire Constitution or statutes, we rely on those precedents merely for guidance and do not consider our results bound by those decisions."* (Pgs.7-8 and *State v. Ball*, 124 N.H. 226, 231, 471 A.2d347, 350 (1983); emphasis added) (See Exhibit A). Kissinger states the following: "Interpreting Part I, Article 32, New Hampshire courts rely on federal cases interpreting the First Amendment to the Federal Constitution for guidance." (Emphasis added.) His statement is sophistry, as he takes this out of context and ignores the previous sentence in front of the quote, which is: "This provision "guarantees the same right to free speech and association," as does the First Amendment to the Federal Constitution." (Emphasis added.) (The Advisory Opinion of the Justices in Voting Age in Primary Elections II, In Pri, 158 N.H. 661, 667 (2009), *Opinion of the Justices*, 973 A.2d 915, 920 (N.H. 2009). [6]

[6] "Further, the New Hampshire Constitution guarantees the same right to free speech and association. N.H. CONST. pt. I, art. 32; see State v. Nickerson, 120 N.H. 821, 826, 424 A.2d 190, 193-94 (1980)." *Opinion of the Justices*, 121 N.H. 434, 437 (N.H. 1981)

This advisory opinion issued by this Court is specific to "free speech and association" protections in Part I, Art. 32. This opinion is correct, as Part I, Art. 32 also protects the freedom of speech in either house of the legislature while exercising the right to redress unjust law by remonstrance. This opinion is contrary to Judge Kissinger's Order and is a substantive error of law, as it states on Page 11 that the Plaintiff has no right to be heard or considered by the legislature.

This advisory opinion does not discuss or express any opinion about the other protections of Part I, Art. 32: The 'people have a right,' in an 'orderly and peaceable manner,' to 'assemble,' and to 'consult' upon the common good [operative clauses], the right 'to instruct their representatives' and the right to request of the legislative body, by way of petition or remonstrance [operative clause], the obligation of the legislature to 'redress of the wrongs done them' and of the 'grievances they suffer' (Emphasis added.) The 'Freedom of Speech' is not in the text of Part I, Art. 32, but it is protected by Part I, Art. 30: The Freedom of 'Deliberation,' 'Speech,' and 'Debate' clauses, as ratified on Oct. 31, 1783. These three clauses protect the people in the exercise of their right to redress of grievances before the legislature while exercising their due process rights under Art. 31 and 32. This is a historical fact. It cannot be forgotten that one of the primary causes of the Glorious Revolution of 1688 and the American Revolution was the deprivation of the right to petition the King, the Parliament, or the Colonial assemblies. Those subjects seeking rights and justice were denied their

rights under the English Bill of Rights, as their constitutional remedies by petitions or remonstrances were ignored (just like today), or they were met with repeated retaliation or injury for exercising these rights, as these rights are "*so essential to the rights of the people*." (Emphasis added.) This is a positive right. It belongs to the people, as enumerated in the New Hampshire Bill of Rights.

Five years after the inhabitants ratified the New Hampshire Constitution in 1783, the United States Constitution was written in 1787, where the Federal Speech and Debate clause appears in Art. 1, § 6, which protects U.S. Senators and U.S. Congressmen and incorporates the specific language that protects the speech and debate of Senators and Congressmen in the U.S. Senate and the U.S. House. Part I, Art. 30 states that the people's right to speech and debate is protected—not the State Senators or the members of the House of Representatives. No such protection is delegated by text to the legislature in Part II, Art. 21 [Privileges of Members of the legislature] or any other Articles of Part II, Form of Government.

Judge Kissinger's Order (See Exhibit A) on Pages 7-8 is both a material and a substantive error of law, as he acknowledges the history, custom, and usage of the redress remedy and, without any logic, he makes the following statement when he refers to Article 32: "It makes no mention of legislative review or hearings. Nor does Article 31 require such procedures. Although it specifies that "*[t]he Legislature shall assemble for redress of public grievances*, it does not explicitly require that the legislature review or conduct hearings on *individual grievances*." (See New Hampshire Constitution, Pt. 1, Art. 32; emphasis added). Judge Kissinger's Order (See Exhibit A) is a material error of law when he states that the Plaintiff's

Remonstrance is an individual grievance. It is not (See Exhibit E, Remonstrance). A Remonstrance filed by one or many Citizens of this State to instruct the legislature to repeal or prevent any legislative act that violates the procedural due process required by Part II, Art. 100 to amend the Constitution by legislative fiat or the repeal of any law that is repugnant or contrary to the Constitution can only be remedied by the Legislature, Part I, Art. 29). Any law passed by the legislature and enacted by the Governor that is repugnant or contrary to the Constitution is a public matter and not a private dispute between two concerning persons (*Merrill v Sherburne,* 1 N.H. 199).

Part I, Art. 31 is mandatory—a positive right and required due process. It is an obligation on the members of the legislature (trustees), as it is their primary job. The prefatory clause states that they "shall" [imperative] 'assemble for redress of public grievances' and is followed by the operative clause: 'for correcting, strengthening, and confirming the laws' that may be repugnant or contrary to the Constitution of New Hampshire. (Emphasis added.) The General Court is the correct venue, as that jurisdiction for redress of public grievances lies with the legislature—not the judiciary, because only the legislature is delegated the power to suspend laws under Part I, Art. 29. (See *Merrill v Sherburne,* 1 N.H. 199.) The legislature's own legal scholar reinforces another point when introducing the reader to Part I, Art. 31 in concert with Art. 32. These Articles may stand alone, but logically and historically may be exercised together for the stated task.

In 1783, Part I, Article 31 states the following: "ought frequently to assemble" for the "redress of grievances," and amended in 1792 to read "shall assemble" . . . "for the redress of public grievances." (Emphasis

added.)[7] "Redress" means a "remedy," and Part 1, Art 14 guarantees a "certain remedy" by having recourse to the "laws" for public grievances to 'obtain' 'right' and 'justice' freely conformably to the laws. The Constitution protects the right to address the legislature by the following articles: Part I, Art. 30, the Freedom of 'deliberation,' 'speech,' and 'debate' 'in either house of the legislature, is so essential to the rights of the people' it cannot be the cause of any retaliation upon those who seek redress, and Article 31 is the obligation to 'assemble' for 'redress' of 'public grievances' and for '*correcting, strengthening, and confirming the laws.*' (Emphasis added.) Such is the language used in 1783, and it is also in the Massachusetts Constitution; Article XXII, as follows:

> *The legislature ought frequently to assemble for the redress of grievances, for correcting, strengthening and confirming the laws, and for making new laws, as the common good may require.*

Judge Kissinger's Order is a substantive error of law (See Exhibit A), as he ignores the first five clauses of Part I, Art. 32, and is void of the protections of the State Constitution, Part I, Bill of Rights, Art. 1, Art. 2, Art. 7, Art. 8, Art. 12, Art. 14, Art 15, Art. 29, Art. 30, Art. 31, Art. 32, and Art. 38. Part I, Art. 32 is a positive right. It is unchanged from its ratification in 1783, and it has seven clauses. The first four clauses are prefatory clauses:

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[7] See Tomson v. Ward, 1 N.H. 9, 12 (N.H. Super. 1816) (—It is an established legal maxim, that when the legislature adopt or re-enact a statute, the previous construction of the statute as settled by the courts of law is adopted . . ..‖); see also Note, Legislative Adoption of Prior Judicial Construction: The Girouard Case and the Reenactment Rule, 59 HARV. L. REV. 1277, 1277, n.7 (1946).

'the people have a right in an orderly and peaceable manner' to 'assemble' and 'consult upon the common good' to protect the people's right to assemble with its legislature for redress of public grievances.

The Massachusetts Constitution, Part I, Art. XIX, is almost identical to the New Hampshire Constitution, Art. 32, except that the 'assemble clause' and second clause (to 'consult upon the common good') under New Hampshire (Art. 32), is one clause in the Massachusetts Constitution, Part I, Art. XIX: '**to assemble to consult'** upon the common good.[8] The second prefatory clause in the New Hampshire Constitution, Part I, Art. 32, is a positive right. The right 'to consult upon the common good' is reaffirmed by the precedence of the House and Senate Journals of that period—the historical record. The third clause, a positive right (operative clause), 'the right to give instructions to your representatives,' is obligatory upon them. (See Exhibit A, Redress Analysis. (See Exhibit H, citing Bernard Schwartz, The Bill of Rights: A Documentary History 273 (1971), Pg. 1094.)

Elbridge Gerry was a signer of the Declaration of independence and the Articles of Confederation. He was the fifth Vice President of the U.S. and a member of the U.S. House from Massachusetts. He was one of three men (including Mason and Randolph) who refused to sign the U.S. Constitution, because it did not have a Bill of Rights. He was an advocate of individual and state liberties, and he played an important role in adopting the U.S. Bill

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[8] Cf. Opinion of the Justices,143N.H.429,437,725A.2d1082,1088(1999) (Because much of the New Hampshire Constitution was taken from the Massachusetts Constitution, this court gives weight to interpretations of relevant portions of the Massachusetts Constitution when interpreting similar New Hampshire provisions. (citations omitted)).

of Rights. The Massachusetts Constitution, having gone into effect in 1780, was nine years old when Mr. Gerry explained what this clause means. His opinion from the debate over adopting the right to instruct representatives into the First Amendment Petition Clause makes two important points. First, his commentary clarifies what the law is under the Massachusetts Constitution. He explains why this right is so important. The second part explains that, if the Right to Instruct Representatives Clause of the States is to be adopted into the First Amendment Petition Clause, it would not have the same effect on the Federal Congress as it does under the State Constitutions. The right to instruct their representatives was voted down and not incorporated into the Federal Petition Clause. In addition, Roger Sherman, a member of the House of Representatives from Connecticut and the only man who signed all four founding documents, stated that if we adopt that which is included in this right to instruct our representatives, as incorporated into the state constitutions, we shall be bound by those instructions.[9] The following quotes is from the 1789 Congress assembled for debates introducing the Bill of Rights:

> *Mr. Gerry: By the checks provided in the constitution, we have a good grounds to believe that the very framers of it conceived that*

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[9] See, e.g., In re Juvenile 2003 95, 150 N.H. 644,650, 843 A.2d 318, 324 (2004) (citing to the Massachusetts Supreme Judicial Court to aid in interpreting New Hampshire‘s identical confrontation clause); Warburton, 136 N.H. at 390, 616 A.2d at 499 (Early constitutional interpretation is entitled great weight in determining the framers‘ intent, especially when the framers later serve in one of the branches of government.);

the Government would be liable to mal-administration, and I presume that the gentlemen of the House do not mean to arrogate to themselves more perfection than human nature has yet been found to be capable of; if they will admit an additional check against abuses which this, like every other Government, is subject to. Instruction from the people will furnish this in a considerable degree…

…Now, though I do not believe the amendment would bind the representatives, to obey the instructions, yet I think the people have a right both to instruct them and bind them. Do gentlemen conceive that on any occasion instructions would be so general as to proceed from all are constituents? If they do, it is the sovereign will; for gentlemen will not contend that the sovereign will presides in the legislature. The friends and patrons of this constitution have always declared that the sovereignty resides with the people, and that they do not part with it on any occasion; to say the sovereignty vest the people, and that they have not a right to instruct and control their representatives, is absurd to the last degree. They must either give up their principle, or grant that the people have a right to exercise their sovereignty to control the whole of government, as well as this branch of it. But the amendment does not carry the principle to such an extent, in only declares the right of the people to send instruction to the House, but how far they shall operate on his conduct, he will judge for himself. (Citing Bernard Schwartz, The Bill of Rights: A Documentary History 273 (1971) Pg. 1094.)

Mr. Sherman stated, "If we establish this right, we shall be bound by those instructions." (The Bill of Rights: A Documented History, Page 1094. See Exhibit H). Part I, Art. 32 must be read in light of the preceding four clauses. The fifth clause, the right to request of the legislative body, presumes that a citizen is addressing the legislative body assembled for "redress" (remedy) of grievances (evidenced by Exhibit F).

The Massachusetts Constitution, Part I, Art. XIX, uses the word "addresses" in front of the petition or remonstrance clause (prefatory clause), as follows: '*by the way of,' 'addresses,' 'petitions,' or 'remonstrances'* [operative clause]. (Emphasis added.) Likewise, the NH legislature is obligated to '"*redress" [remedy] of the "wrongs"* [operative clause] *done them and of the "grievances" they suffer*.' The historical record details the intention of the founders in great detail (See Exhibit F, Analysis of Redress).[10]

The Defendants, lacking any constitutional, statutory, or legislative authority to do so, now state as its only defense that case law from other States where the moving parties seek remedy in the First Amendment Petition Clause in error may apply to this case. The Federal Congress has no obligation to assemble for redress of grievances of State laws. It has no duty to assemble with the citizens of the States to consult upon the common good. It has no obligation to receive instruction from the people, and it has

[10] See In re Opinion of the Justices,78N.H.617,618,100A.49,50 (1917) (The New Hampshire Bill of Rights is mainly a copy of the Massachusetts Bill of 1780 . . .).

no duty to hear and consider the public grievances of the people by petition or remonstrance. It has no duty to redress such State grievances.

All the State and Federal cases cited in this case fail because of this stated error. Petitions seeking these protections under the First Amendment fail, because the founding fathers debated these clauses in New York during the 1789 debates introducing a Bill of Rights. All these State rights and State protections were debated, some were rejected, and not adopted into the First Amendment Petition Clause. Therefore, the State Constitution possesses protections not available in the First Amendment.

By omitting the unique and important N.H. history for interpretation and ignoring the cited New Hampshire Constitutional language as interpreted by recognized legal scholars, Judge Kissinger's Order (See Exhibit A) is both a material and substantive error of law, because he cites in error a Tennessee case, *Gentry v Former Speaker of the House Glen Casado.* Mr. Gentry did file a Remonstrance with the Tennessee legislature, which received the grievance but did not hold a hearing (any redress) on it. This case is different for the following reason: Mr. Gentry failed to present any evidence of the history, custom, and usage or precedence of the redress of grievance in Tennessee. He failed to argue the right to instruct their representatives and its history, and he failed to argue non-delegation doctrine. The legislature cannot delegate its power to consider a citizen remonstrance to officers of the legislature, nor can it make such rules to do so (Mason's Legislative Manual, § 518, *A Legislative Body Cannot Delegate Its Powers*).

The Tennessee Constitution is void of the New Hampshire Constitution, Part I, Art. 14, Art. 29, Art. 30, Art. 31, and a stronger assembly clause in Art. 32: to "assemble and consult upon the common good."

Nothing in the Tennessee Constitution confers a right on a citizen to orally address the Senate and the House as it does in New Hampshire. Upon Appeal Mr. Gentry (the Plaintiff) failed to state any State precedence supporting his petition; consequently, he never developed a State rights argument. Mr. Gentry opens the door to federal jurisdiction by invoking the protection of the First Amendment Petition Clause from the beginning. Therefore, the case is dismissed by the Tennessee Court of Appeals. Mr. Gentry failed to state a claim upon which relief could be granted, because he sought the protections of the First Amendment in error. In the absence of any State precedence, the appellate court cites Federal case law, which held that "The Arkansas State Highway Commission's refusal to consider employee grievances when filed by the union rather than directly by an employee of the State Highway Department does not violate the First Amendment." (*Smith v. Arkansas State Highway Employees*, 441 U.S. 463 (1979)). In *Smith v. Arkansas,* The Plaintiffs filed suit, seeking the protections of the First Amendment. The Plaintiffs failed to plead the State Constitutional Right of Assembly and of Petition (Article 2, Declaration of Rights, § 4). Instead, they failed to state a claim under which relief could be granted, as the First Amendment does not protect union employees or grant the right to redress their grievances before an administrative agency of the State of Arkansas.

The First Amendment is void of the protection of the Constitution of New Hampshire and the obligation of the State to protect those rights. Also, the

jurisdiction to repeal State laws lies with the New Hampshire legislature—not the Federal Congress.

In sum, the Petition Clause of the First Amendment only protects the core petitioning activities—preparing and signing a written petition and transmitting it to the government—either individually or in concert with others, but without the involvement of public meetings. Any protection of activities beyond this scope is derived from other constitutional rights; therefore, the cited Federal cases do not apply to this case.

The Plaintiff's case is based on citing the protections of the Constitution of New Hampshire: Part I, Art. 1, Art. 2, Art. 7, Art. 8, Art. 12, Art. 14, Art. 15, Art. 29, Art. 30, Art. 31, Art. 32, and Art. 38—not the First Amendment Petition Clause of the Federal Constitution, as it is void of all the protections and obligations of the State to protect the Constitutional rights of the citizens of this State.

A lawyer today, representing someone who claims some constitutional protection and who does not argue that the State constitution provides that protection, is skating on the edge of malpractice. *(State v. Jewett*, 500 A.2d 233, 234 (Vt. 1985) (quoting Oregon Supreme Court Justice Hans Linde, in Welsh & Collins, *Taking State Constitutions Seriously*, 14 THE CENTER MAG. 6, 12 (Sept./Oct. 1981)).

CLOSING COMMENTS

1. The Plaintiff states the following: The Defense and the legislature (the State) cannot evade or avoid its duty by legislative rule or lack thereof. (See Mason's Legislative Manual, Chapter 2, § 21, 2. *Rules Must Conform to the Constitutional and Statutory Provisions.)*

2. Communicating words that discredit, criticize, embarrass, or question the government, its policies, or its officials is protected speech. The freedom of 'd*eliberation,'* '*speech,'* and '*debate'* in either house of the legislature is protected under Part I, Art. 30, as it is essential to the rights of the people (Part I, Art. II).
3. When written in 1789, the First Amendment Petition Clause prohibits the Federal Congress from making any law that deprives the people from petitioning the Federal Government. The right to petition the State Government is protected under the State Constitution—not the Federal Constitution. All the Federal case law relied upon by the Defense and Judge Kissinger are substantive errors of law. The moving parties in their pleadings seek the protections of the First Amendment Petition Clause in error, because the First Amendment cannot provide the remedy they seek. They fail to state a claim that the First Amendment Petition Clause can remedy, as it is void of all the protections incorporated into the New Hampshire Constitution, Part I, Art. 29, Art. 30, Art. 31, and Art. 32.
4. The aforesaid State rights are excluded because of jurisdiction. Under the Tenth Amendment, these State rights and State powers are not Delegated to the Federal Government, nor are they prohibited to the States; therefore, they are reserved to the States respectively or to the people. The jurisdiction for the repeal of unjust State laws that are repugnant and contrary to the State Constitution is delegated to the New Hampshire legislature in Part I, Art. 29—not the Federal Congress.

5. The State (the legislature or its leadership) cannot abolish a constitutional right. The Defendants cannot obstruct or refuse to present a public grievance of the people to the legislature, as required by the Constitution, since it has no authority to do so.
6. The legislature can only propose amendments to the voters at the biannual elections. The Constitution can only be amended under Part II, Art. 100 by a two-thirds majority of the inhabitants. The legislature cannot abolish by rule or lack of a rule the right to redress of public grievances (the repeal of unjust laws) incorporated into Part I, Art. 29, Art. 30, Art. 31, and Art. 32 by ignoring these laws of the land. Such due process is protected by Part I, Art. 14 and Art 15. These rights have never been repealed.
7. All the protections of the Constitution of New Hampshire incorporated into Part I, the Bill of Rights, Art. 1, Art. 2, Art. 7, Art. 8, Art. 10, Art. 12, Art. 14, Art. 29, Art. 30, Art. 31, and Art. 32 are excluded from the Federal First Amendment Petition Clause (a negative right); therefore, it does not apply to this case because the Constitution of New Hampshire is written in light of seven hundred years of English history, and it predates the United States Constitution by five years. The State Bill of Rights are positive rights and some of the laws of the land.
8. All the laws of the land cited in this case have not been repealed; therefore, the right of the sovereign people to enforce the laws of the land (the Trust) cannot be ignored, altered, or amended by the trustees, who are servants of the Trust indenture—the Constitution of New Hampshire.

REQUEST FOR ORAL ARGUMENT

Plaintiff respectfully requests that oral argument not exceed fifteen minutes.

REQUEST FOR RELIEF

Wherefore, Mr. Richard respectfully requests that this Honorable Court enter the following relief:

A. An order declaring Judge Kissinger's Order void ab initio.

B. An order permanently enjoining Speaker Packard and President Morse from exercising the power and discretion of the legislature by obstructing or concealing petitions or remonstrances that require the attention of the legislative body of the whole.

C. An order compelling Speaker Packard to follow the Constitution and House Rule 1 (schedule the legislature to assemble with the Senate), and for President Morse to call the Senate to join the House for the redress of public grievance.

D. An order compelling the Speaker of the House to follow the Constitution and House Rule 4, requiring that the Speaker shall refer the Plaintiff's Remonstrances to the legislative body of the whole for the legislature to hear and consider the Remonstrances, so they may judge for the benefit and welfare of this State according to the laws of the land.

E. Any other relief this Court finds just and equitable.

F. An order awarding all fees and cost to the Plaintiff.

CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

The Plaintiff certifies that this brief complies with Supreme Court Rule 16(11). This brief contains 9,338 words.

CERTIFICATION

I, Daniel Richard, do hereby swear that on July 22, 2021, I did mail, e-mail or hand deliver a copy of this Writ to the Speaker of the House, Sherman Packard, and to the President of the Senate, Chuck Morse.

Dated July 22, 2021

VERIFICATION

I, Daniel Richard, certify that the foregoing facts are true and correct to the best of my knowledge and belief.

/s/ *Daniel Richard*
Daniel Richard