

---

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

Case No. 2022-0184

---

Theresa Norelli & *a.*

*Plaintiffs,*

v.

Secretary of State & *a.*

*Defendants.*

---

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF PROPOSED  
CONGRESSIONAL DISTRICTING PLAN**

---

Steven J. Dutton, NH Bar No. 17101  
McLANE MIDDLETON, P.A.  
900 Elm Street  
Manchester, NH 03101

Paul Twomey, NH Bar No. 2589  
P.O. Box 623  
Epsom, NH 03234

John Devaney, *pro hac vice*  
PERKINS COIE LLP  
700 Thirteenth Street NW, Suite 800  
Washington, DC 20005

Abha Khanna, *pro hac vice*  
Jonathan P. Hawley, *pro hac vice*  
ELIAS LAW GROUP LLP  
1700 Seventh Avenue, Suite 2100  
Seattle, WA 98101

Aaron M. Mukerjee, *pro hac vice*  
ELIAS LAW GROUP LLP  
10 G Street NE, Suite 600  
Washington, DC 20002

## INTRODUCTION

In this action, Plaintiffs challenge New Hampshire's congressional districts, which were enacted in 2012 and were drafted based on data from the 2010 Census. In light of the results of the 2022 Census, those districts are unconstitutionally malapportioned in violation of the New Hampshire and United States Constitutions. Soon after the case was filed, this Court assumed supervisory jurisdiction and ordered briefing and argument on a series of specific questions, including questions relating to the criteria the Court should use if it is required to adopt a congressional districting map.

On May 12, 2022, the Court issued an opinion concluding: (1) the statute currently delineating New Hampshire's congressional districts, RSA 662:1 (2016), violates Article I, Section 2 of the United States Constitution, and (2) "upon a demonstrated legislative impasse, this court must establish a new district plan" using a "'least change' approach." *Norelli v. Sec'y of State*, No. 2022-0184 (N.H. May 4, 2022), slip. op. at 2. As to the first holding, the Court explained that the State had not demonstrated that the 2.6% overall deviation among the state's current congressional districts is "necessary to achieve some legitimate state objective" and that the current districts therefore violate the U.S. Constitution. *Id.* at 11 (quoting *Karcher v. Daggett*, 462 U.S. 725, 740 (1983)).

As to the second holding, the Court rejected the State's argument that "judicial non-intervention in this case is more important than protecting the voters' fundamental rights under the United States Constitution." *Id.* at 12. It further explained that it would use a "'least change' approach," which uses the "one-person, one-vote" principle as its primary guide and the "existing congressional districts" as its "benchmark." *Id.* at 13, 14. In other

words, the Court will adopt a plan that “reflect[s] the least change necessary to remedy the constitutional deficiencies in the existing congressional districts.” *Id.* at 13. To that end, as “contiguous populations are added or subtracted as necessary to correct the population deviations,” the remedial plan should, “to the greatest extent practicable,” “contain roughly the same constituents as the last validly enacted plan” and maintain “the core of the districts.” *Id.* at 14. The Court further recognized that New Hampshire’s historical practice of not “dividing towns, city wards, or unincorporated places unless they have previously requested to be divided by referendum” warrants requiring “any plan we adopt [to] reflect such historic redistricting policies to the greatest extent practicable so long as they are consistent with the ‘least change’ approach to achieving congressional districts with populations as close to perfect equality as possible.” *Id.* Finally, the Court explained that the least-change approach is preferable to any other approach because it best ensures that political considerations do not make their way into its remedial plan. *Id.* at 14–15.

Simultaneously with its opinion, the Court issued an order (“May 12 Order”) appointing Professor Nathaniel Persily as a special master and instructed Dr. Persily to propose a recommended remedial plan to the Court. May 12 Order at 1. In that order, the Court instructed Dr. Persily that his recommended plan “shall modify the existing congressional districts . . . only to the extent required to comply with the following criteria and ‘least change’ standards:

1. Districts shall be as equal in population as practicable, in accordance with Article I, Section 2 of the United States Constitution;
2. The redistricting plan shall comply with the Voting Rights Act of 1965, as amended, 52 U.S.C. § 10101 *et seq.*, and any other applicable federal law;

3. Districts shall be made of contiguous territory;
4. To the greatest extent practicable, each district shall contain roughly the same constituents as it does under the current congressional district statute, such that the core of each district is maintained, with contiguous populations added or subtracted as necessary to correct the population deviations, *see Below v. Secretary of State*, 148 N.H. 1, 13–14, 28 (2002);
5. The plan shall not divide towns, city wards, or unincorporated places, unless they have previously requested by referendum to be divided, or unless the division is necessary to achieve compliance with the population equality required by Article I, Section 2 of the United States Constitution; and
6. The special master shall not consider political data or partisan factors, such as party registration statistics, prior election results, or future election prospects.

*Id.* at 1–2.

The Court noted that the New Hampshire Senate Minority Leader and the New Hampshire House of Representatives Minority Leader (the “Minority Leaders”) had previously submitted a proposed congressional plan they characterized as “least-change.” *Id.* at 2. The Court invited any other interested party, intervenor, or person seeking to participate as *amicus curiae* to submit their own proposed plan, accompanied by appropriate data, documentation, or memoranda.

Pursuant to that invitation, Plaintiffs have submitted a proposed remedial plan that fully satisfies the Court’s criteria for a remedial plan. Attached to this memorandum are maps of Plaintiffs’ proposed plan (Exhibit A), and a list of the towns, cities, and unincorporated places included in each of the plan’s two districts (Exhibit B). As directed by the Court’s supplemental order issued May 13, Plaintiffs have separately emailed the Court a census block equivalency file that correspond to their proposed plan.

## ARGUMENT

Plaintiffs' plan satisfies each of the standards established by the May 12 Order. The plan achieves nearly perfect population equality without splitting any town or ward. It achieves this by moving just four towns from one district to the other: Plaistow and Campton from the First District into the Second, and Bridgewater and Center Harbor from the Second District into the First.

- **Standard 1: Population Equality.** Plaintiffs' plan achieves nearly perfect population equality. According to the 2020 Census, New Hampshire's population is 1,377,529, meaning the ideal population of each congressional district is 688,764.5. Under Plaintiffs' plan, District 1's population is 688,764, and District 2's population is 688,765. Because it is impossible to make the population among the districts more equal, the plan automatically satisfies the requirements of Article I, Section 2 of the U.S. Constitution. *Karcher*, 462 U.S. at 732 ("States must draw congressional districts with populations as close to perfect equality as possible.").

- **Standard 2: Compliance with the Voting Rights Act of 1965.** Plaintiffs' plan complies with the Voting Rights Act ("VRA"). Section 2 of the VRA prohibits any "standard, practice, or procedure" that "results in a denial or abridgement of the right . . . to vote on account of race." 52 U.S.C. § 10301(a). Plaintiffs' plan was not drawn with the purpose of denying or abridging minority voting rights, nor would it have the effect of denying or abridging minority voting rights.

- **Standard 3: Contiguity.** Both of the districts in Plaintiffs’ plan are contiguous because all towns, city wards, and unincorporated places that comprise each district “adjoin[]” another town, ward, or unincorporated place in the same district. *Below*, 148 N.H. at 9.

- **Standard 4: Core retention.** Plaintiffs’ plan achieves nearly perfect population equality while maximizing core retention. Maximizing “core retention” means keeping as many people as possible in their current districts. Put another way, it means minimizing the number of people who are moved to a different congressional district.

Plaintiffs’ plan moves the smallest number of people necessary to achieve near-perfect population equality. Under Plaintiffs’ plan, 99.04% of New Hampshire residents are kept in the same congressional district. This is only slightly lower than the core retention of the Minority Leaders’ plan, which keeps 99.36% of the state’s residents in the same district as last cycle.

In this sense, Plaintiffs’ plan and the Minority Leaders’ plan are compliments of one another, demonstrating the necessary trade-off between maximizing core retention and population equality. While the Minority Leaders’ plan achieves the best possible core retention while minimizing population deviation, it results in a slightly higher population deviation (51 persons) than Plaintiffs’ plan. Meanwhile, to achieve nearly perfect population equality, Plaintiffs’ plan slightly sacrifices core retention, resulting in .32% fewer residents staying in the same congressional district.

Plaintiffs take no position as to whether their plan or the Minority Leaders’ is superior; both plans clearly comply with the Court’s criteria. While the Minority Leaders’

plan has slightly less-than-perfect population equality, that deviation in this instance is arguably justified by a legitimate state policy, *i.e.*, core retention.

- **Standard 5: Maintenance of towns, city wards, and unincorporated places.** Plaintiffs' plan does not divide any town, city ward, or unincorporated place.

- **Standard 6: Prohibition of political considerations.** Plaintiffs' plan was drawn without consideration of political data. Instead, Plaintiffs' plan was drawn to maximize core retention while maintaining perfect population equality. Thus, adoption of this plan would not involve prohibited political considerations.

- **Additional Principle: Compactness.** While the Court did not explicitly state that its proposed plan should contain compact districts, compactness is a widely accepted traditional districting principle. *See, e.g., Bush v. Vera*, 517 U.S. 952, 962 (1996) (noting that the state “neglected traditional districting criteria such as compactness”); *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (defining traditional districting principles to include compactness); *In re Senate Joint Resol. of Legislative Apportionment 1176*, 83 So. 3d 597, 639 (Fla. 2012) (stating that Florida’s compactness criteria required the Legislature “to conform to traditional redistricting principles”). If the Court finds compactness to be relevant in adopting a plan, Plaintiffs note that their proposed plan contains districts that are slightly more compact than the state’s existing congressional districts.

Two of the most commonly used compactness metrics are Reock and Polsby-Popper. The Reock score measures the ratio of the area of the district to the area of the minimum enclosing circle for the district. The measure ranges from zero to one, with one being perfectly compact. The Polsby-Popper score measures the ratio of the district area to

the area of a circle with the same perimeter. Again, the measure ranges from zero to one, with one being maximally compact. The following scores for these metrics show that the districts in Plaintiffs' proposed plan have Reock scores that are identical to those for the existing districts and Polsby-Popper scores that are slightly higher than those for the existing districts:

<b>District</b>	<b>Reock – Existing Plan</b>	<b>Reock – Plaintiffs' Plan</b>	<b>Polsby-Popper – Existing Plan</b>	<b>Polsby-Popper – Plaintiffs' Plan</b>
District 1	0.30	0.30	0.17	0.18
District 2	0.23	0.23	0.15	0.15

### **CONCLUSION**

Plaintiffs respectfully submit that their proposed remedial plan achieves population equality, maximizes core retention, and complies with all of the other criteria set out by this Court.



Dated: May 16, 2022

Respectfully Submitted,

THERESA NORELLI, CHRISTINE  
FAJARDO, MATT GERDING, and  
PALANA HUNT-HAWKINS

By Their Attorneys,

By       /s/ Steven J. Dutton        
Steven J. Dutton, NH Bar No. 17101  
steven.dutton@mclane.com  
McLANE MIDDLETON, P.A.  
900 Elm Street  
Manchester, NH 03101  
Telephone: (603) 628-1377

Paul Twomey, NH Bar No. 2589  
paultwomey@comcast.net  
P.O. Box 623  
Epsom, NH 03234  
Telephone: (603) 568-3254

John Devaney, *pro hac vice*  
jdevaney@perkinscoie.com  
PERKINS COIE LLP  
700 Thirteenth Street NW, Suite 800  
Washington, DC 20005  
Telephone: (202) 654-6200

Abha Khanna, *pro hac vice*  
akhanna@elias.law  
Jonathan P. Hawley, *pro hac vice*  
jhawley@elias.law  
ELIAS LAW GROUP LLP  
1700 Seventh Avenue, Suite 2100  
Seattle, WA 98101  
Telephone: (206) 656-0177

Aaron M. Mukerjee, *pro hac vice*  
amukerjee@elias.law  
ELIAS LAW GROUP LLP  
10 G Street NE, Suite 600  
Washington, DC 20002  
Telephone: (202) 968-4654

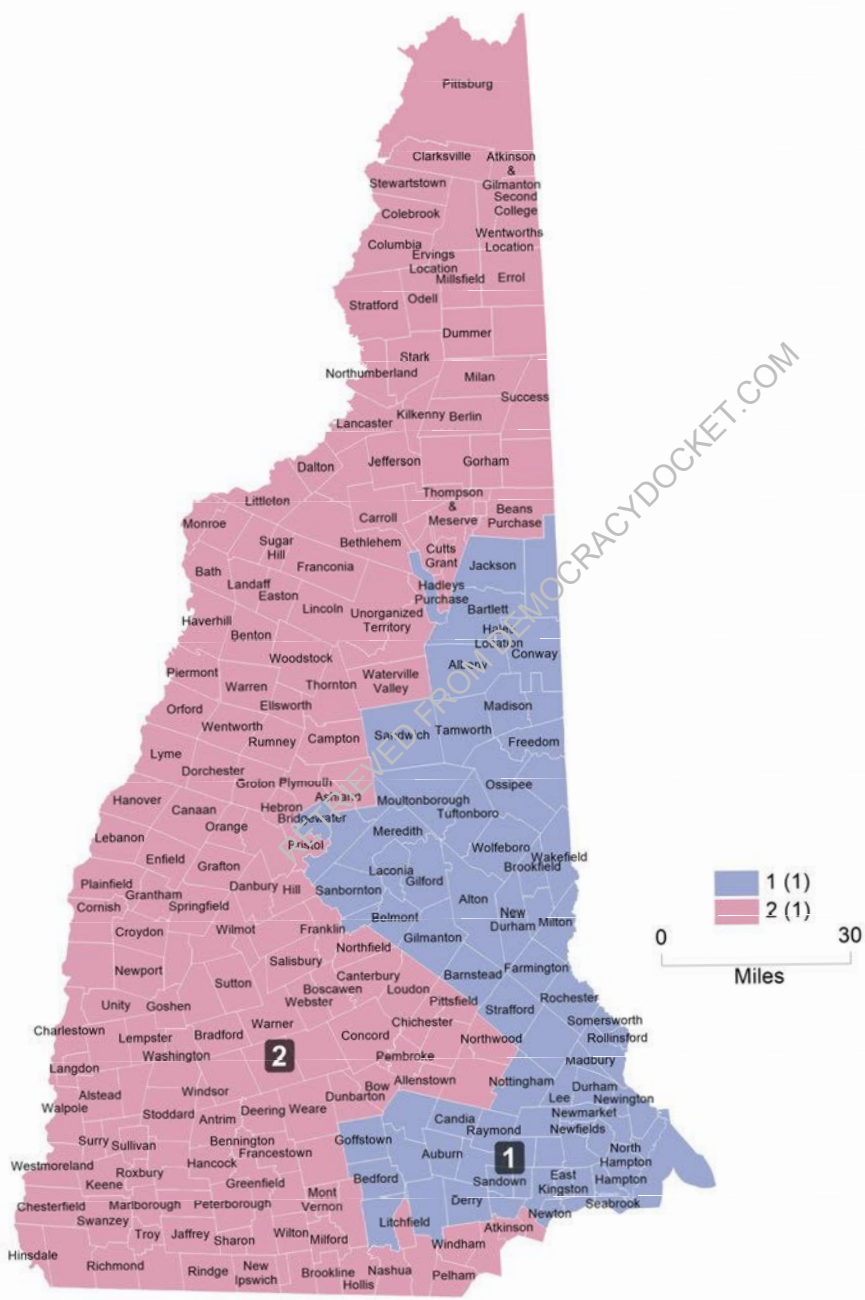
*Counsel for Plaintiffs*

# Exhibit A

RETRIEVED FROM DEMOCRACYDOCKET.COM

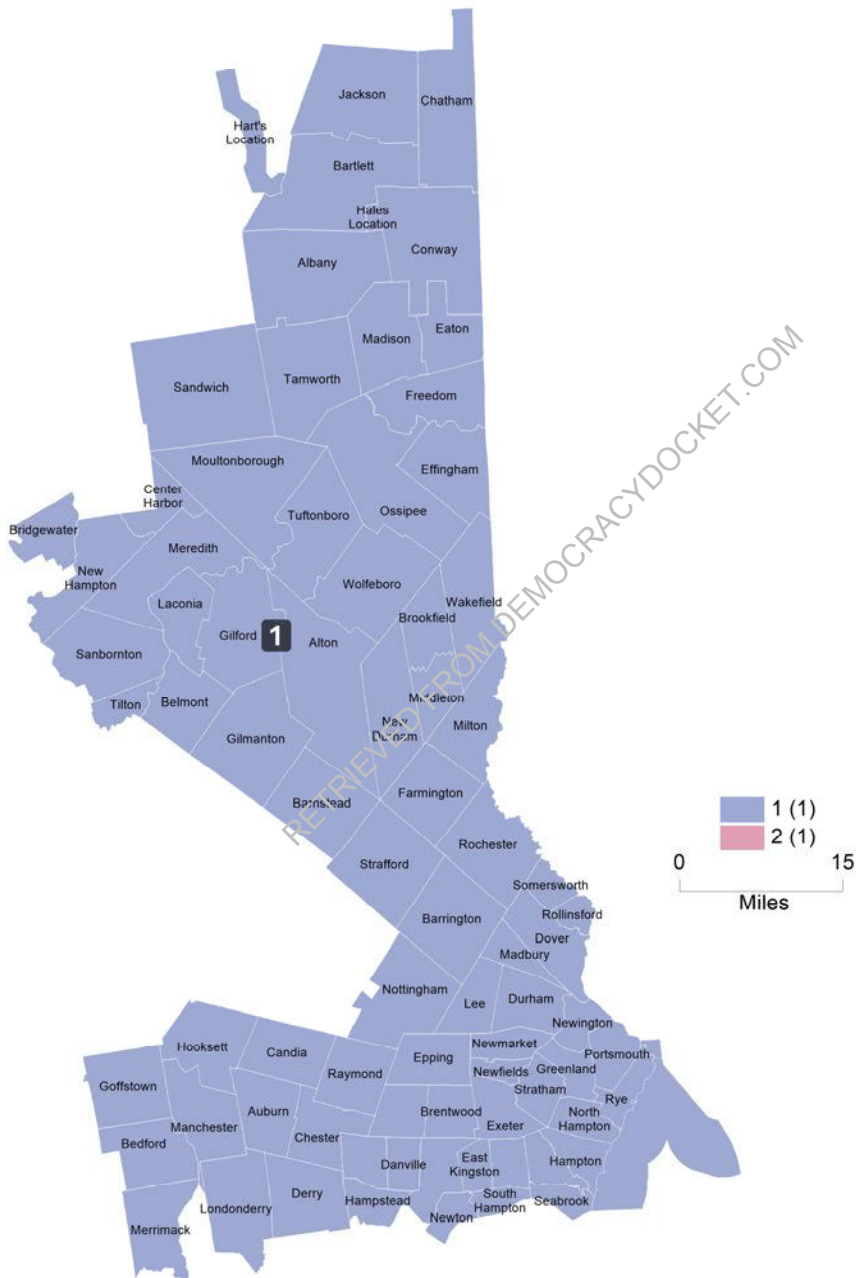
Field	Value
District	1
Population	688764
Deviation	-1
% Deviation	-0%

District: 1 and Vicinity



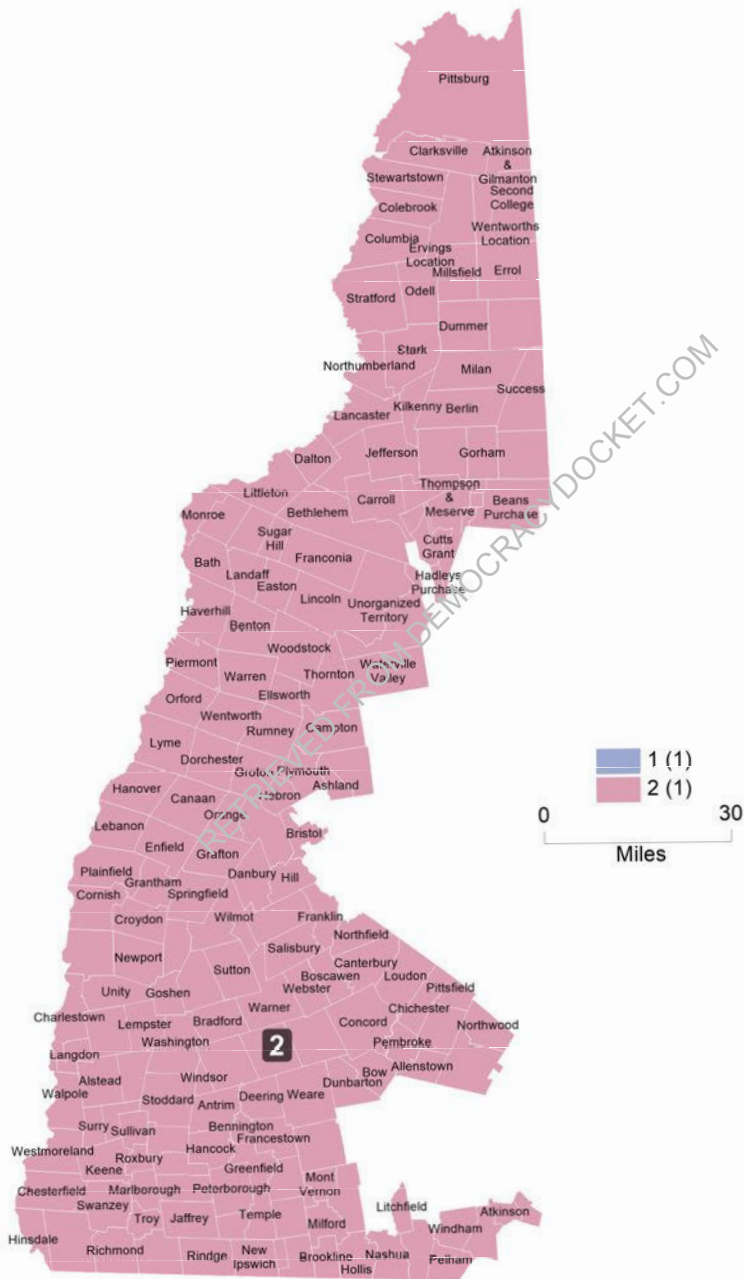
District: 1

Field	Value
District	1
Population	688764
Deviation	-1
% Deviation	-0%



District: 2

Field	Value
District	2
Population	688765
Deviation	0
% Deviation	0%



# Exhibit B

RETRIEVED FROM DEMOCRACYDOCKET.COM

*Norelli v. Sec'y of State*, No. 2022-0184

**Plaintiffs' Proposed Congressional Plan:  
List of Towns, Wards, and Unincorporated Places**

District 1	District 2
Albany	Acworth
Alton	Alexandria
Auburn	Allenstown
Barnstead	Alstead
Barrington	Amherst
Bartlett	Andover
Bedford	Antrim
Belmont	Ashland
Bridgewater	Atkinson
Brentwood	Atkinson and Gilmanton Academy Grant
Brookfield	Bath
Candia	Bean's Grant
Center Harbor	Bean's Purchase
Chatham	Berlington
Chester	Benton
Conway	Berlin
Danville	Bethlehem
Derry	Boscawen
Dover (All Wards)	Bow
Durham	Bradford
East Kingston	Bristol
Eaton	Brookline
Effingham	Campton
Epping	Cambridge
Exeter	Canaan
Farmington	Canterbury
Freedom	Carroll
Fremont	Chandler's Purchase
Gilford	Charlestown
Gilmanton	Chesterfield
Goffstown	Chichester
Greenland	Claremont (All Wards)
Hale's Location	Clarksville
Hampstead	Colebrook
Hampton	Columbia
Hampton Falls	Concord (All Wards)

District 1	District 2
Hart's Location	Crawford's Purchase
Hooksett	Cornish
Jackson	Croydon
Kensington	Cutt's Grant
Kingston	Dalton
Laconia (All Wards)	Danbury
Lee	Deerfield
Londonderry	Deering
Madbury	Dix's Grant
Madison	Dixville
Manchester (All Wards)	Dorchester
Meredith	Dublin
Merrimack	Dummer
Middleton	Dunbarton
Milton	Easton
Moultonborough	Ellsworth
New Castle	Enfield
New Durham	Epsom
New Hampton	Errol
Newfields	Erving's Location
Newington	Fitzwilliam
Newmarket	Francestown
Newton	Franconia
North Hampton	Franklin (All Wards)
Nottingham	Gilsum
Ossipee	Gorham
Portsmouth (All Wards)	Goshen
Raymond	Grafton
Rochester (All Wards)	Grantham
Rollinsford	Greenfield
Rye	Green's Grant
Sanbornton	Greenville
Sandown	Groton
Sandwich	Hadley's Purchase
Seabrook	Hancock
Somersworth (All Wards)	Hanover
South Hampton	Harrisville
Strafford	Haverhill
Stratham	Hebron
Tamworth	Henniker



District 1	District 2
Tilton	Hill
Tuftonboro	Hillsborough
Wakefield	Hinsdale
Wolfeboro	Holderness
	Hollis
	Hopkinton
	Hudson
	Jaffrey
	Jefferson
	Keene (All Wards)
	Kilkenny
	Lancaster
	Landaff
	Langdon
	Lebanon (All Wards)
	Lempster
	Lincoln
	Lisbon
	Litchfield
	Littleton
	Livermore
	Loudon
	Low and Burbank's Grant
	Lyman
	Lyme
	Lyndeborough
	Marlborough
	Marlow
	Martin's Location
	Mason
	Milan
	Milford
	Millsfield
	Monroe
	Mont Vernon
	Nashua (All Wards)
	Nelson
	New Boston
	New Ipswich
	New London

District 1	District 2
	Newbury
	Newport
	Northfield
	Northumberland
	Northwood
	Odell
	Orange
	Orford
	Pelham
	Pembroke
	Peterborough
	Piermont
	Pinkham's Grant
	Pittsburg
	Pittsfield
	Plainfield
	Plaistow
	Plymouth
	Randolph
	Richmond
	Rindge
	Roxbury
	Rumney
	Salem
	Salisbury
	Sargent's Purchase
	Second College Grant
	Sharon
	Shelburne
	Springfield
	Stark
	Stewartstown
	Stoddard
	Stratford
	Success
	Sugar Hill
	Sullivan
	Sunapee
	Surry
	Sutton

District 1	District 2
	Swanzy
	Temple
	Thornton
	Thompson and Meserve's Purchase
	Troy
	Unity
	Walpole
	Warner
	Warren
	Washington
	Waterville Valley
	Weare
	Webster
	Wentworth
	Wentworth's Location
	Westmoreland
	Whitefield
	Wilmot
	Wilton
	Winchester
	Windham
	Windsor
	Woodstock

RETRIEVED FROM DEMOCRACY.ORG