STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY 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

MEMORANDUM OF LAW IN SUPPORT OF
THE DEFENDANTS' JOINT MOTION TO DISMISS

The Defendants, David Scanlan, in his official capacity as New Hampshire Secretary of State, and the State of New Hampshire, respectfully submit this Joint Memorandum of Law in support of their Motion to Dismiss the Plaintiffs' Complaint for Declaratory and Injunctive Relief.

INTRODUCTION

Making public policy decisions regarding the reciprocal harm in allocating single-member districts in redistricting the New Hampshire House of Representatives is a political question. As such, this Court needs to resist the Plaintiffs' invitation to impose a judicially-

decreed *political* solution to a legislative *political* problem that involves the balancing of many considerations. The Court should therefore dismiss the Plaintiffs' claims as they present a nonjusticiable political question.

The Plaintiffs, two cities and ten registered New Hampshire voters, bring this action to challenge duly enacted and constitutionally mandated reapportionments of the New Hampshire House of Representatives districts following the 2020 federal Census. The Plaintiffs challenge the reapportioned districts based solely on Part II, Article 11 of the New Hampshire Constitution under a theory that there is no rational or legitimate basis for HB 50, the enrolled and signed legislation redistricting the House of Representatives' map following the decennial Census.

The Plaintiffs' claim relies on the direction in Part II, Article 11 that where population 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. However, the Plaintiffs' claim ignores public policy decisions the Legislature must make in balancing reciprocal harm to satisfy the various requirements and considerations in redistricting, including acting consistent with the direction in the subsequent sentence in Part II, Article 11 that granting any town or ward a single-member district "shall not deny any other town or ward membership in one non-floterial representative district." *Id.*

While the Plaintiffs appear to offer a plan that they argue is better than the Legislature's, the existence of alternative maps does not render the existing map unconstitutional. Instead, it is the Plaintiffs' burden to establish the absence of a rational or legitimate basis for the challenged plan's failure to satisfy constitutional or statutory criteria. This, the Plaintiffs cannot do, resulting in the failure of their claim.

Based on the Legislature's articulation of its consideration of the Part II, Article 11 balancing to avoid arbitrarily favoring one town over another—the rational and legitimate making of public policy decisions regarding the reciprocal harm in allocating single-member districts—the issue presented is a nonjusticiable political question under state law. This Court should accordingly dismiss the Plaintiffs' complaint in its entirety.

BACKGROUND

I. LEGISLATIVE HISTORY

The four hundred State House of Representatives districts were reapportioned following the 2020 federal Census through House Bill ("HB") 50. *See Bill Docket* – HB50, N.H. Gen. Court, *available at* http://gencourt.state.nh.us/bill_Status/billinfo.aspx?id=610&inflect=2. The bill was introduced on January 6, 2021, and passed by the House on January 5, 2022, and by the Senate on February 16, 2022. *See id*. It was enrolled on March 17, 2022, and the bill was then signed by the Governor on March 23, 2022, with an effective date of the same day. *See id.*

II. PLAINTIFFS' CHALLENGES TO THE HOUSE DISTRICTS

The Plaintiffs allege that the current State House of Representatives districts violate Part II, Article 11 of the New Hampshire Constitution. Specifically, the Plaintiffs argue that HB 50 has too many "forced violations" of Part II, Article 11, which demands that town or wards with a population "within a reasonable deviation from the ideal population for one or more representative seats, . . . shall have its own district of one or more representative seats." Plaintiffs' Complaint, at 7, ¶ 22. However, the Plaintiffs readily admit that "forced violations" are inevitable:

> Due to the relatively small population of New Hampshire in comparison to its large number of House representatives, redistricting the House may require some "forced" violations of Part II, Article 11, meaning a violation of the State Constitution is necessary

> in order to comply with the "one person, one vote" requirements of the state and federal constitution [sic].

Cpl. at 8, ¶ 29. The Plaintiffs assert that there are 55 Part II, Article 11 violations state-wide—and bring this complaint based on 7 of those violations—but that only 14 of those 55 are "unexplained and lack any "rational or legitimate basis" that could justify such constitutional violations." Cpl. at 10, ¶ 36.

Instead, the Plaintiffs point to alternate Map-a-Thon maps—a redistricting advocacy organization's proposed maps—as evidence that the "the legislative history of House Bill 50, now Laws 2022, 9:1, offers no explanation or justification for the policy decisions made for the House districts and no rationale for rejecting the Map-a-Thon proposals that significantly reduced the number of violations of Part II, Article 11." Cpl. at 12, ¶ 50. Put another way, Plaintiffs claim that the mere existence of such an alternate map necessarily means that there is no rational or legitimate basis for any other map that contains additional "forced" violations of Part II, Article 11.

The Plaintiffs identify the affected towns and wards covered by their complaint. They are Dover Ward 4, Rochester Ward 5, New Ipswich, Wilton, Hooksett, Lee, and Barrington. Cpl. at 14, ¶ 58. The Plaintiffs suggest that adopting Map-a-Thon proposals would have reduced the Part II, Article 11 forced violations in Strafford County from six to two; in Hillsborough County from six to four; and in Merrimack County from seven to five. Cpl. at 15-17, ¶¶ 59-80.

To summarize, the Plaintiffs seek to revise legislative choices, moderately reduce the total number of inevitable "forced violations" of Part II, Article 11 without making difficult legislative policy decisions, and reallocate districts to favor single-member House districts for the particular jurisdictions they represent.

The Defendants further note that the sole basis for relief is sought under Part II, Article 11. And while the Plaintiffs briefly discuss in their complaint the deviation in the House districts, they plead no count related to such deviation and request no relief on the basis of any deviation claim. Therefore, the State submits that the resolution of this matter in its entirety is regarding Part II, Article 11.[1]

III. STANDARD OF REVIEW

In reviewing a motion to dismiss, the standard of review is whether the allegations in the Plaintiffs' complaint are reasonably susceptible of a construction that would permit recovery. *See McNamara v. Hersh*, 157 N.H. 72, 73 (2008). The Court assumes the Plaintiffs' factual allegations to be true and construes all reasonable inferences in the light most favorable to the Plaintiffs. *See id*. However, the Court does not have to accept allegations that are "merely conclusions of law." *Beane v. Dana S. Beane & Co.*, 160 N.H. 708, 711 (2010). The Court should dismiss the Plaintiffs' complaint if the facts pled do not constitute a basis for legal relief. *Id*.

[1] For context and without further argument, the State notes that in an equal representation "one person, one vote" analysis, the degree of population deviation from the ideal state legislative district size alone is not determinative. Deviation is constitutionally acceptable if supported by legitimate state objectives, including district compactness, preservation of political subdivision boundaries, conservation of prior district lines, the avoidance of contests between incumbents, and a legislature's fulfillment of its reapportionment constitutional obligation. The State furthers understands the deviation references to be that the Plaintiffs' claim HB 50's districts map represents a 10.13% deviation and their proposed remedy plan would represent a deviation of 9.94%. The State understands this difference of deviation between maps to represent approximately 11 individuals state-wide as measured against the largest and smallest districts. Further, it appears that this deviation of greater than 10%—unexpected based on the legislative record—was due to the City of Keene redrawing ward lines but failing to notify the Legislature of the changes and resulting population adjustments. The difference between the largest district's population, Keene Ward 5, and presumptive constitutionality of the House map based on deviation is approximately 8 individuals.

ARGUMENT

IV. REDISTRICTING CASE LAW

New Hampshire courts have dealt with redistricting cases over the decades, including for the House of Representatives. However, no case has specifically addressed the language at issue related to the legislative balancing explicit in Part II, Article 11 concerning granting single-member districts to qualifying towns or wards and avoiding harm to similarly situated towns or wards. The Defendants submit that this is because of the novel reading proposed by the Plaintiffs that ignores that explicit balancing built into Part II, Article 11 as well as the routinely upheld political balancing that is part and parcel of appropriate legislative reapportionment considerations.

In *Monier v. Gallen*, 122 N.H. 474 (1982), the New Hampshire Supreme Court held that it had jurisdiction to resolve apportionment cases, and that it would do so only if no duly-enacted redistricting map was in place in the final few days before the start of the statutory filing period. *Monier* does not here apply as the Legislature passed and the Governor signed HB 50 into law. But, it features a theme in New Hampshire redistricting case law—acknowledgment of judicial nonintervention in reapportionment absent pressing circumstances and where political questions are not at issue.

In *Burling v. Chandler*, 148 N.H. 143 (2002), the New Hampshire Supreme Court dealt directly with Part II, Article 11, though the precursor version prior to the 2006 constitutional amendment and also primarily in the context of "one person, one vote" population equality. In one component of the opinion, finding that the use of floterials resulted in unconstitutional deviation, the Court wrote at length about its struggle to produce an acceptable map. *Id.* at 157-59. It acknowledged that in seeking to reduce deviations, the risk was to contravene other

constitutional imperatives. *Id.* at 159. While the amended language of Part II, Article 11 and focus on population equality do not render *Burling* most pertinent to the analysis of the current case, it too references the judicial preference for nonintervention: "This court has been drawn reluctantly into what is primarily a legislative task. It is not our function to decide the peculiarly political questions involved in reapportionment, but it is our duty to insure the electorate equal protection of the laws." *Id.* at 144.

Below v. Gardner, 148 N.H. 1, 963 A.2d 785 (2002), shows another Supreme Court assessment of the handling of redistricting regarding state legislative maps. There, the question concerned senatorial districts where the Legislature had failed to enact a new district plan following the 2000 Census. While both chambers of the Legislature had passed redistricting legislation, the Governor vetoed the legislation, then the General Court recessed without further action. *Id.* at 786-87. The Court determined that, since the constitutional apportionment obligations in the New Hampshire Constitution, Part II, Article 26, had not been completed, the Court had jurisdiction to intervene given the overall range of deviation from the ideal population, which for Senate districts totaled 31.27 percent. *Id.* at 787. But, the Court did so reluctantly. In citing to various cases, the Court held:

> A state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality. Thus, we undertake the unwelcome obligation of performing in the legislature's stead gingerly, mindful that, as a court, we possess no distinctive mandate to compromise sometimes conflicting state apportionment policies in the people's name.

Id. at 788-89 (citations omitted). *Below* does not address or support the Plaintiffs' contention relative to towns or wards being entitled to a single-member district; but it does reinforce the Defendants' position—making public policy decisions regarding the reciprocal harm in allocating single-member districts in redistricting the New Hampshire House of Representatives

is a political question, and there is no circumstance here, such as the failure to apportion, that mandates judicial involvement.

It is also important to note that Part II, Article 11 has a built-in balancing mechanism that is absent in other constitutional obligations such as population equality and "one person, one vote." The fact that adjacent sentences create a preference for single-member districts yet balance that direction with the need to avoid disadvantaging neighboring or similar-situated towns is telling as to the operation of the constitutional provision. Unlike "one person, one vote," where judicial intervention has a clear governing principle, Part II, Article 11 necessitates legislative analysis of the consequences of granting a town or ward a single-member district. That built-in balancing mechanism to reduce harm—particularly in the reality where "forced violations" are inevitable given the number of political subdivisions and often small populations—makes clear that legislative, political determinations are necessary to the constitutional operation of Part II, Article 11. As highlighted by the *Below* Court, those legislative, political determinations give the court no "mandate to compromise sometimes conflicting state apportionment policies" even in the circumstance of population equality where the constitutional obligation is clear. *Id.* In other words, for a population equality assessment the court need not balance the political considerations at play in order to determine that an apportionment is constitutionally compliant with "one person, one vote." On the other hand, such as in this case, the constitutional directions would *necessitate* a resolution by a court reliant on political considerations inherent in the Part II, Article 11 balancing obligation. As will be discussed further below, that is a political question.

The Plaintiffs seek relief that could be in the form of "implementing the Court's own map as a permanent remedy." Cpl. at 3, ¶ 3. This is clearly contrary to established precedent. *In re*

Below, 151 N.H. 135 (2004) ("*Below II*"), concerned the question of whether the Legislature may follow a court's redistricting with its own reapportionment, and could do so in legislative sessions subsequent to the first following the court action. *Id.* at 136. This case confirmed that the Legislature remains constitutionally empowered to reapportion regardless of judicial intervention. *Id.* at 151. The Court further held that, while the constitutional instruction is to reapportion (once) closely following the federal decadal census, the Legislature is not obligated to pass new maps in the legislative session immediately following the issuance of census data. Finally, and most relevant to the case at hand, the Court rejected extraterritorial precedent holding that a court redistricting would foreclose a legislature's ability to reapportion:

> Separation of the three co-equal branches of government is essential to protect against a seizure of control by one branch that would threaten the ability of our citizens to remain a free and sovereign people. Thus, the separation of powers doctrine prohibits each branch from encroaching upon the powers and functions of the other branches. Our State Constitution vests the authority to redistrict with the legislative branch, and for good reason.

Id. at 150 (internal citations omitted).[2] This again strengthens the theme of judicial deference to legislative bodies in the context of redistricting, particularly as it concerns political questions such as the balancing of public policy interests.

A 2008 case does concern the post-amendment language of Part II, Article 11, but does not address the language at issue in this case. *Town of Canaan v. Secretary of State*, 157 N.H. 795 (2008), held that CACR 41's amendment of Part II, Article 11 did not compel an immediate

[2] The *In re Below* Court also cited to a Wisconsin Supreme Court opinion at length: "Redistricting remains an inherently political and legislative—not judicial—task. Courts called upon to perform redistricting are, of course, judicially legislating, that is, writing the law rather than interpreting it, which is not their usual—and usually not their proper—role. Redistricting determines the political landscape for the ensuing decade and thus public policy for years beyond. The framers in their wisdom entrusted this decennial exercise to the legislative branch because the give-and-take of the legislative process, involving as it does representatives elected by the people to make precisely these sorts of political and policy decisions, is preferable to any other." *Id.* at 150.

reapportionment following adoption. *Id.* at 799. The opinion contained no analysis of the allocation of single-member districts and the corresponding harm avoidance obligation.

The case that best frames the issue of the Plaintiffs' arguments is *City of Manchester v. Secretary of State*, 163 N.H. 689 (2012). In assessing floterial and single-member districts, the Supreme Court affirmed the principle that the Legislature is afforded wide latitude in managing redistricting considerations for state legislative districts once the equal representation obligation is satisfied by bringing population deviation within a constitutionally acceptable margin. *Id.* at 701. The petitioners did not allege an equal representation violation, and the Court relied on its line of decisions discussed above in holding that the legislature's map with a deviation of 9.9 percent embodied a rational legislative policy sufficient to override other imperatives, such as the pursuit of single-member districts. *Id.* at 702.

The Court clarified that statutes are presumed constitutional, and it will not "hold the statute to be unconstitutional unless a clear and substantial conflict exists between it and the constitution. It also means that when doubts exist as to the constitutionality of a statute, those doubts must be resolved in favor of its constitutionality." *Id.* at 696 (citations omitted). Further solidifying the threshold to enable judicial involvement, the Court noted: "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.*at 697 (citations omitted).

City of Manchester repeats the deference to legislative, political balancing decisions that are appropriately left to the Legislature. As mentioned earlier, the Plaintiffs claim that the existence of other House maps with fewer "forced violations" of Part II, Article 11 demonstrates that HB 50 has no rational or legitimate basis. That argument is demolished by the *City of*

Manchester Court. The Court repeatedly rejected invitations to conduct its own redistricting, stating: "Our only role in this process is to ascertain whether a particular redistricting plan passes constitutional muster, not whether a better plan could be crafted." *Id.* at 705 (internal citations omitted). The Court continued: "Moreover, we will not reject a redistricting plan simply because the petitioners have devised one that appears to satisfy constitutional and statutory requirements to a greater degree than the plan approved by the Legislature." *Id.* at 698.

And, as argued earlier, "one person, one vote" analyses are more straightforward in that they do not have the built-in harm balancing mechanism of Part II, Article 11. In quoting United States Supreme Court cases, the *City of Manchester* Court stated:

> So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature. In a congressional redistricting case, the State has the burden of proving that each significant variance between districts was necessary to achieve some legitimate goal.

Id. at 701 (citations omitted). So, the threshold for judicial intervention is high in the equal population context where there is a legitimate articulated legislative goal. That threshold for judicial intervention becomes a bar in the context of Part II, Article 11—a nonjusticiable political question—precisely because of the necessity of political balancing in pursuit of the harm reduction obligation explicit in the very same constitutional provision and its implicit attendant obligation to avoid discriminating in the case of similarly situated towns or wards.

As admitted by the Plaintiffs in this case, in *City of Manchester* the New Hampshire Supreme Court held that the State's paramount need to comply with the 10% population deviation is a "rational or legitimate basis" justifying "forced" violations of Part II, Article 11. Cpl. at 9, ¶ 33. So too is the legislative, political balancing necessitated by the harm reduction direction explicit in Part II, Article 11. While the Plaintiffs point to the constitutional direction to

provide single-member districts to qualifying towns, it is not an unqualified direction. That makes it distinct from cases concerning the constitutionality of maps related to deviation, as there is no constitutional qualifying provision relating to "one person, one vote." The fact that the New Hampshire Constitution, in the sentence immediately after articulating the single-member district qualification provision, qualifies that direction based on harm to neighboring or similarly situated towns or wards is telling. It is different in kind than other constitutional obligations imposed in the redistricting sphere. It is firmly established in a harm-analysis framework—while the constitutional preference is for single-member districts for qualifying towns or wards, it is not mandated where harm may occur. The balancing of that harm is a political and public policy decision and is not an appropriate question for this Court to revisit and revise.

Contrary to the Plaintiffs' claims, the Legislature, in HB 50, clearly considered harm reduction and the necessity of political balancing related to single-member districts in pursuit of harm reduction to avoid discriminating in the case of similarly situated towns or wards. Representative Carol McGuire noted:

> This bill, as amended, presents districts within counties which were created meeting the usual definition of "reasonable deviation," namely 10%. All districts are contiguous, and no town boundaries were broken. All towns are in a non-floterial district, some with a floterial, in order to meet the representation required. Where possible and practicable, single town districts were created without depriving another town of its fair representation.

New Hampshire House of Representatives, *House Journal No. 11 (Cont.)*, January 5, 2022, page 82.[3] The record also shows that, in the legislative milieu, there were alternative applications presented and considered. Representative Paul Bergeron stated:

> The minority's approach to creating state House districts prioritized giving each town and ward its own state representative if it has the population to support it and, when this was impossible, to create geographically small districts. The minority amendment prioritizes keeping cities together in districts, giving each ward their own representative and keeping related floterials contained by city lines as much as possible. While the minority understands that no map will be perfect, the minority amendment corrects the significant flaws in the committee amendment in order to create the most fair and constitutional state House map possible.

Id. Representative Turcotte elaborated on Part II, Article 11 concerns:

> HB 50 is a statewide redistricting plan and as a statewide plan, it is impossible to achieve perfection. Our own New Hampshire Supreme Court has acknowledged this state, "Ultimately Part II, Article 11 cannot be considered in isolation," and it sets forth only some of several constitutional criteria that a redistricting plan must satisfy. In 2001, the court, as further explained, a balance must be drawn, tradeoffs must be made. The majority of the committee has created a map that has increased the number of towns, wards and places with their own representatives, while falling within constitutionally permissible deviation. The majority has avoided the unnecessary creation of a large floterial, while striking a balance to avoid the arbitrary favoring of one town over another. The minority map fails to achieve these same objectives and instead favors certain districts for the purpose of artificially enhancing cherry-picked numbers.

Id. at 120.

The record clarifies that in conducting the legislative balancing necessary in redistricting, and necessary for the application of Part II, Article 11, a majority of the Legislature supported one constitutional version of a district map, and now the Plaintiffs are asking this Court to set aside those legislative, political decisions and award them the legislative text that failed to advance in the legislative process.

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[3] Available at http://gencourt.state.nh.us/house/calendars_journals/viewer.aspx?fileName=Journals\2022\HJ%2001%20January%2005,%202022.PDF

The Plaintiffs are essentially arguing that they have identified district maps that are "more fair" in the context of Part II, Article 11. While fairness may be a concept for discussion among the body politic and in legislative debate, the Plaintiffs are asking the Court to utilize an unworkable standard in the context of judicial consideration of redistricting maps. In analyzing variations of fairness—competitiveness, desire for party proportional representation, communities of interest, protecting incumbents, awarding single-member districts, protecting against disadvantage to a neighboring town based on assignment of a single-member district, avoiding harm by treating similarly situated towns or wards alike—the United States Supreme Court has stated clearly that it has no role in determining fairness in the context of redistricting:

> Deciding among just these different visions of fairness (you can imagine many others) poses basic questions that are political, not legal. There are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral. Any judicial decision on what is "fair" in this context would be an "unmoored determination" of the sort characteristic of a political question beyond the competence of the federal courts.

Rucho v. Common Cause, 139 S.Ct. 2484, 2500 (2019). As noted above, the New Hampshire Supreme Court has similarly observed that it is "indifferent to political considerations, such as incumbency or party affiliation." *Burling* 148 N.H. at 145. This context clarifies that the application of Part II, Article 11 is a political question.

V. NONJUSTICIABILITY OF A POLITICAL QUESTION

The Plaintiffs' claims should be dismissed because they present nonjusticiable political questions. Whether a controversy is nonjusticiable presents a question of law. *Burt v. Speaker of the House of Representatives*, 173 N.H. 522, 525 (2020). The nonjusticiability of a political question derives from the principle of separation of powers, a principle that is set forth in Part I Article 37 of the State Constitution, which provides:

> In the government of this state, the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity.

N.H. CONST., Pt. I, Art. 37; *see also Burt*, 173 N.H. at 525. "The justiciability doctrine prevents judicial violation of the separation of powers by limiting judicial review of certain matters that lie within the province of the other two branches of government." *Burt*, 173 N.H. at 525 (quotation omitted).

"Deciding whether a matter has in any measure been committed by the Constitution to another branch of government is itself a delicate exercise in constitutional interpretation. . . ." *Id*. (quotation omitted). Where there is such commitment, courts "must decline to adjudicate the matter to avoid encroaching upon the powers and functions of a coordinate political branch." *Id*. (quotation omitted). "A controversy is nonjusticiable—i.e., involves a political question—where there is a textually demonstrable commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." *Id*. (quotation omitted); *see also Baines v. New Hampshire Senate President*, 152 N.H. 124, 129 (2005) (recognizing that a case may also raise a nonjusticiable political question if a court cannot make a "deci[sion] without an initial policy determination of a kind clearly for nonjudicial discretion" (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

Consistent with this express language, the New Hampshire Supreme Court has recognized that redistricting is inherently a *legislative* function. In *City of Manchester*, the Court observed: "Our State Constitution vests the authority to redistrict with the legislative branch, and for good reason." 264 N.H. at 697 (citation and quotation marks omitted). Likewise, in *Below I*, the Court observed that "[r]eapportionment is primarily a matter of legislature consideration and

determination." 148 N.H. at 5 (citation and quotation marks omitted). A court must "tread lightly in this political arena, lest [it] materially impair the legislatures redistricting power." *City of Manchester*, 163 N.H. at 697 (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).

The New Hampshire Supreme Court has only contemplated judicial intervention when the Legislature has failed to meet a mandatory reapportionment requirement. For instance, when the Legislature has failed to meet its express constitutional obligation to reapportion the State Senate and House districts "following [a] decennial federal census," N.H. CONST., Pt. 2, Art. 26 (senate); N.H. CONST., Pt. 2, Art. 11 (house); *see also* N.H. CONST., Pt. 2, Art. 9 (house), the Court has stepped in, *see, e.g.*, *Below I*, 148 N.H. at 2–3; *Burling v. Chandler*, 148 N.H. 143, 144 (2002). Even then, though, the Court provided a judicial remedy only when the State House and Senate districts in question indisputably did not meet the constitutional requirement of equal apportionment, a requirement derived from the express language of the State Constitution itself. *See Below I*, 148 N.H. at 3 ("The State Constitution requires the legislature to redraw each senate seat into a single member district 'as nearly equal as may be in population' every ten years, based upon the federal decennial census." (quoting N.H. CONST., Pt. 2, Arts. 11 & 26)); *Burling*, 148 N.H. at 145 ("The New Hampshire Constitution requires the legislature to redraw each representative district 'as equal as circumstances will admit' every ten years, based upon the decennial census." (quoting N.H. CONST., Pt. 2, Art. 9)).

Similarly, the New Hampshire Supreme Court recently intervened to draw congressional districts when new districts were not enacted following the 2020 federal Census and the Court

was able to determine as a matter of law that the old districts failed to meet the federal constitutional requirement of one person/one vote. *See Norelli v. Secretary of State*, __ A.3d __, 2022 WL 1498345 (N.H. May 12, 2022).

In contrast, the New Hampshire Supreme Court has never invalidated a redistricting plan duly enacted by the Legislature following the then most recent federal decennial census. The Court has emphasized that a duly enacted plan "is entitled to the same presumption of constitutionality as any other statute." *City of Manchester*, 163 N.H. at 697. "Judicial relief becomes appropriate only when a legislature fails to reapportion according to constitutional requisites in a timely fashion after having had an adequate opportunity to do so." *Id.* (citations omitted). Again, "[b]oth the complexity of 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).

New Hampshire precedent makes clear that judicial intervention regarding redistricting is only appropriate in the narrow circumstances where there is a clear, direct, irrefutable violation of a mandatory constitutional requirement. The State Constitution imposes no mandatory obligation on the Legislature with respect to how it may weigh political considerations when exercising its reapportionment authority. In the absence of such obligation, the New Hampshire Supreme Court has repeatedly recognized "that redistricting is an inherently political process," *City of Manchester*, 163 N.H. at 695 (quoting *In re Below*, 151 N.H. 135, 138 (2004) (*per curiam*) ("*Below II*")), and that the Legislature may factor political considerations into its redistricting calculus, *see Burling*, 148 N.H. at 156; *see also id.* (noting that "political considerations are tolerated in legislatively-implemented redistricting plans"); *Below I*, 148 N.H. at 11 (noting that "political considerations may be permissible in legislatively-implemented

redistricting plans"). This is because the Legislature is "the institution by far best situated to identify and then reconcile traditional state policies within the constitutional framework of substantial population equality." *Below I*, 148 N.H. at 5. "The framers in their wisdom entrusted this decennial exercise to the legislative branch because the give-and-take of the legislative process, involving as it does representatives elected by the people to make precisely these sorts of political and policy decisions, is preferable to any other." *Id.* at 9 (citation and quotation marks omitted). The Legislature thus has a "distinctive mandate to compromise sometimes conflicting state apportionment policies in the people's name." *Id.*

The Judiciary enjoys no similar mandate. Just as nothing in the text of the State Constitution proscribes the Legislature from considering political factors when drawing redistricting maps, so too does nothing in the text of the Constitution empower courts to invalidate and redraw maps based on notions of political fairness or deciding amongst the disadvantage to one town or ward over another relative to assignment of single-member districts and the reduction in the use of floterial districts. To the contrary, "courts engaged in redistricting primarily view the task through the lens of the one person/one vote principle and all other considerations are given less weight." *Id.* A court has "no principled way to choose among [competing redistricting] plans, especially knowing that [it] would be endorsing an unknown but intended political consequence by the choice [it] makes." *Id.* at 13. As the New Hampshire Supreme Court recently recognized, "any change to the existing . . . districts may have political ramifications." *Norelli*, __ A.3d __, 2022 WL 1498345, at *9. "[W]hile these types of political considerations may be permissible in legislatively-implemented redistricting plans, they have no place in a court-ordered remedial plan." *Below I*, 148 N.H. at 11.

Constitutional text and controlling precedent thus make clear that the authority to factor political considerations into the reapportionment calculus lies *exclusively* with the Legislature, not the Judiciary. When the State Constitution places authority over a matter "entirely within legislative control and discretion," it is "not subject to judicial review *unless* the legislative procedure is mandated by the constitution." *Burt*, 173 N.H. at 526 (emphasis in original). Because the State Constitution imposes no mandatory requirement on how the Legislature must weigh political considerations during the reapportionment process, how the Legislature ultimately chooses to do so, if at all, is not subject to judicial review. *Id.*

As noted above, the Supreme Court has contemplated judicial intervention in the redistricting process when the Legislature fails to meet its express, mandatory obligations under the State Constitution's redistricting's provision. *See, e.g.*, *Below I*, 148 N.H. at 2–3; *Burling*, 148 N.H. at 144; *cf. Norelli*, 2022 WL 1498345. Because those cases involved claims that the Legislature had failed to adhere to mandatory constitutional requirements, the Court could resolve them consistent with the political-question doctrine. *See, e.g.*, *Burt*, 173 N.H. at 526 (observing that the Legislature's internal procedures were a matter "entirely within legislative control and discretion, not subject to judicial review *unless the legislative process procedure is mandated by the constitution*" (emphasis added)); *Sumner v. New Hampshire Secretary of State*, 168 N.H. 667, 672 (2016) (ruling that alleged violations of the Legislature's procedural rules presented a nonjusticiable political question because the Constitution gives the Legislature "complete control and discretion" over its procedural rules); *Baines*, 152 N.H. at 130 (determining that judicial review of the Legislature's compliance with "nonconstitutionally mandated statutory legislative procedures" was nonjusticiable political question); *In re Judicial Conduct Committee*, 145 N.H. 108 (2000) (determining that judicial review of an impeachment

proceeding presented a nonjusticiable political question because Part II, Article 17 committed the authority to impeach judges to the legislative branch).

Here, however, the Plaintiffs ask this Court to resolve claims that necessarily turn on political considerations that the Legislature has the *exclusive* province to weigh and decide. Under the New Hampshire Supreme Court's political-question jurisprudence, those claims are not justiciable.

In the alternative, should this court decline to hold that the Plaintiffs' allegations relating to Part II, Article 11 represent a nonjusticiable question, the Defendants argue that the Plaintiffs' claims should still be dismissed for failure to state a claim. Incorporating the argument above, while the Plaintiffs appear to offer a plan that they argue is better than the Legislature's, the existence of other possible maps does not render the existing map unconstitutional or demonstrate that it is lacking a rational or legitimate basis. Instead, it is the Plaintiffs' burden to establish the absence of a rational or legitimate basis for the challenged plan's failure to satisfy constitutional or statutory criteria. The Plaintiffs simply have not satisfied that burden. They instead insist that their preferred legislative text should prevail all while never mentioning the legislative record's demonstration of the Legislature's discussion, reasoning, and balancing of this subject. As such, the Plaintiffs' claims should be dismissed.

CONCLUSION

The nonjusticiability of a political question derives from the constitutional principle of separation of powers. *See* N.H. CONST., Pt. I, Art. 37. Under this principle, courts must decline to adjudicate matters that the Constitution committed to another branch of government or matters to which the Constitution does not provide judicially discoverable and manageable standards for resolving.

The State Constitution commits reapportionment of the House of Representatives districts exclusively to the Legislature, subject to a handful of express constitutional requirements. The New Hampshire Supreme Court has consistently refused to intervene in the redistricting process absent "clear, direct, irrefutable constitutional violations" premised on an express constitutional requirement. *City of Manchester v. Secretary of State*, 164 N.H. 689, 697 (2012). New Hampshire Supreme Court precedent makes clear that the Legislature, not the courts, has the *exclusive* authority to factor political considerations into its redistricting calculus, among the many other considerations including the allocation of single-member districts to qualifying towns or wards. *See, e.g.*, *Below v. Gardner*, 148 N.H. 1, 11 (2002) ("*Below I*").

The Plaintiffs' allegations of avoidable Part II, Article 11 violations would require the Court to encroach upon the power and functions of the Legislature—the coordinate branch of government to which the State Constitution has committed the authority to reapportion State House of Representatives districts—even though the State Constitution does not clearly, directly, and irrefutably prohibit such reciprocal harm balancing, and even though the State Constitution does not provide any judicially discoverable and manageable standards for resolving the Plaintiffs' claims. The Plaintiffs' complaint seeks to have this Court craft a political solution to the benefit of the Plaintiffs' political subdivisions to overturn districts that elected, politically accountable legislators created. The Court cannot do so without wading into "one of the most intensely partisan aspects of American political life," *see Rucho,* 139 S.Ct. at 2507, and without running afoul of the New Hampshire Supreme Court's clear directive that "political considerations have no place in a court-ordered remedial redistricting plan," *Norelli v. Secretary of State*, __ N.H. __, 2022 WL 1498345, at *9 (decided May 12, 2022) (*per curiam*). The core contention in the Plaintiffs' claims is, therefore, not susceptible of judicial review, and this Court

must resist the Plaintiffs' invitation to impose a judicially-decreed *political* solution to a legislative *political* challenge that involves the balancing of many considerations.

For the foregoing reasons, the Plaintiffs' claims present non-justiciable political questions. Their complaint should accordingly be dismissed for lack of subject-matter jurisdiction.

Respectfully submitted,

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SECRETARY OF STATE

and

THE STATE OF NEW HAMPSHIRE

By his attorneys,

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Date: October 17, 2022

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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.

/s/ *Myles Matteson*
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