

THE STATE OF NEW HAMPSHIRE SUPREME COURT

No. 2023-0097

Daniel Richard

v.

Christopher Sununu, et al.

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**SUR-REPLY TO RESPONDENTS BREIFS**

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Now comes Appellant Daniel Richard pro se in his sur-reply to the supplemental briefs of Respondents, the Town of Auburn and the state of NH.

**Federal Issues**

The Defendants have chosen not to answer or deny Appellants claims that the enactment and enforcement of the state statutory scheme violated his rights to due process and equal protection under the 14<sup>th</sup> Amendment as raised at the start. Therefore, at law they are presumed true and admitted as fact.

It is un-disputed fact that the statutory scheme (Count II – Count VI) controls the local, State, and Federal elections; Therefore, federal laws apply to this case. The United States Supreme Court (hereinafter “SCOTUS”) established precedent in (Smiley v. Holm, 285 U.S. 355, (1932), recently reinforced and cited by Moore v. Harper et al. (2023).) previously detailed in late authorities (filed Aug. 14, 2023) and Memorandum of law (filed April 24, 2024).

Smiley had taxpayer standing as a *"citizen, elector and taxpayer of the state"* under Article 1. Section 4 to challenge the due process violations of the Minnesota legislature’s redistricting efforts. Based on an Act of Congress June 18, 1929, Mr. Smiley appealed to the Minnesota Supreme Court, and he ultimately prevailed on appeal to SCOTUS in 1932. Quoting Mr. Chief Justice Hughes:

*“This suit was brought by the petitioner as a "citizen, elector and taxpayer of the state” to obtain a judgment declaring invalid all fillings for nomination for the office of representative in Congress, which should designate a subdivision of the state as a congressional district, and to enjoin the Secretary of State from giving notice of the holding of elections for that office in such subdivisions.” (1932)*

Smiley v. Holm Court reaffirmed the constitutional fact that a citizen, elector and taxpayer of a state has constitutional standing under Article 1. Section 4 of the U.S. Const. to bring suit in State and Federal Court to obtain a judgment declaring an Act of a state legislature affecting the time, place and manner of federal elections contrary and repugnant to the State or Federal constitutions and *void ab initio*.

The *Moore* court and the line of decisions SCOTUS relied upon, all deal with the enactment of law and procedural due process violations by state legislatures. In all cases the question for review is: Did the state legislature act within the scope of its delegated powers when performing its law-making duties under Article 1. Section 4 Time, Place and Manner for conducting federal elections?

*Smiley* and *Moore* decisions are about redistricting. Like gerrymandering, the present claim of vote dilution is also labeled “speculative” but it is speculative only as to potential fraud operations, and not dissimilar from the effect of gerrymandering – which occurs for the purpose of altering election results. For example, the tally of **all** absentee ballots – if not properly verified (by the local official assigned to that task in the state constitution) means that illegally deposited votes will be included and counted. That process of counting any and all votes in the machine constitutes ‘legalized’ ballot box stuffing. But *Smiley* and *Moore*, et.al. confirm the umbrella of standing to be “all acting within the scope of delegated power while performing ....”. It is no more reason to deny judicial review in this case, than a courts review of the legislative process enabling gerrymandering.

The *Moore* Court defined states' legislative duties to include other legislature responsibilities besides redistricting. *Moore* citing *Smiley*:

*“By fulfilling their constitutional duty to craft the rules governing federal elections, state legislatures do not consent, ratify, or elect—they make laws. Elections are complex affairs, demanding rules that dictate everything from the date on which voters will go to the polls to the dimensions and font of individual ballots. Legislatures must “provide a complete code for congressional elections,” including regulations “relati[ng] to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns.” (Emphasis Added).*

Under *Smiley*, the following duties of the state legislature are subject to judicial scrutiny by this Court and fall within the enumerated categories such as “dimensions and font of individual ballots,” “registration,” “supervision of voting,” “protection of voters,” “prevention of fraud and corrupt practices,” “counting votes,” “duties of inspectors,” and “making and publication of election returns.”

### **Constitutional Limits**

Defendants failed to establish any valid constitutional power or lawful authority to exercise un-delegated powers. This is strictly political statutory tactic, for the new election ballot-counting schemes. The N.H. Constitution is a social contract enacted in 1784. See *State v. Express Co.*, 60 N.H. 219, (1880), cited 69 times in state law, including the *Clairmont* decision, it provides:

*The bill of rights is a bill of their equal, private rights, reserved by the grantors of public power. The reservation precedes the grant. Before they create the power of proportional taxation in the fifth article, and the supreme legislative first article,*

*they lay the foundation, and therein reserve those personal liberties, which, upon the evidence of history and their own experience, they think cannot safely be surrendered to government. The definition of taxation, given in the foundation, is taken from books with which the leading statesmen of the Revolution were familiar. ...*

*Government, says the bill of rights, is "instituted for the general good," "for the common benefit, protection, and security of the whole community." Arts. 1, 10. "Every member of the community has a right to be protected by it in the enjoyment of his life, liberty, and property. He is therefore bound to contribute his share in the expense of such protection." Art. 12. Upon every member of the community is laid a constitutional obligation to contribute his share of public expense. " ... The reason is given. He is entitled to the common benefit, protection, and security for which government is instituted; he has a right to be protected in the enjoyment of life, liberty, and property: "he is therefore bound to contribute his share" of the expense. The right of benefit and protection, and the duty of contribution are reciprocal. The former is the consideration for the latter. The latter is the price of the former.*

In other words, this constitutional language about taxation means the people have reserved unto themselves "all government of right originates from the people, founded in consent," (namely, the amendment process) ...; and Part I, art. 8 provide "all power residing originally in, and being derived from the people," cannot be repealed or altered without the consent of the inhabitants (Part II, art. 100.). The last sentence of the N.H. Const. of 1784 reads: "provided that no alteration shall be made in this constitution before the same shall be laid before the towns and unincorporated places, and approved by two-thirds of the qualified voters present, and voting on the question."

Part I, art. 1 and Part II, art. 100. (amendment process) are some of the protections guaranteed by the N.H. Const. Part I, art. 12, Taxation and Protection are reciprocal. In

exchange for paying your fair share of the expense for such protection. Some of the consideration guaranteed to the inhabitants for paying taxes is detailed in these two clauses... First:

*“But no part of a man’s property shall be taken from him, or applied to public uses, without his consent, or that of the representative body of the people.”*

The second part of the sentence restricts the manner in which state taxes can be levied. Part I, art. 12. Second: *“and Part I, Article 12 which forbids any tax statute which requires any taxpayer to pay more than his fair share of the tax burden?”* Allene V. City of Portsmouth No. 6949. 114 N.H. 573 (1974)

This essential taxpayer element of the state constitution making privileges reciprocal duties, cannot be overruled or ignored by a series of new slippery-slope legislative voting statutes. *See, Boody v. Watson*, decided in December, 1886:

*“The public right of enforcing a taxpayer's obligation to contribute his share of public expense is created by a legislative division of the common burden in execution of the social contract, and not by a judicial assessment.”*

*“The right of every citizen that his property shall not be taken by the state under the name of a tax except in pursuance of authorizing statutes is not only affirmed by the common law, but is secured to him by the express terms of the constitution. The bill of rights (Art. 28) declares that "no subsidy, charge, tax, impost, or duty shall be established, fixed, laid, or levied, under any pretext whatsoever, without the consent of the people or their representatives in the legislature, or authority derived from that body.”*

Part I, art. 12 guarantees taxpayers due process of law in order to alter the manner in which the people are to be subject to taxes or laws. Such changes to taxes can only be altered in the by manner provided for by art. 12. in exchange for paying taxes. One way is

to amend the Const. to grant more taxing power to the legislature, or by those powers already delegated to the legislature in Part I, art. 28. and Part II, art. 5 for paying taxes. and the Second clause:

*“Nor are the inhabitants of this State controllable by any other laws than those to which they, or their representative body, have given their consent.”*

Under the recent SCOTUS precedent in *Bruen*, and *Moore* decisions, this Court must examine the plain text of art. 12 and its historical application established in 1784.

**The first part** states, “Nor are the inhabitants of this State controllable by any other laws than those to which they ...”. Who? The inhabitants. (Part I, art. 11. Part II, art. 30) of this State.”

**The second part** is a command that establishes that the inhabitants of this State are not controllable by “any other laws” than those which they (again, the inhabitants) ...

**And the third part:** or “*their representative body* (Part II, art. 100-the amendment process)” *after the fourth part is completed*

**The fourth part:** [inhabitants] “*have given their consent.*” Part I, art. 1. and Part II, art. 100. These four parts clarify that at stake in this case is the private right of the Appellant, not the public right of the state. Part I, art. 12 established taxpayer standing (1784), as the plain text prohibits Part II the government, from making any other laws (including election laws) not founded upon constitutional authority and from altering or amending the Const. of N.H. without the consent of the inhabitants, who have reserved this power to themselves. (Part I, art.1, Part II, art. 100). Such acts as Appellant complained (namely the statutory voting and vote counting schemes denying him equal protection and due process at law) are prohibited by, Part I, art. 12 and the due process clause of the 14<sup>th</sup> Amendment.

Therefore, in exchange for an inhabitant’s paying a fair share of the expense of such protection, the legislature cannot enact any legislation that is contrary or repugnant to other provisions in the state constitution. Const. of N.H. Part II, art. 5 as such acts are also prohibited by Part II. Art. 5 as follows: “*That clause, which confers upon the*

*‘general court’ the authority ‘to make laws’, provides at the same time that they must not be ‘repugnant or contrary to the constitution....’” Id. 210, Merrill v. Sherburne, (1818)*

Defendants have exercised what they call “**permissible legislative judgment**” from the beginning of this case and repeatedly violated this constitutional restraint - that they believe they may act where they believe the Const. of N.H. is silent, while never establishing any history, custom or law that would permit such ultra vires actions. As such, those ultra vires acts are de facto repugnant and contrary to the state constitution.

Under our constitutional form of government, Part II the Form of Government can only exercise those powers specifically delegated to them by the Const. of N.H. The power to enact laws cannot be assumed or delegated or contrived by politicians and the legislature, (as Defendants repeatedly have done before and throughout this case as recently as weeks ago, pending appeal.) Until this court rules, state politicians continue to act in an ongoing attempt to manipulate the voting process to alter election outcomes in a manner that is repugnant to the Constitution. But all governmental powers (Part I, art. 1. art.8 art. 10. art. 12. Part II, art. 100) must be derived from the consent of the inhabitants of this State. Thus, the people retained their sovereignty in the face of even ongoing blatant political overreach to alter and control the election process. See Part I, art. 7.

The Appellant moves the Court to take judicial notice, that the state’s attorneys made material mis-representation of Appellant tax-payer standing status in this case, by repeatedly claiming Defendant lacks standing to raise the case. (pg. 19. Item II, Defend.’s Supplement Brief). Such a claim misleads and deflects accountability for repeated State Actor violations leading to present and future injury and harm.

The Appellant claimed Part I, Art. 12 as one of his rights from the beginning of this case, establishing constitutional standing as a citizen, as an inhabitant and as a tax-payer. Appellant cited these proper elements of standing from the beginning. See standing issues addressed at pages 9, 10, 12, 16, 17, 18, 24, 27, 33, 37, 40, 46, and in his Motion to Reconsider at page 9. Throughout the appeal process, Appellant cited the

Const. of N.H. Part I. Art. 12 that taxation and protection are and have been reciprocal (since 1784) for constitutional standing.

### **Injuries**

The Town of Auburn *de facto* deferred briefing any statutory schema issues throughout the pendency of this case in deference to the State's Attorney's until now.

Now, it submits a 2,911-word brief in response to the open solicitation for Amicus curie or memoranda. From the beginning, it failed to deny and answer all details of March 9, 2022 as detailed in Appellant's Complaint (pg. 10, 11, 12, items 27—4), and it is right and fair that all facts plead by Appellant be accepted as fair and accurate descriptions of injury for purposes of this appeal.

As a result of this Court's decision in *Richard v. Speaker* (2022) the legislature is now emboldened that it no longer has a constitutional duty to hear Appellant's 'petition' or 'remonstrance' for relief (under Part I, art. 32) including a remonstrance filed regarding this new statutory scheme. See Remonstrance dated Feb. 24, 2022, @ complaint Exhibit B. (dismissed).

All Defendants were noticed, prior to the March 8, 2022 election day. It's an undisputed fact the Town of Auburn claimed as their defense that the e-mail from the Secretary of State's Office (Asst. Sec. of State Karen Ladd) (cited as exhibit D in the complaint), which instructed the Town to use voting machines. Atty. Tierney conceded the point that he told Town Election official to enforce the statutory scheme and use only voting machines, after notice.

Fundamentally Defendant's brief confesses to the underlying issue. On March 9, 2022, the Town did not have a hand count policy and relied on the state's statutory scheme to use voting machines to count all ballots. Appellant was deprived of his right to a constitutionally fair vote. The non and unconstitutional voting process, was not only illegal, but potentially fraudulent vote manipulation. The Town would only count Appellants ballot if he used the voting machine to count his ballot.



Defendant's current position is to cure the injury. That the Town adopted a new hand count policy. This non-uniform, manner for sorting, verifying and counting all ballots is un-equal. The adaptation of a hand count policy provided a separate box in which to deposit his ballot. This adds further layers of safety, security, and equality questions about secrecy of his ballot or that his ballot was counted at all. Defective remedy is not adequate remedy to address any harm, injury, and other concerns raised in improper legislative usurpation of the constitutional process in this case. Why would the Town provide a remedy to the problem if the Appellant had no right to have his ballot properly counted by the moderator and not an electronic voting machine?

### **Relief**

Appellant respectfully requests the following:

1. The moderator (or his deputies) of the Town of Auburn shall sort and hand count and verify all ballots as provided for in Part II, art. 32 and not by machine.
2. The moderators in all towns, cities or unincorporated places in this State, shall "sort" and "count" ballots in an equal manner provided in Part II, art. 32. (1784) by hand, and not by a machine (1979).
3. No voting machines means Count III is moot, as the safety of voting machines is longer an issue if not used.
4. The legislature shall return to the word and voter requirements as "inhabitant" as the definition of a qualified voter unless and until properly voted upon to amend the state constitution.
5. The legislature shall only provide for absentee voting as prescribed in Part I, art. 11, for those inhabitants who are absent from their voting district, or they are un-able to vote in person because of a disability. Each absentee application and ballot shall properly comply with affidavit/notary requirements, and envelopes shall be properly

verified and retained also as constitutionally provided. No votes not so affirmed and properly delivered shall be counted.

6. The Court shall again declare that the 1976 ballot question 8 b) and all of its amendment achieved under question 8, are void ab initio; and legislature shall restore past, present, and future election statutes to be in harmony with the state constitution and its pre-amendment status prior to 1976.
7. And for such other and further relief as this Court deems just and proper.

Respectfully submitted,

Daniel Richard  
*/s/ Daniel Richard*

#### **CERTIFICATION OF COMPLIANCE WITH WORD LIMIT**

The Plaintiff certifies that this sur-reply complies with Supreme Court Rule 16. This brief has 2982 words.

Dated: April 30, 2024

Daniel Richard  
*/s/ Daniel Richard*

#### **CERTIFICATION**

I, Daniel Richard, do hereby swear that on April 30, 2024, I did e-mail a copy of this to all the name Parties via the Supreme Court web portal.

Dated: April 30, 2024

Daniel Richard

*/s/ Daniel Richard*

**VERIFICATION**

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

Dated: April 30, 2024

Daniel Richard  
*/s/ Daniel Richard*