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

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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, respectfully submit the following Reply in Support of Plaintiffs' Motion for Summary Judgment, stating as follows:

First, Defendants' summary judgment objection is most noteworthy for what it does not say: nowhere do the Defendants offer any tenable justification for the enacted House plan's undisputed failure to follow constitutional requirements. The handful of procedural issues Defendants do briefly address do not in any way aid the State or justify the enacted House plan. For the Court's benefit, the primary purpose of this reply is to address and dispel any confusion created by the Defendants about the burden of proof in this case.

I. The "burden of proof" issue is a procedural diversion from the merit (or lack thereof) in the State's analysis.

In an apparent effort to relieve themselves of any role or responsibility to explain any tenable justification for ignoring the Map-a-Thon House redistricting plan, Defendants accuse Plaintiffs of "mistat[ing] the standard that the Plaintiffs must meet to prove that HB 50 is unconstitutional." *See* Defs' MSJ Obj. ¶ 3. Before addressing that assertion, it bears reiterating

that the "burden" issue is largely academic and, just as the "burden" played no starring role in *City of Manchester*, the same holds true in this case because what matters in substance is the analysis of the relevant House redistricting method and outcome.

Any discussion of the burden issue must begin with *City of Manchester*, which makes very plain that "[t]he burden at all times rests with the petitioners to establish that the legislature acted without a rational basis in enacting the Plan." *City of Manchester v. Secretary of State*, 163 N.H. 689, 698 (2012). So while Plaintiffs must carry the burden of **persuasion**, that does not exclude consideration of the State's articulated justification(s) (or lack thereof).

As elucidated in the two Vermont cases cited and quoted in *City of Manchester*, once a challenger to an enacted plan shows that "the State has failed to meet constitutional or statutory standards or policies with regard to a specific part of the plan . . .[,] the burden shift[s] to the State to show that satisfying those requirements was impossible because of the impermissible effect it would have had on other districts." *In re Town of Woodbury*, 861 A.2d 1117, 1120 (Vt. 2004) (quoting *In re Reapportionment of Town of Hartland*, 624 A.2d 323, 327 (Vt. 1993)). In short, *City of Manchester* itself cited burden-shifting cases from Vermont in the course of outlining and discussing the burden in a Part II, Article 11 challenge.

Separately, Defendants in this case have cross-moved for summary judgment, meaning the State must carry such a movant's burden. *See* RSA 491:8-a; *Cilley v. New Hampshire Ball Bearings*, 128 N.H. 401, 405 (1986) ("On a motion for summary judgment, the moving party has the burden to demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (cleaned up)); *City of Aurora v. Spectra Communications*, 592 S.W.3d 764, 781 (Mo. 2019) ("As the movants for summary judgment, the Cities had the burden of proving they were entitled to judgment as a matter of law."); *Chemical*

Insecticide Corp. v. State, 108 N.H. 126, 129 (1967) ("We conclude that the State is subject to the requirements of RSA 491:8-a in any case in which it has consented to suit.").

Even putting all that aside, and even if *City of Manchester* did not intend to adopt the burden-shifting within the Vermont cases (which is far from clear), here the Plaintiffs have shown, undisputedly, that the enacted House plan contains avoidable, unnecessary Part II, Article 11 exceedances. At this analytical point the State should (and presumably would want to) articulate one or more justifications for that which the State chose to enact. *See or cf.* RSA 491:8-a (setting forth relative summary judgment burdens for movant and non-movant). For example, in *City of Manchester* the State (and thereafter, the Court) cited adherence to the 10% population threshold extant in the law, which the Court readily agreed with in discounting the proffered House plans. In sharp contrast here, the State, without the 10% threshold justification used in *City of Manchester*, apparently has no such justification and so leans heavily on the "burden" issue, hoping that is enough to avoid conceding Plaintiffs' claim.

In all, and irrespective of how one characterizes the State's burden or lack thereof, three inescapable, undisputed facts satisfy Plaintiffs' ultimate burden of persuasion as a matter of law: (i) the enacted House plan does not provide the Affected Towns/Wards a dedicated House seat, (ii) Map-a-Thon developed and provided the State with a House plan that illustrated exactly how such exceedances could have easily been avoided consistent with other House redistricting criteria, and (iii) the State has now had more than ample opportunity—during the legislative process and again in this litigation—to produce or identify <u>any</u> tenable rational or legitimate reason for ignoring or discounting the Map-a-Thon House plan, but has failed to do so because no conceivable rational or legitimate reason exists.

Not only do these established, undisputed facts prove Plaintiffs' claim, but it is hard to envision what more a plaintiff could be expected to show in proving a Part II, Article 11 violation. In denying the Defendants' earlier motion to dismiss, this Court found that the allegations in the Complaint "sufficiently" stated a viable claim for a Part II, Article 11 violation, *see* Order dated June 30, 2023 at 6-7. Now, following the close of discovery, Plaintiffs' summary judgment motion simply revisits these same "sufficient[]" allegations and proves each material one with undisputed record evidence. In response, Defendants have placed neither facts nor legal authority on the summary judgment scale, which now plainly tips in favor of awarding the Plaintiffs summary judgment.

Respectfully submitted,

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Dated: January 30, 2024 By: /s/ Joshua M. Wyatt

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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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