

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

No. 2019-0507

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

Rule 7 Mandatory Appeal from the New Hampshire Superior Court,  
Merrimack County, Case No. 217-2019-CV-00236

**OPPOSING BRIEF OF DEFENDANT/APPELLEE  
SPEAKER OF THE HOUSE OF REPRESENTATIVES**

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## **TABLE OF CONTENTS**

Table of Authorities.....	3
Issue Presented.....	5
Statement of the Facts and the Case.....	5
Summary of Argument.....	6
Argument.....	8
1. The precise issue presented by this case has been definitively decided by this Court in <i>State v. LaFrance</i> . ....	8
2. Separation of powers supports the nonjusticiability of legislative rules of proceedings in this case. ....	9
3. The purported constitutional issues presented in this case do not merit judicial review of a fundamentally political dispute. ....	13
Conclusion.....	15
Certificate of Service.....	16
Certificate of Compliance.....	16

## TABLE OF AUTHORITIES

### Cases

<i>Baines v. N.H. Senate President</i> , 152 N.H. 124 (2005).....	12
<i>Bleiler v. Chief, Dover Police Department</i> , 155 N.H. 693 (2007).....	14
<i>Consumer Party of Pennsylvania v. Comm.</i> , 507 A.2d 323 (Pa. 1986).....	12
<i>Des Moines Register v. Dwyer</i> , 542 N.W.2d 491 (Iowa 1996).....	11
<i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008).....	14-15
<i>Horton v. McLaughlin</i> , 149 N.H. 141 (2003).....	10, 11
<i>Hughes v. Speaker of NH House of Representatives</i> , 152 N.H. 276 (2005)..	11
<i>New Hampshire Health Care Ass’n. v Governor</i> , 161 N.H. 378 (2011)...	14
<i>Petition of Judicial Conduct Committee</i> , 145 N.H. 108 (2000).....	11
<i>Progress Missouri, Inc. v. Missouri Senate</i> , 494 S.W.3d 1 (Mo. App. W.D. 2016).....	11
<i>Rucho v. Common Cause</i> , 588 U.S. ___, 139 S.Ct. 2484 (2019).....	15
<i>Starr v. Governor</i> , 154 N.H. 174 (2006).....	10
<i>State v. Addison</i> , 165 N.H. 381 (2013).....	13
<i>State v. Barr</i> , ___ N.H. ___, 2019 WL 6255853 (November 22, 2019).....	15
<i>State v. LaFrance</i> , 124 N.H. 171 (1983).....	7, 8, 9, 12
<i>State v. Lilley</i> , 171 N.H. 766 (2019).....	15
<i>State v. Paul</i> , 167 N.H. 39 (2014).....	14
<i>State v. Smagula</i> , 117 N.H. 663 (1977).....	14
<i>Union Leader Corp. v. Chandler</i> , 119 N.H. 442 (1979).....	12-13
<i>University System of New Hampshire v. Jardis</i> , 2012 WL 254820 Grafton County Superior Court, No. 11-C-553.....	14

### **Constitutional Provisions**

N.H. Const. pt. I, art. 2-a.....	13, 14
N.H. Const. pt. I, art. 37.....	passim
N.H. Const. pt. II, art. 22.....	9, 11
N.H. Const. pt. II, art. 37.....	9, 11
N.H. Const. pt. II, art. 73-a.....	9

### **Other**

House Rule 63.....	passim
Journal of the House of Representatives (N.H.H.R. Jour.)....	5, 6
Manual of the New Hampshire General Court.....	5, 6

## **ISSUE PRESENTED**

Whether the Superior Court properly dismissed the Plaintiffs' complaint as nonjusticiable for lack of subject matter jurisdiction pursuant to the separation of powers doctrine contained in Part I, Article 37 of the New Hampshire Constitution?

## **STATEMENT OF THE FACTS AND THE CASE**

On January 2, 2019 the New Hampshire House of Representatives by a roll call vote of 220-163 adopted an amendment to House Rule 63 which reads as follows:

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 **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.

N.H.H.R. Jour. (January 2, 2019) (emphasis added)

([http://www.gencourt.state.nh.us/house/caljournals/journals/2019/HJ\\_2.pdf](http://www.gencourt.state.nh.us/house/caljournals/journals/2019/HJ_2.pdf));

*see also* Manual of the New Hampshire General Court 2019-2020 at 152.

The present rule is substantially similar to a rule first adopted by the House in 1971. *See* N.H.H.R. Jour. 84 (1971). A version of this rule which includes the operative phrase, “carry or have in possession” was in effect

from 1971-2011, *See* Manual of the New Hampshire General Court (1971) *et. seq.*

In 2011, the rule was amended by replacing the phrase “carry or have in possession” with “display”. N.H.H.R. Jour. 19 (2011); Manual of the New Hampshire General Court 2011-2012 at 139. Since 2011, the operative phrase has been changed back and forth in similar fashion on the three occasions when political control of the House of Representatives has switched. *See* N.H.H.R. Jour. 18 (2013); Manual of the New Hampshire General Court 2013-2014 at 141 (“carry or have in possession”); N.H.H.R. Jour. 21 (2015); Manual of the New Hampshire General Court 2015-2016 at 140 (“display”); N.H.H.R. Jour. (January 2, 2019); Manual of the New Hampshire General Court 2019-2020 at 152 (“carry or have in possession”). To the best of the Defendant’s knowledge, the constitutionality of this rule has never been challenged in any judicial proceeding.

On April 12, 2019, over four months after the amended rule was adopted and implemented, Plaintiffs filed a complaint in Merrimack County Superior Court which alleged various constitutional arguments. On August 1, 2019, the Court (Kissinger, J.) dismissed the complaint as nonjusticiable for lack of subject matter jurisdiction. In its well-reasoned Order, the Court concluded, “As an independent and coequal branch of government, the legislature holds the inherent power to control the wearing of firearms within their chambers. This Court will not encroach on the legislature’s inherent authority to enact such rules.” Order at 5. Plaintiffs subsequently appealed the dismissal to this Court.

### **SUMMARY OF ARGUMENT**

The Superior Court properly dismissed this case as nonjusticiable for lack of subject matter jurisdiction because it duly followed this Court’s

well-established precedent regarding the constitutional authority of each coequal branch of government to establish internal rules of proceeding.

The specific question posed by this case – whether each branch may establish a rule of conduct regarding firearms within its own chambers – has been directly answered in the affirmative by this Court in *State v. LaFrance*. Despite Plaintiffs’ efforts to distinguish *LaFrance* or to avoid the plain impact of its holding on their case, the constitutional grounding in Part I, Article 37’s separation of powers provision makes it clearly applicable to the present matter.

This Court has consistently reaffirmed the constitutional rulemaking authority of all three branches of government and, specifically, the authority of the legislature to establish internal rules of proceeding which encompass rules of conduct. When each branch of government exercises its constitutional rulemaking authority over its “inherent and internal affairs”, such action is not reviewable by the other branch. The Superior Court recognized this constitutional framework as central to its Order and dismissed the case accordingly.

This Court is the final arbiter of the constitution and the Defendant does not question this fundamental principle. The Defendant argues that within the specific context of this case, it is unnecessary for this Court to enter into a constitutional inquiry of House Rule 63, particularly where the House of Representatives has acted well within its authority.

Finally, Plaintiffs’ undeveloped assertions of the rule’s unconstitutionality do not suggest that the Judicial Branch should depart from its traditional position of nonjusticiability. House Rule 63 simply reestablishes a longstanding, reasonable restriction on firearms which is consistent with both state and federal constitutional provisions and precedent. Plaintiffs’ complaint is fundamentally political, not legal, and does not merit judicial review.

This Court need not depart from its precedent nor establish new ground in this case. This Court need only look to its own jurisprudence to conclude that the Superior Court properly dismissed this case.

### **ARGUMENT**

#### **1. The precise issue presented by this case has been definitively decided by this Court in *State v. LaFrance*.**

In *State v. LaFrance*, 124 N.H. 171 (1983) this Court upheld the inherent constitutional authority of the Judicial Branch to prohibit firearms in courthouses; in doing so, it unequivocally stated:

It would not be within the constitutional prerogative of the judiciary to tell either of the other two branches of government who could or could not wear guns in the Executive Council Chamber or in the Representatives' Hall. That would properly be a matter for those branches of government to resolve, as the House of Representatives has done in the following rule [ . . . ] The separation of powers doctrine set forth in New Hampshire Constitution part I, article 37 compels limits to encroachments by one branch into the inherent and internal affairs of another branch.

*State v. LaFrance*, 124 N.H. at 181.

This statement alone provides sufficient grounds for this Court to uphold the Superior Court's dismissal of this action. Despite Plaintiffs' characterizations to the contrary, *LaFrance* is constitutionally grounded upon the separation of powers doctrine and is directly controlling on the issue in the present case. In affirming the authority of the Judiciary to establish internal rules of conduct to control its own proceedings, this Court recognized the same authority in the other two coequal branches of government.

This Court determined that the Judiciary's inherent authority to adopt rules of practice and procedure is "of ancient origin", independent of



legislative authority, and also expressly provided in Part II, Article 73-a of the New Hampshire Constitution. *State v. LaFrance*, 124 N.H. at 180. Such rules necessarily include the power to control the use of cameras in the courtroom, the power to control dress and attire in the courtroom, the power to punish disorderly conduct, *id.* (citations omitted), and, at issue in *LaFrance* itself, the power to prohibit firearms in courthouses. “The power of the judiciary to control its own proceedings, the conduct of participants, the actions of officers of the court and the environment of the court is a power absolutely necessary for a court to function effectively and do its job of administering justice.” *Id.* at 179-180.

By this same token, Part II, Article 22 of the New Hampshire Constitution grants the House of Representatives the authority to “settle the rules of proceedings in their own House” which necessarily includes the authority to establish internal rules of conduct to control its own proceedings, such as House Rule 63. The Superior Court correctly acknowledged this authority when it concluded:

The judiciary does not stand above the other two branches of government. To the contrary, the three branches of government are coequal, each with the inherent authority to set their own rules of proceedings and conduct within their respective chambers. N.H. CONST. pt. I, art. 37, pt. II, arts. 22, 37. As an independent and coequal branch of government, the legislature holds the inherent power to control the wearing of firearms within their chambers. This Court will not encroach on the legislature’s inherent authority to enact such rules.

Order at 5. This Court need look no further than *LaFrance* to uphold the dismissal of this case.

**2. Separation of powers supports the nonjusticiability of legislative rules of proceedings in this case.**

The separation of powers considerations at the root of this Court's holding in *LaFrance* are also central to this case. The political question doctrine inherent in Part I, Article 37 further supports the principle of nonjusticiability and is firmly established in this Court's jurisprudence.

The political question doctrine is essentially a function of the separation of powers, existing to restrain courts from inappropriate interference in the business of the other branches of Government, and deriving in large part from prudential concerns about the respect we owe the political departments. The principle of separation of powers is set forth in Part I, Article 37 of the New Hampshire Constitution. 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.

A case presents a nonjusticiable political question when there is a textually demonstrable constitutional commitment of the issue to a coordinate political department. Where such a commitment exists, we must decline to adjudicate the matter to avoid encroaching upon the powers and functions of that coordinate political branch. 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 its ultimate interpreter.

*Starr v. Governor*, 154 N.H. 174, 176 (2006) (citations and internal quotations omitted). Simply put, where the text of the constitution has “demonstrably committed the disposition of a particular matter to a coordinate branch of government, a court should decline to adjudicate the issue to avoid encroaching upon the powers and functions of that branch.” *Horton v. McLaughlin*, 149 N.H. 141, 143 (2003).

As a general rule, this Court has held that the legislature's authority to adopt its own rules evidences the textually demonstrable commitment underlying the principle of nonjusticiability:

Part II, Articles 22 and 37 of the New Hampshire Constitution contain textually demonstrable commitments to the House and Senate to adopt their own rules of proceedings. Such rulemaking authority is a continuous power absolute. This means that each branch of each successive Legislature may proceed to make rules without seeking concurrence or approval of the other branch, or of the executive, and without being bound by action taken by an earlier Legislature. The legislature, alone, has complete control and discretion whether it shall observe, enforce, waive, suspend, or disregard its own rules of procedure.

*Hughes v. Speaker of NH House of Representatives*, 152 N.H. 276, 284 (2005) (citations and internal quotations omitted). *See also Horton v. McLaughlin*, 149 N.H. at 144 (“The legislature has full authority to establish all rules, regulations and laws necessary and proper to carry out its constitutional mandate.”); *Petition of Judicial Conduct Committee*, 145 N.H. 108, 112 (2000) (legislature’s constitutionally delegated authority to make, implement, and interpret rules regarding impeachment of judges is, under most circumstances, nonjusticiable).

Importantly, rules of proceeding encompass more than simply rules for the passage of legislation, they also include rules of conduct. As one court has explained, rules of proceeding broadly encompass:

(1) rules which govern the internal workings of the legislature; (2) statutes which relate solely to the internal organization of the legislature; (3) rules which apply to a branch of government itself rather than to members of [that] body; (4) internal rules which govern acts that occur in the regular course of the legislative process; and (5) internal operating procedures.

*Des Moines Register v. Dwyer*, 542 N.W.2d 491, 498 (Iowa 1996) (citations and internal quotations omitted); *see also Progress Missouri, Inc. v. Missouri Senate*, 494 S.W.3d 1, 6 (Mo. App. W.D. 2016) (rejecting narrow interpretation of rules of proceeding).

The foregoing authority supports the principle that, in the very same way that the Judiciary, pursuant to its constitutional authority, may independently adopt its own rules of proceedings to encompass all aspects of conduct within the courts, so too may the legislature, pursuant to its own explicit constitutional authority, adopt its own rules of proceedings which encompass all aspects of conduct within its chambers. When each branch of government exercises its constitutional rulemaking authority over its “inherent and internal affairs”, such action is not reviewable by the other branch. *State v. LaFrance*, 124 N.H. at 181.

The Defendant does not dispute this Court’s role as the final arbiter of the constitution. *See Baines v. N.H. Senate President*, 152 N.H. 124, 129 (2005); *see also State v. LaFrance*, 124 N.H. at 177 (“Any 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.”) (emphasis added). However, the Defendant disagrees with Plaintiffs’ assertion that this Court must review the constitutionality of House Rule 63 in this particular case because the legislature has not “stepped beyond its bounds.” The Defendant believes that this case is an instance where it is appropriate to give due deference to a coequal branch of government which is “functioning within constitutional constraints” *Baines* 152 N.H. at 129, *quoting Consumer Party of Pennsylvania v. Comm.*, 507 A.2d 323, 333 (Pa. 1986). By declining to exercise subject matter jurisdiction in this case, the Judiciary would not be “deliberately ignor[ing] a clear constitutional violation”. *Id.* Rather, the Defendant believes that the Superior Court, consistent with principles of separation of powers, properly declined to exercise subject matter jurisdiction in this case in light of the textually demonstrable commitment of the House to establish its own rules of proceedings. *See Union Leader Corp. v. Chandler*, 119 N.H. 442, 445 (1979) (House of Representatives, as a separate and coequal branch of

government, is constitutionally authorized to promulgate its own rules consistent with other provisions of N.H. Constitution).

The Defendant does not foreclose the possibility that the case may arise where the legislature acts outside the scope of its constitutional authority or “steps beyond its bounds”; in that instance, the Defendant submits that it is properly within the purview of the Judiciary to exercise its constitutional authority. However, this is not that case. This Court has acknowledged that the separation of powers contained in Part I, Article 37 is a “provision of interrelation which contemplates no absolute fixation and rigidity of powers between the three great departments of government.” *State v. Addison*, 165 N.H. 381, 628-629 (2013) (citations and internal quotations omitted). “[T]he three branches of government, while distinct, must move in concert whenever possible, as the practical and efficient operation of government is not served by the erection of impenetrable barriers between the branches.” *Id.* (citations and internal quotations omitted). The Defendant does not believe that this Court would avoid its constitutional duty in upholding the dismissal of this case; to the contrary, the Defendant believe that this Court would be acting “consistent with that chain of connection that binds the whole fabric of the Constitution in one indissoluble bond of union and amity.” *See* N.H. Const. pt. I, art. 37.

**3. The purported constitutional issues presented in this case do not merit judicial review of a fundamentally political dispute.**

In order to persuade this Court to disregard its well-established doctrine of nonjusticiability, the Plaintiffs have made the conclusory argument that House Rule 63 violates Part I, Article 2-a of the New Hampshire Constitution, as well as other various provisions. But Plaintiffs’ arguments fail to overcome even the most basic burden inherent in any constitutional challenge to a legislative act; as this Court has stated on numerous occasions:

In reviewing a legislative act, we presume it to be constitutional and will not declare it invalid except upon inescapable grounds. This means that we will not hold a statute to be unconstitutional unless a clear and substantial conflict exists between it and the constitution. It also means that [w]hen doubts exist as to the constitutionality of a statute, those doubts must be resolved in favor of its constitutionality. The party challenging a statute's constitutionality bears the burden of proof.

*New Hampshire Health Care Ass'n. v Governor*, 161 N.H. 378, 385 (2011) (citations and internal quotations omitted). Furthermore, this Court's doctrine of constitutional avoidance favors, whenever reasonably possible, the construction of a statute or legislative enactment so as to avoid bringing it into conflict with the constitution. *State v. Paul*, 167 N.H. 39, 44-45 (2014); *State v. Smagula*, 117 N.H. 663, 666 (1977) ("It is a basic principle of statutory construction that a legislative enactment will be construed to avoid conflict with constitutional rights wherever reasonably possible.")

Plaintiffs base their conclusion upon an unsupported reading of the standard of review and the nature of the right granted by Part I, Article 2-a of the New Hampshire Constitution. See *Bleiler v. Chief, Dover Police Department*, 155 N.H. 693, 700 (2007) (holding that "reasonableness" is proper standard of review under pt. 1, art. 2-a). In fact, both state and federal authority squarely support the position that House Rule 63 merely imposes a reasonable restriction on deadly weapons in the House chamber. See *Bleiler v. Chief, Dover Police Department*, 155 N.H. at 699-700 (legislature's authority to impose reasonable restrictions on firearms); *University System of New Hampshire v. Jardis*, 2012 WL 254820 Grafton County Superior Court, No. 11-C-553 (January 9, 2012) (Order, Vaughan, J.) (finding university system firearm policy constitutional under both state and federal constitution); *District of Columbia v. Heller*, 554 U.S. 570, 626-

627 and n.26 (2008) (laws forbidding the carrying of firearms in government buildings are “presumptively lawful regulatory measures”).

Plaintiffs’ remaining constitutional arguments revolve around assorted, hypothetical violations of the New Hampshire Constitution which this Court should disregard as nothing more than “bare assertions” and a “mere laundry list of complaints” which lack a developed a legal argument. *See State v. Lilley*, 171 N.H. 766, 782-783 (2019). “[O]ff-hand invocations of the State Constitution that are supported by neither argument nor authority warrant no consideration.” *State v. Barr*, \_\_\_ N.H. \_\_\_, 2019 WL 6255853 at \*3.

Plaintiffs’ theoretical assertion of unconstitutionality is an inadequate basis for overcoming this Court’s time-honored doctrine of nonjusticiability. Indeed, this case presents a “political question” in the broadest sense of the term: a version of House Rule 63 stood unchallenged for nearly 40 years; it is only within the past ten years that it has become a political issue, changing back and forth whenever a new political party comes to power. This Court need not exercise jurisdiction over the Plaintiffs’ political grievances nor become embroiled in an essentially partisan, political debate. *See, e.g., Rucho v. Common Cause*, 588 U.S. \_\_\_, 139 S.Ct. 2484 (2019).

### **CONCLUSION**

For the foregoing reasons, the Defendant respectfully requests that this Court affirm the Superior Court’s dismissal of this case as nonjusticiable for lack of subject matter jurisdiction.

Respectfully submitted,

SPEAKER OF THE HOUSE OF  
REPRESENTATIVES

By his attorney,

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### **CERTIFICATE OF SERVICE**

I hereby certify that pursuant to Supreme Court Rule 26 (7) a copy of this brief was sent to counsel of record Dan Hynes, Esq. through the Judicial Branch's e-filing system.

Date: December 6, 2019

/s/ James S. Cianci  
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### **CERTIFICATE OF COMPLIANCE**

I hereby certify that pursuant to Supreme Court Rule 16 (11) this brief contains approximately 3,800 words. I have relied on the word count of the computer program used to prepare this brief.

Date: December 6, 2019

/s/ James S. Cianci  
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