

STRAFFORD COUNTY

STATE OF NEW HAMPSHIRE

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 RECONSIDER

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 Reconsider, stating in support as follows:

1. The Defendants’ Joint Motion to Reconsider (“Reconsideration Motion”) does not even attempt to identify “with particular clarity, points of law or fact that the court has overlooked or misapprehended.” *Super. Ct. R.* 12(e). That is, the defendants point to no fact or point of law which the Court misunderstood or overlooked in any way and, instead, rehash/reargue their motion to dismiss. Plaintiffs could easily stand on their original objection and related filings/authority, which address and dispose of the issues defendants seek to revisit, yet certain assertions made in the defendants’ Reconsideration Motion warrant specific response.

2. First, the defendants invest heavily in the inaccurate (and misleading) assertion that “the Plaintiffs admit [the Map-a-Thon plan] fails to comply with the State Constitution’s redistricting requirements.” Reconsideration Motion ¶ 2. That is untrue—at no time have the plaintiffs ever suggested that the Map-a-Thon maps are flawed, unconstitutional, or in any way

invalid. To clarify the defendants argument for them, the defendants are trying to leverage the fact that all parties acknowledge the impossibility for perfect compliance with Part II, Article 11 given the need to respect the “one person, one vote” requirements of the federal constitution. The defendants would have it that, because some violations of Part II, Article 11 are necessary in pursuit of compliance with that federal constitutional requirement, then Part II, Article 11 is meaningless and can and should be disregarded entirely. As the plaintiffs have already explained in their earlier filings, that assertions lack any merit and robs Part II, Article 11 of any value and its intended effect. Common sense and applicable legal authority underscore that the practical necessity to comply with federal constitutional requirements does not provide an unfettered license to disregard Part II, Article 11 of the State Constitution. Put another way, even where perfect compliance cannot be achieved, Part II, Article 11 still requires minimization of violations, consistent with its plain text and applicable decisional law here and elsewhere.

3. Second, the defendants incorrectly argue, without any pinpoint citation, that “*City of Manchester* . . . ruled that the Court is ‘compelled’ to defer to the Legislature.”

Reconsideration Motion ¶ 5. Yet, nowhere within *City of Manchester* does such a pronouncement appear. The case in fact outlined principles of law applicable in this context and ultimately concluded that, on the facts presented, there was no remedy it could provide for the asserted violations of Part II, Article 11. As already outlined in the plaintiffs’ earlier filings, this case presents an issue falling within the legal framework outlined in *City of Manchester*, but on facts here that were not presented in *City of Manchester* that compel a different result in this case. As plaintiffs have already explained, and the Court no doubt is aware:

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%.

See Plaintiffs’ Objection to Motion to Dismiss, at 8-9.

4. Third, and finally, the defendants posit a purported parade of political horrors should the Court ultimately rule in favor of the plaintiffs and award a remedy. The Court no doubt can see through this alarmist argument. There is nothing political about applying the plain, express, and practically self-executing text of the State Constitution, which amounts to an objective math exercise of determining which City wards and towns could (and by Part II, Article 11 should) have received a dedicated House seat but did not, controlling for other applicable law. The defendants presuppose that the Court would resort to issuing a remedy in the first instance, ignoring that ordinarily the legislature would be given the opportunity to re-draft the unconstitutional redistricting plan before the Court did so, provided there is sufficient time to allow such a legislative process. *See Monier v. Gallen*, 122 N.H. 474, 476 (1982). And, even when the Court itself has to undertake modifying an unconstitutional map, the Court typically follows the “least change” approach as means of “remedy[ing] the existing constitutional deficiencies” without having to engage in politics or policymaking. *See, e.g., Norelli v. Secretary of State*, 175 N.H. 186, 203 (2022).

5. The Court’s Order denying the defendants’ motion to dismiss was detailed, well-reasoned, supported by the text and purpose of Part II, Article 11 of the State Constitution, and consonant with applicable decisional law in New Hampshire and elsewhere.

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

A. Deny the Reconsideration Motion;

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

Respectfully submitted,

THE CITY OF DOVER, NEW HAMPSHIRE

Dated: July 13, 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.

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