THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Case No. 2021-0325

Daniel Richard

v.

Sherman Packard and Chuck Morse

MEMORANDUM OF LAW OF SENATOR PRESIDENT CHUCK MORSE

I. INTRODUCTION

Plaintiff;s Brief cites numerous constitutional provisions and makes a variety of incorrect assertions about their meanings. Despite the breadth of his argument, his claim boils down to a simple, narrow question: Does the right to petition in Part I, Art. 32 of the New Hampshire Constitution, require the President of the Senate or the Speaker of the House to take any affirmative action in response to a remonstrance that the plaintiff filed with the clerks of the two houses of the General Court? Petitioner's brief poses eight questions for the Court, only two of which are applicable. The plaintiff's questions asked:

> 5. Does the right under Art. 32, to assemble with the legislature to consult upon the common good still exist?
>
> 8. Does the right, under Art. 32, to request of the legislative body by way of petition or remonstrance to redress of [sic] wrongs done them and of the grievances they suffer still apply?

The answers to these questions are that Part I, Art. 32 does not provide a right for an individual citizen to "assemble with" the legislature, and that the right to petition still applies, just not in the way the plaintiff argues.

II. ARGUMENT

PART I, ARTICLE 32 OF THE NEW HAMPSHIRE CONSTITUTION DOES NOT REQUIRE THE PRESIDENT OF THE SENATE OR THE SPEAKER OF THE HOUSE TO ASSEMBLE THE SENATE AND HOUSE AS A COMMITTEE OF THE WHOLE TO CONSIDER THE PLAINTIFF'S REMONSTRANCE.

The plaintiff states that the question presented is whether Part I, Art. 32 "still applies." The answer to this question is simple: Part I, Art. 32 is the law of the land and "still applies," of course. But this answer to this "question presented" as identified by the plaintiff does not resolve the actual controversy here. The plaintiff asserts that his right to petition or remonstrate carries with it a corresponding requirement that the "the leaders of the legislature call for an assembly of the body as a whole, as 'only the legislature is delegated such authority' to hear and consider the remonstrances of the people to repeal unjust laws…" Plaintiff's Brief at 15. He further claims that he has a fundamental right to engage in speech and debate in the general court, pursuant to Part II, Art. 30, and that "[t]his is a positive right." Plaintiff's Brief at 28. Thus, the actual question posed is not whether the cited amendments "still apply," but rather, whether those (or any other) provisions of the New Hampshire Constitution vest the plaintiff with a right not only to petition the General Court, but also to require the President of the Senate and the Speaker of the House to gather the bodies in joint assembly as a committee of the whole to consider his remonstrance and to allow him to speak to the General Court thus assembled as to the merits of his petition. Furthermore, the plaintiff asserts a right to have this court issue a writ of mandamus ordering the Senate President and Speaker of the House to formally introduce his petition, to give him a hearing of the "assembly of the body of the whole," and to permit him to speak to his petition. Thus, the subsidiary question presented is whether this Court has authority to issue a *mandamus* ordering the President and Speaker to call the Senate and the House into joint

assembly as a committee of the whole for the purpose of considering the plaintiff's remonstrance. The answer to each of these questions is resoundingly, "no."

The plaintiff argues that the general court is required to apply the same practices to his remonstrance as historical sources suggest were common at the time Part I, Article 32 was adopted in 1784. In support of this claim, plaintiff makes reference to several law review articles and some historical research. None of the sources cited establish that he is entitled to have a court issue a writ of mandamus against the Senate President. First, the plain meaning of the words found in Part I, Art. 32 do not establish that the President of the Senate and Speaker of the House have an obligation to convene the Senate and House of Representatives as an assembly of the whole to consider his remonstrance. Second, the structure and history of the Constitution of 1784, taken as a whole, reflects that newly added provisions granting express authority to the Senate and House to settle their own rules of proceeding reflect a break from the past practice that precludes the requested finding that the bodies are required to follow the pre-existing practice. Third, the plaintiff has failed to provide any authority supporting his claim that the historical practices surrounding the right to petition were considered mandatory by contemporary legislative bodies. Fourth, the plaintiff has failed to produce any judicial authority supporting his claim. Fifth, even if such a positive right existed (which it does not) the plaintiff has failed to meet his burden of establishing that he is entitled to the extraordinary relief of issuance of a writ of *mandamus* against the President and Speaker. Finally, the plaintiff did not develop his claim that the trial court was "politically biased" against him and his case, and therefore that claim is waived.

(1) The Plain Meaning Of Part I, Article 32 Does Not Entitle The Plaintiff To Address An Assembly Of The Body As A Whole Called To Hear And Consider His Remonstrance, Nor Does It Require The Senate President Or Speaker To Take Any Affirmative Action.

Analysis of a constitution claim must begin, as always, with the text of the provision at issue. When interpreting a constitutional provision, this Court "will look to its purpose and intent, bearing in mind that [it] will give the words in question the meaning they must be presumed to have had to the electorate when the vote was cast." *In re Below*, 151 N.H. 135, 139 (N.H.,2004). "The simplest and most obvious interpretation of the constitution, if sensible, is most likely that meant by the people in its adoption." *Carrigan v. New Hampshire Department of Health and Human Services*, 174 N.H. 362, ___ , 262 A.2d 388, 394 (2021).

Part I, Article 32 reads:

> **[Art.] 32. [Rights of Assembly, Instruction, and Petition.]** The People have a right, in an orderly and peaceable manner, to assemble and consult upon the common good, give instructions to their Representatives, and to request of the legislative body, by way of petition or remonstrance, redress of the wrongs done them, and of the grievances they suffer.

This provision provides three distinct rights: (1) the right of the People to assemble and consult upon the common good; (2) the right of the People to give instructions to their Representatives;[1] and (3) the right of the People to make requests of the legislative body, by way of petition or remonstrance. Notably, the words and structure of this provision mirror the orderly process by which citizens discuss their concerns about the common good, communicate with their Representatives, and ask for a specific form of relief.

The plaintiff's brief improperly combines these distinct and separate rights into what he argues is a right of the people to assemble and consult upon the common good *with their*

[1] The plaintiff spends several pages arguing that instructions given to representatives are mandatory and that the claimed-right to "instruct" legislators can be exercised "by one or many citizens." Plaintiff's Brief at 29. This issue is not properly before the Court, as the plaintiff has not clearly argued that he gave instructions to his Representative. However, even if it was, the notion that an individual, as opposed to a political subdivision, has authority to issue binding instructions to his or her representatives is ludicrous on its face, as it would permit any individual to overcome the will of the majority and fails to account for the possibility of contradictory instructions.

Representatives, and more to the point, *with "the legislative body."* See, Plaintiff's Brief at 30-31 (emphasis added). The plain meaning of the words used in the text and the manner in which they are used plainly indicates that the "assemble and consult" clause does not define the relationship between the "the People" and the "legislative body." The plaintiff provides no authority to the contrary.[2] Further, as recognized by the superior court, the express language of Part I, Article 32 protects the right "to request." It does not require any response and it most certainly does not permit an individual to require the Senate and the House to meet together in joint assembly to hear claims brought forward by individual citizens.

The meaning the words of this provision had to the people who adopted the Constitution can be discerned from contemporary dictionaries. Dr. Johnson's Dictionary, a widely used source for 18th century definitions, defines "petition" as a "request; intreaty; supplication; prayer." https://johnsonsdictionaryonline.com/views/search.php?term=remonstrance In its verb form, the word means, "to solicite; to supplicate." [sic]. "Remonstrance" is defined as "strong representation." https://johnsonsdictionaryonline.com/views/search.php?term=remonstrance The verb form of that word mean "to make a strong representation; to show reasons on any side in strong terms." Nothing in the contemporaneous usage of the words in 1784 suggests that the meaning and intent behind those words used goes beyond this "simplest and most obvious" meaning to include an implied right to require official action from the General Court. The simplest meaning is that the people have a right to petition. The words mean no more than that.

(2) The Structure Of The Constitution Of 1784, Taken As A Whole, Does Not Suggest That The Plaintiff Has A Right To A Hearing Before The Joint Assembly.

[2] Confusingly, the plaintiff argues that "the first four clauses are prefatory clauses," and then asserts that, "[t]he second prefatory clause…is a positive right." *Plaintiff's Brief* at 30-31. A "prefatory clause" is a statement that announces the purpose of an "operative clause" that follows. See generally, *District of Columbia v. Heller,* 554 U.S. 570, 577 (2008). It is unclear in the plaintiff's telling how a prefatory clause creates a substantive right.

The structure of the Constitution also indicates that no positive right exists to compel the hearing demanded by the plaintiff. "The constitution as it now stands is to be considered as a whole, as if each provision were enacted at one time. *Carrigan,* 292 A.2d at 394, (citing *Bd. Of Trustees, N.H. Judicial Ret. Plan v. Sec'y of State,* 161 N.H. 49, 53 (2010); *Thompson v. Kidder*, 74 N.H. 89, 91 (1906) ("The whole is to be considered, and the true meaning to be drawn from the consideration of every part.").

Reading the Constitution as a whole, it is clear that if the framers had intended to impose a mandatory obligation on the Senate and House to meet as an assembly of the whole, or to place affirmative obligations on it, they could have done so. They did not. The Constitution requires joint assemblies or affirmative or mandatory actions in several different articles. See: [Art.] 3. [General Court, When to Meet and Dissolve.]**;** [Art.] 8. [Open Sessions of Legislature.]; [Art.] 18. [Money Bills to Originate in House.]**;** [Art.] 24 [Journals and Laws to be Published; Yeas and Nayes; and Protests.]**;** [Art.] 61. [Vacancies, How Filled, if No Choice.]**;** [Art.] 67. [Election of Secretary and Treasurer.]. These provisions clearly reflect that if the drafters of the Constitution had intended to place a duty on the General Court to meet as a committee of the whole to address citizen petitions, they certainly could have done so. The absence of a provision requiring a joint assembly to address petitions and remonstrances stands in stark contrast to the provisions cited above. There is simply no basis to find that the intent of the drafters or of the citizens who approved the document was to create a right for a citizen to demand a joint assembly and a right to present his petition to the assembled body.

Reviewing the history of the constitution and its amendments is often instructive, and in so doing, it is the court's "duty ... 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." *In re Below*, 151 N.H. at 139 (quoting *Warburton v. Thomas,* 136 N.H. 383, 387 (1992)). The Constitution of 1776 said little about legislative procedure other than to require that acts or resolves must pass both houses and that money bills had to originate in the house. However, the Constitution of 1784 added Parts II, Article 22 and 37. Unlike the rewording of the "money bill" provision in Part 2, Article 18, which was reworded, "merely to make that [existing] provision more concise," *Baines v. Senate N.H. Senate President,* 152 N.H. 124, 134 (2005), the addition of Parts II, Article 22 and 37 added language concerning a subject completely unaddressed in the Constitution of 1776. These "textually demonstrable commitments to the House and Senate to adopt their own rules of proceeding," *Hughes v. Speaker of the New Hampshire House of Representatives,* 152 N.H. 276, 284 (2005)(quoting *Baines,* 152 N.H. at 130-31), by their plain meaning authorized the General Court to change existing procedure. At the very least, this clear grant of authority to the Senate and the House gave them the authority to make their own rules of proceeding and freed the bodies from whatever pre-existing practices were common at the time. The plaintiff's claim that the constitution provides him, as an individual, with an absolute right to address an assembly of both houses of the legislature flies in the face of the right to each body to determine its own rules of proceeding and should be rejected.

(3) The plaintiff has failed to provide any authority supporting his claim that the historical practices surrounding the right to petition were considered mandatory by contemporary legislative bodies

The plaintiff has attached various law review articles and other non-precedential writings to his petition and has with some success established that the people who approved the Constitution in 1784 believed the right to petition was important. This is not disputed. He has also produced a document arguably showing that the practice of the early, post-ratification

legislature appears to have continued the pre-existing colonial practices. What he has failed to do, however, is present any compelling source to suggest that any of the pre-1784 *practices* were considered *mandatory*. The fact that a practice continued after ratification of the Constitution of 1784 does not establish that the participants in such a practice understood it to be mandatory. Rather, it merely reflecst that it was considered a useful way to exercise the right at the time.

Even if there was a source suggesting that the practices were considered mandatory before 1784, the plaintiff has produced no evidence that the mandatory nature of such proceedings survived the adoption of the Constitution of 1784. Absent any such authority, this Court must reject such a claim.

(4) The plaintiff has failed to produce any judicial authority supporting his claim that he possesses a "positive right" to be heard by a full assembly of the general court.

The Speaker of the House has provided the Court with an outstanding brief outlining the federal and state case law addressing nearly identical claims to those brought by the plaintiff and the President adopts the Speaker's argument by reference. As set forth therein, the United States Supreme Court has on three separate occasions rejected a claim that the petition clause of the First Amendment places an affirmative requirement on the government to hear citizen complaints. See, Speaker's Brief at 11-12, citing *Minnesota State Bd. For Community Colleges v. Knight,* 465 U.S. 271 (1984); *Smith v. Arkansas State Highway Emp., Local 1315,* 441 U.S. 463, 464-65 (1979); *Bi-Metallic Inv. Co. v. State Bd. Of Equalization,* 239 U.S. 441 (1915); See also, *Gentry v. Former Speaker of the House Glen Casada,* 2020 WL 5587720 (Tenn.Ct.App. 2020), *cert. denied,* 141 S.Ct.2804 (2021).

In addition to the cases cited above, then-Circuit Court Judge Kavanaugh's opinion in *We The People Foundation, Inc. v. United States*, 485 F.3d 140 (D.C.Cir.2007)(hereinafter "*WTP*"),

underscores the weakness of the plaintiff's claim. In *WTP,* plaintiff tax protesters contended that their right to petition the government was violated where various executive branch agencies did not answer questions posed in their mnumerous petitions and refused to enter into "good faith exchanges." *Id.* at 141. The *WTP* plaintiffs cited many of the same law reviews relied upon by the plaintiff here. Now-Justice Kavanaugh ultimately concluded that they had failed to distinguish their case from the Supreme Court precedent set forth above. *Id.* at 144.

In short, the plaintiff has failed to either distinguish the compelling First Amendment precedent or provide judicial authority supporting his petition. He has thus provided this Court with no precedential basis on which to overturn the lower court's ruling.

(5) Even If Such A Right Existed (Which It Does Not) This Court Has No Authority To Issue A Writ of *Mandamus* Against The President And Speaker.

As with his description of relevant case law, the Speaker has also fully, fairly, and compellingly set forth the reasons that a *mandamus* or injunction should not issue in this case, and those arguments are incorporated herein by reference. See, Speaker's Brief at 7-9.

(6) The Plaintiff Waived His Claim That The Trial Court Judge Demonstrated "Political Bias" By Denying His Motion To Recuse.

This Court has repeatedly held that, "[j]udicial review is not warranted for complaints regarding adverse rulings without developed legal argument, and neither passing reference to constitutional claims nor casual invocations of constitutional rights without support by legal argument or authority warrants extended consideration." *Anna H. Cardone Revocable Trust v. Cardone*, 160 N.H. 521, 526 (2010)(citing *Radziewicz v. Town of Hudson,* 159 N.H. 313, 318 (2009). "This Court will not address arguments that a party has not sufficiently developed in its brief." *White v. Auger,* 171 N.H. 660, 665 (2019)(citing *Douglas v. Douglas,* 143 N.H. 419, 429 (1999).

The only reference in the plaintiff's brief to the issue of recusal or bias by the trial court is contained in his section entitled, "Issues Presented For Review." Plaintiff's Brief at 7. In that section, the claim is presented in summary fashion and argued only to the extent that the Plaintiff alleges in a footnote that the trial court judge, "has established a pattern of bias in matters involving *Citizens v. State.*" (Emphasis in original). The "Issues Presented For Review" section contains a reference to the case *Burt v. Speaker of the House of Representatives*, 173 N.H. 522 (2020), a case involving a challenge to house rules by a member of the house. It is entirely unclear how the trial court's ruling in that matter reflects "bias in matters involving citizens v. state," and the plaintiff's brief makes virtually no effort to clarify this point. For this reason, the Court should find that the plaintiff waived this argument and decline further consideration of his request for relief.

III. CONCLUSION

For the foregoing reasons, this Court should affirm the ruling below.

Respectfully Submitted
SENATE PRESIDENT CHUCK MORSE
By his attorneys,
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January 4, 2022

/s/Richard J. Lehmann
_____
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CERTIFICATION

I hereby certify that a copy of this pleading was this day forwarded to the opposing pro se party and to counsel for Speaker of the House Sherman Packard via the Court's electronic service system.

January 4, 2022

/s/Richard J. Lehmann
_____
Richard J. Lehmann

CERTIFICATION AS TO DOCUMENT LEGNTH

I hereby certify that this memorandum of law is less than 4000 words in length, as required by S.Ct.R. 16(4)(b).

January 4, 2022

/s/Richard J. Lehmann
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Richard J. Lehmann