STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY SUPERIOR COURT

City of Dover et. al.

v.

David Scanlan, Secretary of State for New Hampshire et. al.

Docket No. 219-2022-CV-00224

PLAINTIFFS' OBJECTION TO DEFENDANTS' JOINT MOTION TO DISMISS

NOW COME the plaintiffs, City of Dover, New Hampshire ("Dover"), City of Rochester, New Hampshire ("Rochester"), Debra Hackett, Rod Watkins, Kermit Williams, Eileen Ehlers, Janice Kelble, Erik Johnson, Deborah Sugerman, Susan Rice, Douglas Bogen, and John Wallace, by and through their undersigned counsel, and object to the Defendants' Joint Motion to Dismiss, stating in support as follows:

I. Introduction

This case challenges the constitutionality of the 2022 New Hampshire House of Representatives ("House") redistricting statute, and specifically compliance with the mandatory, rights-creating language in Part II, Article 11 of the State Constitution, added with voter approval in 2006. The defendants (collectively, the "State") jointly moved to dismiss the Complaint, presenting the following core questions for review:

> Issue 1: The "political question" exception to justiciability applies where a matter is sufficiently committed to the pure discretion of another branch of government, but does not apply where a mandatory constitutional duty exists. The redistricting statute at issue allegedly violated an express, mandatory constitutional mandate with self-contained, objective standards. Are plaintiffs' claims "political questions" beyond judicial review?
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> Issue 2: In order to state a claim, a Complaint must include allegations "reasonably susceptible of a construction" that permits recovery. Here, the Complaint alleges the existence of a mandatory constitutional duty and

> corresponding right, extensive allegations outlining the breach of that duty/right by way of unnecessary constitutional violations without sufficient (or any) basis, an expert affidavit providing an alternative redistricting plan showing the degree of unnecessary violations of the State Constitution, and harm to plaintiffs. Have plaintiffs failed to state a claim?

As set forth below, the answer to each is "no" and the Court should deny the State's Joint Motion in its entirety.

II. Factual Background[1]

In 2006, Part II, Article 11 of the State Constitution was amended (with voter approval) to provide, in relevant part:

> When the population of any town or ward, according to the last federal census, is within a reasonable deviation from the ideal population for one or more representative seats the town or ward shall have its own district of one or more representative seats.

See N.H. CONST. pt. II, art. 11

According to the 2020 federal census, dividing the population of New Hampshire by 400 House members yields an ideal population of 3,444 for an individual seat. *See* Complaint ¶ 58; *see generally City of Manchester v. Secretary of State*, 163 N.H. 689, 699 (2012) (discussing method of apportioning House districts).

As part of New Hampshire's decennial redistricting process, on March 23, 2022, the Governor signed House Bill 50, now Laws 2022, Chapter 9, repealing and reenacting RSA 662:5 to redistrict the House. Complaint ¶ 2. Of the towns and wards with sufficient population to require their own district under Part II, Article 11, the new House plan denies 55 of them their own district. *Id*. ¶ 35. The plaintiffs acknowledge in the Complaint that, due to the relatively small population of New Hampshire in comparison to its large number of Representatives (400),

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[1] The plaintiffs incorporate the Complaint and its attachments herein entirely, and briefly summarize same below for the Court's convenience.

redistricting may require "forced" violations of Part II, Article 11. *Id*. ¶ 29. However, fourteen of the enacted 55 violations of Part II, Article 11 were not in fact "forced," and instead were voluntarily chosen for reasons that remain unexplained and lack any "rational or legitimate basis." *See id*. ¶36. Among the towns and wards that have been denied their rights by unforced violations of Part II Article 11 are Dover Ward 4, Rochester Ward 5, Barrington, Lee, Hooksett, New Ipswich, and Wilton, all of which exceed the ideal population for a House seat. *See* Complaint ¶¶ 58-81.

Throughout the legislative process that produced Laws 2022, 9:1, the legislature received public input and feedback from various people, including the Map-a-Thon coalition. *Id*. ¶¶ 37, 38. Map-a-Thon is a non-partisan group of professionals, including those with software coding, data, and redistricting knowledge and expertise, who, among other things, created proposed New Hampshire House districts/maps based on the 2020 census. *Id*. ¶ 39. Using the same legal criteria and traditional policies used by the legislature, Map-a-Thon created proposed House maps that complied with all applicable laws and traditional redistricting policies, avoided placing any town or district solely in a floterial district, complied with the federal/state "one person one vote" requirements (with under 10% population deviation statewide), and showed how to reduce enacted violations of Part II, Article 11 of the State Constitution for towns and wards with sufficient population. *Id*. ¶ 40 & Ex. 2, Affidavit of David Andrews ¶¶ 8, 9, and Ex. G.

In all, as alleged in the Complaint and demonstrated in the attachments to the Complaint, Map-a-Thon showed how the violations of Part II, Article 11 could be reduced from 55 to 41. Complaint ¶ 47& Ex. 2, Affidavit of David Andrews ¶¶ 8, 9, and Ex. G.

At every turn, the legislature rejected the Map-a-Thon proposed maps without explanation. *See* Complaint ¶ 45. The legislative history of Laws 2022, 9:1 offers no

explanation or justification for the policy decisions for the House districts and no rationale for rejecting the Map-a-Thon proposals that significantly reduced the number of violations of Part II, Article 11. *Id.* ¶ 50. The exposition of legislative history contained in the State's motion to dismiss likewise sheds no light on the subject.[2] *See generally* State's MOL.

In filing this action, the plaintiffs submitted a comprehensive affidavit from a representative of Map-a-Thon, explaining Map-a-Thon's participation in the legislative process, proposed House maps, and methodology. *See* Ex 2 to Complaint, Affidavit of David Andrews. In moving to dismiss, the State challenges neither the facts in the Complaint nor the affidavit/attachments submitted with the Complaint.

III. Standard of Review

"Whether a controversy is nonjusticiable because it involves a political question presents a question of law . . . ." *Richard v. Speaker of the House of Representatives*, 2022 N.H. LEXIS 74, *5 __ N.H. __ (July 6, 2022). That said, assertions of a "political question" cannot rest on assertions of disputed fact at the pleading stage. *See Cooper v. Tokyo Electric Power Co.*, Docket No. 15-56424, at 41 (9th Cir. June 22, 2017) ("Because determining whether a case raises a political question requires a discriminating inquiry into the precise facts and posture of the particular case, it is not always possible to tell at the pleading stage whether a political question will be inextricable from the case . . . ." (quotations and citation omitted)).

In reviewing a motion to dismiss for failure to state a claim, the Court inquires "whether the allegations in the plaintiff's pleadings are reasonably susceptible of a construction that would permit recovery." *McNamara v. Hersh*, 157 N.H. 72, 73 (2008). The Court assumes as true allegations of fact, but not conclusions of law. *See Beane v. Dana S. Beane & Co.*, 160 N.H.

[2] The State does not dispute that the enacted plan violates the 10% deviation safe harbor, while the Map-a-Thon proposed plan does not. *See* State's MOL at 5 n.1; *see also* Complaint ¶ 54.

708, 711 (2010). The Court may consider "documents attached to the plaintiffs' pleadings, documents the authenticity of which are not disputed by the parties, official public records, or documents sufficiently referred to in the complaint." *Automated Transactions, LLC v. Am. Bankers Ass'n*, 172 N.H. 528, 523 (2019). Using the Complaint and attachments, the Court tests the facts against applicable law. *See Surprenant v. Mulcrone*, 163 N.H. 529, 530 (2012).

IV. Argument

The State almost exclusively bases its motion on the "political question" doctrine, advancing the novel proposition that House redistricting—indeed, practically all legislative redistricting—is so political as to be unreviewable by this Court. That proposition finds no support in New Hampshire law or elsewhere. To the contrary, New Hampshire has routinely decided redistricting disputes on the merits, including a 2012 case asserting a claimed violation of the very same mandatory, express State Constitutional provision at issue here.

Alternatively, the State has included a single paragraph making bare assertions that plaintiffs failed to state a claim for relief. The State offers no analysis or authority, likely because, as set forth below, the Complaint far exceeds the pleading threshold.

a. This case presents no "political questions."

i. Adjudicating a dispute over compliance with an express, textual mandate in the State Constitution is not a "political question."

"In general, the Judiciary has a responsibility to decide cases properly before it, even those it would gladly avoid." *Zivotofsky v. Clinton*, 566 U.S. 189, 194 (2012) (quotation omitted); *see also*, *e.g.*, *State v. LaFrance*, 124 N.H. 171, 177 (1983) ("The judiciary, whose duty it is to expound what the law is, simply compares the legislative act with the constitution; since the constitution clearly cannot be adjudged void, the courts have no choice but to declare

any act which is inconsistent with it to be of no effect.”). The “political question” doctrine is a “narrow exception,” *see Zivotosfky*, 566 U.S. at 189, with no relevance to the claims here.

“The nonjusticiability of a political question derives from the principle of separation of powers . . . .” *Burt v. Speaker of the House of Representatives*, 173 N.H. 522, 525 (2020) (quotation omitted). “A controversy is nonjusticiable — i.e., involves a political question — where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.” *Id*. (quotation omitted). This case presents no “political questions”.

To begin, the New Hampshire Supreme Court has never invoked the “political question” doctrine to avoid deciding a dispute over redistricting. To the contrary, the New Hampshire Supreme Court has decided numerous cases alleging constitutional redistricting violations.[3]

One of those cases, *City of Manchester v. Secretary of State*, 163 N.H. 689 (2012), produced a decision on the merits of a claimed violation of the very same constitutional provision at issue in this action—Part II, Article 11. The plaintiffs’ theory in *City of Manchester* was identical to the one here, insofar as the plaintiffs alleged that the House redistricting plan following the 2010 Census contained more violations of Part II, Article 11 than necessary. *Id.* at 696. Although the merits of the claim were hotly disputed, it was unquestioned that this was a dispute within the power of the Courts to resolve. Even the New Hampshire Attorney General effectively concurred, stating in a 2012 *City of Manchester* brief that:

> [I]t is this Court’s role to interpret the Constitution and resolve the disputes arising under it. *Petition of Below*, 151 N.H. 135, 139 (2004). The Court is the final arbiter of the state’s constitutional disputes. *Id.*

[3] *See Monier v. Gallen*, 122 N.H. 474 (1982); *Burling v. Chandler*, 148 N.H.143 (2002); *Below v. Gardner*, 148 N.H. 1 (2002); *Petition of Below*, 151 N.H. 135 (2004); *Town of Canaan v. Secretary of State*, 157 N.H. 795 (2008); *City of Manchester v. Secretary of State*, 163 N.H. 689 (2012); *Norelli v. Secretary of State*, 175 N.H. 186 (2022).

City of Manchester, Brief for the Attorney General at 5, attached as Ex A. The New Hampshire Supreme Court decided the case on the merits, without any indication that the "political question" doctrine limited the Court's authority.[4]

By way of background, although the Court ruled against the plaintiffs in *City of Manchester*, there is a crucial distinction between that case and this one. In *City of Manchester*, the challenged plan had a deviation range of 9.9%, while the plaintiffs' proposed plans all exceeded the 10% deviation safe harbor. Thus, while the *City of Manchester* plaintiffs' proposed plan would have yielded fewer violations of Part II, Article 11, the legislature was required to comply with the "paramount authority" of the United States Constitution. *City of Manchester*, 163 N.H. at 701 to 703. Here, the situation is reversed. The enacted plan at issue in this case creates 14 unforced violations of Part II, Article 11, and also exceeds the 10% threshold, making it *unconstitutional* for multiple reasons. The plaintiffs' proposed plan in this case eliminates these unforced violations and brings the overall range of population deviation below 10%.

As the foundation of the State's current "political question" argument here, the State inaccurately asserts "the Legislature has the *exclusive* province to weigh and decide" redistricting. *See* State's MOL at 20. To the contrary, the challenged redistricting plan was a <u>statute</u> passed by the legislature <u>and</u> signed by the Governor[5] on March 23, 2022. *See* Laws 2022, Chapter 9. Therefore, Laws 2002, Chapter 9 itself was not a matter committed

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[4] While *City of Manchester* did not analyze the "political question" doctrine, the New Hampshire Supreme Court recently warned against assuming that a reviewing court "overlooked a basic jurisdictional tenet" in a case involving redistricting. *See Norelli*, 175 N.H. at 194.

[5] The Governor, in fact, has vetoed past redistricting plans, including a House redistricting plan in 2012. *See* House Bill 592 (2012). In 2022, the Governor vetoed a passed plan for the U.S. House (Senate Bill 200).

"exclusively" to the legislature.[6] Furthermore, the New Hampshire Supreme Court has gone so far as to draw (or re-draw) legislative districts itself where the task has not been constitutionally performed to date. *See Norelli*, 175 N.H. at 202 (2022) ("This court has both the authority and the obligation to ensure that the upcoming election proceeds under a legally valid congressional district plan."); *Burling*, 148 N.H. at 144 ("[W]hen the legislature has failed to act, it is the judiciary's duty to devise a constitutionally valid reapportionment plan."). That the Court would fashion a remedy by drawing its own districts belies any assertion that redistricting is exclusively a legislative function or that no remedy lies with this branch.

Nor do the claims in this case involve a lack of judicially discoverable or manageable standards. This case centers upon mandatory language in the first sentence of Part I, Article 11 of the State Constitution. *See* N.H. CONST. pt. II, art. 11 ("When the population of any town or ward, according to the last federal census, is within a reasonable deviation from the ideal population for one or more representative seats, the town or ward shall have its own district of one or more representative seats." (emphasis added)). The word "shall" creates a mandatory requirement. *See*, *e.g.*, *In the Matter of Liquidation of Home Ins. Co.*, 157 N.H. 543, 553 (2008) (observing "shall" is mandatory). In addition to the mandatory language, the State Constitution intrinsically contains standards for its own enforcement—a population requirement met by each plaintiff in this case, which the State does not dispute in its memorandum of law.

Alleged violations of constitutional mandates such as Part II, Article 11 have long been held justiciable. *See Baines v. N.H. Senate President*, 152 N.H. 124, 132 (2005) ("Claims regarding compliance with these kinds of mandatory constitutional provisions are justiciable.").

[6] True, the legislature might theoretically override a veto, but that is not the legislative process that produced Laws 2022, Chapter 9. And, even in the event of an override, that does not foreclose the Executive Branch's involvement in the process. To view the process otherwise would mean every statute enacted by legislative override is potentially a "political question."

For example, in *Hughes v. Speaker of the N.H. House of Representatives*, 152 N.H. 276 (2005), private negotiation of a bill out of public view was held to be justiciable because of the mandatory nature of the constitutional language requiring open government and the Court's "duty to interpret constitutional provisions and to determine whether the legislature has complied with them." *Hughes*, 152 N.H. at 288. Likewise, in *Richard v. Speaker*, 2022 N.H. LEXIS 74, *7-*8 (July 6, 2022), the Court held that deciding the question of "whether the Speaker and the Senate President . . . failed to comply with constitutional mandates" was not a political question.

This case presents a justiciable claim based on mandatory language of the State Constitution (Part II, Article 11) analytically the same as the constitutional mandate claims held justiciable in *Hughes* and *Richard*. The legislature has no unilateral discretion or authority to enact redistricting. As a corollary, the State's redistricting must adhere to an express mandate approved by voters in 2006 for the express purpose of creating a constitutional right to an individual House district for those with sufficient population.

The lack of merit in the State's argument is exposed by this year's *Norelli* decision, which, in light of federal constitutional mandates, redrew this State's two federal congressional districts after expressly rejecting political question arguments tendered by the State. *See Norelli*, 175 N.H. at 196-197 (quoting mandates in Article I, Section 3 of the Federal Constitution). *Norelli* spoke in unmistakable terms about these fundamental constitutional rights:

> We reject the State's position that, despite the unconstitutionality of the current congressional districting statute, judicial non-intervention in this case is more important than protecting the voters' fundamental rights under the United States Constitution. It is the duty of the judiciary to protect constitutional rights and, in doing so, to support the fundamentals on which the Constitution itself rests.

Id. at 200 (quotation and citations omitted). This Court has also drawn House districts where the legislature failed to do so as constitutionally required. *See Burling*, 148 N.H.

at 144. More recently, Judge Colburn recently considered the same "political question" arguments asserted by the State in this case and observed that claims concerning compliance with express redistricting mandates are justiciable. *See Brown v. Scanlan*, Docket No. 2022-CV-00181 (October 5, 2022) (*Colburn*, J.) ("Based on the foregoing, the Court concludes that the only justiciable issues it can address concerning senate and executive council redistricting are whether the newly-enacted districts meet those express [State Constitutional] requirements . . . ."), copy attached as Exhibit B.

The mandatory constitutional redistricting language at issue in this case equally, indeed even more clearly, prescribes required redistricting criteria just as the constitutional mandates analyzed in the *Norelli* decision and the *Brown* decision.

For its part, the State openly acknowledges and concedes that "judicial intervention in the redistricting process" is proper "when the Legislature fails to meets its express, mandatory obligations under the State Constitution's redistricting[] provision." State's MOL at 19. Yet the failure to satisfy an express constitutional mandate is precisely what plaintiffs allege here.

In terms of decisional law, the State fails to cite a single case categorizing a claimed statutory violation of express, mandatory constitutional language as a "political question." The State's citation to and reliance upon *Rucho v. Common Cause*, 139 S.Ct. 2484 (2019) has no application to this case—the claims in this case are not partisan gerrymandering claims untethered to specific constitutional text, but instead are anchored in the express text of the State Constitution and its self-contained standards. *Rucho* itself acknowledges that such claims, with judicially applicable standards, are indeed justiciable. *See Rucho*, 139 S.Ct. at 2488 (discussing and reaffirming prior cases holding population inequality and racial discrimination claims are justiciable); *Baker v. Carr*, 369 U.S. 186 (1962) (holding that population inequality claims were

justiciable and rejecting assertion of political question); *Richard v. Speaker*, 2022 N.H. LEXIS 74, *7 (July 6, 2022) (recognizing New Hampshire has adopted *Baker* under State Constitution).

To accept the State's broad view of the "political question" doctrine—bereft of any limiting principle—and take that to its logical conclusion would mean no Court ever reviews any redistricting plan, which is an illogical outcome. Agreeing with the State would set a precedent here that constitutional mandates generally could be freely disregarded by the political branches of government, without redress or consequence. Indeed, agreeing with the State and categorizing this case as a "political question" would contravene the 2022 *Norelli* and 2002 *Burling* decisions.

Further illustrating the broad lack of merit in the State's argument, numerous out-of-state Courts have decided disputes about constitutional mandates similar to Part II, Article 11.[7]

If the "judicial power" constitutionally vested in this Court by Part II, Article 72-a means anything, it must include review of claimed governmental violations of express State Constitutional mandates such as Part II, Article 11, and judicial remedies for same. *See Merrill v. Sherburne*, 1 N.H. 199, 201 (1818); *Marbury v. Madison*, 5 U.S. 137 (1803). The claims at issue in this case are not "political questions."

ii. The State's discussion of the second sentence in Part II, Article 11 is irrelevant and lacks merit.

Presumably as part of its "political question" argument, the State's memorandum makes passing references to the second sentence in Part II, Article 11.[8] Though irrelevant, in the event the Court needs to reach the issue, that second sentence provides no support for dismissal.

[7] *See Twin Falls Cnty. v. Idaho Comm'n on Redistricting*, 271 P.3d 1202, 1203 (Idaho 2012); *Holt v. 2011 Legislative Reapportionment Comm'n*, 38 A.3d 711, 754-57 (Pa. 2012); *In re Reapportionment of the Colo. Gen. Assembly*, 332 P.3d 108, 109 (Colo. 2011); *Legislative Research Comm'n v. Fischer*, 366 S.W.3d 905, 91-12 (Ky. 2012); *In re Colorado General Assembly*, 828 P.2d 185, 195-96 (Colo. 1992).

[8] The first and second sentences of Part II, Article 11 are quoted below for reference:

Preliminarily, and as discussed, the clear, express text of the first sentence in Part II, Article 11 (as amended in 2006) creates a constitutional right for the plaintiffs to have their own House district. In an apparent attempt to cast doubt on that clear right, the State's memorandum of law cites the second sentence in Part II, Article 11, *see* State's MOL at 2, 8, 12, seemingly arguing that, because the number of house districts and other redistricting parameters prescribed by the State Constitution result in forced House redistricting violations no matter what, the legislature has (unreviewable) discretion and is entitled to disregard the mandatory nature of the first sentence in Part I, Article 11. This is both wrong and a red herring.

First, in *City of Manchester*, the impossibility of "perfect compliance" with Part II, Article 11 was raised, yet did not insulate the 2012 House redistricting statute from judicial review—the Court nonetheless reached the merits and verified a sufficient basis existed for the violations of Part II, Article 11. *See City of Manchester*, 163 N.H. at 706 ("As the petitioners conceded at oral argument, perfect compliance with all of these mandates is impossible. Redistricting is a difficult and often contentious process. A balance must be drawn. Trade-offs must be made. The petitioners have failed to persuade us that the trade-offs the legislature made in enacting the Plan were unreasonable." (quotation, citation, brackets omitted)).

Second, the State's argument implausibly renders Part II, Article 11's first sentence a precatory suggestion beyond judicial review/enforcement, which could not have been the actual intent. *See State v. Robinson*, 123 N.H. 665, 669 (1983) (construing constitutional right to

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> **[Art.] 11. [Small Towns; Representation by Districts.]** When the population of any town or ward, according to the last federal census, is within a reasonable deviation from the ideal population for one or more representative seats, the town or ward shall have its own district of one or more representative seats. <u>The apportionment shall not deny any other town or ward membership in one non-floterial representative district</u>. . . ." (Emphasis added).

N.H. CONST. pt. I, art. 11.

counsel so as not to be meaningless); *Opinion of the Justices*, 162 N.H. 160, 167 (2011) (discussing importance of intent in construing State Constitution). To the contrary, the clear and express constitutional right set forth in the first sentence of Part II, Article 11 means, and should be construed, as a requirement to minimize violations, even if some "forced" violations are necessary. Otherwise, the necessity of "forced" violations becomes a license to violate by legislative fiat. The Attorney General agreed in his 2012 *City of Manchester* brief, citing Part II, Article 11's intent to "provide as many single town districts as possible." *See* Ex. A at 7. Other States have reached the same conclusion—that a mandatory constitutional redistricting requirement, even if impossible to comply with literally, requires minimization of violations.[9] That proposition was also implicit in the *City of Manchester* decision, which decided the merits of a claim (i) asserted in the context of acknowledge inability to perfectly comply with all constitutional mandates, and (ii) based on an alternative redistricting plans existed "that complied more fully with Part II, Article 11". *See City of Manchester*, 163 N.H. at 702.

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[9] *See Twin Falls Cnty. v. Idaho Comm'n on Redistricting*, 271 P.3d 1202, 1203 (Idaho 2012) ("We hold that the plan is invalid because it violates Article III, section 5, of the Idaho Constitution by dividing more counties than necessary to comply with the Constitution of the United States."); *Holt v. 2011 Legislative Reapportionment Comm'n*, 38 A.3d 711, 754-57 (Pa. 2012) (invalidating redistricting plan where alternative plan "avoided a highly significant percentage of political subdivision splits and fractures while maintaining a lower average population deviation"); *In re Reapportionment of the Colo. Gen. Assembly*, 332 P.3d 108, 109 (Colo. 2011) ("We hold that the Adopted Plan is not sufficiently attentive to county boundaries to meet the requirements of article V, section 47(2) and the Commission has not made an adequate showing that a less drastic alternative could not have satisfied the hierarchy of constitutional criteria set forth in our most recent reapportionment opinion."); *Legislative Research Comm'n v. Fischer*, 366 S.W.3d 905, 91-12 (Ky. 2012) (holding reapportionment scheme unconstitutional and reaffirming prior decisional law, which "requires division of the fewest number of counties mathematically possible in reapportionment plans"); *In re Colorado General Assembly*, 828 P.2d 185, 195-96 (Colo. 1992) ("We conclude that the Commission's explanation for dividing Pitkin County and the City of Aspen, and for the further division of Snowmass Village from Aspen, does not rise to the level of an adequate factual showing that less drastic alternatives could not have satisfied the equal population requirement of the Colorado Constitution."); *cf. In re 2011 Redistricting Cases*, 294 P.3d 1032, 1034 (Alaska 2013) ("A reapportionment plan may minimize article VI, section 6 requirements when minimization is the only means available to satisfy Voting Rights Act requirements."); *In re Legislative Districting of General Assembly*, 193 N.W.2d 784, 792-92 (Iowa 1972) (invalidating redistricting plan for failure to comply with compactness requirements in State Constitution).

Third, the State's passing references to the second sentence of Part II, Article 11 are simply a red herring and irrelevant. *See* footnote 8 *supra* (quoting the first and second sentence of Part II, Article 11). The second sentence of Part II, Article 11 merely refers to the consideration of "other town[s] or ward[s]" not ending up in "floterial" districts at the expense of creating a dedicated individual House district, which speaks to the new recognition of floterials added by the same 2006 constitutional amendment.[10] The State has offered nothing to suggest the second sentence has any impact on the plaintiffs' constitutional rights in the first sentence in this case. The House maps developed by Map-A-Thon and attached to the Complaint do not place any town or ward solely in a floterial district. *See* Ex. 2 to Complaint, Affidavit of David Andrews ¶¶ 8, 9, and Ex. G. And, even if the State intends to challenge that proposition, any argument to the contrary would simply raise an issue of fact (disputed by plaintiffs) and inappropriate to address at the pleading stage of the case. *See Town of Winthrop v. FAA*, 535 F.3d 1, 6 (1st Cir. 2008) (assuming outcome on merits at this stage "puts the cart before the horse; it assumes the outcome on the merits in making its preliminary . . . objection.").

The import of the 2006 constitutional amendment was to require redistricting to adhere to mandated standards. The State's arguments turn the 2006 amendments on their head claiming discretion where none exists. For all these reasons, the State's discussion of the second sentence in Part II, Article 11 lacks merit.

[10] The second sentence in Part II, Article 11 does not foreclose the possibility of placing such other towns/wards in multi-member districts, which are distinct from floterials, *see City of Manchester*, 163 N.H. at 695-696 (discussing and contrasting single-member districts, multi-member districts, and floterials). The Attorney General agreed and also argued this same meaning of Part II, Article 11's second sentence in a 2012 *City of Manchester* brief. *See* Ex. A at 7 ("In 2006, Part II, Article 11 of the New Hampshire Constitution was amended with the purpose to provide as many single town districts as possible while not allowing any town to be represented solely in a floterial district." (emphasis added)).

b. Plaintiffs met—and far exceeded—the pleading threshold for stating a claim.

i. The defendants inadequately briefed this issue.

In a single paragraph included at the end of their memorandum, devoid of any citation to legal authority or analysis of the Complaint, the State argues that plaintiffs have failed to state a claim. *See* Defs' MOL at 20. This argument is inadequately briefed and should be deemed waived. *See*, *e.g.*, *State v. Papillon*, 173 N.H. 13, 28 n.1 (2020).

ii. The detailed allegations in the Complaint together with its exhibits, including an expert affidavit, easily state a claim for relief.

The plaintiffs went to considerable effort to outline—in great detail, including an expert affidavit—their claims and the factual bases for those claims in the Complaint. The State does not profess a lack of understanding of the claims, or really any particular pleading deficiency. The Complaint in this case easily meets New Hampshire's pleading threshold. Indeed, though not required to,[11] the Complaint alleges a prima facie claim for violation of Part II, Article 11.

The Complaint alleges the existence of an express constitutional right in Part II, Article 11. As already discussed above and incorporated by reference, the State Constitution supplies the mandatory language and correlative right forming the basis for the plaintiffs' claims. *See* N.H. CONST. pt. I, art. 11 ("When the population of any town or ward, according to the last federal census, is within a reasonable deviation from the ideal population for one or more representative seats, the town or ward shall have its own district of one or more representative seats."). The word "shall" creates a mandatory requirement. *See*, *e.g.*, *In the Matter of Liquidation of Home Ins. Co.*, 157 N.H. at 553 (observing "shall" is mandatory).

[11] *See*, *e.g.*, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510-512 (2002) (A "prima face case . . . is an evidentiary standard, not a pleading requirement.").

Plaintiffs also alleged the breach of that constitutional right (resulting in harm to the plaintiffs—the failure to have an individual dedicated House district). As illustrated in *City of Manchester*, to establish breach of the right set forth in Part II, Article 11, the plaintiffs need only allege that Laws 2022, 9:1 lacks any "rational or legitimate basis." *See City of Manchester*, 163 N.H. at 698 (discussing standard of review). Importantly, the New Hampshire Supreme Court described this standard as "akin to the well-established rational basis standard," which is to say that it is similar to but not necessarily the same as typical rational basis review. This standard "consider[s] . . . the specific violations claimed" but is also mindful of "the various legal requirements statewide." *Id*. (quotation omitted).

The Complaint alleges (and shows) the absence of any "rational or legitimate" basis for the enacted House redistricting plan and explains why. The legislature was notified of the unnecessary violations, yet did nothing to address it. So not only is there an insufficient justification—there is in fact no justification. And, the only possible type of rational or legitimate basis that could justify clear violations of the State Constitution in this case are the requirements of a separate constitutional or legal requirement, as *City of Manchester* exemplifies. Put another way, run-of-the-mill policymaking considerations cannot justify a violation of the State Constitution. A *comparable legal requirement* must exist to justify violating the State Constitution. For example, in *City of Manchester* the Court held that the necessity of complying with another, overriding federal constitutional requirement—the "one person, one vote" 10% population deviation standard—justified the legislature's decision in 2012 to commit the "forced" violations of Part II, Article 11 at issue in that case. As the Complaint outlines, no such justification exists for Laws 2022, 9:1 and its unnecessary violations of Part II, Article 11.

Even now, the State's current discussion of and citation to legislative history contains no justification for why, in the face of a submitted redistricting plan that could significantly reduce the number of Part II, Article 11 violations, the decision was made to forego such a map or to even review the merits of the submitted Map-a-Thon map or any alternative map. The State cites and quotes legislative history, but nothing in the State's memorandum of law contains any justification or rationale for committing unnecessary violations of Part II, Article 11 and failing to minimize such violations. The glaring absence of any justification in the current Joint Motion to Dismiss speaks for itself and supports plaintiffs' claims.

And, while an alternative plan may not necessarily be required to prove a violation, here the plaintiffs have provided one with the Complaint verified by an expert affidavit. *See City of Manchester*, 163 N.H. at 698 (observing that "proof of such a plan may cast doubt on the legality of the Legislature's plan" but is not necessarily conclusive). Not only that, but the plan submitted by plaintiffs complies with the 10% safe harbor "one person/one vote" standard that the enacted plan admittedly does not comply with. In the context of population deviation claims, "[i]f the challenger to such a plan demonstrates that the population differences could have been avoided, the State then bears the burden of justifying those differences." *Id*. at 701. Here, the plaintiffs' tendered plan does or should shift the burden[12] of constitutionally justifying the enacted plan to the State, who has fallen well short of carrying that burden.

[12] *See or cf. City of Manchester*, 163 N.H. at 701. Furthermore, Case law relied upon by the New Hampshire Supreme Court in *City of Manchester* (to establish and articulate the "rational or legitimate basis" framework) makes plain that a prima facie case for proving an unconstitutional redistricting plan exists once plaintiffs show "that the State has failed to meet constitutional or statutory standards or policies with regard to a specific part of the plan." *In re Town of Woodbury*, 861 A.2d 1117, 1120 (Vt. 2004) (quotation omitted). Thus, "once petitioners have shown that the State has failed to meet constitutional or statutory standards or policies with regard to a specific part of the plan, the State then has the burden to show that satisfying those requirements was impossible because of the impermissible effect it would have had on other districts." *Id*.; *see also In re Reapportionment of Towns of Hartland, Windsor and West Windsor*, 624 A.2d 323, 327 (Vt. 1993).

Finally, the State's bare assertion of failure to meet the pleading threshold begs the question: what more could the plaintiffs do to state a claim? The plaintiffs alleged (i) the existence of an express constitutional right—to an individual House district; (ii) the existence of an enacted redistricting plan that does not grant an individual House district to the plaintiffs; (iii) the existence of an alternative redistricting plan—presented to the legislature and verified by expert affidavit attached to the Complaint—that could have been enacted to give the plaintiffs their own House districts and, more generally, significantly reduce the number of overall facial violations of Part II, Article 11, and (iv) the absence of any justification in the legislative history or otherwise for selecting the enacted redistricting plan (which the State effectively confirms now by its memorandum's failure to identify any justification).

The detailed allegations in the Complaint and its attachments underscore that Plaintiffs have adequately stated claims for relief.

V. Conclusion

The claims in this case do not come close to "political questions." To stretch that doctrine to fit this case would render the 2006 constitutional amendment to Part II, Article 11 a nullity, if not render all legislative redistricting beyond the scope of judicial review.

The State briefly argues alternatively the Complaint fails to state a claim for relief. Yet, the Complaint as well as the State's own memorandum's inability to justify or even foreshadow a justification for the State Constitutional violations confirm there is no such justification for committing the unnecessary violations of Part II, Article 11 that harmed plaintiffs.

Finally, in the event the Court is inclined at all to dismiss the Complaint for failure to state a claim for relief, then the Court should grant, and the plaintiffs hereby request, leave to amend the Complaint, consistent with normal New Hampshire practice and *ERG, Inc. v. Barnes*,

137 N.H. 186, 189 (1993) ("To assure the opportunity for amendment has practical meaning, however, the plaintiff must be given leave to amend the write to correct perceived deficiencies before an adverse judgment has preclusive effect.").

WHEREFORE, the plaintiffs respectfully request and pray that this Court:

A. Schedule a hearing on the State's Motion to Dismiss;

B. Deny the State's Motion to Dismiss;

C. In the event of any perceived deficiencies in the Complaint, grant plaintiffs leave to amend the Complaint prior to dismissal; and

D. Grant such other relief as the Court deems just, equitable, and proper.

Respectfully submitted,

THE CITY OF DOVER, NEW HAMPSHIRE

Dated: November 15, 2022 By: /s/ Joshua M. Wyatt

Joshua M. Wyatt, Esquire
N.H. Bar No. 18603
City Attorney
Office of the City Attorney
288 Central Avenue
Dover, NH 03820
603-516-6520
j.wyatt@dover.nh.gov

By: /s/ Jennifer R. Perez

Jennifer R. Perez, Esq.
N.H. Bar No. 272947
Deputy City Attorney
Office of the City Attorney
288 Central Avenue
Dover, NH 03820
603-516-6520
j.perez@dover.nh.gov

THE CITY OF ROCHESTER, NEW HAMPSHIRE

Dated: November 15, 2022 By: /s/ Terence M. O'Rourke
Terence M. O'Rourke
N.H. Bar No. 18648
City Attorney
31 Wakefield Street
Rochester, NH 03867
603-335-1564
Terence.orourke@rochester.nh.net

DEBRA HACKETT
ROD WATKINS
KERMIT WILLIAMS
EILEEN EHLERS
JANICE KELBLE
ERIK JOHNSON
DEBORAH SUGERMAN
SUSAN RICE
DOUGLAS BOGEN
JOHN WALLACE

By their attorney,

Dated: November 15, 2022 By: /s/ Henry Quillen
Henry Quillen
NH Bar No. 265420
Whatley Kallas LLP
159 Middle St., Suite 2C
Portsmouth, NH 03801
603-294-1591
hquillen@whatleykallas.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on all counsel of record through the Court's electronic filing system.

Dated: November 15, 2022 By: /s/ Joshua M. Wyatt
Joshua M. Wyatt, Esquire

EXHIBIT A to Plaintiffs' Objection to Defendants' Joint Motion to Dismiss

(Attorney General's Brief in *City of Manchester v. Secretary of State*, 163 N.H. 689 (2012))

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Docket No. 2012-0338

City of Manchester, *et al.*
v.
William M. Gardner, in his official capacity as Secretary of State of the State of New Hampshire

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City of Concord
v.
William M. Gardner, in his official capacity as Secretary of State of the State of New Hampshire

---

Hon. Mary Jane Wallner, *et al.*
v.
William M. Gardner, in his official capacity as Secretary of State of the State of New Hampshire

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Town of Gilford, *et al.*
v.
William M. Gardner, in his official capacity as Secretary of State of the State of New Hampshire

---

Hon. Marshall E. Quandt, *et al.*
v.
William M. Gardner, in his official capacity as Secretary of State of New Hampshire

---

Interlocutory Transfer Pursuant to Rule 9

BRIEF FOR THE ATTORNEY GENERAL

MICHAEL A. DELANEY
ATTORNEY GENERAL

Anne M. Edwards [Bar #6826]
Associate Attorney General
Stephen G. LaBonte [Bar #16178]
Assistant Attorney General
NH Department of Justice
33 Capitol Street
Concord, NH 03301-6397
(603) 271-3658

May 23, 2012

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ISSUES PRESENTED

A. Whether RSA 662:5 is unconstitutional under the Federal or State Constitutions?

B. If part of RSA 662:5 is determined to be unconstitutional, whether that part is severable from the remaining parts of the statute?

STATEMENT OF THE CASE

This matter comes before this Court by interlocutory transfer without a ruling pursuant to Supreme Court Rule 9. On March 28, 2012, the New Hampshire Legislature enacted RSA 662:5 (2012) defining the state representative districts for the upcoming 2012 general election. As a result, five separate actions have been filed and consolidated against Secretary of State William M. Gardner, in his official capacity, challenging the constitutionality of the statute. The actions seek a declaratory judgment and injunctive relief enjoining the Secretary of State from implementing the statute as currently enacted. [1]

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[1] The Secretary of State is a named party to this action solely in his official capacity. He takes no specific position with respect to the constitutionality of RSA 662:5 (2012). As these actions challenge the constitutionality of a state law, the Attorney General is defending that law under his common law authority and Supreme Court Rule 31.

STATEMENT OF THE FACTS

The Attorney General incorporates the Agreed Statement of Facts appearing in section II of the Interlocutory Transfer Statement.

SUMMARY OF THE ARGUMENT

One voter, one vote is the primary rule with regard to satisfying the constitutional mandate of substantial equality with respect to state legislative representation for all citizens. The Legislature is the governing body best situated to enact a state legislative apportionment plan based on equality. The Legislature may use single member, multi-member and floterial districts in order to see that each person's vote is as near equal as possible.

The New Hampshire Constitution provides that the House of Representatives be founded on equality and maintains no less than three hundred and seventy-five or no more than four hundred representative seats. The state Constitution further provides that towns and wards with populations within a reasonable deviation of the ideal population be apportioned their own districts with one or more representatives. In drafting RSA 662:5, the Legislature adopted a ten percent deviation guideline as established by federal common law apportioning individual districts to the various towns and wards.

In 2006, Part II, Article 11 of the New Hampshire Constitution was amended with the purpose to provide as many single town districts as possible, while not allowing any town to be represented by a floterial district. As currently enacted, RSA 662:5 (2012) provides for two hundred and four house districts, whereas the previously enacted statute provided one hundred and three house districts. The Legislature maintained the constitutionally required number of representative seats and assured that the boundaries of the towns, wards and unincorporated places were preserved and contiguous. The Legislature balanced all of the constitutional and common law requirements in enacting RSA 662:5. Presuming the statute is constitutional and considering all of the agreed upon facts, Petitioners have failed to meet their burden of proof and RSA 662:5should be held to be constitutional.

ARGUMENT

I. RSA 662:5 (2012) IS CONSTITUTIONAL PURSUANT TO THE UNITED STATES AND NEW HAMPSHIRE CONSTITUTIONS.

RSA 662:5 (2012) is constitutional under the United States and New Hampshire Constitutions. RSA 662:5 is presumed constitutional and it will not be declared invalid except upon inescapable grounds. *See N.H. Assoc. of Counties v. State of New Hampshire,* 158 N.H. 284, 288 (2009). This Court will not hold a statute to be unconstitutional unless a clear and substantial conflict exists between it and the Constitution. *Id.* Further, it is this Court's role to interpret the Constitution and resolve the disputes arising under it. *Petition of Below*, 151 N.H. 135, 139 (2004). The Court is the final arbiter of the state's constitutional disputes. *Id.* When interpreting a constitutional provision, the Court looks to its purpose and intent, giving the words in question the meaning they must be presumed to have had to the electorate when the vote was cast. *Id.* The Court reviews the history of the Constitution and its amendments thereby making it the Court's "duty ...to place itself as nearly as possible in the situation of the parties at the time the instrument was made, [so] that it may gather their intention from the language used, viewed in light of the surrounding circumstances." *Id., quoting Warburton v. Thomas*, 136 N.H. 383, 387 (1992). "In reviewing a state legislative reapportionment case, this Court must of necessity consider the challenged scheme as a whole in determining whether the ... state apportionment plan, in its entirety meets ... constitutional requisites." *Maryland Committee for Fair Representation v. Tawes*, 377 U.S. 656, 673 (1964).

"[T]here can be room but for a single constitutional rule – one voter, one vote." *Below v. Gardner*, 148 N.H. 1, 8 (2002) (*citing Gray v. Sanders*, 372 U.S. 368, 382 (1963). "The equal protection clauses of the New Hampshire and Federal Constitutions 'demand no less than

substantially equal state legislative representation for all citizens, of all places as well as all races." *Petition of Below*, 151 N.H. 135, 136 (2004). "'Reapportionment is primarily a matter of legislative consideration in determination.' (Citation omitted). A state legislature is by far the best situated to identify and then reconcile traditional state policies with the constitutionally mandated framework of substantial population equality." *Below v. Gardner,* 148 N.H. 1, 5 (2002); *see also* New Hampshire Constitution Part II, Article 9-a. Therefore, the Legislature is constitutionally required to apportion legislative districts so that each person's vote is as near equal as possible. *See Below*, 148 N.H. at 8. The Legislature "need not achieve absolute equality with respect to ...legislative districts." *Id.* Single member, multimember and floterial districts may be used to accomplish the overriding objection of substantial equality of the population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen. *See Reynolds v. Simms*, 377 U.S. 533, 579 (1964).

The New Hampshire Constitution Part II, Article 9 provides in part that:

> the legislature of this State, a House of Representatives ... founded on equality, and the representation therein shall be as equal as circumstances will admit. The whole number of representatives to be chosen from the towns, wards, places, and representative districts thereof established hereunder, shall be not less than three hundred seventy-five or more than four hundred.

The New Hampshire Constitution Part II, Article 11 further provides that:

> [w]hen the population of any time or ward, according to the last federal census, is within a reasonable deviation from the ideal population for one or more representative seats, the town or ward shall have its own district of one or more representative seats. The apportionment shall not deny any other town or ward of membership in one non floterial representative district. When any town, ward, or unincorporated places has fewer than the number of inhabitants necessary to entitle it to one representative, the legislature shall form those towns, wards, or unincorporated places into representative

> districts which contain a sufficient number of inhabitants to entitle each district so formed to one or more representatives for the entire district. In forming the districts, the boundaries of towns, wards, and unincorporated places shall be preserved and contiguous. The excess number of inhabitants of a district may be added to the excess of inhabitants of other districts to form at-large or floterial districts, conforming to acceptable deviations.

In 2006, Part II, Article 11 of the New Hampshire Constitution was amended with the purpose to provide as many single town districts as possible while not allowing any town to be represented solely in a floterial district. Record at CHR-000579. In order to accomplish this, the amendment provided every town or ward, within a reasonable deviation of the ideal population, the respective number of representative seats based on its actual population, provided it would not deny another town or ward membership in one non-floterial district. Record at CHR-000581, 000513-14. As currently enacted, RSA 662:5 (2012) provides for 204 House districts. Interlocutory Transfer Statement, ¶ 61. As previously enacted, RSA 662:5 provided for 103 House districts. *See* Appendix to the Interlocutory Transfer Statement, pp. 100-106. In forming the 204 new districts, the boundaries of towns, wards, and unincorporated places were preserved and remained contiguous. *Id.*, pp. 69-87.

When reviewing the constitutional history of the 2006 amendment, the Court must consider the phrase *reasonable deviation* used in the amended language in light of the constitutional mandate of equality provided by the United States Constitution Fourteenth Amendment and the New Hampshire Constitution Part II, Article 9. Considering the language above, a town or ward is only granted its own representative district under Part II, Article 11 of the New Hampshire Constitution if its actual population falls within a reasonable deviation of the ideal population. It has been established "as a general matter that an apportionment plan with a maximum population deviation under 10% falls within [a] category of minor deviations." *Brown*

v. Thomson, 462 U.S. 835, 842 (1983). "A plan with larger disparities in population, however, creates a *prima facie* case of discrimination and therefore must be justified. *Id.* at 842-43. Along with the constitutional mandate of one person, one vote, the Legislature must maintain the constitutionally required number of representative seats and assure that the boundaries of the towns, wards and unincorporated places are preserved and contiguous unless otherwise requested by the town, ward, or place. *See* N.H. Const. Pt. II, Art. 9 and 11.

As currently enacted, RSA 662:5 (2012) provides for 400 representative seats. *See* Record at CHR-000943. The 2010 decennial census identifies New Hampshire as having a population of 1,316,470, resulting in, as the Legislature calculated, the ideal population per representative seat being 3,291. Interlocutory Transfer Statement, ¶ 56. In constructing RSA 662:5 (2012), the House Special Committee on Redistricting ("the Committee") considered its obligation to conform to both the United States and New Hampshire Constitutions. *See* Record at 000005. The Committee endeavored to preserve the one person, one vote requirement of the Federal Constitution, while implementing the single town/ward districting system prescribed by Part II, Art. 11 of the State Constitution. *See Id.* The Committee undertook this task by using the less than 10% deviation guideline as established by federal common law. *See Id.*; *see also Brown v. Thomson*, 462 U.S. 835, 842 (1983). As currently enacted, RSA 662:5 (2012), satisfies the federal common law guideline with a statewide range of deviation of 9.9%. Interlocutory Transfer Statement, ¶ 56. As a result, RSA 662:5 (2012) is constitutional and the petitions requesting that it be declared unconstitutional should be denied.

II. THE PROVISIONS OF RSA 662:5 (2012) ARE SEVERABLE BY COUNTY.

Regarding severability, if any provisions of RSA 662:5 (2012) are determined to be unconstitutional, those provisions are severable by county. With respect to this issue, the Attorney General concurs with the arguments in the House's brief.

CONCLUSION

The Legislature balanced all of the constitutional and common law requirements in enacting RSA 662:5 (2012). Presuming the statute is constitutional and considering all of the agreed upon facts, Petitioners have failed to meet their burden of proof and their petitions should be denied. Based on the arguments presented in this brief, the Attorney General respectfully requests that this honorable Court affirm the presumption of constitutionality and find RSA 662:5 (2012) constitutional.

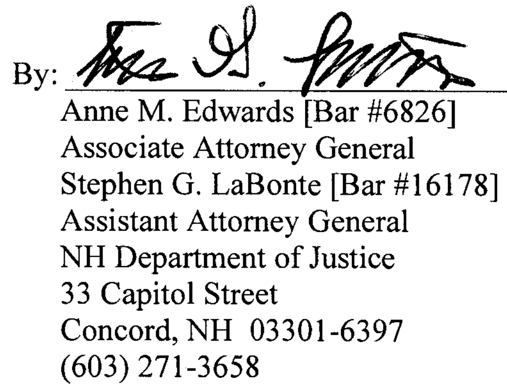
ORAL ARGUMENT

The Attorney General yields his time for oral argument to the Intervenor.

Respectfully submitted,

MICHAEL A. DELANEY
ATTORNEY GENERAL

By his attorneys,

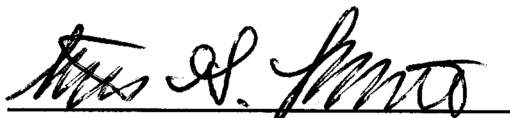


By: ______________________
Anne M. Edwards [Bar #6826]
Associate Attorney General
Stephen G. LaBonte [Bar #16178]
Assistant Attorney General
NH Department of Justice
33 Capitol Street
Concord, NH 03301-6397
(603) 271-3658

Date: May 23, 2012

CERTIFICATION

I hereby certify that two (2) copies of the foregoing were mailed this day, postage prepaid, to: Thomas J. Donovan, Esquire, Richard J. Lehmann, Esquire, David A. Vicinanzo, Esquire/Anthony J. Galdieri, Esquire, Peter V. Millham, Esquire, Danielle L. Pacik, Esquire, Martin P. Honigberg, Esquire/Jay Surdukowski, Esquire, Tony F. Soltani, Esquire/Jason B. Dennis, Esquire, and Allan Krans, Esquire.



Stephen G. LaBonte [Bar #16178]
Assistant Attorney General

Dated: May 23, 2012

EXHIBIT B to Plaintiffs' Objection to Defendants Joint Motion to Dismiss

(*Brown v. Scanlan*, Docket No. 2022-CV-00181 (October 5, 2022) (*Colburn*, J.))

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS **SUPERIOR COURT**
SOUTHERN DISTRICT **No. 2022-CV-00181**

Miles Brown; Elizabeth Crooker; Christine Fajardo; Kent Hackmann; Bill Hay; Prescott Herzog; Palana Hunt-Hawkins; Matt Mooshian; Theresa Norelli; Natalie Quevedo; and James Ward

v.

David M. Scanlan, in his official capacity as the New Hampshire Secretary of State; and the State of New Hampshire

ORDER ON DEFENDANTS' JOINT MOTION TO DISMISS

The plaintiffs have brought this action challenging the constitutionality of two recently enacted laws establishing the boundaries for senate and executive council districts. The defendants, the State of New Hampshire and David M. Scanlan, in his official capacity as the Secretary of State, now move to dismiss. The plaintiffs object. After considering the record, the arguments, and the applicable law, the Court finds and rules as follows.

Legal Standard of Review

In ruling on "a motion to dismiss for failure to state a claim, [the Court] assume[s] the truth of the facts alleged by the plaintiff[s] and construe[s] all reasonable inferences in the light most favorable to the plaintiff[s]." Sivalingam v. Newton, 174 N.H. 489, 494 (2021). The Court "need not, however, assume the truth of statements in the plaintiff[s'] pleadings that are conclusions of law." Id. The Court ultimately "engage[s] in a threshold inquiry that tests the facts in the complaint against the applicable law." Id. "If the alleged facts do not constitute a basis for legal relief," the Court should grant the motion to dismiss. Id.

This is a Service Document For Case: 226-2022-CV-00181
Hillsborough Superior Court Southern District
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Discussion

In May 2022, the governor signed two bills changing the boundaries for New Hampshire's senate and executive council districts. See Laws 2022, ch. 45; Laws 2022, ch. 46. These new district boundaries will be used for the next decade, beginning with the upcoming November 2022 election. The plaintiffs assert that the newly-drawn districts "are partisan gerrymanders[1] that defy the basic principles of representative government." (Compl. ¶ 3.) As a result, the plaintiffs have brought this action in which they: (1) seek a declaration that the newly-drawn districts "violate Part I, Articles 1, 10, 11, 12, 22, and 32 of the New Hampshire Constitution;" (2) seek preliminary and permanent injunctive relief enjoining Mr. Scanlan "from implementing, enforcing, or giving any effect" to those laws; and (3) request the Court to adopt new maps for the senate and executive council districts "that comply with the New Hampshire Constitution." (Id. Prayer ¶¶ A–C.) The defendants now move to dismiss. They assert that the complaint fails to state a claim for which relief may be granted because the issues raised in the complaint present non-justiciable political questions.

"The political question doctrine is essentially a function of the separation of powers, existing to restrain courts from inappropriate interference in the business of the other branches of Government, and deriving in large part from prudential concerns about the respect we owe the political departments." Horton v. McLaughlin, 149 N.H. 141, 143 (2003) (cleaned up). "In the New Hampshire Constitution, the principle of separation of powers is espoused in Part I, Article 37," id., which provides:

[1] Political or partisan gerrymandering "is the practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition's voting strength." Below v. Gardner, 148 N.H. 1, 9–10 (2002) (cleaned up).

> In the government of this state, the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity.

This clause "prohibits each branch of government from encroaching on the powers and functions of another branch." In re Judicial Conduct Comm., 145 N.H. 108, 109 (2000).

To adhere to the Constitution's commitment to separation of powers, the supreme court has held that "the range of the matters subject to judicial review is limited by the concept of justiciability." Id. at 111. Specifically, "[t]he justiciability doctrine prevents judicial violation of the separation of powers by limiting judicial review of certain matters that lie within the province of the other two branches of government." Burt v. Speaker of the House of Representatives, 173 N.H. 522, 525 (2020). "A controversy is nonjusticiable — i.e., involves a political question — where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department[.]" Id. "Where there is such commitment, [the Court] must decline to adjudicate the matter to avoid encroaching upon the powers and functions of a coordinate political branch." Id. "Deciding whether a matter has in any measure been committed by the Constitution to another branch of government is itself a delicate exercise in constitutional interpretation[.]" Id.

The Court, therefore, will begin by examining the text of the relevant constitutional provisions. Part II, Article 26 governs senate districts. It states:

> And that the state may be equally represented in the senate, the legislature shall divide the state into single-member districts, as nearly equal as may be in population, each consisting of contiguous towns, city wards and unincorporated places, without dividing any town, city ward or unincorporated place. The legislature shall form the single-member districts . . . at the regular session following each decennial federal census.

N.H. CONST. pt. II, art. 26 (emphases added). As reflected by the phrase "as equal as may be in population," the "overriding constitutional principle" embodied by this provision is "one person/one vote." Below, 148 N.H. at 9. In addition, Part II, Article 26 also mandates that: "(1) senate districts be comprised of 'contiguous' towns, city wards and unincorporated places; (2) no town, city ward or unincorporated place may be divided unless the town, city ward or unincorporated place requests division by referendum; and (3) each senate district must elect only one senator." Id. (citation omitted). "[T]hese additional requirements, however, are secondary" to the "one person/one vote" requirement," id., as there may be situations "where perfect compliance with all of these mandates is impossible," City of Manchester v. Sec'y of State, 163 N.H. 689, 706 (2012).

Part II, Article 60 establishes the executive council. It provides: "There shall be biennially elected, by ballot, five councilors, for advising the governor in the executive part of government." N.H. CONST. pt. II, art. 60. Originally, there were only five counties in New Hampshire, and "[t]he natural result was that one from each county was taken." Edwin C. Bean, Introductory Note to 9 Laws of New Hampshire, at vii (Edwin C. Bean ed. 1921). "[B]ut when the number of counties was increased" in the State, "it became necessary" for the legislature "to provide for councilor districts" pursuant to Part II, Article 65. Id. Under that provision, "[t]he legislature may, if the public good shall hereafter require it, divide the state into five districts, as nearly equal as may be, governing themselves by the number of population, each district to elect a councilor[.]" N.H. CONST. pt. II, art. 65 (emphasis added). The legislature first used the authority delegated to it under Part II, Article 65 in 1828, see Laws 1828, ch. 104, and has been

drawing the boundaries for executive council districts ever since. As with senate districts, the legislature's "overriding objective" when establishing executive council districts is to obtain "substantial equality of population among the various districts." City of Manchester, 163 N.H. at 700–01 (cleaned up).

The clear language of both Article 26 and Article 65 demonstrates that our State Constitution "commits" the authority to draw the boundaries for senate and executive councilor districts to the legislature. Burt, 173 N.H. at 525; see also Monier v. Gallen, 122 N.H. 474, 476 (1982) (explaining that "[r]eapportionment is primarily a matter of legislative consideration and determination"). In exercising that authority, the legislature must adhere to the explicit requirements outlined in each article, the most important of which is equal population in each district. See Below, 148 N.H. at 9; Op. of Justices, 106 N.H. 233, 234 (1965). If the legislature fails to draw districts that comply with the mandatory requirements of each article, "it is . . . appropriate to provide judicial intervention," as "[c]laims regarding compliance with these kinds of mandatory constitutional provisions are justiciable." Baines v. N.H. Senate President, 152 N.H. 124, 132 (2005). However, "political considerations are tolerated in legislatively-implemented redistricting plans," Burling v. Chandler, 148 N.H. 143, 156 (2002), and therefore the Court must "tread lightly in this political arena" as to not "materially impair the legislature's redistricting power." In re Below, 151 N.H. 135, 150 (2004). Thus, "the Court's jurisdiction in this area is significantly limited," Horton v. McLaughlin, No. 2001-E-121, 2001 N.H. Super. LEXIS 16, at *30 (July 17, 2001), aff'd, 149 N.H. 141 (2003), as "judicial relief becomes appropriate only when [the] legislature fails to reapportion according to constitutional requisites in a timely fashion after having had an adequate

opportunity to do so," City of Manchester, 163 N.H. at 697; see, e.g., Monier, 122 N.H. 474; see generally Harper v. Hall, 868 S.E.2d 499, 572 (N.C. 2022) (Newby, C.J., dissenting) ("The role of the judiciary through judicial review is to decide challenges regarding whether a redistricting plan violates the objective limitations in Article II, Sections 3 and 5 of our constitution or a provision of federal law.").

Here, the plaintiffs do not claim that either of the redistricting plans violate any of the mandatory, express requirements of Article 26 and Article 65. Nor could they.[2] "Finding no explicit constitutional provision prohibiting partisan gerrymandering," the plaintiffs "creatively attempt to mine the [Bill] of Rights [found in Part I] to find or create some protection" against the practice. Harper, 868 S.E.2d at 581 (Newby, C.J., dissenting). For example, the plaintiffs claim that the redistricting plans violate Part I, Article 11, which states: "All elections are to be free, and every inhabitant of the state of 18 years and upwards shall have an equal right to vote in any election." The plaintiffs also maintain that the redistricting plans violate their state constitutional rights to equal protection, free speech, and free assembly. However, none of the Part I articles cited by the plaintiffs have any language concerning redistricting. It is therefore unsurprising that the plaintiffs have not cited any New Hampshire authority supporting their position

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[2] New Hampshire's population was 1,377,529 according to the 2020 census. Thus, the ideal size of each senate district would be 57,397.04 people. According to the complaint, the smallest senate district by population (District 1) has 55,947 people and the largest district (District 13) has 60,252 people. (Compl. ¶ 56.) The 4,305 difference in size between the largest and smallest senate districts results in a deviation of 7.5%. This deviation is under the 10% threshold and therefore the new senate districts satisfy the constitutional requirement of "one person/one vote." See City of Manchester, 163 N.H. at 701 (observing that "an apportionment plan with a maximum population deviation under 10%" satisfies constitutional requirement and is presumptively constitutional). Likewise, the ideal size of each executive council district would be 275,505.8 people. According to the complaint, the largest executive council district by population is 277,888 and the smallest is 274,409. (Compl. ¶ 87.) This means that the new executive council districts have a maximum population deviation of 1.26%, which is well under the 10% threshold. See City of Manchester, 163 N.H. at 701. It is also clear, based on even a cursory review of each redistricting map, that each senate and executive council district is contiguous.

that their Part I rights can be used to essentially add a "no gerrymandering" requirement to the explicit provisions concerning redistricting found in Part II. Cf. Levitt v. Att'y Gen., 104 N.H. 100, 107 (1962) (rejecting argument that redistricting provisions in Part II were "invalidated because the broad reservation stated in Article 11 of the Bill of Rights"); Town of Canaan v. Sec'y of State, 157 N.H. 795, 800 (2008) (rejecting argument that "[d]ecennial reapportionment," as authorized under Part II, "violate[s] the essential right to vote freely for the candidate of one's choice" presumably found in Part I, Article 11); Thompson v. Kidder, 74 N.H. 89 (1906) (rejecting argument that explicit provision of constitution permitting estate tax was invalid because it conflicted with other provisions). In the absence of such authority, the Court rejects the plaintiffs' position that their Part I rights make their political gerrymandering claims justiciable. Rather, the Court believes that if the citizens of this State intended to require the legislature to meet additional criteria in drawing legislative and executive council districts, they would have explicitly provided those requirements alongside the existing ones in Part II of the constitution. This is precisely what the citizens of several other states have done in their state constitutions. See Rivera v. Schwab, 512 P.3d 168, 187 (Kan. 2022) (citing various state constitutional provisions that "outright prohibit[] partisan favoritism in redistricting").

In sum, Articles 26 and 65 of Part II of the State Constitution clearly commit to the legislature the authority to draw senate and executive councilor districts, with few explicit requirements. "[I]n the absence of a clear, direct, irrefutable" violation of those explicit redistricting requirements, "the complexity in delineating state legislative district boundaries and the political nature of such endeavors necessarily preempt judicial intervention." City of Manchester, 163 N.H. at 697 (emphases added; cleaned up).

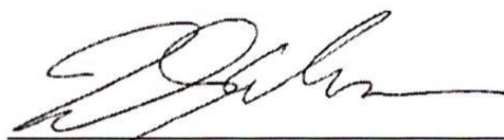
Indeed, "[o]ur State Constitution vests the authority to redistrict with the legislative branch, and for good reason." In re Below, 151 N.H. at 150. "A state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality." Id. As such, "[i]t is not the [C]ourt's function to decide the peculiarly political questions involved in reapportionment." Id. at 151 (cleaned up). Accordingly, once the legislature performs its decennial redistricting duties in compliance with the explicit requirements of Articles 26 and 65, this Court should not reexamine or "micromanage all the difficult steps the legislature [took] in performing the high-wire act that is legislative district drawing." City of Manchester, 163 N.H. at 704 (cleaned up).

Conclusion

Based on the foregoing, the Court concludes that the only justiciable issues it can address concerning senate and executive council redistricting are whether the newly-enacted districts meet the express requirements of Articles 26 and 65. Because the newly-drawn districts meet those express requirements, the Court must decline to consider the plaintiffs' challenge to the constitutionality of the districts based on claims of excessive political gerrymandering as such claims present non-justiciable political questions. See Rucho v. Common Cause, 139 S. Ct. 2484, 2506–07 (2019) (holding "that partisan gerrymandering claims present political questions beyond the reach of the federal courts"); Rivera, 512 P.3d at 187 (holding that political gerrymandering claims were not justiciable). The defendants' joint motion to dismiss is therefore GRANTED.

So ordered.

Date: October 5, 2022



Hon. Jacalyn A. Colburn,
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 10/05/2022