

THE SUPREME COURT OF NEW HAMPSHIRE

No. 2022-_____

The City of Dover,
Debra Hackett

v.

David Scanlan,
In His Capacity as Secretary of State for New Hampshire

**PETITION FOR ORIGINAL JURISDICTION
PURSUANT TO SUPREME COURT RULE 11**

CITY OF DOVER

By its Attorneys,

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A. PRELIMINARY STATEMENT

This matter concerns the constitutionality of the decennial redistricting of the New Hampshire House of Representatives (“New Hampshire House”).

Recently, the legislature enacted, and the Governor signed, House Bill 50, now Laws 2022, chapter 9. Petitioners believe Laws 2022, 9:1 contravenes Part II, Article 11 of the State Constitution because at least 14 towns/wards in New Hampshire with sufficient population (including Dover Ward 4) should and could have received their own district, as shown in the proposed maps being submitted with this petition, but the State nevertheless enacted a redistricting scheme that commits at least 14 unnecessary violations of Part II, Article 11 (including Dover Ward 4).

Laws 2022, 9:1 also exceeds the 10% population deviation threshold articulated within prior cases construing state and federal constitutional requirements of what is known as the one person/one vote standard.

By comparison, the proposed map being submitted by the Petitioners falls within the 10% population deviation, while also avoiding the 14 unnecessary State Constitution violations previously mentioned.

Given these constitutional concerns and the approaching candidate filing period (commencing June 1, 2022), the Petitioners respectfully request that this Court exercise original jurisdiction and accept this matter for expedited resolution on the merits.

B. DECISION TO BE REVIEWED

None. This matter has not, to date, been filed with or decided in whole or in part by the New Hampshire Superior Court.

C. PORTIONS OF PETITION FILED UNDER SEAL

None.

D. QUESTIONS TO BE REVIEWED

This matter presents the following questions:

- I. Whether, as a threshold matter, Laws 2022, 9:1 (repealing and reenacting RSA 662:5) complies with the Federal Equal Protection Clause (U.S. CONST. amend. XIV) and Part II, Article 9 of the State Constitution, given the redistricting scheme's population deviation is greater than 10%.
- II. Whether the State/respondent can carry the burden of demonstrating any justification for enacting a House redistricting scheme that exceeds 10% population deviation.
- III. Whether Laws 2022, 9:1 is entitled to any presumption of constitutionality, given that Laws 2022, 9:1 enacts a reapportionment scheme that exceeds 10% population deviation.
- IV. Whether redistricting of the New Hampshire House is required to minimize violations of Part II, Article 11 of the State Constitution and/or avoid unnecessary violations of Part II, Article 11 of the State Constitution.
- V. Whether Laws 2022, 9:1 complies with Part II, Article 11 of the State Constitution with respect to the Strafford County Districts of the New Hampshire House, given that Laws 2022, 9:1 failed to minimize violations of Part II, Article 11's mandatory requirement for a "town or ward . . . [to] have its own district" and, instead, enacted at least four unnecessary

such violations in Strafford County (including Dover's Ward 4).

- VI. To the extent necessary for this Court to decide, whether Laws 2022, 9:1 complies statewide and/or in any county in redistricting the New Hampshire House, given that Laws 2022, 9:1 failed to minimize violations of Part II, Article 11's mandatory requirement for a "town or ward . . . [to] have its own district" and, instead, enacted at least 14 unnecessary such violations statewide.
- VII. Whether any rational basis supports Laws 2022, 9:1's failure to minimize violations of the State Constitution and/or avoid unnecessary violations of the State Constitution.
- VIII. Whether the unconstitutionality of Laws 2022, 9:1 warrants preliminary injunctive, permanent injunctive, and/or declaratory relief from this Court to protect voters, protect representative rights, and ensure the 2022 New Hampshire House membership and elections are lawful and based on constitutionally apportioned and configured districts.
- IX. Whether this Court should temporarily stay or enjoin the candidate filing period in RSA 655:14 with respect to the New Hampshire House election, in order to allow briefing and resolution of this matter.
- X. Whether this Court should itself redraw the New Hampshire House districts based upon the 2020 census data, to remedy and address the unconstitutionality of Laws 2022, 9:1.

- XI. Whether this Court should adopt Map-a-Thon’s proposed map (or maps) to cure and address the unconstitutionality of Laws 2022, 9:1 (unnecessary violations of Part II, Article 11 of the State Constitution and/or the population deviation in excess of that allowed by the Federal Equal Protection Clause (U.S. CONST. amend. XIV) and Part II, Article 9 of the State Constitution).
- XII. Whether this Court should declare a set of procedural instructions to guide future legislative redistricting by the State to ensure vindication of important State Constitutional considerations, similar to Hickel v. Southeast Conference, 846 P.2d 38, 49 (Alaska 1992).

E. PROVISIONS OF CONSTITUTION, STATUTES, RULES, AND REGULATIONS INVOLVED

1. RSA 662:5 State Representative Districts:

[Due to the length of RSA 662:5, the versions the legislature enacted in 2012 and 2022 (Laws 2022, 9:1) will be attached in full within the accompanying appendix]

2. New Hampshire Constitution:

Part 2, Article 9. [Representatives Elected Every Second Year; Apportionment of Representatives.] There shall be in the legislature of this state a house of representatives, biennially elected and founded on principles of equality, and representation therein shall be as equal as circumstances will admit. The whole number of representatives to be chosen from the towns, wards, places, and representative districts thereof

established hereunder, shall be not less than three hundred seventy-five or more than four hundred. As soon as possible after the convening of the next regular session of the legislature, and at the session in 1971, and every ten years thereafter, the legislature shall make an apportionment of representatives according to the last general census of the inhabitants of the state taken by authority of the United States or of this state. In making such apportionment, no town, ward or place shall be divided nor the boundaries thereof altered.

June 2, 1784

Amended 1877 three times providing for biennial elections; increasing representation from 150 rateable polls to 600; prohibiting towns and wards from being altered so as to increase representation.

Amended 1942 limiting size of House to between 375 and 400.

Amended 1964 providing for equal representation.

Part 2 Article 11 [Small Towns; Representation by Districts.]

When the population of any town or ward, according to the last federal census, is within a reasonable deviation from the ideal population for one or more representative seats, the town or ward shall have its own district of one or more representative seats. The apportionment shall not deny any other town or ward membership in one non-floterial representative district. When any town, ward, or unincorporated place has fewer than the number of inhabitants necessary to entitle it to one representative, the legislature shall form those towns, wards, or unincorporated places into representative districts which contain a sufficient number of inhabitants to entitle each district so formed to one or more representatives for the entire district. In

forming the districts, the boundaries of towns, wards, and unincorporated places shall be preserved and contiguous. The excess number of inhabitants of district may be added to the excess number of inhabitants of other districts to form at-large or floterial districts conforming to acceptable deviations. The legislature shall form the representative districts at the regular session following every decennial federal census.

June 2, 1784

Amended 1792 changing General Assembly to General Court.

Amended 1877 changing 150 rateable polls to 600 inhabitants.

Amended 1889 providing that towns of less than 600 should be represented a proportional amount of time instead of being classed as formerly provided in Art. 10.

Amended 1942 deleting reference to 600 and providing that small towns should be represented at least once in every 10 years.

Amended 1964 to permit small towns to be districted for one or more representatives.

Amended November 7, 2006 to enable towns with sufficient population to have their own representative district and permits the use of floterial districts.

3. Federal Constitution

Amendment XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor

shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

F. DOCUMENTS INVOLVED IN THE CASE

The following documents are included in the accompanying appendix to this petition:

1. Affidavit of David Andrews, with the following attachments:
 - Ex A. Andrews Curriculum Vitae
 - Ex B. Summary of Methodology
 - Ex C. Hatcher Curriculum Vitae
 - Ex D. November 2, 2021 Map-a-Thon Submission
 - Ex E. November 9, 2021 Map-a-Thon Submission

- Ex F. February 1, 2022 Map-a-Thon Submission
 - Ex G. Updated and Final Map-a-Thon Submission
 - Ex H. Map-a-Thon Analysis of Laws 2022, 9:1
2. RSA 662:5 (2013) (repealed and reenacted 2022)
 3. Laws 2022, chapter 9 (repealing and reenacting RSA 662:5)
 4. House Bill 50 (2022) Docket
 5. CACR 41 (2006)
 6. City of Dover Ordinance O-2022.01.12-001

G. STATEMENT OF THE CASE

The Petitioners in this matter are the City of Dover (“City”) and one eligible voter who resides in Dover’s Ward 4, Debra Hackett. Ms. Hackett is also a Dover City Councilor (for Ward 4), but she is petitioning in her personal capacity only. These Petitioners request this Court exercise original jurisdiction pursuant to New Hampshire Supreme Court Rule 11 to review the constitutionality of Laws 2022, 9:11, which redistricts the New Hampshire House following the 2020 census.

To briefly recite the relevant legislative history, the legislature’s current session has included several redistricting bills. Relevant to this case, House Bill 50 (“HB 50”) redistricted the New Hampshire House employing 400 districts (the maximum number allowed by Part II, Article 9 of the State Constitution). See Appendix to Petition for Original Jurisdiction Pursuant to Supreme Court Rule 11 (“App.”) at 167, 183.

Over the course of the legislation, the legislature received significant public input and feedback. Among the various submissions to the legislature were the proposed legislative maps provided by the Map-a-Thon coalition, see App. at 29, 58, 78, a non-partisan group of data professionals

who, among other things, created proposed New Hampshire House districts/maps based on the 2020 census data using the same methodology as that employed by the New Hampshire legislature and did so in compliance with federal/state “one person one vote” requirement (with under 10% deviation statewide). See generally App. at 2, 8.

The Map-a-Thon maps also complied with other requirements and policies. See id. With respect to the requirement in Part II, Article 11 of the State Constitution requiring a dedicated district/representative for any town or ward with sufficient population, the Map-a-Thon submission to the legislature acknowledged that the paramount “one person one vote” requirement precluded perfect compliance with Part II, Article 11. However, Map-a-Thon has been able to minimize the necessary violations of Part II, Article 11 to only 41 statewide (two in Strafford County, neither of which affected the City). See App. at 111.

For its part, the legislature apparently rejected the Map-a-Thon map and opted instead for the legislature’s own map. In March 2022, the New Hampshire House and Senate each approved HB 50, which the Governor signed into law on March 23, 2022 as Laws 2022, chapter 9. See App. at 183. In relevant part, Laws 2022, 9:1 enacted a scheme that (i) exceeded the 10% deviation safe harbor, see App. at 133, and (ii) enacted 55 violations of Part II, Article 11 of the State Constitution, see App. at 133. The legislative history of HB 50 offered no explanation or justification for these constitutionally significant circumstances.

With respect to the 10% deviation exceedance, it may be relevant to observe that the legislature entertained a series of amendments to HB 50 prior to its passage and, meanwhile, several communities, such as Dover,

redistricted their internal voting ward boundaries late due to delay of the 2020 census data and other circumstances¹. In any event, given that the legislature has not to Petitioners' knowledge published final deviation statistics for the enacted law, Map-a-Thon has recently calculated the population deviation of Laws 2022, 9:1 statewide, taking account of late redistricting and reapportionment of Cities (which occurred later than normal due to the delayed 2020 census results). Map-a-Thon's calculation reveals that Laws 2022, 9:1 actually enacted a 10.13% population deviation, see App. at 133, which, as discussed below, is *prima facie* unconstitutional and disproportionate. By comparison, Map-a-Thon's final proposed map for New Hampshire has a 9.94% deviation. See App. at 111.

Beyond the deviation problem, specific to the City, Laws 2022, 9:1 failed to provide Dover Ward 4 with its own dedicated district. Dover Ward 4's population based on the 2020 census is 5,439. See App. at 129. The ideal district size in New Hampshire based on the 2020 census is 3,444. See App. at 10 (rounding up from numerator/denominator). Because Dover Ward 4 met (and exceeded) the ideal district size, Part II, Article 11 of the State Constitution required Dover Ward 4 receive at least one dedicated house district/representative. Instead of according Dover

¹ Dover, for example, had to undergo a charter amendment review and approval process, which culminated in voter approval at the November 2021 election, in order to allow the Dover City Council to pass an ordinance to redistrict Dover's voting wards (in February 2022). See App. 187 (ordinance and background information).

Ward 4 its own district/representative, Laws 2022, 9:1 combined Dover Ward 4 with other towns. See App. at 178-179.

Zooming out to Strafford County, Laws 2022, 9:1 contained a total of six violations of Part II, Article 11 of the State Constitution (including Dover Ward 4). See App. at 151. Yet, Map-a-Thon’s original proposed map for Strafford County only contained fewer of such violations, see App. at 54, 74, 96, and Map-a-Thon’s recently updated Strafford County map (taking account of Cities, like Dover, who undertook redistricting/reapportionment late, due to delayed 2020 census data²). See App. at 129

Zooming out statewide, Laws 2022, 9:1 enacted a total of 55 violations of Part II, Article 11 of the State Constitution. See App. at 133. Yet, recall that Map-a-Thon’s original proposed maps contained significantly fewer necessary violations of Part II, Article 11 of the State Constitution. See App. at 31. Map-a-Thon’s recently updated maps contain only 41 necessary violations of Part II, Article 11 of the State Constitution. See App. at 111. In short, Laws 2022, 9:1 enacted 14 unnecessary violations of Part II, Article 11. And to emphasize again—Map-a-Thon’s final proposed map has a 9.94% deviation and complies with the constitutional one person/one vote standard. See App. at 111.

H. REASONS THIS COURT SHOULD EXERCISE ITS ORIGINAL JURISDICTION

Two core reasons support the exercise of original jurisdiction in this matter: (1) there is significant urgency, given the need for speedy

² The 2020 census data was delayed due to the COVID-19 pandemic.

resolution by the highest Court in the State of New Hampshire; (2) it is evident that Laws 2022, 9:1 falls well short of meeting the requirements of the federal and state constitutions. Each is discussed more fully below.

1. Urgency

Petitioners and the public need a speedy resolution of this matter. See, e.g., Monier v. Gallen, 122 N.H. 474, 476 (1982). At stake in this matter is the certainty of New Hampshire House elections.

The legislature enacted and the Governor signed Laws 2022, 9:1 only recently—in March 2022—leaving insufficient time to file this matter with the Superior Court in the first instance. Pursuant to RSA 655:14, the candidate filing period in New Hampshire begins June 1, 2022. Even under an accelerated Superior Court litigation schedule, traditional Superior Court processes would likely take months to even present the merits of the case. After a Superior Court’s final order, one or both sides would almost certainly appeal to this Court.

Consistent with the foregoing considerations, this Court recently transferred a pending Congressional redistricting matter from the Superior Court to this Court, observing as follows:

[This Court] take[s] this supervisory action because this case is one in which “the parties desire[,] and the public need requires[,] a speedy determination of the important issues in controversy.” Monier v. Gallen, 122 N.H. 474, 476 (1982) (quotation omitted); see also Appeal of McDonough, 149 N.H. 105, 109-10 (2003); Petition of Mone, 143 N.H. 128, 132 (1998). [This Court’s] exercise of original jurisdiction here is consistent with prior redistricting and election cases. See, e.g., Petition of Below, 151 N.H. 135, 138-39 (2004) (Below II); Appeal of McDonough, 149 N.H. at

109-10; Burling v. Speaker of the House, 148 N.H. 143, 145 (2002); Below v. Secretary of State, 148 N.H. 1, 4 (2002) (Below I); Monier, 122 N.H. at 476.

Theresa Norelli & a. v. Secretary of State, Case No. 2022-0184 (April 11, 2022) (non-precedential Order).

As this Court recognized in Norelli, there is a long-standing practice of the New Hampshire Supreme Court exercising original jurisdiction over redistricting challenges. As this very matter demonstrates, the legislation at issue usually gets finalized very close to the candidate filing period.

2. Unconstitutionality of Laws 2022, 9:1

Petitioners harbor significant constitutional concerns over Laws 2022, 9:1, which they expect this Court would agree with upon reviewing the facts and applicable law. These constitutional concerns are briefly summarized below for the Court's consideration of this petition:

Unnecessary Violations of Part II, Article 11

The core constitutional problem within Laws 2022, 9:1 is the statute's failure to minimize violations of Part II, Article 11. In City of Manchester v. Secretary of State, 163 N.H. 689, 695 (2012) and Town of Canaan v. Secretary of State, 157 N.H. 795, 797-798 (2008), this Court summarized the recent, relevant history of 2006 amendments to Part II, Article 11 (via CACR 41). The enacted redistricting plan within Laws 2022, 9:1 contains 55 instances of depriving otherwise entitled towns and wards to a dedicated district/representative in the New Hampshire House. Strafford County exemplifies this problem, in which Laws 2022, 9:1 enacted six such violations.

It did not have to be this way. As Map-a-Thon's work has shown throughout the legislative process, the legislature could have reduced the violations of Part II, Article 11 to two in Strafford County (providing Dover Ward 4 its own dedicated district/representative) and 41 statewide. Map-a-Thon's map, moreover, has under 10% deviation in population (9.94% in the final proposed map accompanying this petition).

Accordingly, this matter presents the situation that was not presented in City of Manchester. See City of Manchester, 163 N.H. at 702 (“Moreover, they do not argue that the legislature could have given more towns, wards, and places their own districts while still maintaining a deviation range of under 10%.”).

While violations of Part II, Article 11 may be necessary to comply with the one person/one vote requirement, see City of Manchester, 163 N.H. at 702, the overwhelming weight of authority underscores the requirement that the legislature minimize violations of the State Constitution and enact only those violations necessary.

First, Part II, Article 11 uses clear, mandatory language in setting forth the requirements for dedicated districts/representatives. “When the population of any town or ward, according to the last federal census, is within a reasonable deviation from the ideal population for one or more representative seats, the town or ward shall have its own district of one or more representative seats.” N.H. CONST. pt. II, art. 11 (emphasis added).

Other states have construed similar state constitutional requirements to mean that the legislature must minimize state constitutional violations committed in the course of complying with the one person/one vote requirement. See Twin Falls Cnty. v. Idaho Comm'n on Redistricting, 271

P.3d 1202, 1203 (Idaho 2012) (“We hold that the plan is invalid because it violates Article III, section 5, of the Idaho Constitution by dividing more counties than necessary to comply with the Constitution of the United States.”); Holt v. 2011 Legislative Reapportionment Comm’n, 38 A.3d 711, 754-57 (Pa. 2012) (invalidating redistricting plan where alternative plan “avoided a highly significant percentage of political subdivision splits and fractures while maintaining a lower average population deviation”); In re Reapportionment of the Colo. Gen. Assembly, 332 P.3d 108, 109 (Colo. 2011) (“We hold that the Adopted Plan is not sufficiently attentive to county boundaries to meet the requirements of article V, section 47(2) and the Commission has not made an adequate showing that a less drastic alternative could not have satisfied the hierarchy of constitutional criteria set forth in our most recent reapportionment opinion.”); Legislative Research Comm’n v. Fischer, 366 S.W.3d 905, 91-12 (Ky. 2012) (holding reapportionment scheme unconstitutional and reaffirming prior decisional law, which “requires division of the fewest number of counties mathematically possible in reapportionment plans”); cf. In re 2011 Redistricting Cases, 294 P.3d 1032, 1034 (Alaska 2013) (“A reapportionment plan may minimize article VI, section 6 requirements when minimization is the only means available to satisfy Voting Rights Act requirements.”).

One Person/One Vote

Separate from the violations of Part II, Article 11, Laws 2022, 9:1 also raises constitutional concerns under the so-called one person/one vote requirement.

Every ten years, Part II, Article 9 of the State Constitution requires the legislature to redistrict the New Hampshire House in accordance with the federal census results (or state census, should once be taken).

While there are various legal considerations in the redistricting process, “[t]he overriding objective of apportionment must be substantial equality of population among the various legislative districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State.” Burling v. Speaker of the House, 148 N.H. 143, 145 (2002) (quoting Reynolds v. Sims, 377 U.S. 533 (1964)) (brackets omitted). “This principle is often referred to as the one person/one vote standard.” City of Manchester, 163 N.H. at 699. “With respect to the House, the primacy of this principle is secured by both the Equal Protection Clause of the Federal Constitution, U.S. CONST. amend. XIV, and Part II, Article 9 of the State Constitution.” Id.

“The established method to determine whether a redistricting plan affords citizens an equal right to vote is to calculate the extent to which it deviates from the ideal district population.” Id. In Burling and City of Manchester, this Court explained that methodological process in detail. Following that methodology in this matter, Map-a-Thon has calculated the statewide deviation of Laws 2022, 9:1 as 10.13%.

A redistricting plan that exceeds a 10% deviation is prima facie unconstitutional. See id. at 703-04; Brown v. Thompson, 462 U.S. 835, 842-43 (1983). The burden is on the State to justify the exceedance based on “historically significant state policy or unique features.” Burling, 148 N.H. at 478 (quoting Chapman v. Meier, 420 U.S. 1 (1975)); see also Brown, 462 U.S. at 842-43. In this matter, Petitioners believe the State

lacks any tenable justification for exceeding the 10% deviation safe harbor. At a minimum, however, Laws 2022, 9:1 is entitled to no presumption of constitutionality given the exceedance.

In summary, for reasons of urgency and significant constitutional concerns, the Petitioners ask this Court to follow its normal practice and accept original jurisdiction over this matter challenging the constitutionality of Laws 2022, 9:1.

I. JURISDICTIONAL BASIS

The New Hampshire Supreme Court has jurisdiction to hear this case pursuant to Part II, Article 73-a of the State Constitution and RSA 490:4. , as further specified in New Hampshire Supreme Court Rule 11.

J. PRESERVATION STATEMENT

Not applicable.

K. PARTIES

Petitioners:

The City of Dover

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L. TRANSCRIPT OF STATEMENT

No transcript is necessary to adjudicate the merits of the issues raised in this Petition. There have been no prior proceedings in any New Hampshire Court to date.

M. CONCLUSION

Laws 2022, 9:1 falls well short of meeting constitutional requirements. The enacted law contains many unnecessary violations of the Part II, Article 11 of the State Constitution while also exceeding federal and state population deviation safe harbors. Given the urgency of this situation and this Court's long-standing practice of exercising original jurisdiction over legislative redistricting actions, the Petitioners respectfully submit the Court accept this matter pursuant to Supreme Court Rule 11.

Respectfully submitted,

CITY OF DOVER

By its attorneys,

Dated: May 3, 2022

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By her attorney,

Dated: May 3, 2022

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CERTIFICATION OF SERVICE

In compliance with Supreme Court Rule 11(6), the undersigned certify that a copy of this petition and accompanying appendix is being filed on this date through the Supreme Court's electronic filing service, which shall cause a copy to be served upon Anthony Galdieri, Solicitor General for the New Hampshire Department of Justice and counsel for the Respondent, at Attorney Galdieri's electronic mail address of record with this Court. See Sup. Ct. Supp. R. 18(b). In addition, the following counsel will be served conventionally by first class mail at the addresses below:

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By:

Dated: May 3, 2022

/s/ Joshua M. Wyatt
 Joshua M. Wyatt, City Attorney

Dated: May 3, 2022

/s/ Jennifer R. Perez
 Jennifer Perez

Dated: May 3, 2022

/s/ Henry Quillen
 Henry Quillen