

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' RESPONSES TO PLAINTIFFS' STATEMENT OF MATERIAL FACTS
IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

The Defendants, David Scanlan, in his official capacity as the New Hampshire Secretary of State, and the State of New Hampshire, through counsel, object to the Plaintiffs' motion for summary judgment.

1. In 2021, the House of Representatives ("House") redistricting process began with the introduction of House Bill 50. *See* docket for House Bill 50.

Defendants' Response: Undisputed.

2. The House redistricting legislative process continued into and concluded in March 2022, when the Governor signed House Bill 50, thereafter chaptered as Laws 2022, ch. 9 and codified as RSA 662:5. *See* docket for House Bill 50.

Defendants’ Response: Undisputed.

3. For House redistricting, the first step in calculating the ideal population is to identify the total population of New Hampshire according to the census, which for 2020 is 1,377,529.¹ *See* Ex. 2 to Plfs’ Mem. of Law, State’s Response to Requests for Admission (“RFAs”), Request 1.

Defendants’ Response: The Defendants do not dispute that the total population of New Hampshire according to the 2020 federal census was 1,377,529. See also City of Manchester, 163 N.H. 689, 699 (2012) (explaining the “established method to determine whether a redistricting plan affords citizens an equal right to vote”).

4. The second step is to divide that total population number by 400 House seats to yield the ideal population of 3,444 (rounded) for a House seat. *See id.* at Request 2 & Request 11 (tacitly admitting this by admitting that statewide population deviation was calculated using this figure).

Defendants’ Response: The Defendants do not dispute that 1,377,529 divided by 400 and rounded to the nearest whole number equals 3,444. See also City of Manchester, 163 N.H. at 699 (explaining how to “calculate the ideal population of a single-member district”).

¹ Available at: <https://www.census.gov/quickfacts/fact/table/NH/PST045222>. The census is susceptible to judicial notice, *see N.H. R. Ev. 201*; *see generally Burling v. Chandler*, 148 N.H. 143 (2002) (citing to census data and providing link to federal government website).

5. The New Hampshire statewide population deviation of the enacted House plan in Laws 2022, ch. 9 is 10.13%. *See* Andrews Affidavit to Plfs' Mem. of Law as Ex. 1 (hereinafter "Andrews Aff.") and Ex. G to same; *see also* Ex. 2 to Plfs' Mem. of Law, Request #11.

Defendants' Response: The Defendants do not dispute that the total statewide deviation for the enacted redistricting plan is 10.13%.

6. By way of explanation, that 10.13% figure is derived by first ascertaining the degree to which each House district deviates from the ideal figure (3,444). *See* Ex. 1 to Plfs' Mem. of Law, Andrews Aff. at Ex. G.

Defendants' Response: The Defendants do not dispute that Mr. Andrews calculated that 10.13% figure by first calculating the degree to which each House district deviates from the ideal figure (3,444). By way of further answer, Mr. Andrews' methodology is set forth in Exhibit B to his affidavit, not Exhibit G. See Ex. 1 to Plfs' Mem. of Law, Andrews Aff. at Ex. B; see also City of Manchester, 163 N.H. at 699-700 (explaining the different methods for calculating the relative deviation of single-member, multi-member, and floterial districts).

7. Next, statewide population deviation is calculated as the numerical difference between the House district with the lowest deviation district in the State (Nashua Ward 7 in Hillsborough County, -4.95%) and the highest deviation across the State (Keene Ward 5 in Cheshire County, 5.18%). *See id.*

Defendants' Response: The Defendants do not dispute that Mr. Andrews calculated the relative deviation in the enacted redistricting plan for Nashua Ward 7 in Hillsborough County as being and Keene Ward 5 as being -4.95% and for Keene Ward 5 in Cheshire County as being 5.18%. By way of further answer, these figures are set forth in Exhibit H

to the Mr. Andrews’ affidavit, not Exhibit G. See also City of Manchester, 163 N.H. at 700 (explaining the method for calculating the overall range of deviation for a statewide plan).

8. The following 55 towns/wards met or exceeded the ideal House seat population (3,444), but were not provided a dedicated House seat by Laws 2022, ch. 9:

County	Town or Ward	2020 Census Population
Belknap	Tilton	3962
Belknap	Gilford	7699
Belknap	Gilmanton	3945
Belknap	Alton	5894
Belknap	Barnstead	4915
Carroll	Moultonborough	4918
Carroll	Wakefield	5201
Carroll	Wolfeboro	6416
Cheshire	Walpole	3633
Cheshire	Chesterfield	3552
Cheshire	Hinsdale	3948
Cheshire	Swanzey	7270
Cheshire	Jaffrey	5320
Grafton	Littleton	6005
Grafton	Haverhill	4585
Grafton	Plymouth	6682
Grafton	Canaan	3794
Grafton	Hanover	11870

Hillsborough	Hillsborough	5939
Hillsborough	New Ipswich	5204
Hillsborough	Wilton	3896
Hillsborough	Peterborough	6418
Hillsborough	Brookline	5639
Hillsborough	New Boston	6108
Merrimack	Loudon	5576
Merrimack	New London	4400
Merrimack	Henniker	6185
Merrimack	Bow	8229
Merrimack	Hopkinton	5914
Merrimack	Hooksett	14871
Merrimack	Pittsfield	4075
Rockingham	Northwood	4641
Rockingham	Nottingham	5229
Rockingham	Auburn	5946
Rockingham	Candia	4013
Rockingham	Deerfield	4855
Rockingham	Newmarket	9430
Rockingham	Kingston	6202
Rockingham	Newton	4820
Rockingham	Plaistow	7830
Rockingham	Portsmouth Ward 1	4276
Rockingham	Portsmouth Ward 5	4087

Rockingham	Greenland	4067
Rockingham	Rye	5543
Strafford	Milton	4482
Strafford	Rochester Ward 5	5419
Strafford	Barrington	9326
Strafford	Strafford	4230
Strafford	Dover Ward 4	5439
Strafford	Lee	4520
Sullivan	Charlestown	4806
Sullivan	Newport	6299
Sullivan	Claremont Ward 1	4461
Sullivan	Claremont Ward 2	4491
Sullivan	Claremont Ward 3	3997

Compare U.S. Census Data², with RSA 662:5 (codification of Laws 2022, ch. 9); *see also* Ex. 1 to Plfs’ Mem. of Law., Andrews Aff. at Exhibits F & G; *see also* Ex. 2 to Plfs’ Mem. of Law, State RFAs, Request #3.

Defendants’ Response: The Defendants do not dispute that each of these towns and wards has a population greater than 3,444. However, the Defendants dispute that this is a complete list of towns and wards that have a population “within a reasonable deviation from the ideal population for one or more representative seats.” See N.H. CONST., Pt. II, Art. 11. Campton (population 3,343) and Durham (population 15,490) both are within or over a reasonable deviation from the ideal population. The Defendants do not dispute that

² Available at: <https://www.census.gov/quickfacts/fact/table/NH/PST045222>. The census is susceptible to judicial notice, *see N.H. R. Ev. 201*; *see generally Burling v. Chandler*, 148 N.H. 143 (2002) (citing to census data and providing link to federal government website).

the enacted redistricting plan did not provide single-member districts to each of these towns and wards on the Plaintiffs’ list. Campton and Durham did not. See Defs.’ App’x at 21, 32.

9. During the legislative process that preceded the enactment of Laws 2022, ch. 9, a non-partisan coalition called “Map-a-Thon” submitted proposed House redistricting districts/maps to the legislature. *See* Ex. 1 to Plfs’ Mem. of Law, Andrews Aff. at ¶¶ 5-7.

Defendants’ Response: Undisputed.

10. Map-a-Thon’s House redistricting criteria is summarized in Exhibit B to the Andrews Affidavit. *See* Ex. 1 to Plfs’ Mem. of Law, Ex. B.

Defendants’ Response: Undisputed

11. Map-a-Thon’s proposed House districts/maps used the same legal and other redistricting criteria as used by the legislature and in Laws 2022, ch. 9,³ but illustrated how to reduce the deprivations of a dedicated House seat by net of 14 (or 41 in total; a 25% reduction), *see* Ex. 1 to Plfs’ Mem. of Law, Andrews Aff. at ¶ 4 and Exhibits F & G.

Defendants’ Response: Disputed. Mr. Andrews, the primary author of the Map-a-Thon redistricting plan admitted that he used additional redistricting criteria that are not required by law, including: (1) addressing an alleged partisan gerrymander; and (2) prioritizing smaller districts over larger districts. Dep. David Andrews Tr. at 17-18, 27-29. The Defendants further dispute the veracity of the Plaintiffs’ calculations, which do not account for every town for which the Plaintiffs’ proposed plan removed two single-member districts that had been provided in the enacting redistricting plan. See Defs.’ App’x at 21,

32. Further, Plaintiffs’ Statement of Fact #11 contains a footnote, #3, for which there is no text.

12. Map-a-Thon’s final House redistricting proposal illustrated how to accord the following fifteen towns and wards (net gain of 14 total) with a dedicated House seat:

Town/Ward	Population
Barrington	9326
Bow	8229
Canaan	3794
Chesterfield	3552
Dover Ward 4	5439
Hanover	11870
Hinsdale	3948
Hooksett	14871
Milton	4482
New Ipswich	5204
Newton	4820
Lee	4520
Plaistow	7830
Rochester Ward 5	5419
Wilton	3896

See Ex. 1 to Plfs’ Mem. of Law, Andrews Aff. at Exhibits F & G. The foregoing fifteen towns and wards are referred to hereinafter as the “Affected Towns/Wards.”

Defendants’ Response: The Defendants do not dispute that the Map-a-Thon redistricting plan provided single-member districts to the towns and wards identified above. The Defendants Dispute the Plaintiffs’ calculations for the reasons set forth in response to Plaintiffs’ Statement of Fact #12.

13. Map-a-Thon highlighted its ability to increase in dedicated House districts in a summary comparison between its proposed House districts/maps and the legislation under review:

2. Map Comparison Summary

Enacted Maps vs. Map-a-Thon Proposed Maps Summary					
County	# Reps	Enacted Map Deviation	Proposed Map Deviation	Enacted Map Violations	Proposed Map Violations
Belknap	18	8.27%	8.27%	5	5
Carroll	15	6.48%	6.48%	3	3
Cheshire	22	9.81%	7.62%	5	3
Coos	9	8.74%	8.68%	0	0
Grafton	26	8.44%	9.86%	5	3
Hillsborough	123	9.75%	9.49%	6	4
Merrimack	45	9.22%	8.57%	7	5
Rockingham	91	9.80%	9.80%	13	11
Strafford	38	9.13%	9.48%	6	2
Sullivan	13	3.73%	3.73%	5	5
Total	400	10.13%	9.94%	55	41

See Ex. 1 to Plfs’ Mem. of Law, Andrews Aff. at Exhibits F & G.

Defendants’ Response: The Defendants do not dispute the figures in this table setting forth enacted map deviation and proposed map deviation. The Defendants dispute the remaining two columns, which incorporate the Plaintiffs legal argument as to what constitutes a constitutional “violation.”

14. The Map-a-Thon House plan’s statewide population deviation is 9.94%. See Ex. 1 to Plfs’ Mem. of Law, Andrews Aff. at Ex. G (lowest deviation: Nashua Ward 7 in Hillsborough

County, -4.95%; highest deviation: GR-10 in Grafton County and BE-4 in Belknap County; each 4.99%).

Defendants’ Response: Undisputed.

15. A narrative list of Map-a-Thon’s districts, formatted the same as Laws 2022, ch. 9, is attached to the supplemental affidavit of David Andrews. *See* Ex. 3 to Plfs’ Mem. of Law, Supplemental Affidavit of David Andrews at ¶ 3 & Ex. to same.

Defendants’ Response: Undisputed.

16. The legislature did not adopt Map-a-Thon’s proposed House maps. *See* Legislative History of House Bill 50.

Defendants’ Response: Undisputed.

17. Map-a-Thon’s House maps would have increased the total population in single-seat House districts by over 60,000:

	Enacted Maps	Map-a-thon Proposed Maps
Number of single member districts	97	110
Population (of all single-member districts)	843,536	917,053

See Ex. 3 to Plfs’ Mem. of Law, Supplemental Affidavit of David Andrews.

Defendants’ Response: Undisputed.

18. In discovery, the State’s discovery responses did not answer the specific basis for Laws 2022, ch. 9’s 55 instances of denying a town/ward with sufficient population, pursuant to the 2020 census, a dedicated House seat. *See* Ex. 4 to Plfs’ Mem. of Law, State’s Responses to Interrogatories (without attachments), Interrogatories #2 and #3.

Defendants' Response: The Defendants properly objected to Plaintiffs' interrogatories #2 and #3 to the extent that they called for information in the possession of the legislature or legislators, other than the public bill file, on the ground that such information is not in the possession, custody, or control of the Defendants and on the ground that such information would be protected by legislative privilege. The Defendants provided the complete legislative bill file for Laws 2022, Chapter 9. The Defendants further note that the Plaintiffs bear the burden of proving that the Laws 2022, Chapter 9 is unconstitutional; the Defendants bear no burden to prove that Laws 2022, Chapter 9 is constitutional. To the extent that the Plaintiffs can prove that Laws 2022, Chapter 9 violates a constitutional redistricting requirement, the Plaintiffs bear the burden of proving that Laws 2022, Chapter 9 lacks a rational or legitimate basis.

19. Also in discovery, the State disclosed no expert witness. *See* Discovery Record.

Defendants' Response: Undisputed.

Defendants' Statement of Additional Material Facts. The Defendants incorporate the statement of material facts attached to their cross motion for summary judgment, to the extent that those facts are not contained in the Plaintiffs' statement of material facts.

Respectfully submitted,

DAVID SCANLAN, SECRETARY OF STATE

and

THE STATE OF NEW HAMPSHIRE

By their attorneys,

JOHN M. FORMELLA
ATTORNEY GENERAL

Date: January 22, 2024

/s/ Matthew G. Conley
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CERTIFICATE OF SERVICE

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

Date: January 22, 2024

/s/ Matthew G. Conley
Matthew G. Conley