

STRAFFORD COUNTY

STATE OF NEW HAMPSHIRE

SUPERIOR COURT

City of Dover et. al.

v.

David Scanlan, Secretary of State for New Hampshire et. al.

Docket No. 219-2022-CV-00224

**PLAINTIFFS' SURREPLY IN SUPPORT OF
OBJECTION TO DEFENDANTS' JOINT MOTION TO DISMISS**

NOW COME the plaintiffs in this matter, by and through their undersigned counsel, and submit this surreply memorandum in support of their objection to the Defendants' Joint Motion to Dismiss, stating in support as follows.

First, it bears noting that the Defendants have still failed to cite a single case in support of the novel, remarkable proposition that mandatory language in Part II, Article 11 presents a political question incapable of judicial review. *But see City of Manchester v. Secretary of State*, 163 N.H. 689, 706 (2012) (observing that "Part II, Article sets forth . . . some of several constitutional criteria that a redistricting plan **must satisfy**" (emphasis added)).

Second, Plaintiffs did not at all misunderstand or misconstrue the Defendant's "political question" argument. The Defendants are comparing apples and oranges—this is not a situation where the legislature chose between two competing plans with equal numbers of State Constitutional violations. Rather, the enacted plan contains 14 additional and unnecessary violations of Part II, Article 11 (while also violating the one person, one vote standard), whereas the Map-a-Thon plan can eliminate those 14 violations of Part II, Article 11 (while complying with the one person, one vote standard). To reiterate, the Plaintiffs in this case have alleged that the State's 2022 House district map contains 55 violations of a Part II, Article 11, fourteen of

which were avoidable yet enacted without any rational or legitimate basis. *Id.* ¶¶ 22, 35–57. Each of the 14 affected towns and wards could be given its own representative without denying any other town or ward membership in a non-floterial district (as Part II, Article 11 requires). *Id.* ¶¶ 40, 47 & Ex. 2, Affidavit of David Andrews ¶¶ 8, 9, and Ex. G. Choosing to violate Part II, Article 11 to a greater degree than necessary, all in contravention of mandatory language in Part II, Article 11, does not approach being a “political question.” It is instead an attempt to cloak a decision to commit constitutional violations as a “political question.”

Third, given the Defendants’ discussion of “reciprocal harms” and “forced violations,” one of two things seems to be happening here. One possibility is that the Defendants consider any violation of Part II, Article 11 to be a “forced violation,” and therefore they view the State as having unreviewable latitude to decide the scope of the violations and which towns and wards will suffer a forced violation and which won’t. The factual premise of this argument improperly contradicts the well-pled facts in the Plaintiffs’ complaint, which alleges that not every violation is “forced”: only 41 violations are forced by New Hampshire’s demographics, while the other 14 violations in the State’s plan are unforced—they could be eliminated without contravening any law or constitutional provision, state or federal. *See* Complaint ¶ 36. If this is the Defendants’ position, then their motion to dismiss must be denied because the Defendants cannot purport to contradict the factual allegations of the complaint at the dismissal stage.

The second possibility is that the Defendants believe that if it is impossible to comply with a constitutional requirement in some instances, then compliance with that requirement is never required, even when it is possible. This argument would make Part II, Article 11 a dead letter; in theory, under this view the State could divide New Hampshire into two districts of equal population with 200 representatives each, denying a dedicated House representative to

every town and ward, and evade judicial review by claiming that some violations were forced anyway. This view defies common sense, as well as the prior, judicially filed opinion of the Attorney General¹ **and** the mandatory language in Part II, Article 11. As explained in the Plaintiffs' objection, unnecessary violations of an explicit constitutional requirement are justiciable, as Courts in New Hampshire and elsewhere have held. Objection at 8–11.

Respectfully submitted,

THE CITY OF DOVER, NEW HAMPSHIRE

Dated: December 2, 2022 By: /s/ Joshua M. Wyatt
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Dated: December 6, 2022 By: /s/ Terence M. O'Rourke
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¹ The Attorney General opined in his 2012 *City of Manchester* brief that Part II, Article 11 was intended to “provide as many single town districts as possible.” *See* Ex. A to Plfs’ Objection to Joint Motion to Dismiss, at 7.

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By their attorney,

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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.

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