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Hillsborough Superior Court Southern District
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STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS
SOUTHERN DISTRICT

SUPERIOR COURT

No. 226-2022-CV-00181

MILES BROWN,
ELIZABETH CROOKER,
CHRISTINE FAJARDO,
KENT HACKMANN,
BILL HAY,
PRESCOTT HERZOG,
PALANA HUNT-HAWKINS,
MATT MOOSHIAN,
THERESA NORELLI,
NATALIE QUEVEDO, and
JAMES WARD

v.

DAVID M. SCANLAN,
in his official capacity as the New Hampshire Secretary of State

&

THE STATE OF NEW HAMPSHIRE

JOINT OPPOSITION TO INTERLOCUTORY TRANSFER

The parties, by and through their respective counsel, jointly oppose an interlocutory transfer of this matter without ruling to the New Hampshire Supreme Court at this time, as proposed at the June 3, 2022 status conference. In support of their opposition to an interlocutory transfer, the parties state as follows:

1. The Plaintiffs bring partisan-gerrymandering challenges to the State Senate and Executive Council maps. The Plaintiffs have moved for a preliminary injunction, seeking relief in advance of the 2022 elections. The Defendants have objected to that motion on both legal and factual grounds. A hearing on the Plaintiffs' motion was scheduled for June 13, 2022.

2. The Court held a status conference on June 3. At the conference, the Court indicated its intent to approve an interlocutory transfer of the Plaintiffs' preliminary injunction motion, without ruling on it, to the New Hampshire Supreme Court under Superior Court Civil Rule 46 and Supreme Court Rule 9. Following the conference, the Court issued an order in which it directed the parties to file a joint proposed interlocutory transfer statement, or, failing that, separate proposed statements, by June 10. *See* June 3, 2022 Order at 1. The Court canceled the June 13 hearing, but indicated that "[s]hould the case not be accepted and/or remanded by the New Hampshire Supreme Court, by agreement of the parties, this Court will thereafter schedule a one (1) hour hearing on the plaintiff[s'] request for preliminary injunction as expeditiously as the Court's docket permits," at which "[t]he parties will proceed by offers of proof." *Id.*

3. The relevant court rules authorize interlocutory transfers of "question[s] of law." Sup. Ct. R. 9(1); Sup. Ct. R. 46(a). Supreme Court Rule 9 requires that an interlocutory transfer statement include, among other things, "a statement of the facts necessary to an understanding of the controlling question of law as determined by the transferring trial court." Sup. Ct. R. 9(1)(b). In resolving a transferred question of law, the New Hampshire Supreme Court "accept[s] the facts as presented in the interlocutory transfer statement" and considers any additional facts "for background only." *Rankin v. S. St. Downtown Holdings, Inc.*, 172 N.H. 500, 502 (2019). The New Hampshire Supreme Court's decisions contemplate that interlocutory transfers proceed on "undisputed" facts. *See, e.g.*, *In re Teresa E. Craig Living Trust*, 171 N.H. 281, 282 (2018); *City of Manchester v. Secretary of State*, 163 N.H. 689, 707 (2012); *see also State v. Hess Corp.*, 161 N.H. 426, 440 (2011) (resolving transferred questions of law but leaving "a factual dispute . . . to the trial court to determine").

4. The parties have conferred and now jointly agree that an interlocutory transfer without ruling is not appropriate at this juncture. The Plaintiffs' motion for a preliminary injunction presents mostly contested issues of fact not readily susceptible to interlocutory transfer without ruling. While the Defendants' argument that the claims presented in this case are not justiciable is a question of law, the New Hampshire Supreme Court is unlikely to render an expedited decision on that issue over the summer months. Thus, in the parties' view, any attempt at an interlocutory transfer without ruling at this stage would not resolve the Plaintiffs' motion for preliminary injunction prior to the 2022 elections and would likely not be accepted by the New Hampshire Supreme Court.

5. Even if the New Hampshire Supreme Court did rule on the legal question, a ruling that this case is justiciable would simply result in a remand back to this Court, further delaying and jeopardizing the chance for a resolution of the Plaintiffs' motion for preliminary injunction prior to the 2022 elections. The interests of efficiency further weigh against this type of piecemeal review by the New Hampshire Supreme Court.

6. The parties have significant, albeit different, interests in having the Plaintiffs' motion for preliminary injunction resolved in a timely manner, and they agree that the best procedural path for reaching resolution is through this Court in the first instance.

7. Accordingly, the parties jointly request that this Court decline to order an interlocutory transfer statement and instead resolve the Plaintiffs' motion for a preliminary injunction.

WHEREFORE, the parties jointly respectfully request that this Honorable Court:

A. Decline to order an interlocutory transfer at present;

B. Schedule a hearing on the Plaintiffs' motion for a preliminary injunction as soon as the Court's calendar permits; and

C. Grant such further relief as the Court deems just and equitable.

Respectfully submitted,

DAVID SCANLAN, SECRETARY OF STATE

By his attorneys,

JOHN M. FORMELLA
ATTORNEY GENERAL

Date: June 10, 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/ *Samuel Garland*
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