

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT**

No. 2020-0414

**Request for an Opinion of the Justices (Quorum under Part II, Article 20)
MEMORANDUM OF LAW OF REPRESENTATIVE LEE OXENHAM**

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NOW COMES Representative Lee Oxenham,¹ by and through counsel, who respectfully submits this memorandum of law regarding the New Hampshire House of Representatives’ constitutional authority to hold and exercise legislative powers at a remote session.

INTRODUCTION

On September 16, 2020, the New Hampshire House of Representatives (“House”) requested an opinion of the justices pursuant to Part II, Article 74 of the New Hampshire Constitution on the following question of law: Would holding a session of the New Hampshire House of Representatives remotely, either wholly or in part, whereby a quorum could be determined electronically, violate Part II, Article 20 of the New Hampshire Constitution?

The Court should note that holding remote sessions would allow the House to better protect public health—not just the health of its individual members—during the ongoing COVID-19 pandemic. Holding in-person House sessions during the current crisis poses a clear risk of increasing infection rates throughout the State. Having hundreds of representatives assemble in person risks needlessly exposing House members as well as administrative and security staff to attendees who may be pre-symptomatic carriers.² Even more importantly, the subsequent return of potentially infected House

¹ Representative Oxenham represents Sullivan District 1 and is the Clerk of the House Committee on Science, Technology and Energy.

² Multiple studies have found that persons infected with SARS-CoV-2 (the virus that causes COVID-19) can infect others before they experience symptoms. *Transmission of*

members to virtually every community in the state would risk accelerating the spread of COVID-19 throughout New Hampshire.

However, if Part II, Article 20 (“Article 20”) allows the House to hold remote sessions, the House could eliminate these risks while continuing to exercise its legislative powers. Ultimately then, the House’s question concerns to what extent, if any, Article 20 forces it to choose between protecting New Hampshire’s citizens and serving them as a functional legislative body during an ongoing public health crisis.

SUMMARY OF THE ARGUMENT

The Court should answer the House’s question in the negative. A close reading of Article 20’s text shows that it does not require the House to assemble in person to either achieve a quorum or exercise legislative powers. As such, nothing in Article 20 prohibits the House from holding a remote session. Furthermore, any contrary interpretation would require reading Article 20 inconsistently with Part II, Article 22 (“Article 22”), which expressly grants the House the power to determine the rules that govern its own proceedings. Lastly, the historical context in which New Hampshire adopted Article 20 indicates that its drafters never intended to prevent the House from modifying its legislative procedures to help limit the spread of a deadly pandemic. Holding a remote House session would therefore not violate Article 20.

Nothing in Article 20’s text requires House members to be in the same physical location in order for the House to achieve a quorum. Article 20’s first clause simply provides that “[a] majority of the members of the house of representatives shall be a quorum for doing business.” N.H. CONST. pt. II, art. 20. It does not prescribe any specific procedure the House must follow in assembling the necessary majority of members to render the resulting quorum valid. The House can therefore achieve a valid

SARS-CoV-2: Implications for Infection Prevention Precautions, WORLD HEALTH ORG. (July 9, 2020), <https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions>.

quorum by electronically verifying that a majority of its members are participating in a remote session without violating Article 20.

The text of Article 20 likewise allows the House to exercise its legislative powers at a remote session. The only part of Article 20's text that might indicate otherwise is its use of the term "present" in its second clause. Specifically, Article 20's second clause provides that "when less than two-thirds of the representatives elected shall be present" the House can only pass legislation with the assent of at least two-thirds of the representatives who are present. *Id.* That logically precludes the House from exercising its legislative powers unless at least some of its members are "present." However, both the meaning the word "present" had to Article 20's drafters and the context in which they used the term demonstrate that here "present" means "not absent." The second clause of Article 20 thus simply requires a supermajority vote to pass legislation when more than a third of the House's elected members are absent from a session. It does not mandate that the House must meet in person to exercise its legislative powers.

Furthermore, Article 22 implicitly authorizes the House to hold remote sessions. Specifically, Article 22 grants the House the power to determine its own rules of proceedings, which includes the power to determine the procedures by which it votes on legislation. N.H. CONST. pt. II, art. 22. That in turn includes the power to adopt a procedure of voting on legislation via a remote session. Any contrary interpretation of Article 22 would be inconsistent with one of its purposes: enabling the House to make necessary and proper changes to its procedures in light of unforeseen exigencies. Reading Article 20 in conjunction with Article 22 thus necessitates the conclusion that Article 20 does not prohibit remote sessions.

Finally, the historical context of recurrent and devastating smallpox epidemics in which New Hampshire adopted Article 20 also indicates that its drafters never intended to force the House to hold in-person sessions. For 18th century Americans, smallpox outbreaks were a constant threat that could be more terrifying than war. As such, they used all available means to prevent and contain them. Moreover, the outbreak of the Great Smallpox Epidemic in 1775 compromised both the security and war-fighting

capabilities of the New England colonies during the initial phase of the Revolutionary War. Thus, Article 20's drafters were vividly aware of the dangers of infectious disease, and had direct experience of how an epidemic undermined New Hampshire's struggle for representative self-government. It therefore strains credulity to suppose the drafters ever intended to rigidly condition the House's ability to exercise its hard-won legislative powers on following a procedure that needlessly risks spreading a deadly contagion during a pandemic.

For these reasons, the House can hold a remote session without violating Article 20. The Court should therefore answer the House's question in the negative.

ARGUMENT

I. The Text of Article 20 Does Not Require the House to Assemble in the Same Physical Location in Order to Achieve a Quorum or Exercise Legislative Powers.

Nothing in Article 20's text requires the members of the House to be in the same physical location in order to achieve a quorum. The only potential reference to House members meeting in person in Article 20 occurs in its second clause—which does not address quorum requirements. That clause provides that “when less than two-thirds of the representatives elected shall be present” the House needs a supermajority of the representatives who are present to pass legislation. N.H. CONST. pt. 2, art. 20. Though this clause logically precludes the House from exercising legislative powers unless some of its members are “present,” both the contemporaneous definition of “present” and the surrounding context show that Article 20's drafters used “present” merely as a synonym for “not absent.” As such, nothing in Article 20's text requires the House to assemble together in the same physical location to achieve a quorum or exercise legislative powers. The House can therefore hold a remote session without violating Article 20.

A. The Plain Text of Article 20 Contains No Requirement that the House Assemble in a Single Physical Location in Order to Achieve a Quorum.

The first clause of Article 20 provides that the House needs one and one thing only to achieve a quorum: a majority of its members. *See* N.H. CONST. pt. II, art. 20 (“A

majority of the members of the house of representatives shall be a quorum for doing business”). It places no limitation on how the House may choose to assemble the necessary majority, let alone mandate that the House must meet in the same physical location in order to achieve a quorum. As such, if the House electronically verifies that a majority of its members are participating in a remote session, that remote session has a valid quorum for Article 20 purposes.

Indeed, the only potential reference Article 20 contains to representatives meeting in the same physical location occurs in Article 20’s second clause, where it uses the word “present.” *See id.* (“But when less than two-thirds of the representatives elected shall be *present*, the assent of two-thirds of those members shall be necessary to render their acts and proceedings valid.” (emphasis added)). But the second clause of Article 20 addresses an issue distinct from the quorum requirement—specifically when the House needs a supermajority of the representatives who are “present” at a session to pass legislation. *Id.* In other words, the second clause determines when House votes are valid under Article 20, and does not affect whether the House has a valid quorum under Article 20.

Thus, even if the word “present” in the second clause meant “together at the same physical location,” the second clause would still not require a majority of representatives to meet in the same physical location in order for the House to achieve a quorum. It therefore follows that the House can achieve a valid quorum at a remote session without violating Article 20, regardless of what the term “present” means in the article’s second clause.

B. The Word “Present” in Article 20’s Second Clause Simply Means “Not Absent” and Therefore Article 20 Does Not Require the House to Assemble in One Physical Location in Order to Exercise Its Legislative Powers.

Though the text of Article 20 does not expressly require members to be “present” in order for the House to achieve a quorum, its text logically requires at least some House members to be “present” in order for the House to exercise legislative powers. Specifically, Article 20’s second clause provides that when less than two-thirds of all elected representatives are present, the House’s acts are only valid if at least two-thirds of

the representatives that are present assent to them. N.H. CONST. pt. II, art. 20. The House can therefore only validly exercise its legislative powers if either (1) more than two-thirds of all its elected members are present or (2) at least two-thirds of the members that are present agree to do so. Either way, at least some members of the House must be “present” within the meaning of Article 20 in order for the House to exercise its legislative powers. If Article 20 used “present” in the sense of “together at the same physical location,” Article 20 would bar the legislature from exercising any legislative power at a wholly remote session, even if the remote session satisfied Article 20’s quorum requirement. However, as shown below, Article 20 only uses the word “present” to mean “not absent” and thus does not prohibit the House from exercising its legislative powers at a remote session.

When determining the meaning of constitutional language, this Court looks to the meaning given to the words in question at the time of the relevant provision’s adoption. *See Baines v. N.H. Senate President*, 152 N.H. 124, 133-34, 876 A.2d 768 (2005) (quoting *Petition of Below*, 151 N.H. 135, 139, 855 A.2d 459 (2004)) (“The language used by the people in the great paramount law which controls the legislature . . . is to be always understood and explained in that sense in which it was used at the time when the constitution and the laws were adopted.”). In doing so, “the court endeavors ‘to place itself as nearly as possible in the situation of the parties at the time the instrument was made, that it may gather their intention from the language used.’” *Id.* at 133 (quoting *Petition of Below*, 151 N.H. at 139, 855 A.2d 459). Since New Hampshire adopted Article 20 in 1784 the Court should consider what the word “present” meant in the context of late 18th century America. *State Constitution – House of Representatives*, NH.GOV, <https://www.nh.gov/glance/house.htm> (last visited Oct. 6, 2020).

In the second half of the 18th century, when used as an adjective “present” meant “not absent; being face to face; being at hand.”³ Samuel Johnson, *A Dictionary of the*

³ Note that this quotation has been altered to match modern orthography by using “s” where Johnson used “ſ” for ease of reading.

English Language: In Which the Words Are Deduced from Their Originals and Illustrated in Their Different Significations by Examples from the Best Writers. To Which Are Prefixed, a History of the Language, and an English Grammar. 1560 (photo. reprt. 1967) (London, J&P Knapton, 1755), <https://johnsonsdictionaryonline.com/page-view/?i=1560>. Thus at the time of Article 20’s adoption, “present” could mean “being face to face,” that is, being in the same physical location, or “not absent.” As such, the mention of “representatives . . . present” in Article 20 might refer to representatives that are meeting face to face or might simply refer to all representatives that are not absent from the session.

However, the fact that Article 20’s first clause does not explicitly require House members to be present in order to achieve a quorum indicates that the article’s drafters only intended “present” to mean “not absent.” Achieving a quorum necessarily requires the members of a body constituting the quorum to not be absent. Thus, the drafters of Article 20 did not need to use any additional language to convey the requirement that the House can only have a quorum if less than half its members are absent. If they instead wanted to impose a requirement that the House must assemble in a single physical location to achieve a quorum, then Article 20’s drafters would have needed to use additional language—which they did not.

Yet, as noted above, if the word “present” in Article 20’s second clause meant “together at the same physical location” or “being face to face” then Article 20 would require House members to assemble at a physical location in order to pass any bill or resolution. Article 20 would thus bizarrely allow the House to achieve a quorum in a situation in which it simultaneously barred the House from exercising any legislative powers. The absurdity of that result counsels against interpreting “present” as meaning “being face to face.” *Cf. State v. Gallagher*, 157 N.H. 421, 423, 951 A.2d 130 (2008) (quoting *State v. Warren*, 147 N.H. 567, 568, 794 A.2d 790 (2002)) (“We do not presume that the legislature would pass an act leading to an absurd result, however, and we will consider other indicia of legislative intent where the literal reading of a statutory term would compel an absurd result.”). If the drafters of Article 20 intended to require the

House to meet in person to exercise its powers, they most likely would have made that a precondition to achieving a quorum as well.

But if “present” merely means “not absent” the second clause would not prohibit the House from exercising legislative powers when it has a valid quorum and the constitutionally required number of votes to pass legislation. It would simply require that “when less than two-thirds of the representatives elected [are not absent], the assent of two-thirds of those members [that are not absent] shall be necessary to render their acts and proceedings valid.” N.H CONST. pt. II, art. 20. In other words, when more than one-third of all elected House members are absent from a session, the House can only pass legislation by a two-thirds supermajority vote of those in attendance. This is a non-absurd interpretation of Article 20’s second clause that is consistent with the late 18th century definition of “present.” Johnson, *supra*, at 1560. That indicates that this is also the correct interpretation of Article 20’s second clause. As nothing in this interpretation requires the House to assemble in the same physical location to exercise legislative powers, Article 20’s second clause does not prohibit the House from exercising its legislative powers at a remote session.

The Court should also note that Article 20’s late 18th century drafters could not have foreseen how using the word “present” might imply additional legal constraints in an age of teleconferences and virtual meetings. No form of modern telecommunications technology existed at the time. To its drafters, the plain language of Article 20 would therefore not have suggested any constitutional limitations on the practical methods the House might use to vote on legislation. This strongly implies that they never intended Article 20 to impose any such limitations. Rather, they only intended Article 20 to (1) specify a quorum requirement for the House and (2) require a supermajority of House members attending a session to assent to any legislative action when more than a third of all elected members were absent. *Cf. Opinion of the Justices*, 121 N.H. 552, 560, 431 A.2d 783 (1981) (interpreting Articles 20 and 37 of Part II of the State Constitution as barring the legislature from delegating lawmaking authority to smaller legislative bodies).

As such, the Court should not read too much into the fact that one of the literal meanings of “present” in 1784 was “being face to face.” Johnson, *supra*, at 1560. Indeed, the past practice of this Court has been to disfavor literal readings of constitutional language that ignore its purpose and intent. *See, e.g., Petition of Below*, 151 N.H. 135, 147, 855 A.2d 459 (2004) (“While we acknowledge that a literal reading of Part II, Articles 9, 11 and 26 supports the petitioners' argument, it ignores the purpose and intent of requiring decennial reapportionment, which is to ensure substantially equal representation based upon population.”). The Court should follow that precedent here, especially since it can opt for another literal interpretation of “present”—that of simply meaning “not absent”—which is consistent with 18th century usage and that does not give Article 20 a meaning its drafters could scarcely have intended. Johnson, *supra*, at 1560.

For these reasons, the text of Article 20 does not require the House to assemble in person to either achieve a valid quorum or exercise its legislative powers. The text of Article 20 therefore does not prohibit the House from holding a remote session, either wholly or in part.

II. Article 22’s Express Grant to the House of the Power to Determine its Own Rules of Proceedings Shows Article 20 Was Not Intended to Limit the Methods by Which the House May Choose to Assemble or Exercise Its Legislative Powers.

When appropriate, different articles of the State Constitution “must be read in conjunction with” each other. *Associated Press v. State of N.H.*, 153 N.H. 120, 124, 888 A.2d 1236 (2005). The Court should therefore note that reading Article 20 in conjunction with Article 22 further indicates that the former article was never intended to limit the practical means through which the House could achieve a quorum or exercise its legislative powers. Article 20 therefore does not limit the House’s ability to exercise its legislative powers at a remote session to any greater extent than it does at an in-person session.

Article 22 expressly provides that “[t]he house of representatives shall . . . settle the rules of proceedings in their own house” N.H. CONST. pt. II, art. 22. Article 22

thereby conveys “a continuous power absolute” to the House to determine the rules that govern its proceedings. *Hughes v. Speaker, N.H. House of Representatives*, 152 N.H. 276, 284, 876 A.2d 736 (2005) (quoting *Paisner v. Attorney General*, 390 Mass. 593, 458 N.E.2d 734, 739 (1983)). That includes the power to determine how the House votes on legislation and how the House assembles for the purpose of voting on legislation. See *Baines*, 152 N.H. at 130, 876 A.2d 768 (“The authority to adopt procedural rules for passing legislation is demonstrably committed to the legislative branch by Part II, Articles 22 and 37 of the State Constitution.”). That naturally implies that the House has the power to adopt rules allowing it to assemble, deliberate, and vote on legislation at a remote session.

Granted, this authority does not allow the House to ignore other constitutional provisions governing the legislative process. See *Seabrook Citizens v. Yankee Greyhound Racing, Inc.*, 123 N.H. 103, 110, 456 A.2d 973 (1983) (“[S]ubject to certain constitutional provisions such as the quorum requirements of part II, articles 20 and 37 . . . it remains for the legislature to establish the rules and procedures applicable to the legislative process.”). But past rulings of this Court show that Article 22 gives the House broad authority to choose the means by which it satisfies such constitutional requirements. For instance, the Court has held that Article 22 gives the House the authority to determine how it can arrive at the three-fifths vote required to propose a constitutional amendment pursuant to Part II, Article 100 of the State Constitution. *Bednar v. King*, 110 N.H. 475, 476-77, 272 A.2d 616 (1970). In other words, Article 22 grants the House the power to determine *how* it can satisfy a constitutionally mandatory voting threshold. By analogy, Article 22 likewise grants the House the authority to determine *how* it can satisfy Article 20’s quorum requirement and its two-thirds voting requirement when the latter applies.

Indeed, barring the House from exercising its legislative powers except when it is able to meet in person would contradict the purpose and intent of Article 22. Article 22 was meant to give the House “full authority to establish all rules, regulations and laws necessary and proper to carry out its constitutional mandate.” *Horton v. McLaughlin*, 149

N.H. 141, 144, 821 A.2d 947 (2003) (citing N.H. CONST. pt. II, art. 22). Requiring the House to meet in person in order to pass legislation would unduly interfere with the House’s ability to carry out its constitutional functions during times—such as the present—when holding sessions in person is either impractical or inadvisable. Presumably, part of the reason Article 22 gives the House “a continuous power absolute” to alter its own rules of proceedings is to ensure the House can continue to effectively perform its constitutional duties during unforeseen exigencies. *Hughes*, 152 N.H. at 284, 876 A.2d 736 (quoting *Paisner*, 390 Mass. 593, 458 N.E.2d at 739). Prohibiting the House from implementing operational changes to its proceedings that it deems necessary and proper—such as holding remote sessions during a pandemic—would therefore infringe upon its Article 22 powers.

Thus, reading Article 20 consistently with Article 22 requires the conclusion that the State Constitution allows the House to hold a remote session. The Court should therefore not read Article 20 as requiring the House to meet in person in order to achieve a quorum or validly exercise its legislative powers.

III. Their Experience of Smallpox Epidemics Indicates Article 20’s Drafters Never Intended to Force the House to Choose Between Limiting the Spread of a Deadly Contagion and Exercising Hard-Won Powers of Representative Self-Government.

When this Court interprets the State Constitution, it “endeavors ‘to place itself as nearly as possible in the situation of the parties at the time the instrument was made, that it may gather their intention from the language used, viewed in the light of the surrounding circumstances.’” *Baines*, 152 N.H. at 133, 876 A.2d 768 (quoting *Petition of Below*, 151 N.H. at 139, 855 A.2d 459). The Court should therefore consider the history of devastating smallpox epidemics New Englanders endured during the period that directly preceded Article 20’s adoption in 1784. Ruling that Article 20 prohibits remote sessions would force the House to run an otherwise avoidable risk of spreading a deadly contagion in order to exercise fundamental powers of representative self-government. The history of smallpox epidemics in 18th century America thus has a direct bearing on

whether such an unfortunate result would be consistent with the purpose and intent of Article 20.

That history shows that Article 20's drafters almost certainly never intended to force the House to choose between protecting public health and conducting the business of representative self-government during a pandemic. In the 18th century, Americans "universally feared" smallpox and therefore used all available means to contain its spread. Ann M. Becker, *Smallpox in Washington's Army: Strategic Implications of the Disease During the American Revolutionary War*, 68 J. Mil. Hist. 381, 383, 385 (2004). Furthermore, a smallpox outbreak at the beginning of the Revolutionary War placed New Hampshire in a strategically compromised position that endangered its continued existence as a self-governing political entity. *See id.* at 404, 409-410, 412, 419-421, 430 (discussing how smallpox severely inhibited the ability of the Continental Army and the militias to recruit and retain soldiers, particularly in New England, as well as how smallpox resulted in the Canadian Campaign's failure to prevent British forces from launching attacks from the north). Thus, Article 20's drafters directly experienced how an infectious and deadly disease had terrifyingly threatened both public health and New Hampshire's ability to secure the right to representative self-government.

It therefore defies reason to suppose its drafters meant for Article 20 to condition the exercise of that right on the House following a procedure that needlessly risks spreading a deadly contagion. Consequently, forcing the House to assemble in person in order to achieve a quorum or exercise legislative powers cannot be part of Article 20's intended purpose.

A. Their Experience of Smallpox Epidemics Shows that Article 20's Drafters Never Intended to Prevent the House from Using Reasonable Disease Control Measures During a Deadly Pandemic.

During the late colonial and revolutionary periods, "[s]mallpox epidemics were recurrent, devastating, and frequent" as well as "universally feared" in North America. Becker, 68 J. Mil. Hist. at 383, 385. Indeed, the Great Smallpox Epidemic ravaged the entire North American continent from 1775 to 1782, ending only a mere two years before

Article 20's adoption. Elizabeth Fenn, *The Great Smallpox Epidemic*, HIST. TODAY (Aug. 8, 2003), <https://www.historytoday.com/archive/great-smallpox-epidemic>. The horrors of a widespread, deadly infectious disease were recent memories for the drafters of Article 20. They were not individuals who would take a pandemic lightly, nor would they wish to prioritize procedural technicalities over measures to control the spread of a deadly disease.

For late 18th century Americans, smallpox was a threat that could be more terrifying than war. Its "victims suffered in agony as the disease progressed" and could experience grotesque pitting of their skin, oozing pustules, cracking sores, severe scarring that closed up their nostrils, as well as outright blindness. Becker, 68 J. Mil. Hist. at 384-85. Mortality rates for the disease could be as high as 50%. *Id.* at 385. Those lucky enough to survive were often left permanently scarred, disfigured, and socially ostracized. *Id.* at 384-85. Referring to smallpox, Abigail Adams wrote that "[t]he desolation of War is not so distressing as the Havock made by the pestilence." *Id.* at 397 (citation omitted). As such, smallpox was a "'terrifying scourge' for American colonists in the same way the plague was for Europeans." *Id.* at 383 (citation omitted).

In the 18th century Americans "tried every means available to prevent outbreaks of smallpox." *Id.* at 385. Though at the time medical science did not fully understand how smallpox was transmitted, 18th century Americans "understood that exposure to the disease led to infection." *Id.* More specifically, they "knew that smallpox was communicated between individuals and could also be contracted from inanimate objects used by those suffering from the illness." *Id.* Consequently, they employed isolation measures, quarantines and individual efforts to avoid areas where the disease was prevalent to control its spread. *Id.* at 384-85, 402 n.76.

Article 20's drafters would therefore have appreciated the necessity of limiting in-person contact during a pandemic caused by a deadly disease capable of pre-symptomatic transmission. This would be especially true in the case of a disease that has killed over 200,000 Americans and will probably kill 180,000 more in the next three months alone. Bill Chappel, *'Enormous And Tragic': U.S. Has Lost More than 200,000 People to*

COVID-19, NPR (Sept. 22, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/09/22/911934489/enormous-and-tragic-u-s-has-lost-more-than-200-000-people-to-covid-19>. Article 20’s drafters had just lived through the horrors of a continent-wide epidemic caused by a disease they were accustomed to using “*every means available*” to control. Becker, 68 J. Mil. Hist. at 385 (emphasis added). The idea that such individuals intended Article 20 to force the House to choose between implementing a reasonable measure to control a deadly pandemic and exercising the powers of representative self-government is simply not credible.

B. The Threat Smallpox Posed to the Security of New Hampshire During the Revolutionary War Further Indicates that Article 20’s Drafters Did Not Intend Article 20 to Limit the House’s Ability to Respond to a Pandemic.

The Great Smallpox Epidemic of 1775-1782 did not just threaten the lives of individual Americans. It also compromised the ability of Americans in general and New Englanders in particular to field effective military forces during the Revolutionary War. Becker, 68 J. Mil. Hist. at 383, 403, 410, 421, 429-430. Widespread smallpox among American forces was likely the main reason for the failure of the 1775-76 Canadian Campaign. *Id.* at 382, 419-420, 429-430. That smallpox-induced failure left the American colonies and soon-to-be states vulnerable to a British attack from the north—particularly those like New Hampshire that directly bordered Canada. Thus, Article 20’s drafters had lived through a time in which a deadly epidemic endangered the continued existence of New Hampshire as a self-governing political entity. That shared experience makes it all the less likely that Article 20’s drafters intended to limit the House’s ability to safely exercise its legislative powers during a pandemic.

Smallpox severely reduced the military effectiveness of Continental Army and militia forces during the initial years of the Revolutionary War. 18th century Americans—and New Englanders in particular—were extremely susceptible to smallpox due to

their “lack of regular exposure to the disease as children.” *Id.* at 394.⁴ Fear of smallpox among the vulnerable American population actively discouraged enlistment and re-enlistment while encouraging desertion. *Id.* at 383, 403, 421. Smallpox outbreaks among the highly susceptible American forces also severely reduced the number of serving soldiers who could actually fight. *Id.* at 415-16, 419-420. For example, by Spring 1776, smallpox had incapacitated so many troops serving in the Canadian Campaign that it rendered the invasion force incapable “of meaningful engagement with the enemy.” *Id.* at 416. Indeed, smallpox was likely the primary cause of the campaign’s failure. *Id.* at 382, 430.

The smallpox-induced failure of the Canadian Campaign was a severe blow to the Revolution and it left New England colonies like New Hampshire in a strategically precarious position. The Continental Congress had ordered the invasion of Canada in June 1775, believing that including Canada in the Revolution was “strategically vital both to generate support and prevent a devastating attack from the north . . . on the newly organized American colonies.” *Id.* at 404. The campaign met with initial success, and by November the invading American forces had captured both St. Johns and Montreal and reached Quebec. *Id.* at 405. Shortly thereafter, however, the American army was

⁴ Unlike in the American colonies where smallpox recurred periodically in epidemics, “in Europe it was primarily an endemic disease generally suffered in childhood.” Becker, 68 *J. Mil. Hist.* at 383. Consequently, most European adults had previous exposure to smallpox as children and thus higher rates of immunity than Americans. *Id.* at 389. This included the majority of British troops deployed to America during the Revolutionary War, who were further protected by the British Army’s practice of routine inoculation. *Id.* As a result, American soldiers and potential recruits were far more susceptible to smallpox than their British counterparts. *Id.* The New England population had particularly low rates of immunity because New Englanders tended to live in isolated towns, which inhibited the spread of and exposure to smallpox outside of epidemics. *Id.* at 383, n. 4.

exposed to smallpox and by December was suffering from “a full blown epidemic” that would ultimately force it to retreat, leaving Canada as a staging ground for future British attacks. *Id.* at 405, 407, 421, 430.⁵

The smallpox epidemic destroyed the invasion force’s ability to function as an army. *Id.* at 414, 421. It directly incapacitated many soldiers, made it difficult to recruit reinforcements, and caused most of the New Englanders serving in the army to refuse to re-enlist beyond the end of 1775. *Id.* at 410, 412. These problems directly led to General Richard Montgomery’s decision to assault Quebec with insufficient forces on the night of December 30-31. *Id.* at 410-12. The assault proved to be a military disaster that further degraded the American army’s strength. *Id.* at 413. Smallpox also destroyed the army’s ability to recover from the defeat, as most of the few new recruits and reinforcements the army could muster became sick almost as soon as they arrived in camp. *Id.* The result was that in early 1776 only about twenty to twenty-five percent of the American soldiers serving in Canada were fit for combat duty. *See id.* at 415 (noting that only 700 to 800 of the 2,700 to 2,800 Americans besieging Quebec and only 500 to 700 of the 3,200 Americans occupying Montreal were likely capable of fighting). Once significant British reinforcements arrived in the spring, the smallpox-debilitated American forces had no choice but to retreat and abandon Canada. *Id.* at 417-18.

In addition to leaving New England colonies like New Hampshire vulnerable to an attack from the north, the smallpox-induced failure of the Canadian Campaign hindered their ability to muster additional forces. *Id.* at 421. These were not problems New England policymakers of the time took lightly. John Adams, recognizing that the disease

⁵ Smallpox was apparently present in Quebec at the time American forces arrived. Becker, 68 *J. Mil. Hist.* at 407. British biological warfare may have also caused or contributed to the high rate of smallpox infection in the American invasion force. *See id.* at 408 (“Evidence indicates that Sir Guy Carleton, military governor of Canada, ordered or condoned sending contagious victims of the disease into the enemy lines with the intention of infecting the American attackers.”).

was the reason for the American defeat in Canada, wrote that “[t]he small-pox is ten times more terrible than Britons, Canadians, and Indians together.” *Id.* at 420 (citation omitted). In a July 4, 1776 letter to George Washington, the Governor of Connecticut Jonathan Trumbull stated that:

The Retreat of the Northern Army and its present Situation, have spread a general Alarm. . . . The prevalence of the small pox among them [the troops] is every way unhappy; our people in General have not had this Distemper. Fear of the infection operates strongly to prevent Soldiers from engaging [sic] in the Service, and the Battalions ordered to be raised in this colony fill up slowly: are there no measures may be taken to remove the Impediment? May not the army soon be freed from that infection? Could any expedient be fallen upon that would afford probable hopes that this infection may be avoided?

Id. at 421 (citation omitted). In short, New England’s leaders were keenly aware of how an epidemic had ravaged their forces, left the region strategically vulnerable to attack, and undermined their ability to recruit additional troops.

These events were recent experiences for Article 20’s drafters when New Hampshire adopted the article in 1784. They had lived through a terrifying, seven year-long epidemic during a time of war. They had experienced infectious disease not just as a threat to public health, but as a threat to New Hampshire’s security and war-fighting capability during a struggle to secure their right to representative self-government. *Cf.* N.H. CONST. part I, art. 7 (“The people of this State have the sole and exclusive right of governing themselves as a free, sovereign, and independent State . . .”). To them, the necessity of using every available technical means to limit the spread of a deadly pandemic would have been self-evident. It is thus almost inconceivable that Article 20’s drafters intended to force a future House to choose between taking measures to control a pandemic and exercising the hard-won powers of representative self-government.

Requiring the House to meet in person to achieve a quorum or exercise legislative powers therefore cannot be part of Article 20's purpose or intent. This constitutes the final reason why the Court should rule that the House can hold and exercise legislative powers at a remote session without violating Article 20.

CONCLUSION

WHEREFORE, for the reasons stated above, the Court should rule that the House can hold a session remotely, either wholly or in part, without violating Article 20.

Accordingly, the Court should answer the question the House presented in the negative.

Respectfully submitted

REPRESENTATIVE LEE OXENHAM

By her attorney:

Dated: October 7, 2020

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CERTIFICATE OF SERVICE

I, Ian R. A. Oxenham, Esq., do hereby certify that on this date I caused a copy of the foregoing memorandum to be delivered to the New Hampshire House of Representatives and David Reyburn Coursin, the parties of record to this Request for an Advisory Opinion, via electronic service through the Court's electronic filing system.

Dated: October 7, 2020

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