

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS  
SOUTHERN DISTRICT

SUPERIOR COURT  
No. 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

**ORDER**

The plaintiffs have brought this action challenging the constitutionality of two recently enacted laws establishing boundaries for senate and executive council districts for the next decade. See Laws 2022, ch. 45; Laws 2022, ch. 46. The plaintiffs assert that the newly-drawn districts “are partisan gerrymanders<sup>1</sup> that defy the basic principles of representative government.” (Compl. ¶ 3.) The plaintiffs: (1) seek a declaration that the newly-drawn districts “violate Part I, Articles 1, 10, 11, 12, 22, and 32 of the New Hampshire Constitution;” (2) seek preliminary and permanent injunctive relief enjoining the defendant from “from implementing, enforcing, or giving any effect” to those laws; and (3) request the Court to adopt new plans for the senate and executive council districts “that comply with the New Hampshire Constitution.” (Id. Prayer ¶¶ A–C.)

After the plaintiffs filed this action, the Court scheduled a preliminary injunction hearing for June 13, 2022. Prior to that hearing, the Court held a status conference on June 3, 2022. At that status conference, the Court informed the parties of its intent to

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<sup>1</sup> Political or partisan gerrymandering “is the practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition’s voting strength.” Below v. Gardner, 148 N.H. 1, 9–10 (2002) (cleaned up). The Court will use the terms “political gerrymandering” and “partisan gerrymandering” interchangeably.

transfer certain questions of law to the New Hampshire Supreme Court. See RSA 491:17. The Court directed the parties to file a proposed interlocutory appeal statement without ruling by June 10, 2022. See Sup. Ct. R. 9. The parties did not comply with the Court's Order. Rather, both the plaintiffs and the defendant/intervenor objected to the interlocutory transfer without ruling on the basis that "[t]he [p]laintiffs' motion for a preliminary injunction presents mostly contested issues of fact not readily susceptible to interlocutory transfer without ruling." (Court Doc. 29 ¶ 4.)

To the extent the parties move for reconsideration of the Court's decision to transfer questions of law to the Supreme Court, that request is DENIED. Rather, the Court continues to find that plaintiffs' complaint raises an important threshold issue of state constitutional law that should be decided before the Court considers whether to take the drastic step of invalidating duly-enacted senate and executive council districts for an election that is set to occur in less than five months. See Glover v. Baker, 76 N.H. 261, 263 (1911) (holding that superior court may transfer questions of law over the objection of the parties); see also In re Below, 151 N.H. 135, 150 (2004) (cautioning that courts "tread lightly in this political arena" as to not "materially impair the legislature's redistricting power"). Specifically, the Court questions whether the plaintiffs have stated a claim for which relief may be granted. The New Hampshire Supreme Court has held that "political considerations are tolerated in legislatively-implemented redistricting plans." Burling v. Chandler, 148 N.H. 143, 156 (2002). Similarly, the United States Supreme Court has recently held that claims of partisan or political gerrymandering similar to those made by the plaintiffs are not justiciable under any provision of the United States Constitution. Rucho v. Common Cause, 139 S. Ct. 2484, 2506–07 (2019)

(holding that “partisan gerrymandering claims present political questions beyond the reach of the federal courts”). However, at least one state supreme court has declined to follow the reasoning of Rucho for partisan gerrymandering claims brought under the provisions of its state constitution. See Harper v. Hall, 868 S.E.2d 499 (N.C. 2022) (finding partisan gerrymandering claims concerning state senate districts to be justiciable under several provisions of North Carolina’s Constitution). And at least one other state supreme court recognized the justiciability of political gerrymandering claims under its state constitution before the Rucho decision. See League of Women Voters v. Commonwealth, 178 A.3d 737, 741 (Pa. 2018) (“While federal courts have, to date, been unable to settle on a workable standard by which to assess [partisan gerrymander] claims under the federal Constitution, we find no such barriers under” the state charter).

After reviewing these decisions, including the dissenting opinions associated with each case, it is clear that there is a legitimate question as to whether political gerrymandering claims present justiciable issues in New Hampshire courts. Thus, the clerk of court is directed to transfer the following questions of law to the Supreme Court<sup>2</sup>:

- (1) Does any provision of the New Hampshire Constitution prohibit the general court from enacting senate and executive council districts that are drawn in a manner that heavily favors one political party over another?
- (2) If the answer to question (1) is “yes,” are political gerrymandering claims justiciable in New Hampshire state courts?
- (3) If the answer to questions (1) and (2) are “yes,” what framework should the Court use to evaluate such claims? In other words, what must a plaintiff alleging unconstitutional political gerrymandering prove in order to be entitled to any relief?

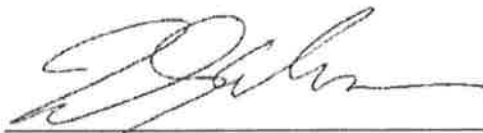
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<sup>2</sup> A separate Statement of Interlocutory Transfer Without Ruling shall issue.

The Court recognizes that if the plaintiffs' claims are determined to be justiciable under the State Constitution, the Court will need to conduct the necessary fact-finding associated with those claims on remand. See generally State v. Brown, 166 N.H. 520, 521–22 (2014) (noting the supreme court's interest "in avoiding cases which require [it] to perform the unfamiliar task of fact finding"). The Court only seeks guidance on these threshold legal issues as "the parties may be saved a prolonged struggle over facts which in the end might be found entirely useless" in the event such claims are held to be non-justiciable. Glover, 76 N.H. at 263.

So ordered.

Date: June 20, 2022



Hon. Jacalyn A. Colburn,  
Presiding Justice

Clerk's Notice of Decision  
Document Sent to Parties  
on 06/21/2022