THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Docket No. 2022-0249

City of Dover & a.

v.

Secretary of State & a.

RESPONDENTS' JOINT BRIEF MEMORANDUM

The State of New Hampshire and the Secretary of State submit this joint brief memorandum in accordance with this Court's May 5, 2022 Order.

The City of Dover and Debra Hackett jointly bring a petition for original jurisdiction directly in this Court under Supreme Court Rule 11. They challenge House Bill 50 (HB 50), a duly enacted and constitutionally mandated reapportionment of the state representative districts following the 2020 federal census. *See* N.H. Const. pt. II, art. 9. The General Court passed HB 50 on March 10, 2022, and the Governor signed it into law on March 23. The petitioners filed their petition on May 3, nearly six weeks later, naming the Secretary of State as the sole respondent. The petition contains twelve separate "questions to be reviewed." *See* Pet. at 4–6.

On May 5, this Court joined the State of New Hampshire as a respondent in this matter and directed the respondents to address whether

the petitioners' "questions to be reviewed" meet the standards prescribed in Rule 11. May 5, 2022 Order at 1. Under that rule, a petition for original jurisdiction "shall be granted only when there are special and important reasons for doing so." Sup. Ct. R. 11. As set forth below, the petitioners have not identified "special and important reasons" for why this Court should exercise its original jurisdiction, and several considerations weigh against it doing so. The Court should therefore decline to exercise its original jurisdiction in this case.

A. The petitioners' "questions to be reviewed" present legal and factual issues ill-suited for resolution through a Rule 11 petition.

The petitioners' "questions to be reviewed" raise two distinct constitutional claims. First, the petitioners contend that HB 50 violates Part II, Article 11 because it does not provide various towns and wards with their own representatives. *See* Pet. at 4–5, 15–17. Second, the petitioners contend that HB 50 is presumptively unconstitutional because it contains a 10.13% population deviation. Pet. at 4, 17–19. Neither argument presents a "special or important reason[]" for this Court to exercise its original jurisdiction. Sup. Ct. R. 11.

The mere assertion that a state law is unconstitutional does not warrant this Court's review in the first instance under Rule 11. A claim that a state law violates the constitution is only that: a claim. To be entitled to relief—or, in the context of a fundamental right, even to heightened scrutiny—a plaintiff must first prove that there has been "an actual deprivation of the right." *State v. Lilley*, 171 N.H. 766, 776 (2019). This well-established aspect of this Court's constitutional jurisprudence extends to redistricting cases. In *City of Manchester v. Secretary of State*, this

Court rejected the notion that an allegation that a duly enacted redistricting plan is unconstitutional deprives the plan of "a presumption of constitutionality." 163 N.H. 689, 697 (2012) (per curiam). The Court observed that "[i]f the presumption of constitutionality could be overcome merely by challenging a statute, the presumption would be rendered meaningless." *Id.* The Court further emphasized that "the party challenging [a redistricting plan] bears the burden of proof." *Id.* at 698. Thus, the fact the petitioners allege that HB 50 violates the constitution, standing alone, has little bearing on whether this case warrants review under Rule 11.

There is likewise nothing about the specific constitutional claims the petitioners present through their "questions to be reviewed" that might warrant such review. The petitioners contend that "[t]he core constitutional problem within [HB 50]" arises out of the Legislature's alleged failure to provide "otherwise entitled towns and wards to a dedicated district/ representative in the New Hampshire House." Pet. at 15. They assert that this alleged failure violates Part II, Article 11. *See id.* This Court considered and rejected similar claims in *City of Manchester*. *See* 163 N.H. at 696. The Court made clear in *City of Manchester* that in order to prevail on such a claim under Part II, Article 11, a petitioner "must establish that [the challenged plan] was enacted without a rational or legitimate basis." *Id.* at 698 (citation and quotation marks omitted). Beyond one stray reference to rational-basis review in their questions to be reviewed, *see* Pet. at 5, the petitioners do not allege in their petition that HB 50 is irrational or lacks a legitimate basis.

Instead, the petitioners ask this Court, at least implicitly, to supplant the standard set forth in *City of Manchester* with a standard under which the

Legislature must "minimize violations of the State Constitution and enact only those violations necessary." Pet. at 16. In other words, the petitioners functionally ask this Court to overrule *City of Manchester* to the extent it established a rational-basis test for claims brought under Part II, Article 11. The petitioners offer no analysis under the established *stare decisis* factors for why such a result is warranted. *See N.H. Democratic Party v. Sec'y of State*, 174 N.H. 312, 262 A.3d 366, 377 (2021) (discussing *stare decisis*). Nor do they more generally provide any reason—let alone a "special and important" one, Sup. Ct. R. 11—for why it would be an appropriate use of this Court's original jurisdiction to upend established precedent, declare a new constitutional standard, and use that standard to invalidate a duly elected legislative map in favor of a map of the petitioners' own choosing, all within weeks of the candidate filing period opening.

The petitioners alternatively contend that HB 50 is unconstitutional because it contains a population deviation of 10.13%. *See* Pet. at 17–20. This contention likewise does not provide a basis for this Court to exercise its original jurisdiction under Rule 11. Notably, the petitioners do not premise their deviation-based argument on undisputed evidence. Rather, they rely on an independent calculation conducted by the Map-a-Thon project—a third-party entity that submitted its own maps to the Legislature during the redistricting process, which the Legislature ultimately declined to adopt. *Id.* at 11, 18. The petitioners seek to support Map-a-Thon's calculation by attaching to their petition an appendix containing the functional equivalents of expert affidavits, curricula vitae, and reports. *See* App. 1–152. In a normal civil case, the disclosure and admissibility of this information would be governed by RSA 516:29-b, Superior Court Civil

Rule 27, and Rules of Evidence 702, 703, and 705. Under those provisions, the respondents would have an opportunity to conduct discovery related to Map-a-Thon's calculations and the data upon which they are based. The respondents would further have an opportunity to retain and disclose one or more experts of their own.

The petitioners have not identified any reason—special, important, or otherwise—for why this Court should exercise original jurisdiction over a case that may require the type of discovery management typically entrusted to a trial court. *See Laramie v. Stone*, 160 N.H. 419, 435 (2010) ("The trial court has broad discretion in the management of discovery . . . ."). The relief requested in the petition suggests that the petitioners did not contemplate that discovery might be necessary in this case at all. Rather, the petitioners' requests are seemingly premised on a scenario in which this Court would invoke its original jurisdiction to invalidate a duly enacted redistricting map entitled to the presumption of constitutionality entirely on the force of evidence that is untested through the typical adversarial process. The petitioners point to no support for such a course of action.

Furthermore, the inquiry would not end even if Map-a-Thon's calculations proved to be correct. A deviation of greater than 10% only establishes "a prima facie case of discrimination" that "must be justified by the State." *City of Manchester*, 163 N.H. at 701. The State can meet this burden by "proving that each significant variance between districts was necessary to achieve some legitimate goal." *Id.* (citation and quotation marks omitted). This, too, presents a case-by-case inquiry in which the State must "show with some specificity that a particular objective required

specific deviations in its plan, rather than relying on general assertions." *Karcher v. Daggett*, 462 U.S. 725, 741 (1983). It is therefore an inquiry that may also require discovery, including potential expert discovery, before it can be resolved. Thus, even if it were undisputed that HB 50 contained deviations greater than 10%, this case would still be ill-suited for review under Rule 11.

At bottom, the threshold constitutional claims presented in the petitioners' "questions to be reviewed" either turn on legal arguments unsupported in this Court's precedents or factual questions that are particularly unsuited for resolution by an appellate court in the first instance. The petitioners have therefore failed to "satisfy the standards of Rule 11 for the exercise of [this Court's] original jurisdiction." May 5, 2022 Order at 1. Accordingly, the Court should not accept the petitioners' petition.

B. The petitioners' urgency-based arguments do not provide a basis for this Court to exercise its original jurisdiction under Rule 11.

The petitioners further contend that this Court should exercise its jurisdiction because there is "significant urgency" in having this matter resolved. Pet. at 14–15. This argument is also unpersuasive for several reasons. For one, the petitioners are at least partly responsible for the "urgency" professed in their petition. The petitioners waited one day short of six weeks from the date the Governor signed HB 50 to file their petition. By that time, the candidate filing period was less than a month away. The petitioners' own actions thus compressed the timeframe within which they ask this Court to strike down HB 50 and adopt its own redistricting plan.

It is well established, as this Court recently acknowledged, that "a constitutional redistricting plan, including one drawn by a state supreme court, must be adopted 'within ample time to permit such plan to be utilized in the [upcoming] election,' in accordance with the provision of the state's election laws." *Norelli v. Secretary of State*, No. 2022-0184 (N.H., May 12, 2022) (Slip op. at 11) (quoting *Scott v. Germano*, 381 U.S. 407, 409 (1965) (per curiam)). The petitioners were thus on notice that they could not delay in seeking relief if they believed this matter needed to be resolved in advance of upcoming election deadlines, including the candidate filing period. They provide no explanation for why they nevertheless waited nearly a month-and-a-half to bring this action. Their claims of "significant urgency" are therefore "undermined by the fact that [any urgency] is largely . . . of their own making." *Respect Me. PAC v. McKee*, 622 F.3d 13, 16 (1st Cir. 2010).

More generally, the petitioners are incorrect to the extent they suggest that "significant urgency," standing alone, is a "special and important reason[]" for this Court to accept their petition. Sup. Ct. R. 11. Were that true then this Court would be inundated with original jurisdiction actions seeking relief on an expedited and emergency basis. This Court has repeatedly observed, however, that it exercises certiorari review—including over Rule 11 petitions—"sparingly and only where to do otherwise would result in substantial injustice." *Petition of Whitman Operating Co., LLC*, 174 N.H. 453, 459 (2021) (citation and quotation marks omitted). An allegation of "significant urgency," by itself, cannot not meet this stringent standard.

One factor this Court does consider when deciding whether to accept a petition for original jurisdiction is whether there is some other avenue through which a petitioner could seek relief. *See id.* The petitioners acknowledge in their petition that they could have sought relief in the superior court. Pet. at 14. There was nothing stopping them from seeking such relief on an expedited basis. *See Buzzard v. F.F. Enterprises*, 161 N.H. 28, 29 (2010) ("The trial court has broad discretion in managing the proceedings before it." (Citations and quotation marks omitted.)). The petitioners contend, however, that they could not have obtained the relief they seek even under "an accelerated Superior Court litigation schedule." Pet. at 14.

While the respondents do not dispute this contention, it in no way demonstrates that *this Court* should exercise its original jurisdiction under Rule 11. If, as the petitioners tacitly concede, a trial court would not be equipped to resolve the factual and legal questions presented in their petition in advance of the June 1 filing period, then it is hard to conceive how a five-justice appellate court with no established fact-finding apparatus would be better suited to do so. Thus, short of providing a basis for this Court to exercise its jurisdiction under Rule 11, the petitioners' urgency-based arguments if anything demonstrate that *no* court could provide them with the relief they seek within the timeframe they desire. For this additional reason, their urgency-based arguments are misplaced.

The Court's recent decision to invoke its original jurisdiction in *Norelli v. Secretary of State* does not support a contrary conclusion. The circumstances in *Norelli* are materially different from those of this case. *Norelli* concerns the federal congressional map consisting of just two

districts. This case, in contrast, concerns the state representative districts, of which there are 400. When *Norelli* was filed, there was no duly enacted congressional map; rather, the petitioners there contended that judicial intervention was warranted because the political branches were at an "impasse" and because the current congressional map enacted following the 2010 federal census contained population deviations that rendered it presumptively unconstitutional. *See Norelli*, No. 2022-0184 (Slip op. at 1). Here, the petitioners challenge a duly enacted map that "is entitled to the same presumption of constitutionality as any other statute." *City of Manchester*, 163 N.H. at 697. This Court further recognized in *Norelli* that any map it may adopt will not require a wholesale redraw of the current congressional districts. *See Norelli*, No. 2022-0184 (Slip op. at 11–14). Contrast that with this case, where the petitioners ask this Court to adopt a map that the Legislature considered and rejected as part of the redistricting process and that the petitioners themselves appear to acknowledge is profoundly different from the map that was ultimately enacted. *See* Pet. at 10–13, 16–17.

Norelli thus presents a number of unique circumstances that are not present here. Those circumstances—and in particular the fact that no duly enacted congressional map is yet in place—make *Norelli* more akin to other redistricting cases in which this Court has exercised its original jurisdiction. *See, e.g.*, *Burling v. Chandler*, 148 N.H. 143, 144 (2002) (per curiam) (invoking original jurisdiction when the political branches had failed to enact a house map following the 2000 federal census); *Below v. Gardner*, 148 N.H. 1, 3 (2002) (per curiam) (same, but with respect to the senate map); *Monier v. Gallen*, 122 N.H. 474, 475–76 (1982) (invoking and

retaining original jurisdiction when the Legislature had not passed a senate map). The respondents are not aware of any case in which this Court has similarly invoked its original jurisdiction to consider in the first instance a fact-based challenge to a duly enacted map that "is entitled to the same presumption of constitutionality as any other statute." *City of Manchester*, 163 N.H. at 697. Indeed, even in *City of Manchester*, this Court considered questions transferred without ruling from the superior court under Rule 9, which meant that this Court had the benefit of an identifiable universe of undisputed facts that were agreed upon by the parties prior to transfer and included in the superior court's interlocutory transfer statement. *See id.* at 694–96, 707; Sup. Ct. R. 9(1)(b).

This Court also recognized in *Norelli* that principles of nonintervention "advise in favor of resolving [a redistricting] case in a timely and efficient manner so as not to disrupt the upcoming election process." *Norelli*, No. 2022-0184 (Slip op. at 11) (citing *Purcell v. Gonzalez*, 549 U.S. 1, 4–6 (2006) (per curiam); *Republican Nat. Comm. v. Democratic Nat. Comm.*, 140 S. Ct. 1205, 1206–07 (2020) (per curiam)). The Court concluded in *Norelli* that these principles did not preclude it from intervening in the context of the congressional map both because it was able to determine that the current congressional map—passed following the 2010 federal census—is unconstitutional as a matter of law and because sufficient time remains for the Court to adopt its own two-district map in advance of the filing period opening on June 1. *See id.* at 11–15. The Court noted, though, that it will only adopt its own map if the Legislature should fail to enact one. *Id.* at 15.

None of these considerations are mirrored here. The Legislature passed HB 50 and the Governor signed it. The state representative districts are therefore duly enacted. As discussed in the previous section, the petitioners' challenges to HB 50 are fact-driven and may require discovery and the involvement of one or more experts. Those challenges also concern a map consisting of 400 districts, not just two. Under these circumstances, no court can currently resolve *as a matter of law* whether HB 50 is constitutional, as this Court was able to in *Norelli* with respect to the congressional maps. *See id.* at 7–11. Indeed, it is hard to see how that fact-driven question could be resolved before June 1. And even if it were resolved in the petitioners' favor, there would still be a question as to the appropriate remedy. In *Norelli*, this Court set an ambitious schedule *after* declaring the current congressional map unconstitutional to ensure that any new map would be in place by June 1. *See Norelli v. Secretary of State*, No. 2022-0184 (May 12, 2022 Order). That schedule contemplates the special master providing a report and recommendation to this Court on the eve of Memorial Day weekend and this Court potentially holding oral argument on that report and recommendation on May 31. *See id.* That the far less complicated circumstances presented in *Norelli* still call for proceedings potentially up to the day before the filing period opens on June 1 confirms that it is all but impossible to resolve the petitioners' claims here "in a timely and efficient manner so as not to disrupt the upcoming election process." *Norelli*, No. 2022-0184 (Slip op. at 11)

For all of these reasons, the petitioners' urgency-based arguments do not provide "special and important reasons" for this Court to accept the

petitioners' Rule 11 petition. The Court should therefore decline to exercise original jurisdiction over this matter on the basis of "urgency."

C. The petitioners ask this Court to unnecessarily wade into an inherently political process.

This Court will "generally defer to legislative enactments not only because they represent the duly enacted and carefully considered decision of a coequal and representative branch of Government, but also because the legislature is far better equipped than the judiciary to amass and evaluate vast amounts of data bearing upon legislative questions." *City of Manchester*, 163 N.H. at 696 (citations and quotation marks omitted). "This is particularly so in the redistricting context," as the State Constitution expressly "vests the authority to redistrict with the legislative branch, and for good reason." *Id.* at 697 (citations and quotation marks omitted). "A state legislature is the institution by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality." *Id.* (citation and quotation marks omitted).

This Court will therefore "tread lightly in this political arena, lest [it] materially impair the legislature's redistricting power." *Id.* (citation and quotation marks omitted). "Both the complexity in delineating state legislative district boundaries and the political nature of such endeavors necessarily preempt judicial intervention in the absence of a clear, direct, irrefutable constitutional violation." *Id.* (citation and quotation marks omitted). This Court is thus "reluctant" to intervene in what "is an inherently political process." *In re Below*, 151 N.H. 135, 136 (2004). "Unlike the legislature, courts have no distinctive mandate to compromise

sometimes conflicting state apportionment policies in the people's name." *Id.* (citation and quotation marks omitted).

The relief the petitioners seek in their "questions to be reviewed" invites this Court to unnecessarily wade into these "inherently political" waters. The petitioners do not merely ask this Court to invalidate HB 50 and draw its own map to remedy the constitutional deficiencies they contend the current map contains—an inquiry that in and of itself is ill-suited for review on original jurisdiction for the reasons previously stated. Rather, the petitioners suggest that this Court should "adopt Map-a-Thon's proposed map (or maps)." *See* Pet. at 6. They make this request while acknowledging that the Legislature had an opportunity to consider Map-a-Thon's maps and ultimately decided not to adopt them. *See id.* at 11. The petitioners thus ask this Court to substitute its own judgment (and, ultimately, that of a nongovernmental third party) for that of the Legislature in how best "to compromise sometimes conflicting state apportionment policies in the people's name." *In re Below*, 151 N.H. at 136 (citation and quotation marks omitted).

This request is incompatible with this Court's redistricting precedents. This Court will not, consistent with those precedents, substitute its own policy choices (or the policy choices of anyone else) for those made by the Legislature. Rather, this Court's authority is limited solely to remedying "a clear, direct, irrefutable constitutional violation." *City of Manchester*, 163 N.H. at 697. Notably, this Court has not previously invalidated a duly enacted legislative map as unconstitutional under this standard. As discussed above, no constitutional violation is indisputably apparent from the face of the petition. In light of these considerations, the

relief contemplated in the petitioners' "questions to be reviewed" demonstrates that there are "special and important reasons" for this Court to *decline* to exercise its original jurisdiction in this case, not the other way around.

Conclusion

For the foregoing reasons, the petitioners' "questions to be reviewed" do not "satisfy the standards of Rule 11 for the exercise of [this Court's] original jurisdiction." May 5, 2022 Order at 1. The Court should therefore decline to exercise original jurisdiction over this matter.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys

JOHN M. FORMELLA
ATTORNEY GENERAL

&

ANTHONY J. GALDIERI
SOLICITOR GENERAL

Date: May 13, 2022

/s/ *Samuel Garland*
Samuel R.V. Garland, Bar No. 266273
Senior Assistant Attorney General
N.H. Department of Justice
Civil Bureau
33 Capitol Street
Concord, New Hampshire 03301
(603) 271-3650
samuel.rv.garland@doj.nh.gov

and

DAVID SCANLAN, SECRETARY OF STATE

By his attorneys

JOHN M. FORMELLA
ATTORNEY GENERAL

&

ANTHONY J. GALDIERI
SOLICITOR GENERAL

Date: May 13, 2022

/s/ *Myles B. Matteson*
Myles B. Matteson, Bar #268059
Assistant Attorney General
Anne M. Edwards, Bar #6829
Associate Attorney General
Matthew G. Conley, Bar #268032
Attorney
New Hampshire Department of Justice
33 Capitol Street
Concord, New Hampshire 03301
(603) 271-3658
myles.b.matteson@doj.nh.gov
anne.m.edwards@doj.nh.gov
matthew.g.conley@doj.nh.gov

Certification

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

Date: May 13, 2022

/s/ *Samuel Garland*
Samuel R.V. Garland