

STRAFFORD COUNTY

STATE OF NEW HAMPSHIRE

SUPERIOR COURT

219-2022-CV-00224

CITY OF DOVER,
CITY OF ROCHESTER,
DEBRA HACKETT,
ROD WATKINS,
KERMIT WILLIAMS,
EILEEN EHLERS,
JANICE KELBLE,
ERIK JOHNSON,
DEBORAH SUGERMAN,
SUSAN RICE,
DOUGLAS BOGEN, and
JOHN WALLACE

v.

DAVID M. SCANLAN,
in his official capacity as the New Hampshire Secretary of State

&

THE STATE OF NEW HAMPSHIRE

DEFENDANTS' JOINT MOTION TO RECONSIDER

The Defendants, David Scanlan, in his official capacity as New Hampshire Secretary of State, and the State of New Hampshire, submit, pursuant to New Hampshire Rule of Superior Court 12(e), this motion to reconsider the Court's June 23, 2023¹ order denying their motion to dismiss and respectfully request that the Court reconsider its order. In support thereof, the Defendants state the following:

¹ The Defendants note for the record that clerk's notice was sent to the parties on June 30, 2023. See Super. Ct. R. 12(e) (providing that motions for reconsideration shall be filed within 10 days of the date on the written notice of the order).

1. In ruling on a motion to dismiss, “the factual allegations of the plaintiff are assumed to be true and all reasonable inferences drawn therefrom are construed most favorably to the plaintiff.” *Ronayne v. State*, 137 N.H. 281, 283 (1993) (quotations and citations omitted). “Although factual allegations are assumed to be true, a court need not accept statements in the complaint which are merely conclusions of law.” *Id.* (quotations and citations omitted).

2. The Court ruled that the Plaintiffs stated a claim that the enacted redistricting map lacks a legitimate or rational basis based on the Plaintiffs’ submission of the Map-a-Thon plan, which the Plaintiffs admit fails to comply with the State Constitution’s redistricting requirements. As explained in the Supreme Court’s decision in *City of Manchester*, the Plaintiffs cannot state a claim that a redistricting map is unconstitutional based on the Plaintiffs’ submission of a different map that does not fully comply with all constitutional requirements.

3. The New Hampshire Supreme Court has already held that its “only role in this process is to ascertain whether a particular redistricting plan passes constitutional muster, not whether a better plan could be crafted.” *City of Manchester*, 163 N.H. at 705 (quotation omitted). Moreover, the Supreme Court further held that, like here, “perfect compliance with all of [the constitutional mandates regarding redistricting] is impossible.” *Id.* at 706 (emphasis added). Because perfect compliance with all redistricting requirements is impossible, the Legislature is necessarily faced with the political choice of weighing competing redistricting requirements when conducting redistricting.

4. For example, in *City of Manchester*, the Supreme Court noted that the “legislature had a choice to make: adhere to the 10% rule and give fewer towns, wards, and places their own districts or exceed the 10% rule and give more towns, wards, and places their own districts.” *Id.* at 704. The Supreme Court reasoned that this “is a policy decision reserved to the legislature,” the Court “cannot micromanage all the difficult steps the legislature must take in performing the high-wire act that is legislative district drawing,” and therefore the Court’s “preference for deferring to the legislature compels us to resolve this issue in its favor.” *Id.* (quotations and brackets omitted)

5. In other words, the Supreme Court in *City of Manchester* dealt with the same issue presented in this case—which branch of the government should weigh competing constitutional redistricting requirements—and ruled that the Court is “compelled” to defer to the Legislature. Although this Court cited *City of Manchester* in its order, the Court did not provide any explanation as to how or why *City of Manchester* was distinguishable or otherwise not applicable.

6. Moreover, the Court ruling that a plaintiff may state a claim under these circumstances raises an obvious and troubling issue. If no map can possibly comply with all constitutional redistricting requirements, as the Plaintiffs concede² and as the Supreme Court recognized in *City of Manchester*, then the Court cannot issue a remedial map without reallocating which wards and towns receive single-member districts and which do not. The Supreme Court recognized the inherent difficulty of this process as it held, “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.” *City*

² See *Compl.* ¶ 69, 75, 80.

of *Manchester*, 163 N.H. at 706. However, despite the fact that judicial redistricting would similarly require “balancing” and “trade-offs,” none of the wards and town that would be adversely affected by such judicial redistricting are party to this litigation.

7. Stated differently, the Court will be substituting its judgment regarding weighing numerous constitutional redistricting requirements, in a process in which only two cities and a few individual voters are participating,³ for the Legislature’s constitutionally authorized redistricting process, which was performed by politically accountable, elected representatives of every ward and town in the State.

8. In sum, the Plaintiffs failed to state claim upon which relief may be granted. The Plaintiffs argue that the Legislature’s duly enacted redistricting map “lacks a legitimate or rational basis” based solely on their estimation that the Map-a-Thon map, which the Plaintiffs admit does not comply with every constitutional redistricting requirement, is superior. This claim is not sufficient under the Supreme Court’s decision in *City of Manchester*, and this Court cannot and should not wade into the intensely political process of weighing numerous, competing, constitutional redistricting requirements and reallocate single-member, multi-member, and floterial districts among this State’s wards and towns. Therefore, The Court should reconsider its June 23, 2023 order on the grounds of failure to state a claim and dismiss the Plaintiffs’ complaint.

WHEREFORE, the Defendants respectfully request that this honorable Court:

- A. Reconsider its June 23, 2023 order;
- B. Dismiss the Plaintiffs’ complaint; and

³ One example that the Defendants have previously noted, according to Plaintiffs’ Exhibit G, shows that Map-a-Thon gives Chesterfield (pop. 3,552) its own district while Swanze (pop 7,196) is moved from a multi-member district into a *larger* multi-member district. Nevertheless, Swanze is not a party to this litigation despite being potentially harmed by a court-ordered redistricting.

B. Grant such further relief as the Court deems just and equitable.

Respectfully submitted,

DAVID SCANLAN, SECRETARY OF
STATE

and

THE STATE OF NEW HAMPSHIRE

By his attorneys,

JOHN M. FORMELLA
ATTORNEY GENERAL

Date: July 10, 2023

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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.

/s/ Matthew Conley _____
Matthew G. Conley