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

DEFENDANTS' REPLY TO THE PLAINTIFFS' OBJECTION TO THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The Defendants, David Scanlan, in his official capacity as the New Hampshire Secretary of State, and the State of New Hampshire, through counsel, submit this reply to the Plaintiffs' objection to the Defendants' cross-motion for summary judgment. The Defendants' intent is to briefly reply to the Plaintiffs' objection—not to restate the arguments set forth in detail in the Defendants' cross-motion for summary judgment.

I. **The Plaintiffs' objection confirms that the Plaintiffs' claims are nonjusticiable**:

1. The Defendants argued in their cross-motion for summary judgment that the Plaintiffs cannot prove that HB 50 lacked a legitimate or rational basis. See Defs. Mot. Summ. J.,

at 14-16. As explained in detail in the Defendants' motion, the State Constitution is silent regarding how the Legislature may decide which towns, wards, and places will receive single-member districts when it is not possible to provide every otherwise eligible town with a single-member district. Consistent with that constitutional framework, the Defendants articulated several legitimate and rational bases under which the Legislature could have decided to enact a redistricting map that did not provide the Plaintiffs' towns and wards with single-member districts.[1]

2. In their Objection, the Plaintiffs effectively argue their preferred communities somehow have a greater constitutional right to single-member districts than other communities for which the Plaintiffs' preferred plan removed single-member districts. The Plaintiffs assert that "[n]othing in Part II, Article 11 authorizes the Legislature to prioritize a town with larger population." Pls. Obj., at 10-11. The Plaintiffs conveniently ignore that Part II, Article 11 similarly contains no express language requiring the Legislature to provide single-member districts to one or more particular towns and wards at the cost of depriving another eligible town or ward of a single-member district. Taken together, the State Constitution is silent regarding how the Legislature may balance the competing interests of various towns and wards.

3. Because the State Constitution is silent regarding how the Legislature should determine which eligible towns and wards will receive single-member districts when it is not possible to provide single-member districts to all eligible towns and wards, there are no judicially discoverable and manageable standards for resolving the Plaintiffs' claims. See Richard v.

[1] On January 30, 2024, the Plaintiffs filed a Reply to the Defendants' Objection to the Plaintiffs' Cross-Motion for Summary Judgment. The Plaintiffs argued in that pleading that the Defendants did not offer any justification for the House redistricting plan, conspicuously ignoring the legitimate and rational bases for enacting HB 50 that the Defendants' articulated in their Cross-Motion for Summary Judgment, including providing single-member districts to other constitutionally eligible towns.

Speaker of the House of Representatives, 175 N.H. 262, 267-68 (2022) (cases present a nonjusticiable political question when there is a lack of judicially discoverable and manageable standards for resolving it). The Court cannot grant all of the Plaintiffs' requested relief without depriving other constitutionally eligible towns of single-member districts. Deciding which among all constitutionally eligible towns and wards will receive the political benefit of a single-member district is necessarily a political question that should be decided by the Legislature—the branch of government to which the Constitution committed redistricting authority.

II. **The State Constitution does not provide the Plaintiffs' a greater right to receive a single-member district than other eligible towns and wards**.

4. The Plaintiffs assert that this Court only needs to answer a single question: "can the Legislature enact a law that violates an express provision of the New Hampshire Constitution more than a dozen times, when the Legislature undisputedly had been shown that these violations were unnecessary to comply with any other constitutional or statutory requirement." The premise of the Plaintiffs' claim—that these alleged "violations" were unnecessary to comply with any other constitutional or statutory requirement—is demonstrably false.

5. The Plaintiffs' preferred map strips single-member districts from other constitutionally eligible towns. See Defs. Mot. Summ. J., at 14, ¶48. Part II, Article 11 provides that any town or ward with a sufficient population "shall have its own district," and that provision applies to the Plaintiffs' preferred towns and wards as much as it does to the towns from which the Plaintiffs seek to strip single-member districts. Because it is not possible to provide every eligible town and ward with a single-member district, the Legislature's decision not to provide certain eligible towns and wards with single-member districts can readily be justified by the Legislature having complied with Part II, Article 11's requirement to provide other eligible towns with single member districts. In other words, the Plaintiffs continue to erroneously

believe that Part II, Article 11 somehow provides them a greater right to a single-member district than the right provided to the towns from which the Plaintiffs seek to strip single-member districts.

III. The Plaintiffs lack standing to assert claims on behalf of towns located in other counties.

6. The Plaintiffs cannot be harmed by residents of other towns and wards not receiving representation through a single-member district. For example, redistricting Grafton County to provide different towns and wards will have no impact on any Plaintiff's districts. See Defs. App'x at 62-63 (the Map-a-Thon Redistricting Plan created maps separately for each county); see also Defs. Mot. Summ. J., at 10-11, ¶39.

7. In their objection, the Plaintiffs assert that they can nevertheless seek relief on behalf of unrepresented towns. Although the Plaintiffs cite numerous cases, mostly from other states, none of the cited cases support the Plaintiffs' claim. The Plaintiffs either took these cases out of context or relied on cases that involved proportional representation and vote dilution claims that necessarily require a court to evaluate a constitutional claim in the context of an entire redistricting plan.

8. For example, the Plaintiffs cite Town of Brookline v. Secretary, 417 Mass. 406, 417-18 (1994), for the proposition that the "number of town, city, and county boundaries crossed by representative districts in c. 273 is evidence that can be considered for purposes of determining whether the legislation sufficiently complies with the territorial directive of art. 101." See Pls. Obj. at 4. However, the Plaintiffs fail to include the preceding sentences in the paragraph from which the Plaintiffs took this quotation: the Massachusetts Supreme Court's opinion:

> We note at the outset that the plaintiffs do not have standing to challenge c. 273 in its entirety. *Their interest, and our inquiry into the validity of the legislation, is limited to its effect on them*. See Hynson, Westcott & Dunning, Inc. v. Commissioner of Pub. Health, 346 Mass. 606, 610, 195 N.E.2d 74 (1964) (as

> general principle, 'only one whose rights are impaired by a statute can raise the question of its constitutionality, and he can object only as it applies to him').

Town of Brookline, 417 Mass. at 417 (emphasis added). Furthermore, the Massachusetts Supreme Court upheld the legislature's redistricting plan. See id. at 424-25. Thus, this case provides no support for the assertion that a prevailing party who challenges a redistricting plan can obtain relief that is not "limited to its effect on them." See id. at 417.

9. The Plaintiffs reliance on Twin Falls v. Idaho Comm'n on Redistricting, 152 Idaho 346 (2012), is similarly misplaced. In that case, the Idaho Supreme Court was interpreting a provision in that state's constitution that allowed county boundaries to be divided only to the extent that "counties must be divided" to comply with Federal constitutional requirements. But see Durst v. Idaho Comm'n for Reapportionment, 169 Idaho 863, 872 (2022) ("disavow[ing]" the court's prior decision in Twin Falls that the Twin Falls redistricting plan did not comply with the Idaho Constitution because it divided 12 counties while other plans divided fewer counties). Thus, under Idaho law, the propriety of dividing a single county could only be determined by considering a redistricting map as a whole. Conversely, the Legislature here did not divide any county boundaries, and the Plaintiffs' expert explained that each county map was created separately, and the map for any one county did not depend on the map for another county. See Defs. Mot. Summ. J., at 10-11, ¶39; Defs. App'x at 62-63.

10. The Plaintiffs additionally cite City of Manchester v. Secretary of State, 163 N.H. 689, 701 (2012) for the fact that the Court looked at statewide deviation. See also Pls. Obj. at 5 (collecting vote dilution and proportional representation cases from other jurisdictions).[2] However, the Plaintiffs ignore the fact that the plaintiffs in that case asserted that the challenged

[2] The one exception is N.C. State Conference of NAACP v. McCrory, 831 F.3d 204, 240 (4th Cir. 2016). However, this case did not involve a redistricting claim at all. It is not clear why the Plaintiffs believe this case is relevant.

plan violated constitutional requirement of proportional representation. The Court explained that a legislatively-adopted redistricting plan "must [provide] substantial equality of population among the various legislative districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." City of Manchester, 163 N.H. at 699. Thus, this type of inquiry necessarily focuses on whether the overall statewide plan harms the plaintiffs by providing greater weight to the votes of other citizens in the State. Conversely, here the Plaintiffs are alleging that they are harmed by not having the political benefit of a single-member house district, and the Plaintiffs cannot show that they are harmed by residents of some other town or ward in an entirely different county not having their own single-member house district.

11. In sum, none of these cases support the Plaintiffs' assertion that the Plaintiffs have standing to assert alleged constitutional violations that do not harm the Plaintiffs. To the extent that the Court rules that the HB 50 must be redrawn, the Court should follow the least change approach and redraw HB 50 only to the extent necessary to cure any harm to the Plaintiffs in this matter.

WHEREFORE, the Defendants respectfully request that this Honorable Court:

A. Grant summary judgment in favor of the Defendants.

Respectfully submitted,

DAVID SCANLAN, SECRETARY OF STATE

and

THE STATE OF NEW HAMPSHIRE

By their attorneys,

JOHN M. FORMELLA
ATTORNEY GENERAL

Date: January 30, 2024

/s/ *Brendan A. O'Donnell*

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this pleading was served on all counsel of record through the Court's electronic-filing system.

Date: January 30, 2024

/s/ *Brendan A. O'Donnell*
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