



State of New Hampshire

HOUSE OF REPRESENTATIVES

CONCORD

February 9th, 2026

To: Judiciary Committee

Dear Chairman Lynn,

In re. HR29, requesting an opinion of the justices on the scope of part II, article 4 of the New Hampshire constitution, as well as other related articles.

Note: This testimony represents my views and, most importantly, the views and interests of the constituents I serve in the towns of Alexandria, Bridgewater, Bristol, Canaan, Dorchester, Enfield, Grafton, Groton, Hebron and Orange. My testimony is not made on behalf of any private employer nor should it be construed to represent the views of any of my employers.

This resolution does not tell the court what the law is. It asks the court to tell the legislature, and by extension the people of New Hampshire, what our Constitution actually means.

Part II, Article 74 expressly authorizes the General Court to request the opinions of the Justices on important questions of law, not as a matter of convenience but as a constitutional safeguard designed to prevent uncertainty and institutional conflict before it arises. This House Resolution invokes that power precisely as intended: to obtain authoritative guidance on the scope of legislative and judicial authority where the text of the Constitution, voter-approved amendments, and historical practice intersect. The argument that the legislature should not seek such an opinion misunderstands Article 74's purpose. Declining to ask does not preserve separation of powers, it abdicates our duty to legislate with constitutional clarity. Likewise, the claim that the court cannot reach a conclusion different from prior advisory or judicial opinions is incorrect. Advisory opinions are not judgments, do not carry stare decisis in the same manner, and are properly informed by fuller historical records, including voter guides and original public understanding not previously before the court. Article 74 exists so that constitutional meaning may be clarified when necessary, not frozen in time by silence or assumption.

Part II, Article 4 of our Constitution vests the General Court with plenary legislative authority, with the parenthetical insertion "*(except as otherwise provided by Article 72-a of Part 2)*". Those words "*except as otherwise provided*" are doing all the work here.

Articles 72-a (adopted in 1966) and 73-a (adopted in 1978) unquestionably carved out space for an independent judiciary. But the scope of that carve-out has never been clearly or authoritatively defined in light of voter intent, historical practice, and the plain text of Article 4.

As legislators, sworn to support the Constitution, we cannot responsibly legislate in the dark.

The voter guides matter, and they raise real questions. When voters approved Article 72-a in 1966, they were asked a single, narrow question:

“Are you in favor of protecting the supreme court and the superior court from possible political interference by establishing them as constitutional courts?”

The official voter guide framed the amendment as a safeguard against abolition of courts and direct political retaliation. It did not describe a transfer of broad administrative, structural, or rule-making authority from the legislature to the judiciary. It did not tell voters that longstanding legislative practices, such as hearing petitions for redress of grievance, would be extinguished. And it did not suggest that Article 4’s plenary grant of legislative power was being fundamentally re-written. As we have discussed in prior hearings, separation of powers is not synonymous with separation of bodies.

Likewise, when voters adopted Article 73-a in 1978, the voter guide presented it as an administrative efficiency measure, making the chief justice the administrative head of the courts and separating judicial appropriations for budgeting clarity. Once again, voters were not told that they were authorizing an open-ended expansion of judicial power at the expense of legislative authority.

Whether later interpretations have drifted beyond what voters were asked to approve is not a political question. It is a constitutional one.

HR 29 does not dictate outcomes, nor does it reopen cases or challenge judgments.

Instead, it asks the Justices to clarify:

- What “judicial power” means as that term was historically understood.
- Whether that power is limited to adjudication, or extends to administration and rulemaking.
- Where Article 4 still governs, and where it does not.
- Whether the people’s right to petition for redress, explicitly protected in Part I Article 32, retains real meaning.

These are not abstract questions. They go directly to how this body discharges its constitutional duties. Judiciary Committee members understand this better than anyone: separation of powers only works when boundaries are clear. If the legislature legislates too timidly, it abdicates its proper role. If it legislates too aggressively, it invites conflict.

Requesting an advisory opinion is the constitutionally proper, respectful, and conservative way to resolve uncertainty before conflict arises.

An Ought to Pass vote here says that we respect the court; we respect the voters; and we take our oath seriously enough to ask hard questions the right way.

These questions are neither abstract nor academic. This session, the General Court is actively considering multiple measures that implicate the boundaries between legislative authority and judicial power, including matters of court structure, administration, and constitutional allocation of authority. In that context, uncertainty about the scope of Articles 4, 72-a, and 73-a is not hypothetical, rather it directly affects how this body legislates today. Requesting the Justices' opinion ensures that legislation proceeds with constitutional clarity, avoids unintended conflict between branches, and respects the limits of each branch's lawful authority.

For those reasons, I respectfully ask the committee to recommend House Resolution 29 Ought to Pass.

Yours sincerely,

Rep. Donald McFarlane
Grafton 18

encl. 1966 and 1978 Voters' Guides