

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

CASE NO. \_\_\_\_\_

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

**INTERLOCUTORY TRANSFER STATEMENT**

**I. PARTIES**

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**II. STATEMENT OF THE CASE**

The plaintiffs bring this action requesting declaratory and injunctive relief based upon the claimed unconstitutionality of two recently enacted laws establishing new senate and executive council districts following the 2020 federal census. The State of New Hampshire, through the

Attorney General's Office, has intervened. The record of this transferred case includes: this Interlocutory Transfer Statement; the complaint; the trial court's order dated June 3, 2022; the parties' joint opposition to an interlocutory transfer; and the trial court's order dated June 20, 2022. There is no transcript needed to resolve this case.

### III. STATEMENT OF FACTS

On May 6, 2022, Governor Sununu signed two bills, SB 240 and SB 241, which changed the existing boundaries for the senate's twenty-four districts and the executive council's five districts. See Laws 2022, ch. 45; Laws 2022, ch. 46. These new districts were established following the 2020 federal census and presumably will be used for the 2022 through 2030 elections. Following the enactment of SB 240 and 241, the plaintiffs immediately filed a complaint in Hillsborough County Superior Court (Southern Judicial District) (hereinafter the "trial court"). The plaintiffs assert that the newly-created senate and executive council districts violate several provisions of the New Hampshire Constitution because they "are partisan gerrymanders<sup>1</sup> that defy the basic principles of representative government." The plaintiffs ask the trial court to enter an injunction enjoining the defendant from using the newly-drawn districts for the upcoming 2022 state elections and beyond. The plaintiffs also ask the trial court to draw new districts that are less gerrymandered than the ones passed by the general court and signed by the governor.

On June 3, 2022, the trial court (Colburn, J.) held a status conference. The trial court informed the parties that it had decided, sua sponte, to transfer certain questions of law to the supreme court. See RSA 491:17. The trial court directed the parties to draft a proposed

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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).

interlocutory transfer statement in accordance with Supreme Court Rule 9. The parties declined to do so and instead filed a joint opposition to an interlocutory transfer without ruling. In an order dated June 20, 2022, the trial court indicated that it would proceed with the interlocutory transfer without ruling pursuant to RSA 491:17 despite the parties' joint objection. The trial court also stated that it would draft this interlocutory transfer statement.

#### **IV. QUESTIONS OF LAW**

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 trial 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?

#### **V. STATEMENT OF REASONS FOR INTERLOCUTORY TRANSFER**

The trial court reasoned that an interlocutory transfer without ruling pursuant to RSA 491:17 was necessary in this case for the following reasons:

[T]he 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. 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. The Court recognizes that if the plaintiffs’ claims are determined to justiciable under the State Constitution, the Court will need to conduct the necessary fact-finding associated with those claims on remand. 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.

(Internal citations omitted).

In essence, before “tread[ing]” into “this political arena,” In re Below, 151 N.H. 135, 150 (2004), and potentially overturning the districts drawn by the legislature, the trial court seeks a determination as to whether political/partisan gerrymander claims brought under the State Constitution are justiciable in the first instance. The trial court believes “a substantial basis exists for a difference of opinion on the[se] question[s],” Sup. Ct. R. 9(1)(d), given the United States Supreme Court’s sharply divided opinion in Rucho as well as the divided opinions of the Harper and League of Women Voters Courts. The trial court also believes that the interlocutory transfer could prevent needless litigation, see Glover v. Baker, 76 N.H. 261, 263 (1911), and will “present the opportunity to decide, modify or clarify an issue of general importance in the administration of justice,” Sup. Ct. R. 9(1)(d).

## VI. TRIAL COURT’S SIGNATURE



Hon. Jacalyn A. Colburn, Presiding Justice

Date: June 21, 2022