

STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-0507

John Burt & a
v.
Speaker of the House of Representative

RULE 7 APPEAL OF FINAL DECISION OF
MERRIMACK SUPERIOR COURT

BRIEF OF APPELLANTS,
JOHN BURT & a

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TABLE OF CONTENTS

Table of Contents

TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES	iii
TEXT OF RELEVANT STATUTES	v
QUESTION PRESENTED	1
STATEMENT OF THE CASE.....	2
STATEMENT OF THE FACTS	3
ARGUMENT	9
CONCLUSION.....	15
CERTIFICATION.....	16

TABLE OF AUTHORITIES

Cases

<u>Baines v. NH Senate President</u> , 152 NH 124, 129 (2005).....	10
<u>Baker v. Carr</u> , 369 U.S. 186, 211 (1962)	9,13
<u>Cohens v. Virginia</u> , 6 Wheat. 264, 404 (1821).....	13
<u>Consumer Party of Pennsylvania v. Comm.</u> , 507 A.2d 323, 333 (Pa. 1986).....	10
<u>Des Moines Register v. Dwyer</u> , 542 N.W.2d 491, 498 (Iowa 1996)	12
<u>Giss v. Jordan</u> , 309 P.2d 779, 783–84 (Ariz. 1957).....	12
<u>Howard Jarvis Taxpayers Ass’n v. Padilla</u> , 363 P.3d 628, 633 (Cal. 2016).....	13
<u>Hughes v. Speaker, NH House of Representatives</u> , 152 NH 276, 283 - NH: Supreme Court 2005	9
<u>INS v. Chadha</u> , 462 U. S. 919, 943 (1983).....	14
<u>Japan Whaling Assn. v. American Cetacean Soc.</u> , 478 U. S. 221, 230 (1986)	13
<u>Lansing Sch. Educ. Ass’n v. Lansing Bd. of Educ.</u> , 792 N.W.2d 686, 728 (Mich. 2010).....	13
<u>Marbury v. Madison</u> , 1 Cranch 137 (1803)	14
<u>Nixon v. United States</u> , 506 U. S. 224, 228 (1993)	13
<u>Petition of Below</u> , 151 N.H. 135, 139 (2004)	10
<u>Petition of Judicial Conduct Comm.</u> , 151 N.H. 123, 128 (2004).....	9
<u>State ex rel. Barker v. Manchin, et al.</u> , 167 W.Va. 155, 157 (1981)	12
<u>State v. LaFrance</u> , 124 N.H. 171, 177 (1983).....	9
<u>United States v. Munoz-Flores</u> , 495 U.S. 385, 391 (1990)	10
<u>Yellow Dog Dev., LLC v. Bibb Cty.</u> , 871 So. 2d 39, 42 (Ala. 2003).....	12
<u>Zivotofsky v. Clinton</u> , 566 U.S. 189 (2012)	13

Constitutional Provisions

N.H. Const. Part II Art. 22	13
N.H. Const. Part II Art. 37	13
Part 1 Art. 2-A of N.H. Constitution.....	passim

Other Authorities

Treatises

<i>DON’T ANSWER THAT: REVISITING THE POLITICAL QUESTION DOCTRINE IN STATE COURTS</i> , Nat Stern ...	12
FRANK P. GRAD & ROBERT F. WILLIAMS, <i>2 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: DRAFTING STATE CONSTITUTIONS, REVISIONS, AND AMENDMENTS</i> 27 (2006)	13
Just Words”: Common Law and the Enforcement of State Constitutional Social and Economic Rights, 62 STAN.L.REV. 1521, 1539 (2010)	13

The Function of a State Constitution, 30 POL.SCI.Q.201, 205 (1915).....	13
Understanding State Constitutions,65TEMP.L.REV.1169 (1992)	13

TEXT OF RELEVANT STATUTES

House Rule 63 (2019)

“Deadly weapons; electronic devices; cameras. No person, including members of the House, except law enforcement officers while actively engaged in carrying out their duties as such, shall carry or have in possession any deadly weapon as defined in RSA 625:11, V while in the House Chamber, anterooms, cloakrooms, or House gallery. Any person in violation of this rule shall be subject to ejection from any such premises on the order of the Speaker and disciplinary action or arrest or both by action of the House. Nothing in this rule shall indicate that the security officer appointed by the House under Rule 61 has the right to stop and search a member of the House on the premises of the House. With the exception of devices for the hearing impaired, no member shall operate audible electronic transmitting and/or receiving devices nor shall any member operate a video camera or a camera utilizing flash bulbs on the floor of the House, while the House is in session.”

House Rule 63 (2018)

Deadly weapons; electronic devices; cameras. No person, including members of the House, except law enforcement officers while actively engaged in carrying out their duties as such, shall display any deadly weapon as defined in RSA 625:11, V while in the House Chamber, anterooms, cloakrooms, or House gallery. Any person in violation of this rule shall be subject to ejection from any such premises on the order of the Speaker and disciplinary action or arrest or both by action of the House. Nothing in this rule shall indicate that the security officer appointed by the House under Rule 61 has the right to stop and search a member of the House on the premises of the House or that any person is precluded a legally permitted exercise of self-defense or defense of others. With the exception of devices for the hearing

impaired, no member shall operate audible electronic transmitting and/or receiving devices nor shall any member operate a video camera or a camera utilizing flash bulbs on the floor of the House, while the House is in session.”

N.H. State Constitution Part I Art 2-a

[Art.] 2-a. [The Bearing of Arms.] All persons have the right to keep and bear arms in defense of themselves, their families, their property and the state.

N.H. State Constitution Part II Art 22

[Art.] 22. [House to Elect Speaker and Officers, Settle Rules of Proceedings, and Punish Misconduct.]

The House of Representatives shall choose their own Speaker, appoint their own officers, and settle the rules of proceedings in their own House; and shall be judge of the returns, elections, and qualifications, of its members, as pointed out in this Constitution. They shall have authority to punish, by imprisonment, every person who shall be guilty of disrespect to the House, in its presence, by any disorderly and contemptuous behavior, or by threatening, or illtreating, any of its members; or by obstructing its deliberations; every person guilty of a breach of its privileges, in making arrests for debt, or by assaulting any member during his attendance at any session; in assaulting or disturbing any one of its officers in the execution of any order or procedure of the House; in assaulting any witness, or other person, ordered to attend, by and during his attendance of the House; or in rescuing any person arrested by order of the House, knowing them to be such.

QUESTION PRESENTED

1. Whether the Court erred by dismissing the complaint where plaintiffs alleged a sufficient claim for relief. Preserved through Complaint and Plaintiffs memorandum to objection to defendant's motion to dismiss pg 3-8.
2. Whether the complaint alleges a justiciable issue where the issue is whether the adopted House Rule is constitutional. Preserved through Complaint and Plaintiff's memorandum to objection to defendant's motion to dismiss pgs 3-8.
3. Whether the Court has the authority to address House Rules when the Constitutionality of that House Rule is in question. Preserved through Complaint and Plaintiffs' memorandum to objection to defendant's motion to dismiss pgs. 3-8.

STATEMENT OF THE CASE

Plaintiffs appeal the decision of the lower court dismissing their complaint. The Court dismissed the case as they found the issue non-justiciable. The complaint is based upon House Rule 63 which was amended to prohibit people from carrying a firearm in the House Chamber and other places at the State House. Because the House Rule violates Plaintiffs constitutional rights, the Court should address the merits of the case.

STATEMENT OF THE FACTS

The facts in this case are primarily not in dispute as the case was dismissed prior to an answer to the complaint being filed.

Plaintiffs are members of the N.H. House of Representatives.

On January 2, 2019, the New Hampshire House of Representatives (House) voted to amend House Rule 63.

The Rule amendment that passed reads:

“Deadly weapons; electronic devices; cameras. No person, including members of the House, except law enforcement officers while actively engaged in carrying out their duties as such, shall carry or have in possession any deadly weapon as defined in RSA 625:11, V while in the House Chamber, anterooms, cloakrooms, or House gallery. Any person in violation of this rule shall be subject to ejection from any such premises on the order of the Speaker and disciplinary action or arrest or both by action of the House. Nothing in this rule shall indicate that the security officer appointed by the House under Rule 61 has the right to stop and search a member of the House on the premises of the House. With the exception of devices for the hearing impaired, no member shall operate audible electronic transmitting and/or receiving devices nor shall any member operate a video camera or a camera utilizing flash bulbs on the floor of the House, while the House is in session.”

28. The prior House Rule 63 stated:

“63.Deadly weapons; electronic devices; cameras. No person, including members of the House, except law enforcement officers while actively engaged in carrying out their duties as such, shall display any deadly weapon as defined in RSA 625:11, V while in the House Chamber, anterooms, cloakrooms, or House gallery. Any person in violation of this rule shall be subject to ejection from any such premises on the order of the Speaker and disciplinary action or arrest or both by action of the House. Nothing in this rule shall indicate that the security officer appointed by the House under Rule 61 has the right to stop and search a member of the House on the premises of the House or that any person is precluded a legally permitted exercise of self-defense or defense of others. With the exception of devices for the hearing impaired, no member shall operate audible electronic transmitting and/or receiving devices nor shall any member operate a video camera or a camera utilizing flash bulbs on the floor of the House, while the House is in session.”

The pertinent change of the rule is it changed “display” to “carry or have in possession”. In practice this means under the prior rule everyone could lawfully conceal carry a firearm (presuming they are not otherwise prohibited under State or Federal law). The rule change now prohibits Plaintiffs and other members of the public from conceal carrying a firearm no matter what the purpose (There is an exception for law enforcement officers actively engaged in duty. No law enforcement officers are plaintiffs in this lawsuit).

The rule bans firearms in the House Chamber, anterooms, cloakrooms, and House Gallery. The House Chamber is the main room in the State House where all 400 State Reps. gather and vote on bills. The anterooms and cloakrooms attach to that room and are generally restricted to just house members. The House Gallery is the room open to the public that overlooks the House Chamber during votes. Typically there are around 50-100 people present on any day the House is in Session.

Besides the House Chamber being used for votes, it is used for other purposes on certain occasions. During the past two years members of the Senate and the Governor have used the room for official events. This bill effectively makes it unlawful, and subject to arrest, for them to carry a firearm in that room.

Besides those limited events for elected and appointed officials, that room is commonly used to hear testimony of the public on proposed bills. The room is chosen as it is much bigger with a higher capacity than any of the rooms in the Legislative Office Building where house bills are typically heard. Ironically, many of the firearm bills are held in the House Chamber due to the amount of people who show up in support of their constitutional right to have a firearm. Not surprisingly, many of those people, including the plaintiffs, would typically be armed during that testimony.

The Speaker of the House (defendant to lawsuit) has unilateral authority to decide whether a bill is to be heard in that room. By requiring testimony for firearm bills to be in the House Chamber, the Speaker can effectively limit those who show-up, which can affect the outcome of a vote on a bill.

People who wish to exercise their Right to testify and their right to carry a firearm must make a choice; they can either choose one of their rights to the exclusion of the other, or violate House Rule 63. If they do violate House Rule 63 they face penalties to include arrest. Further, House Reps. face the penalty of being expelled from the House.

In 2017, the Legislature passed, and the governor signed SB 12 . This bill/law is referred to as “constitutional carry”. Under constitutional carry, the allowing of open-carrying a firearm without a permit was expanded to allow people to carry in a concealed manner without a permit (which includes in a vehicle or purse).

Under the prior law, with a few exceptions, anyone could lawfully carry a firearm without a permit as long as it was visible/open-carry. In order to conceal carry, one must have applied to the local police. New Hampshire was/is a must-issue State, meaning the Police must approve the permit absent certain limitations.

Under both our present law, and former law, there are still certain people who are prohibited from carrying a firearm. For example, under federal law, someone cannot possess a firearm if

they were convicted of a felony or misdemeanor crime involving domestic violence. Under State law, people can lawfully carry everywhere with limited exception (Courthouses have restricted carry requirements). Under state law there are no limits as to the carrying of a firearm anywhere in the State House.

The New Hampshire Constitution guarantees: **Part I [Art.] 2-a. [The Bearing of Arms.]** All persons have the right to keep and bear arms In defense of themselves, their families, their property and the state.

December 1, 1982.

SUMMARY OF THE ARGUMENT

The court erred by dismissing the complaint for lack of jurisdiction without first deciding whether the House Rule was constitutional. The Court dismissed the case finding that it would lack the authority to address the constitutionality of any House Rule. That finding is wrong as a matter of law, would violate the principles of our checks and balances system of government, and deprive plaintiffs of their constitutional rights.

ARGUMENT

I. THE COURT ERRED BY DISMISSING THE COMPLAINT DUE TO IT BEING NON-JUSTICIABLE

Courts have consistently stepped in to determine whether any law, rule, or action is Constitutional. That is among the primary duties of a Court.

As part of subject matter jurisdiction, courts will look to see if a matter is justiciable.

"The nonjusticiability of a political question derives from the principle of separation of powers. The justiciability doctrine prevents judicial violation of the separation of powers by limiting judicial review of certain matters that lie within the province of the other two branches of government." [Petition of Judicial Conduct Comm., 151 N.H. 123, 128 \(2004\)](#) (quotation and citation omitted). Where there is such commitment, we must decline to adjudicate the matter to avoid encroaching upon the powers and functions of a coordinate political branch. *Id.* "Deciding whether a matter has in any measure been committed by the Constitution to another branch of government . . . is itself a delicate exercise in constitutional interpretation, and *is a responsibility of this Court as ultimate interpreter of the [State] Constitution.*" [Baker v. Carr, 369 U.S. 186, 211 \(1962\)](#). (Emphasis added)

"A controversy is nonjusticiable—*i.e.*, involves a political question— where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." [Petition of Judicial Conduct Comm., 145 N.H. 108, 111 \(2000\)](#) (quotations and ellipsis omitted); see [Baker, 369 U.S. at 217.](#)" [Hughes v. Speaker, NH House of Representatives, 152 NH 276, 283 - NH: Supreme Court 2005](#)

In [Hughes](#), this court went on to find a regulation related to the right to know law (RSA 91-A) was not justiciable because it related to a statute. However, the court found it was justiciable in relation to the New Hampshire constitution. That is precisely the result Plaintiffs are seeking.

"Although we have concluded that the plaintiff's RSA chapter 91-A claim is not justiciable, we reach the opposite conclusion with respect to his Part I, Article 8 claim. As we recognized in [Baines, 152 N.H. at 132](#), "[c]laims regarding compliance with these kinds of mandatory constitutional provisions are justiciable." We have the responsibility to examine whether the defendants' conduct violated Part I, Article 8. See [Baines, 152 N.H. at 132](#). *It is our duty to interpret constitutional provisions and to determine whether the legislature has complied with them.* [State v. LaFrance, 124 N.H. 171, 177 \(1983\)](#)." *Id.* At 288.

Perhaps put another way, if one of the other branches of government is violating the Constitution, it wouldn't be a political question, because such authority is not "within the province of the other two branches of government"

Baines, makes it clear that not only is a question regarding the constitutionality of a legislative action justiciable, but that the court has a constitutional *duty* to address it:

"The Senate President and House Speaker first argue that the question of whether Laws 2004, chapter 200 violates Part II, Article 18, because it is a "money bill" that should have originated in the House, is nonjusticiable. It is our constitutional duty, however, to review whether laws passed by the legislature are constitutional. See United States v. Munoz-Flores, 495 U.S. 385, 391 (1990). "We are the final arbiter of State constitutional disputes." Petition of Below, 151 N.H. 135, 139 (2004). "While it is appropriate to give due deference to a co-equal branch of government as long as it is functioning within constitutional constraints, it would be a serious dereliction on our part to deliberately ignore a clear constitutional violation." Consumer Party of Pennsylvania v. Comm., 507 A.2d 323, 333 (Pa. 1986). The United States Supreme Court reached a similar conclusion in Munoz-Flores when it held that whether a particular piece of legislation violated the Origination Clause of the Federal Constitution presented a justiciable question. Munoz-Flores, 495 U.S. at 390-91; see U.S. CONST. art. I, § 7.

Reviewing whether the disputed legislation violates Part II, Article 18 does not demonstrate lack of respect due the legislative branch of government. Rather, it fulfills the constitutional responsibility of the judicial branch. Munoz-Flores, 495 U.S. at 390. Legislative consideration of constitutional questions "does not foreclose subsequent judicial scrutiny of the law's constitutionality." *Id.* at 391." Baines v. NH Senate President, 152 NH 124, 129 (2005)

Similar to Hughes, Baines found the issue of whether the legislation violated a *statute* was nonjusticiable. Again, that is not the case here. It is clear the court not only has a duty to, but will find justiciable whether a law, rule, or regulation violates the constitution.

The lower court's reliance on State v. LaFrance, 124 N.H. 171 (1983) is misplaced. First, LaFrance didn't deal with a legislative rule, it dealt with one from the Judiciary. Accordingly, the separation of powers and checks and balances analysis are different.

Second, the issue of justiciability did not even arise in that case.

Third, the issue in LaFrance addressed a *statute* and whether the judiciary must comply. This is the exact same issue in Hughes and Baines (both of which were decided after LaFrance and cleared up any ambiguity, or limited LaFrance by applying a more complete analysis); the branches are free to disregard statutes, but cannot violate the constitution.

It is important to note, that in LaFrance, the Court did not address the constitutionality of the rule in question. It is unclear if this was due to the State Constitution granting a right to bear arms being adopted right around the time the case was brought forward. The Court did not address whether the rule violated the constitutional right to bear arms as part of the analysis.

However, the court noted that:

"The house of representatives, as a separate and coequal branch of government, is constitutionally authorized to promulgate its own rules. . . . The house could properly decide, *consistent with the right of reasonable public access required by N.H. CONST. pt. I, art. 8*, that its official tape should not be duplicated or subjected to a so-called voice stress analysis." (emphasis added). Id. at 181-182.

It is clear that the language of LaFrance, when read in its entirety, and not in isolation, means the legislature can adopt rules that the court will not evaluate, *unless* the rule is unconstitutional.

If LaFrance did hold that the House Rules can violate the Constitution, and that the Judiciary would lack the authority to address that, then LaFrance should be overruled to that extent. Under our system of checks and balances, the Court has both the authority and duty to determine whether a House Rule violates the Constitution.

Other courts have also followed the well-established framework that courts will step in when a different branch of government is violating the Constitution.

“The [constitutional] provision that each House shall determine the rules of its proceedings does not restrict the power ... to the mere formulation of standing rules, or the proceedings of the body in ordinary legislative matters; **but in the absence of constitutional restraints**, ... such authority extends to the determination of the propriety and effect of any action ... taken by the body as it proceeds in the exercise of any power, in the transaction of any business, or in the performance of any duty conferred upon it by the Constitution. (Emphasis added)”

Des Moines Register v. Dwyer, 542 N.W.2d 491, 498 (Iowa 1996) (citations and internal quotations omitted).

The Court in West Virginia held in a similar challenge held that “the provisions of the West Virginia Administrative Procedures Act, particularly W.Va. Code §§ 29A-3-11 and 29A-3-12 (1980 Replacement Vol.), pursuant to which the rules in question were disapproved by the Legislative Rule-Making Review Committee, are unconstitutional and void.” State ex rel. Barker v. Manchin, et al., 167 W.Va. 155, 157 (1981). In that case, the West Virginia Legislature revised its Administrative Rules. In doing so, it established a “Rule-Making Review Committee” which was found to be unconstitutional (because it unconstitutionally prevented an executive department from promulgating and implementing valid regulations as required by law).

Case law, and justice require that the judicial branch has both the authority and duty to determine if a law, regulation, or rule is in fact constitutional. Without that ability, citizens would be denied their constitutional rights, and our system would lack a checks and balances form of government. Such a holding would transform our government from a Constitutional Republic, to one where a simple majority can deprive the constitutional rights of the minority.

“As courts and commentators have long recognized, state legislatures possess plenary power except to the extent that they are constrained by their constitution” . *DON’T ANSWER THAT: REVISITING THE POLITICAL QUESTION DOCTRINE IN STATE COURTS*, Nat Stern Pg 20 - <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1673&context=jcl>¹.

¹See, e.g., Yellow Dog Dev., LLC. v. Bibb Cty., 871 So. 2d 39, 42 (Ala. 2003) (finding that legislating local acts is unconstrained unless limited by the state or federal constitution); Giss v. Jordan, 309 P.2d 779, 783–84 (Ariz. 1957) (describing how the Arizona state legislature has plenary legislative power in Arizona unless restrained by constitutional provisions); Howard Jarvis Taxpayers Ass’n v. Padilla, 363 P.3d 628,

The State House of Representatives receive their power to enact rules from the State Constitution. Accordingly, it is limited by the State constitution as well. Part I Art 2-a prohibits the House (and government) from adopting, and enforcing, a rule that violates the State constitution (Plaintiffs are only pursuing their complaint under the State constitution).

In this instance, to the extent there is a conflict, Part I Art 2-a should prevail because it is more recent, and more specific. The court does not need to address that issue at this point as the lower court has not addressed the constitutionality of House Rule 63. However, the lower court did appear to summarily conclude the House had the ability to adopt the rule pursuant to N.H. Const. Part II Art. 22 and N.H. Const. Part II Art. 37 Order Pg 3.

Although the federal analysis related to justiciability is slightly different (as it is based upon the case & controversy clause), it also provides guidance that this case is justiciable.

“In general, the Judiciary has a responsibility to decide cases properly before it, even those it “would gladly avoid.” Cohens v. Virginia, 6 Wheat. 264, 404 (1821). Our precedents have identified a narrow exception to that rule, known as the “political question” doctrine. See, e.g., Japan Whaling Assn. v. American Cetacean Soc., 478 U. S. 221, 230 (1986) . We have explained that a controversy “involves a political question . . . where there is ‘a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.’ ” Nixon v. United States, 506 U. S. 224, 228 (1993) (quoting Baker v. Carr, 369 U. S. 186, 217 (1962)). In such a case, we have held that a court lacks the authority to decide the dispute before it.” Zivotofsky v. Clinton, 566 U.S. 189 (2012)

In determining whether something is a “political question”, in that case, the court held

633 (Cal. 2016) (“[I]t is well established that the California Legislature possesses plenary legislative authority except as specifically limited by the California Constitution.”); Lansing Sch. Educ. Ass’n v. Lansing Bd. of Educ., 792 N.W.2d 686, 728 (Mich. 2010) (stating that the Michigan state legislature has plenary legislative power in Michigan); FRANK P. GRAD & ROBERT F. WILLIAMS, 2 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: DRAFTING STATE CONSTITUTIONS, REVISIONS, AND AMENDMENTS 27 (2006) (“[S]tate government is a government of plenary powers, except as limited by the state and federal constitutions.”); W.F. Dodd, The Function of a State Constitution, 30 POL.SCI.Q. 201, 205 (1915) (“[L]egislative power,’ granted in general terms, must be interpreted as conferring all governmental power, except so far as restricted by constitutional texts, i.e., that all such power inheres in the general grant.”); Helen Hershkoff, “Just Words”: Common Law and the Enforcement of State Constitutional Social and Economic Rights, 62 STAN.L.REV. 1521, 1539 (2010) (“[T]he plenary nature of state legislative power is its central characteristic....”); G. Alan Tarr, Understanding State Constitutions, 65 TEMP.L.REV. 1169 (1992) (asserting that state power is considered plenary).

“[T]he only real question for the courts is whether the statute is constitutional. At least since Marbury v. Madison, 1 Cranch 137 (1803), we have recognized that when an Act of Congress is alleged to conflict with the Constitution, “[i]t is emphatically the province and duty of the judicial department to say what the law is.” *Id.*, at 177. That duty will sometimes involve the “[r]esolution of litigation challenging the constitutional authority of one of the three branches,” but courts cannot avoid their responsibility merely “because the issues have political implications.” INS v. Chadha, 462 U. S. 919, 943 (1983) .” *Id.*

In Zivotovsky, the government further argued that there was a “‘textually demonstrable constitutional commitment’ to the President of the sole power ... to determine whether an American born in Jerusalem may choose to have Israel listed as his place of birth on his passport,”. The Court held that there was no “exclusive commitment to the Executive of the power to determine the constitutionality of a statute.” *Id.*

Applying those rationales to this case, it is clear the Court ought to exercise its judicial authority to determine whether a rule is unconstitutional, so that plaintiffs can have their constitutional rights protected.

The lower court has adopted a finding that every house rule can never be addressed by the court, even if it is unconstitutional.

If the court’s rationale were allowed, that would mean a majority of the house could pass a rule against the minority. They could ban women, African Americans, Jewish, homosexual, republican, gun owners, or any other class of people they want from not only being present in the house chamber, but also from voting. Clearly such a rule would be unconstitutional, and this court should not hesitate to step in and uphold the constitution by striking down an unconstitutional House Rule.

CONCLUSION

The Court should reverse the dismissal of the lower court finding the issue is non-justiciable. Plaintiffs have a Constitutional right to bear arms that the Courts have a duty to protect when the legislature passes a rule violating that constitutional right.

Plaintiffs waive oral argument

Certification for Rule 16 (3)(i)

The decision being appealed is in writing and is attached through the e-file system as "Trial court decision".

Respectfully Submitted,

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CERTIFICATION

I hereby certify that a digital copy of the brief and exhibits have been provided to opposing counsel through the NH Supreme Court e-file system, at the time this document is e-filed.

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