THE STATE OF NEW HAMPSHIRE

THE SUPREME COURT

CITY OF DOVER & a.

v.

SECRETARY OF STATE & a.

CASE NO. 2024-0259

OPENING BRIEF OF APPELLANTS (PLAINTIFFS)

RULE 7 MANDATORY APPEAL FROM FINAL ORDER OF THE STRAFFORD COUNTY SUPERIOR COURT

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This appeal presents the following questions, preserved by plaintiffs' motion for summary judgment[1], objection to defendants' (Appellees) cross-motion for summary judgment[2], reply in support of summary judgment[3], and arguments at the summary judgment hearing on the merits.[4]

Issue 1: Whether the trial court erred in granting summary judgment to the defendants (Appellees), and denying summary judgment to the plaintiffs (Appellants), where the undisputed material facts established that Laws 2022, Chapter 9 violated Part II, Article 11 of the State Constitution without a rational or legitimate basis?

Issue 2: Whether the trial court misconstrued Part II, Article 11 of the State Constitution to enable non-constitutional criteria to override an express, unqualified constitutional mandate for dedicated House districts?

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[1] Appellants' Appendix to Brief ("App.") II at 65 to App. III at 96.
[2] App. III at 203.
[3] App. III at 243.
[4] Transcript of Hearing dated February 7, 2024.

TEXT OF CONSTITUTIONAL PROVISIONS AND STATUTES

N.H. Const. pt. II, art. 11:

> [Art.] 11. [Small Towns; Representation by Districts.] When the population of any town or ward, according to the last federal census, is within a reasonable deviation from the ideal population for one or more representative seats, the town or ward shall have its own district of one or more representative seats. The apportionment shall not deny any other town or ward membership in one non-floterial representative district. When any town, ward, or unincorporated place has fewer than the number of inhabitants necessary to entitle it to one representative, the legislature shall form those towns, wards, or unincorporated places into representative districts which contain a sufficient number of inhabitants to entitle each district so formed to one or more representatives for the entire district. In forming the districts, the boundaries of towns, wards, and unincorporated places shall be preserved and contiguous. The excess number of inhabitants of district may be added to the excess number of inhabitants of other districts to form at-large or floterial districts conforming to acceptable deviations. The legislature shall form the representative districts at the regular session following every decennial federal census.

Laws 2022, ch. 9, enacted as House Bill 50 and codified as RSA 662:5, is included in the appendix to this brief at Volume IV, Page 43.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

I. In 2006, the State Constitution Was Amended to Ensure Dedicated Representation for Certain Towns and Wards.

The State Constitution requires new House districts every ten years to account for population changes. N.H. Const., pt. II, art. 9. In 2002, the Legislature passed House districts, but the Governor vetoed the bill and the Legislature did not override. *Burling v. Chandler*, 148 N.H. 143, 145 (2002). Because the existing House districts were left malapportioned by passage of time, this Court established a reapportionment plan. *Id.* at 146. When doing so, the Court created numerous large multimember districts and rejected floterial districts, which the Legislature had long used but which this Court characterized as "an unsound redistricting device." *Id.* at 150, 158–59.

In response to this Court's decision in *Burling*, in 2006 the Legislature passed Constitutional Amendment Concurrent Resolution 41 (CACR 41), which proposed to amend Part II, Article 11 of the Constitution to provide that "[w]hen the population of any town or ward, according to the last federal census, is within a reasonable deviation from the ideal population for one or more representative seats the town or ward shall have its own district of one or more representative seats." *City of Manchester v. Secretary of State*, 163 N.H. 689, 695–96 (2012). The amendment aimed to also make clear that floterial districts are a permissible redistricting device. *Id.*

When the Legislature was considering CACR 41, then-Secretary of State Bill Gardner testified in support of the amendment. He explained that the importance of dedicated House representation for sufficiently large towns derives from the bargain those towns made when they gave up certain rights

to become part of the State of New Hampshire. App. IV at 26. The amendment, Secretary Gardner explained, "brings us back to the [founders'] idea that … we're going to try to have as many towns and wards as possible to have their own representation [in the House]." *Id*. at 29–30. Secretary Gardner understood the amendment to curtail the Legislature's discretion in drawing House districts: "My guess is this will reduce the redistricting by at least half because there's going to be certain areas that it is all automatic. So, the Legislature and the decisions the Legislature will have to make in the future, will be much less than they have had to make in the past." *Id*. at 29.

The Legislature understood the amendment the same way. When the Senate Election Law Committee passed CACR 41 unanimously, its Statement of Intent read: "The long[-]standing tradition in New Hampshire is to have as many small representative districts as possible so as to best represent all the people of New Hampshire. This CACR, as amended, will allow the legislature to use flot[e]rial districts as used in the past without question or challenges in the courts. This will make sure that our state will have *as many small house districts as possible*." *Id*. at 8 (emphasis added). The 2006 voters' guide explaining the proposed constitutional amendment, which was approved by the appropriate committees of both houses of the Legislature and the Joint Committee on Legislative Facilities, reiterated this understanding: "Each town or ward having enough inhabitants to entitle it to one or more representative seats in the Legislature *shall be guaranteed its own district* for the purposes of electing one or more representatives …." *Id*. at 35 (emphasis added); *see also* App. I at 11, 28; App. II at 55. With the benefit of this information, voters approved the amendment in November 2006.

Then, only six years later, in 2012 the Legislature undertook the first decennial House redistricting since the 2006 amendment to Article 11. In doing so, the Legislature created a document called "Guidelines and Legal Principles Applicable to Redistricting the House," which reiterated "the intent of the 2006 amendment to have as many small house districts as possible." App. IV at 41.

The 2012 House redistricting generated a lawsuit by several individuals and municipalities against the Secretary, alleging that the 2012 plan violated the recently amended Article 11, prompting this Court to review the challenge on interlocutory transfer. *City of Manchester*, 163 N.H. at 694. The petitioners claimed that the plan, which had an overall population deviation of 9.9%, could have been drawn to give more eligible towns and wards their own dedicated district, but the problem that doomed the petitioners' claim was that their plan would have statewide deviation well in excess of 10%. *Id.* at 701, 703–04. The petitioners specifically did "not argue that the legislature could have given more towns, wards, and places their own districts while still maintaining a deviation range of under 10%." *Id.* at 702. Because a deviation of less than 10% is presumptively constitutional under the Equal Protection Clause of the United States Constitution and Part II, Article 9 of the State Constitution, and a deviation of more than 10% is presumptively unconstitutional, this Court held that the Legislature was *not* required to give more towns and wards their own House districts while putting the entire plan at risk of an equal-protection violation; rather, the Legislature was entitled to prioritize the "one person, one vote" principle enshrined in both constitutions. *Id.* at 701–04. This Court also rejected the

petitioners' argument that the Legislature must consider "community of interest" factors when drawing House districts. *Id.* at 707–08.

II. In 2022, the Legislature Denied Dedicated Representation to Many Eligible Towns and Wards.

In the redistricting cycle following the 2020 census, a nonpartisan coalition called Map-a-Thon created a House plan in which as many eligible towns and wards as possible would receive their own district, subject to the requirements of the federal and state constitutions. App. II at 91, 97–99. The plan kept statewide population deviation below 10% so the plan would presumptively comply with federal and state equal protection requirements. *Id*. at 97, 198-200. It contained 400 seats (as the Legislature's plan did), consistent with Part II, Article 9 of the State Constitution. It complied with the other requirements of Article 11 by preserving town and ward boundaries, keeping districts contiguous, and ensuring that giving a town or ward a dedicated district would not "deny any other town or ward membership in one non-floterial representative district." N.H. Const., pt. II, art. 11. And it drew districts county by county, consistent with the Legislature's traditional practice. Within these constraints, the Map-a-Thon plan was able to give all but 41 eligible towns and wards their own House district. App. II at 166, 198, 200; App. III at 46. Members of Map-a-Thon presented its plan to the Legislature and testified about it. *Id*. at 91–92.

The Legislature eschewed the Map-a-Thon plan and passed a different plan, called HB 50, in which 55 eligible towns and wards did not receive their own district—14 more than in the Map-a-Thon plan. *Compare* 2022

Federal Census Data[5] *with* RSA 662:5; App. II at 92, 188 through App. III at 10; App. III at 11-32, 38-39, 46. Unlike the Map-a-Thon plan, HB 50 was presumptively *un*constitutional under the "one person, one vote" standard because its deviation was 10.13%. App. II at 200; App. III at 42-43. It is undisputed that the Legislature's plan does not give a dedicated district to as many eligible towns and wards as possible. The Governor signed HB 50 in March 2022.

For purposes of this appeal, the most important differences between HB 50 and the Map-a-Thon plan are in three counties:

Hillsborough County. In HB 50, six eligible towns do not have a dedicated district. App. III at 13, 20. The Map-a-Thon plan gives two of those towns—New Ipswich and Wilton—a dedicated district without taking a dedicated district from any other town. App. II at 181, 200m 207; App. III at 13.

Merrimack County. In HB 50, seven eligible towns do not have a dedicated district. App. III at 13, 24. The Map-a-Thon plan gives two of those towns—Bow and Hooksett—a dedicated district without taking a dedicated district from any other town. App. II at 183, 200; App. III at 4, 13.

Strafford County. In HB 50, six eligible towns and wards do not have a dedicated district. App. III at 13, 29-31. The Map-a-Thon plan gives five of those towns and wards—Barrington, Dover Ward 4, Lee, Milton, and Rochester Ward 5—a dedicated district. App. III at 7–9. Unlike HB 50, the

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[5] *Available at:* https://www.census.gov/quickfacts/fact/table/NH/PST045222. The census is susceptible to judicial notice, *see N.H. R. Ev.* 201; *see generally Burling v. Chandler*, 148 N.H. 143 (2002).

Map-a-Thon plan does not give a dedicated district to Durham, which is large enough to qualify for one. *Id.* (In this way, the Map-a-Thon plan adheres more closely to the plan enacted in 2012, which gave most of these towns and wards a dedicated district, but did not give one to Durham. *See* Laws 2012, ch. 9.)

In all three counties, HB 50 has fewer dedicated House districts than the Map-a-Thon plan, and thus the districts in HB 50 are more populous on average. App. II at 199 to App. III at 13; App. III at 46.

III. The Plaintiffs Challenged the Legislature's Plan and Lost on Summary Judgment.

In July 2022, twelve plaintiffs challenged the Legislature's plan in Superior Court. App. I at 4 to App. II at 38. Ten individual plaintiffs lived in eligible towns and wards that did not receive a dedicated district; the other plaintiffs were the cities of Dover and Rochester, each of which contains an eligible ward that did not receive a dedicated district. *Id.* Plaintiffs alleged the Map-a-Thon plan shows that their towns and wards could receive a dedicated district in a plan that complies with the federal and state constitutions, but did not. Their complaint presents the flip side of *City of Manchester*, where the plaintiffs' plan presumptively violated the Equal Protection Clause and the enacted plan did not; here, the plaintiffs' plan presumptively complies with the Equal Protection Clause, and the enacted plan does not.

The defendants—the Secretary of State and the State of New Hampshire—moved to dismiss. App. II at 45. They argued the plaintiffs had presented a nonjusticiable political question and that, in the alternative, plaintiffs failed to state a claim. The Superior Court denied the motion to

dismiss, stating as to justiciability that "[t]he plain language of Article 11 creates a mandatory requirement that towns or wards with the requisite population shall have their own district of one or more representative seats," citing several instances in which the New Hampshire Supreme Court decided cases involving alleged constitutional violations in redistricting, including violations of Article 11. App. II at 48–50. As to the Map-a-Thon plan, the Court held that the plan's net reduction of violations of Article 11 and compliance with all other districting requirements stated a viable claim for relief.[6] *Id*. at 50–51.

After the trial court denied the motion to dismiss, the parties took discovery. The plaintiffs designated David Andrews, who had helped create the Map-a-Thon plan (and the expert affidavit attached to the Complaint), as an expert witness. Mr. Andrews submitted a report and was deposed by the defendants. The plaintiffs also produced correspondence, documents, data, and computer code relating to the Map-a-Thon plan. The Defendants chose to produce nothing of their own, other than the legislative bill file for HB 50. App. III at 78. In response to interrogatories, the defendants stated that they lacked knowledge or information beyond the contents of the legislative bill file (and invoked legislative privilege). App. III at 75-79.

After discovery closed, plaintiffs moved for summary judgment. App. II at 65. They argued that Article 11 requires as many eligible towns and wards as possible receive a dedicated district, the Legislature undisputedly

[6] That plaintiffs stated a viable claim for relief is the law of this case, as the defendants did not cross-appeal either the denial of their earlier motion to dismiss or the trial court's summary judgment rulings again rejecting the defendants' political question argument.

failed to meet this requirement, and there was no justification for this failure. The plaintiffs showed that the Map-a-Thon plan, when compared to the Legislature's plan, gives a dedicated district to a net of 14 more towns and wards (and incidentally puts over 73,000 more people in single-member districts, App. III at 46).

The defendants cross-moved for summary judgment, arguing that because it was impossible to provide every eligible town and ward with a dedicated district within the constraints of other constitutional requirements, the Legislature had discretion to make "political decisions regarding the use of single-member, multi-member, and floterial districts, including the decision as to which eligible towns and wards receive single-member districts and which eligible towns and wards do not." App. III at 106. Their summary judgment papers speculated that the Legislature might have chosen to deny a dedicated district to five towns and wards in Strafford County in order to give one to Durham because Durham is large, it contains a university, and because doing so would allow Madbury to be in a smaller district. App. II at 119. The defendants also speculated that, in Hillsborough County, the Legislature may have denied two towns a dedicated district in order to minimize the number and size of floterial districts. *Id*. at 119–20. The defendants did not try to explain the Legislature's denial of dedicated districts to two towns in Merrimack County. In addition, the Defendants contended that the plaintiffs lacked standing to challenge the denial of a dedicated district to towns in which they did not reside, and they argued justiciability once again. *Id*. at 112–13, 120–23.

In its decision on the motions for summary judgment, the Court agreed with defendants in part on the issue of standing, holding plaintiffs

cannot bring claims for towns where they do not reside, but it recognized that House districts are drawn county by county, and providing a remedy to one town may affect other towns in the county. Addendum to Brief ("Add.") at 9–11. Therefore, the Court "confine[d] its analysis to those counties from which at least one plaintiff resides (Hillsborough, Merrimack, and Strafford)." *Id*. at 11. The Court also reiterated its prior decision that the plaintiffs' claims are justiciable. *Id*. at 11–12.

As to the standard of review, the Court first set out the burden of proof: "'[t]he burden at all times rests with the [plaintiffs] to establish that the Legislature acted without a rational basis in enacting the challenged redistricting plan.'" *Id*. at 15 (quoting *City of Manchester*, 163 N.H. at 698). Relying on two United States Supreme Court opinions regarding population deviation and racial gerrymandering in redistricting, the Court held that "a 'rational or legitimate basis' sufficient to justify violations of State constitutional requirements must encompass at least as much as that which justifies the violation of federal constitutional provisions, namely, either 'community of interest' considerations or '[a]ny number of consistently applied legislative policies[.]'" *Id*. at 17. (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993), and *Karcher v. Daggett*, 462 U.S. 725, 741 (1983)).

On the merits, the Court took note of undisputed facts and sided with defendants. It cited potential legislative policies that might have motivated the Legislature, including giving Durham its own district because it is a larger town, creating larger districts for towns like Bedford and Merrimack, and reducing the number of floterial districts. *Id*. at 23. The Court also found that plaintiffs failed to offer evidence that the changes required by the Map-a-Thon plan would not affect communities of interest in New Hampshire. *Id*.

at 24. Therefore, the Court stated, "the plaintiffs have failed to persuade the court that 'the "[t]rade-offs" the legislature made in enacting [HB 50] were unreasonable.'" *Id*. at 27 (quoting *City of Manchester*, 163 N.H. at 706). The Court denied summary judgment to the plaintiffs and granted summary judgment to the defendants. The plaintiffs timely appealed.

SUMMARY OF ARGUMENT

Is Part II, Article 11 of the State Constitution a mandatory requirement the Legislature must follow unless the United States Constitution or another provision of the State Constitution requires otherwise? Or, is it discretionary, violable as long as an attorney can later conceive of a possible reason the Legislature may have *preferred* not to follow it? The text of Article 11 is mandatory: a town or ward with sufficient population "*shall have* its own district of one or more representative seats." (Emphasis added.) Secretary Gardner supported the amendment of Article 11 in 2006 and testified that Article 11 is so mandatory as to make it self-executing ("automatic") in many parts of the state. When it redistricted the House in 2012, the Legislature confirmed Article 11 is mandatory: "State constitutional principles *must be applied* to the extent that they do not violate federal constitutional principles." (Emphasis added.) No less than the Attorney General opined *to this Court* that the intent of Article 11 is to "provide as many single town districts *as possible*." App. III at 88. (Emphasis added.) In that same case, *City of Manchester*, this Court stated that Article 11 is a "mandate." When the Legislature redistricted the House in 2022, the sponsor of the redistricting bill testified that "federal and state constitutional criteria" were the sole criteria for developing the districts.

Despite this shared view, Legislature enacted HB 50 in 2022 and admittedly did not remotely attempt to have as many dedicated House districts as possible, instead opting to deny eligible towns and wards that undisputedly could have been given a dedicated House seat without violating any legal requirement. The Secretary has all but repudiated his predecessor's view of Article 11 (which undoubtedly had formed no small part of its enactment in 2006), now shifting gears completely and arguing that "the Legislature's exercise of its constitutional redistricting authority necessarily involves making political decisions regarding the use of single-member, multi-member, and floterial districts, including the decision as to which eligible towns and wards receive single-member districts and which eligible towns and wards do not." App. III at 106.

The Superior Court's agreement with defendants was error. Although the Legislature may be entitled to some deference when it draws legislative districts, that deference has limits and has never been understood to override express text. The Superior Court's analysis hinged on two inapposite opinions[7] of the United States Supreme Court, neither of which addresses the circumstances under which a legislature may contravene a mandatory provision of a state constitution.

The Superior Court's reasoning is inconsistent not just with bedrock constitutional principles, but also the approach taken in every other state where this issue has arisen. For decades, state supreme courts have entertained challenges to legislative districting plans on the grounds that they

[7] Notably, the defendants below never even cited the two cases that were front and center in the Superior Court's summary judgment analysis.

violated a state constitutional provision. As far as the plaintiffs are aware, not one has held that a violation of a state constitutional provision can be justified by nonconstitutional considerations, as the Superior Court did here. Instead, they have held that a plaintiff can meet its burden of proof by producing an alternative districting plan that eliminates the constitutional violation while adhering to federal and state constitutional requirements.

That is what the plaintiffs did here. They offered as evidence[8] a plan, which had been presented to the Legislature during the districting process, that gives more eligible towns and wards their own dedicated House districts while complying with the federal requirement of equal protection and every relevant state constitutional requirement. Moreover, the plaintiffs' plan has a presumptively constitutional population deviation, while the enacted plan's deviation is presumptively unconstitutional. Therefore, the plaintiffs—not the defendants—were entitled to summary judgment.

To be clear about the remedy plaintiffs seek in this case—summary judgment issuing for plaintiffs—does not in any way force the Superior Court, this Court, or the Legislature to adopt the Map-a-Thon plan, but it does mean that the existing plan is unconstitutional and a new plan must be drawn (with the fewest number of "forced" Article 11 violations). Part II, Article 11's meaning should be restored and recognized, or else perhaps it and all of the redistricting mandates in our State Constitution will be thrust into doubt and violable at the preferential whim of the Legislature.

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[8] This is not a case about imposing the Map-a-Thon plan, or, for that matter, any particular House redistricting plan. The Map-a-Thon plan is evidence of the wrong committed.

ARGUMENT

I. Standard of Review and Burden of Proof

When this Court reviews an order granting summary judgment, "[w]e review *de novo* the trial court's application of the law to the facts in its summary judgment ruling." *Brown v. Concord Group Ins. Co.*, 163 N.H. 522, 524–25 (2012) (citations and internal quotation marks omitted); *Stewart v. Bader*, 154 N.H. 75, 85 (2006) (citations and internal quotation marks omitted).

To prevail in this case, plaintiffs were required to establish that HB 50 "was enacted 'without a rational or legitimate basis.'" *City of Manchester*, 163 N.H. at 698 (quoting *Parella v. Montalbano*, 899 A.2d 1226, 1232 (R.I. 2006)).[9] "The burden at all times rests with the [plaintiffs] to establish that the legislature acted without a rational basis in enacting the Plan." *Id.* (citing *Parella*, 899 A.2d at 1226, 1232–33).[10]

Because of the plaintiffs' burden of proof, this appeal turns on the following question: When Article 11 requires that a town or ward be given a dedicated district, and the Legislature does not provide one, what constitutes a "rational or legitimate basis" for the Legislature's violation of Article 11?

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[9] This brief uses "HB 50" interchangeably with Laws 2022, Chapter 9.

[10] In the Superior Court, the plaintiffs contended that because HB 50 is inconsistent with Article 11 on its face, the burden shifts to the defendants to justify the inconsistency. The Superior Court disagreed, citing this Court's opinion in *City of Manchester*. While the plaintiffs believe that burden-shifting is appropriate in this case, for purposes of this appeal this Court need not reach that issue because the plaintiffs nonetheless ought to prevail on the merits irrespective of who carries the burden.

Or, to put it another way, what is the scope of the Legislature's discretion to depart from the express textual requirements of Article 11?

II. Article 11 Is Explicit and Mandatory.

When interpreting a constitutional provision, the primary authority is the text of the provision itself. *State v. Mack*, 173 N.H. 793, 801 (2020) ("'When our inquiry requires us to interpret a provision of the constitution, we must look to its purpose and intent. The first resort is the natural significance of the words used by the framers.'") (quoting *Duncan v. State*, 166 N.H. 630, 640 (2014)). The text of Article 11 permits no discretion for the Legislature to deny a town or ward a dedicated district if it is large enough to merit one. Such a town or ward "*shall* have its own district of one or more representative seats." N.H. Const., pt. II, art. 11 (emphasis added). "Shall" is mandatory language. *Stergiou v. City of Dover*, 175 N.H. 315, 321 (2022) ("We agree with the City that, as a rule of construction, the word 'shall' is a command which requires mandatory enforcement.") (internal quotation marks omitted). If the framers of the 2006 amendment had intended to give any discretion to the Legislature, they could have used the permissive word "may," or qualified the word "shall" with other language. They did not. This Court was correct, then, when it referred to Article 11 as a "mandate" that "a redistricting plan must satisfy." *City of Manchester*, 163 N.H. at 706. The plain language of Article 11 allows the Legislature no discretion to deny a House seat to a qualifying town or ward.

The history of Article 11, like its text, shows that it is mandatory, not discretionary. *See State v. Mack*, 173 N.H. at 801 ("Reviewing the history of the constitution and its amendments is often instructive, and in so doing, it is the court's duty to place itself as nearly as possible in the situation of the

parties at the time the instrument was made, that it may gather their intention from the language used, viewed in light of the surrounding circumstances.") (internal quotation marks omitted). As described above, the 2006 amendment to Article 11 was a response to *Burling*, in which this Court issued a plan that included many large, multimember House districts. When the Senate Election Law Committee unanimously passed CACR 41, it stated that the purpose of the amendment was to "make sure that our state will have as many small house districts as possible." App. IV at 8. (The Attorney General used similar language when it told this Court in *City of Manchester* that Article 11 "was amended with the purpose to provide as many single town districts as possible." App. III at 88.). This purpose also precludes discretion; if the Legislature were to reject a plan with many single town districts in favor of a plan with one large multimember district, it would not create "as many single town districts as possible." Secretary Gardner, a proponent of the amendment, testified that the amendment would remove discretion from the Legislature: "My guess is this will reduce the redistricting by at least half because there's going to be certain areas that it is all automatic. So, the Legislature and the decisions the Legislature will have to make in the future, will be much less than they have had to make in the past." App. IV at 29. The meaning of Article 11 is clear from its text and history: the Legislature *must* give a dedicated district to as many eligible towns and wards as possible.

III. The Only Rational or Legitimate Reason for Violating an Explicit, Mandatory Constitutional Requirement Is Compliance with Another Constitutional Requirement.

Of course, Article 11 does not exist in a vacuum; districting plans are subject to other constitutional and statutory requirements, and legislators

have nonconstitutional policy preferences as well. How should these requirements and preferences be reconciled? In *City of Manchester*, this Court cited the "'hierarchy of applicable law governing the development of a plan for apportioning the legislature.'" 163 N.H. at 703 (quoting *Twin Falls County v. Idaho Commission on Redistricting*, 271 P.3d 1202, 1204 (Idaho 2012)). The opinion this Court quoted, *Twin Falls County*, explained the hierarchy in more detail:

> The United States Constitution is the paramount authority; the requirements of the Idaho Constitution rank second; and, if the requirements of both the State and Federal Constitutions are satisfied, statutory provisions are to be considered. A lower ranking source of law in this hierarchy is ineffective to the extent that it conflicts with a superior source of law.

271 P.3d at 1204.[11] In this hierarchy, nonconstitutional policy preferences rank last; a legislature is free to consider them when creating a plan, but "only after all constitutional criteria have been met." *In re Reapportionment of the Colorado General Assembly*, 332 P.3d 108, 111 (Colo. 2011); *see also Arizonans for Fair Representation v. Symington*, 828 F. Supp. 684, 687 (D. Ariz. 1992) ("There is a strict hierarchy among these criteria. The Constitution and the Voting Rights Act must be satisfied before a court considers the neutral criteria.").[12]

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[11] *Twin Falls County* was abrogated on other grounds, but the Idaho Supreme Court continues to rely on the part of the opinion cited here. *Durst v. Idaho Commission for Reapportionment*, 505 P.3d 324 (Idaho 2022).

[12] The federal Voting Rights Act also ranks above a state constitution in the hierarchy, but the Voting Rights Act is not at issue here.

In both redistricting cycles since Article 11 was amended, the Legislature has acknowledged this hierarchy. In the 2012 "Guidelines and Legal Principles Applicable to Redistricting the House," the Legislature stated that "[f]ederal constitutional requirements take precedence over state constitutional requirements," and "[s]tate constitutional principles must be applied to the extent that they do not violate federal constitutional principles." App. IV at 41. In 2022, HB 50's sponsor testified that "these districts were developed to meet federal and state constitutional criteria. These criteria were adopted by the committee and at no time during their meetings on redistricting did they have a motion made for any other criteria." Senate Elec. Law and Muni. Affairs Cmte. Hrg. (Jan. 31, 2022), *available at* https://gencourt.state.nh.us/BillHistory/SofS_Archives/2022/senate/HB50S.pdf (page 97).

In cases involving legislative redistricting, state supreme courts have universally adhered to this hierarchy. For example, several state constitutions prohibit splitting counties or municipalities when drawing legislative districts. When such splitting is nonetheless required to comply with the Equal Protection Clause, courts have recognized that the state constitution must yield to the United States Constitution. *E.g.*, *In re 2012 Legislative Redistricting*, 80 A.3d 1073, 1092–93 (Md. 2013); *Wolpoff v. Cuomo*, 600 N.E.2d 191, 193–94 (N.Y. 1992); *Fonfara v. Reapportionment Commission*, 610 A.2d 153, 159 (Conn. 1992). But when the Equal Protection Clause or another provision of the state constitution does not compel a legislature to split counties or municipalities, courts have consistently sustained challenges to plans that do so anyway. *E.g.*, *Holt v. 2011 Legislative Reapportionment Commission*, 38 A.3d 711, 757 (Pa. 2012) ("It is enough that the *Holt* plan

here overwhelmingly shows that the 2011 Final Plan made subdivision splits that were not absolutely necessary, and certainly could not be justified."); *State ex rel. Teichman v. Carnahan*, 357 S.W.3d 601, 607 (Mo. 2012) ("The nonpartisan reapportionment commission's plan violated this [state] constitutional provision by improperly dividing the district boundaries in the multi-district areas of Jackson and Greene Counties."); *In re Reapportionment of the Colorado General Assembly*, 332 P.3d at 111 ("We hold that the Adopted Plan is not sufficiently attentive to county boundaries to meet the requirements of article V, section 47(2), and the Commission has not made an adequate showing that a less drastic alternative could not have satisfied the hierarchy of constitutional criteria …."); *In re Legislative Districting of the State*, 805 A.2d 292, 297 (Md. 2002) ("nonconstitutional criteria [such as preserving communities of interest] cannot override the constitutional ones"); *Stephenson v. Bartlett*, 562 S.E.2d 377, 390 (N.C. 2002) ("The 2001 legislative redistricting plans violate the [whole-county provisions of the State Constitution] for reasons unrelated to compliance with federal law. … The General Assembly may consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions, … but it must do so in conformity with the State Constitution."); *Fischer v. State Bd. of Elections*, 879 S.W.2d 475, 479 (Ky. 1994) ("[Within the 10% deviation threshold,] the General Assembly can formulate a plan which reduces to the minimum the number of counties which must be divided between legislative districts. One such plan was placed in evidence and there may be others which are equal or superior to it."); *Day v. Nelson*, 485 N.W.2d 583, 586 (Neb. 1992) ("The suggestion by the State in its brief that the process is entirely political ignores the mandatory 'shall' in the constitutional

section and would equate it with the permissive 'may.'"); *Hellar v. Cenarrusa*, 664 P.2d 765, 767 (Idaho 1983) ("Since HB 830, on its face, violates the Idaho Constitution, its only basis for survival would be that, where art. 3, § 5, of the Idaho Constitution conflicts with the equal representation mandate of the Fourteenth Amendment of the U.S. Constitution, the latter will prevail."); *State ex rel. Lockert v. Crowell*, 631 S.W.2d 702, 709 (Tenn. 1982) ("It was shown in the trial court that at least one 33 Senator plan can be devised which crosses significantly fewer county lines than does the Act, and yet clearly meets the equal protection guidelines delineated above. The prohibition against crossing county lines should be complied with insofar as is possible under equal protection requirements."); *Clements v. Valles*, 620 S.W.2d 112, 115 (Tex. 1981) ("Although a legislative enactment is entitled to a presumption of validity, it is our opinion that House Bill 960 violates the Texas Constitution and must be declared invalid in its entirety."); *see also Wilson v. Kasich*, 981 N.E.2d 814, 820 (Ohio 2012) (upholding a plan because "political factors were considered only after the applicable constitutional and other legal requirements were met").

When state supreme courts have invalidated a plan on the grounds that it violates the state constitution, the plaintiffs satisfied their burden of proof by producing an alternative plan that reduced the violations while complying with all other legal requirements, as the Map-a-Thon plan does here. *E.g.*, *Holt*, 38 A.3d at 757 ("[T]he number of fractures across the Commonwealth was considerably higher in the Final Plan than the *Holt* plan proved was easily achievable. This powerful evidence, challenging the Final Plan as a whole, suffices to show that the Final Plan is contrary to law."); *Twin Falls County*, 271 P.3d at 1206–07 ("Plan L 87 divides twelve counties. The

commission considered and rejected other plans that comply with the Federal Constitution and divide fewer counties. Thus, Plan L 87 does not divide counties *only to the extent* that counties must be divided to comply with the Federal Constitution. … It therefore violates Article III, section 5, of the Idaho Constitution."); *Fischer*, 879 S.W.2d at 479; *Day*, 485 N.W.2d at 586; *State ex rel. Lockert*, 631 S.W.2d at 709.

Although this Court has never decided a case involving a conflict between a state constitutional redistricting requirement and a nonconstitutional policy preference, its precedents are consistent with the hierarchy of law that other states follow. As mentioned above, *City of Manchester* invoked the Idaho Supreme Court's description of the hierarchy of law, and it cited the petitioners' plans' presumptive violation of the Equal Protection Clause as a rational and legitimate basis for the Legislature not to have adopted such a plan; the Court never suggested that nonconstitutional considerations would justify the Legislature's decision. *Id.* at 701–04. In fact, the Court rejected the petitioners' argument that the Legislature was required to take nonconstitutional "communities of interest" into account: "Nothing in the New Hampshire Constitution requires a redistricting plan to consider 'communities of interest' as the Manchester petitioners define the concept. This phrase appears nowhere in the state constitutional provisions governing redistricting of the House …." *Id.* at 708. Consistent with the hierarchy, this Court placed the federal Equal Protection Clause above the State Constitution, and nonconstitutional policy preferences below it. More recently, when rejecting a challenge to alleged partisan gerrymandering (a nonconstitutional policy preference), this Court emphasized that "the plaintiffs do not assert that, in enacting the statutes setting forth the state

senate and executive council districts at issue, the legislature violated the mandatory redistricting requirements of Part II, Articles 26 and 65." *Brown v. Secretary of State*, 176 N.H. 319, 331 (2023). This statement, and the Court's holding, align with the hierarchy: partisan gerrymandering was permissible because there was no violation of a mandatory constitutional requirement. Had the plaintiffs proven a violation of Article 26 or 65 of the State Constitution, the Court's analysis presumably would have been different.

Because a hierarchy of laws governs legislative redistricting, a nonconstitutional policy preference cannot be a rational or legitimate basis for violating an explicit, mandatory constitutional requirement. *See In re Legislative Districting of the State*, 805 A.2d at 327 ("The premise on which the Special Master proceeded, that the [constitutional requirement to respect subdivision boundaries] may be subordinated to achieve a 'rational goal,' and the State's argument that the provision must give way to 'more important considerations,' also are wrong."). If it could, then the mandatory requirements of Article 11 would no longer be mandatory; they would be on an equal footing with the Legislature's preferences, and the Legislature could comply with Article 11 as little or as much as it wants.

IV. Article 11 Requires the Legislature to Give Dedicated Representation to as Many Eligible Towns and Wards as Possible.

Applying the hierarchy to this case, the Legislature was required to *maximize* compliance with Article 11 (within the confines of the Equal Protection Clause and other state constitutional requirements) before implementing nonconstitutional policy preferences. *See, e.g.*, *In re*

Legislative Districting of the State, 805 A.2d at 297 ("nonconstitutional criteria [such as preserving communities of interest] cannot override the constitutional ones"); *Stephenson v. Bartlett*, 562 S.E.2d at 390 ("The General Assembly may consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions, … but it must do so in conformity with the State Constitution."); *Fischer v. State Bd. of Elections*, 879 S.W.2d at 479 (Ky. 1994) ("[Within the 10% deviation threshold,] the General Assembly can formulate a plan which reduces to the minimum the number of counties which must be divided between legislative districts."); *State ex rel. Lockert v. Crowell*, 631 S.W.2d at 709 ("The prohibition against crossing county lines should be complied with insofar as is possible under equal protection requirements."). This means giving dedicated districts to as many eligible towns and wards as possible. *See Twin Falls County*, 271 P.3d at 1205 ("If one plan that complies with the Federal Constitution divides eight counties and another that also complies divides nine counties, then the extent that counties must be divided in order to comply with the Federal Constitution is only eight counties.").

In Hillsborough and Merrimack Counties, applying this principle is simple because the evidence undisputedly showed that two more towns in each county can receive a dedicated representative without impairing compliance with any federal or state constitutional requirement. Therefore, HB 50 is unconstitutional as it relates to those counties. The remedy for this constitutional violation is not necessarily to adopt the Map-a-Thon plan; the plaintiffs believe the Legislature should be given the chance to draw new districts in the first instance. But any plan the Legislature ultimately adopts

(or a Court imposes) must give dedicated districts to at least as many eligible towns and wards as the Map-a-Thon plan does.

In Strafford County, the only complication is that giving five more towns and wards a dedicated district, as the Map-a-Thon plan does, would prevent Durham from having its own district.[13] Someone who knows nothing about the 2006 amendment to Article 11 might claim that because there would be at least one violation of Article 11 regardless, the Legislature has discretion to choose which towns and wards get a dedicated district. But, as Secretary Gardner told the Legislature in 2006, and the Attorney General told this Court in 2012, the purpose and intent of Article 11 is to provide a dedicated district to as many towns and wards "as possible." App. III at 88. Likewise, the Senate Election Law Committee stated that the amendment "will make sure that our state will have as many small house districts as possible." App. IV at 8. If the Legislature were to decide that Durham should be newly given its own House district because Durham is the largest town[14] in the county, as the defendants suggested here, then why even have the amended Part 11 on the books at all in this State? Intent matters. *See State v. Mack*, 173 N.H. at 801 ("When our inquiry requires us to interpret a provision of the constitution, we must look to its purpose and intent.") (internal quotation marks omitted). Disagreement with the intent of a constitutional

[13] Notably, the Legislature did not give Durham a dedicated House district in the 2012 House redistricting process. So it is not the case that Durham had or could claim any kind of legacy interest.

[14] Of course, Durham is nowhere near the largest municipality in Strafford County. The Cities of Rochester and Dover have significantly more population than Durham.

requirement is not a rational or legitimate basis to violate that requirement. Therefore, HB 50 is unconstitutional as it relates to Strafford County because it does not give as many towns and wards as possible a dedicated district.

Importantly, the difference between HB 50 and the Map-a-Thon plan is not the difference between one constitutional plan and simply a "'better one.'" Add. at 20 (quoting *City of Manchester*, 163 N.H. at 698). It is the difference between a plan that violates an explicit constitutional requirement several times without a legitimate justification, and one that does not.[15] In similar cases, other courts have rejected the defendants' claim that the plaintiffs' plan was merely a "better" plan, and the legislature had discretion to choose a plan that violated the state constitution unnecessarily. *Holt*, 38 A.3d at 757 ("We realize that the task is not so simple as the production of a plan with 'better' numbers …. It is enough that the *Holt* plan here overwhelmingly shows that the 2011 Final Plan made subdivision splits that were not absolutely necessary …."); *Fischer*, 366 S.W.3d at 911 ("By finding

[15] In *City of Manchester*, this Court cited *Gaffney v. Cummings*, 412 U.S. 735 (1973), for the proposition that a "redistricting plan is not unconstitutional simply because some 'resourceful mind' has come up with a better one." 163 N.H. at 689. In *Gaffney*, the Court rejected a challenge to a plan with a deviation well under the 10% threshold for presumptive constitutionality, when the plaintiffs' alternative plan had a smaller deviation but divided substantially more towns (which the state constitution prohibited). 412 U.S. at 737–39. Here, the situation is the reverse of *Gaffney*: the plaintiffs' plan *reduces* violations of the State Constitution, while moving the overall deviation from a presumptively unconstitutional level to a presumptively constitutional one. *See also State ex rel. Lockert*, 631 S.W.2d at 710 ("[*Gaffney*] illustrates the point that, where necessary to meet federal constitutional requirements, a state constitutional provision may be violated to an extent, but still must be given due consideration and *all possible effect*.") (emphasis added).

House Bill 1 unconstitutional, we are not selecting a better legislative redistricting plan but simply upholding our duty faithfully to interpret the Kentucky Constitution."). HB 50 is not simply worse than the Map-a-Thon plan; it is unconstitutional.

V. The Superior Court Relied on Inapposite Precedent When It Held That Nonconstitutional Considerations Can Justify Violating Article 11.

The Superior Court disagreed that HB 50 is unconstitutional, instead holding that rational or legitimate bases for violating Article 11 could include nonconstitutional policy preferences such as prioritizing dedicated representation for larger towns, giving the towns of Madbury, Bedford, and Merrimack a stronger voice in the House, reducing the number of floterial districts, and preserving unspecified communities of interest. Add. at 24. Although the Superior Court acknowledged this Court's discussion of the hierarchy of law in *City of Manchester*, it took a wrong analytical turn when it cited two United States Supreme Court opinions for the proposition that "a 'rational or legitimate basis' sufficient to justify violations of State constitutional requirements must encompass at least as much as that which justifies the violation of federal constitutional provisions, namely, either 'community of interest' considerations, *see Shaw* [*v. Reno*, 509 U.S. 630, 647 (1993)], or '[a]ny number of consistently applied legislative policies,' *see Karcher* [*v. Daggett*, 462 U.S. 725, 741 (1983)]." Add. at 17. Neither opinion, however, supports the idea that nonconstitutional policy preferences can trump explicit requirements of the State Constitution.

In *Karcher*, a case quite unlike this one, involving race-based districting, the Court applied a line of cases beginning with *Reynolds v. Sims*,

377 U.S. 533 (1964), which set out the standard for determining the constitutionality of a state legislative districting plan. In *Reynolds*, the Court had held that "an individual's right to vote for state legislators is unconstitutionally impaired when its weight is *in a substantial fashion* diluted when compared with votes of citizens living in other parts of the State." 377 U.S. at 568 (emphasis added). Therefore, as this Court recognized in *City of Manchester*, the United States Constitution does not require absolute population equality among state legislative districts. 163 N.H. at 700–01. The prime example in *Reynolds* of a deviation from equality that may comply with the United States Constitution is one designed to "accord[] political subdivisions some independent representation in at least one body of the state legislature." 377 U.S. at 580. Relying on *Reynolds* almost twenty years later, the Court made the statement in *Karcher* that the Superior Court errantly cited here: "Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives." 462 U.S. at 740. *Karcher* does not support the Superior Court's holding that any rational nonconstitutional policy preference can trump a mandatory constitutional requirement, for two reasons.

First, the question in *Karcher* (and *Reynolds*) was whether the districting plan violated the United States Constitution at all, not whether a plan that violated an explicit constitutional requirement might nevertheless be justified. In those cases, the Court interpreted the Equal Protection Clause, which does not specifically address legislative districting, much less clearly require absolute equality of population. U.S. Const. amend. XIV, § 1 ("No

State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States … nor deny to any person within its jurisdiction the equal protection of the laws."). The Court concluded in *Reynolds* and *Karcher*, and in other cases since, that certain deviations in population are consistent with the Equal Protection Clause. The Court has never held that a legislative districting plan violated the Equal Protection Clause, but that violation was justified by state policies—such a holding would violate the Supremacy Clause. Here, by contrast, Article 11 could not be clearer. A town or ward whose population "is within a reasonable deviation from the ideal population for one or more representative seats … *shall have* its own district of one or more representative seats." N.H. Const., pt. II, art. 11 (emphasis added). If a town or ward has sufficient population and does not receive its own district, that is a plain violation of Article 11. The Superior Court did not agree or disagree with this proposition, but it did "assum[e] for the sake of argument that the plaintiffs' interpretation is correct." Add. at 18–19. Thus, the Superior Court framed the dispute as one about "the nature or character of what constitutes a 'rational or legitimate basis' sufficient to justify a violation of the dedicated district requirement under Part II, Article 11." Add. at 15. Whether a violation is justified, rather than whether a violation exists, is not the question the Supreme Court answered in *Karcher*, and it was error for the Superior Court to use *Karcher*'s inapposite standard here.

Second, even if *Karcher* had framed the question the way the Superior Court did, the Superior Court's holding would be internally inconsistent. If *Karcher* had held that state legislative policies, such as respecting municipal boundaries, can justify a violation of the Equal Protection Clause, then the

Superior Court's opinion would mean that Article 11 (which also requires the Legislature to respect municipal boundaries) is simultaneously stronger than the United States Constitution and weaker than the nonconstitutional policy preferences of the Legislature. The Legislature rejected this illogical idea in its "Guidelines and Legal Principles Applicable to Redistricting the House," which provide that "[f]ederal constitutional requirements take precedence over state constitutional requirements," and "[s]tate constitutional principles must be applied to the extent that they do not violate federal constitutional principles." App. IV at 42.[16]

In addition to *Karcher*, the Superior Court relied on the United States Supreme Court's opinion in *Shaw v. Reno*, which held that the irregular shape of districts alone may give rise to a claim under the Equal Protection Clause if those districts can be understood only as an effort to separate voters by race. 509 U.S. at 649. In *City of Manchester*, this Court cited *Shaw* when *rejecting* an argument that the State Constitution inherently requires the Legislature to account for communities of interest when drawing district lines. 163 N.H. at 707–08. This Court emphasized that *Shaw*'s reference to race-neutral districting principles (like respect for political subdivisions) did

[16] Additionally, although nonconstitutional "consistently applied legislative policies" cannot be a rational or legitimate basis for violating the Constitution, it is worth mentioning that the policies the Superior Court cited as potential justifications for HB 50 generally *contradict* policies that have been consistently applied. For example, the Superior Court stated that the Legislature "could have simply prioritized providing a dedicated district to Durham, the largest individual town or ward in the County." Add. at 22. This is the opposite of the "long standing tradition in New Hampshire … to have as many small representative districts as possible so as to best represent all the people of New Hampshire." App. IV at 8.

not imply that these principles are constitutionally required, and it emphasized that the framers of the State Constitution had the opportunity to enshrine "communities of interest" as a districting principle but chose not to. *Id.* at 708.

Although this Court correctly explained why *Shaw* is irrelevant to a challenge under Article 11, the Superior Court took the opposite view, holding that concern for "communities of interest"—a phrase never used in *Shaw*—is a valid justification for violating Article 11. In doing so, it repeated its mistake in analyzing *Karcher*, conflating two distinct questions. Here, the question is whether a violation of a constitutional right can be justified: the Superior Court accepted for argument's sake that HB 50 violated Article 11, and then turned to the issue of justification. In *Karcher* and *Shaw*, the question was whether a constitutional right was violated at all. *Shaw* cited adherence to "traditional districting principles" not as justifications for a violation of the Equal Protection Clause, but as evidence that the Equal Protection Clause was not violated because district lines were determined by principles rather than race.[17] *City of Manchester*, 163 N.H. at 708 (making this distinction). Thus, the Superior Court erred when it assumed hypothetical "community of interest" concerns as possible reasons to justify not following Article 11.

[17] *Shaw* does mention "sufficient justification" for separating voters by race, 509 U.S. at 649, but this does not refer to the "traditional districting principles" cited above. Instead, a sufficient justification is one that "serves a compelling interest," such as complying with the Voting Rights Act, and is "narrowly tailored to that end." *Cooper v. Harris*, 581 U.S. 285, 292 (2017). The defendants have the burden to establish a sufficient justification. *Id.*

The Plaintiffs are unaware of any opinion from the supreme court of any state that applies *Karcher* or *Shaw* the way the Superior Court did here. In fact, the North Carolina Supreme Court cited *Shaw*'s discussion of "traditional districting principles" when *invalidating* a plan that would have split counties "for reasons unrelated to compliance with federal law." *Stephenson*, 562 S.E.2d at 389. The lesson from *Shaw* was *not* that nonconstitutional policy preferences like preserving communities of interest can override constitutional mandates; it was that respecting political subdivisions (as Article 11 does) is exceptionally important. *See id.*

VI. The Superior Court's Approach to Rational Basis Review Would Render Article 11 (and Other Constitutional Requirements) Unenforceable.

If the Superior Court was correct that the plaintiffs were required to anticipate and disprove every conceivable "consistently applied legislative polic[y]" and "community of interest consideration[]," then Article 11 is a dead letter, and the 2006 amendment was ineffective. A plaintiff's alternative plan that complies with the federal and state constitutions will necessarily contain changes from the enacted plan—the more egregious the Legislature's constitutional violations, the more significant the changes. No plaintiff could realistically identify every single change and then develop a discovery record robust enough to disprove every possible argument that the change would contravene any nonconstitutional policy the defense or the court could imagine (or that the change would break up a conceivable community of interest), particularly when the court would approach these changes "with skepticism and deference to the legislature." Add. at 21–22. The plaintiff's task would be more daunting still if the court could award summary judgment

to the defendants based on post-hoc, nonconstitutional policy considerations that were never raised during the lawmaking process, as the Superior Court did here. Under these circumstances, enforcing Article 11 would be impossible.

Moreover, Article 11 is not the only constitutional provision that would become unenforceable if this Court endorses the Superior Court's approach. Article 9 provides that the size of the House shall be between 375 and 400 members, and that in apportioning the House, "no town, ward or place shall be divided nor the boundaries thereof altered." N.H. Const., pt. II, art. 9. If the Legislature were to grant an additional seat to all ten counties, increasing the size of the House to 410 members, a plaintiff would have to prove, for every House district, that no legislative policy or community of interest could justify that district's creation. Or the Legislature could divide a town in two (or more) just by claiming that it did so to preserve a community of interest.[18] In light of the considerable deference given to the Legislature, a plaintiff could not successfully challenge such a split, even though it plainly violates Article 9.

The way out of this thicket is the one that every state supreme court has chosen when faced with a claim like the one here: holding that the *only* rational or legitimate justification for violating the explicit, mandatory requirements of Article 11 is compliance with another federal or state

[18] For example, the Legislature could split Stratham in two on the grounds that southern Stratham shares a community of interest with Exeter, and northern Stratham shares a community of interest with Greenland. A court would be bound to defer to that legislative determination.

constitutional requirement. That holding is correct as a matter of law, and it creates a clear, workable standard for lower courts to apply.

CONCLUSION

The enacted House districting plan violates Part II, Article 11 of the State Constitution and lacks a rational or legitimate basis for doing so. Therefore, the Superior Court's decision should be reversed, with directions to grant summary judgment to the plaintiffs and deny summary judgment to the defendants. This Court should direct that on remand, the Superior Court should give the Legislature the opportunity to pass a new plan, but this Court should make clear that any new plan must contain the fewest violations of Article 11 as compliance with other constitutional requirements will allow.

STATEMENT REGARDING ORAL ARGUMENT

As this case presents an important issue that will recur every districting cycle, the Appellants request argument before the full Court. If allowed, the undersigned Henry Quillen will present oral argument for Appellants.

CERTIFICATION OF COMPLIANCE WITH SUP. CT. R. 16(11)

The undersigned counsel certifies that this Brief, exclusive of pages containing the Table of Contents and Table of Authorities, certifications, and the signature block, contains 9,473 words.

By:

Dated: September 26, 2024 /s/ Joshua M. Wyatt
Joshua M. Wyatt, City Attorney

CERTIFICATION OF SERVICE IN COMPLIANCE WITH SUP. CT. R. 16(10) AS MODIFIED BY SUP. CT. SUPP. R. 18

The undersigned counsel certifies that a copy of this brief is being filed on this date through the Supreme Court's electronic filing service, which "satisfies the requirement in Supreme Court Rule 26(2) that a filer provide to all other parties a copy at or before the time of filing." Sup. Ct. Supp. R. 18(b). Counsel of record for the Appellees are receiving a copy of this filing through the Court's electronic system on this date.

By:

Dated: September 26, 2024 /s/ Joshua M. Wyatt

Joshua M. Wyatt, City Attorney

Respectfully submitted,

THE CITY OF DOVER, NEW HAMPSHIRE

Dated: September 26, 2024 By: /s/ Joshua M. Wyatt

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ADDENDUM TO BRIEF

STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY SUPERIOR COURT

City of Dover, et al.

v.

David Scanlan, in his official capacity as the New Hampshire Secretary of State, and the State of New Hampshire

Docket No. 219-2022-CV-224

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

This case challenges the constitutionality of the decennial redistricting of the State House of Representatives following the 2020 federal census. The plaintiffs include the Cities of Dover and Rochester, along with individuals residing in the following towns and wards: Dover Ward 4, New Ipswich, Wilton, Hooksett, Lee, Rochester Ward 5, and Barrington. (Court index #1 (Compl.)). Before the court are the parties' cross-motions for summary judgment. (See court index #31 & #32 (Pls.' Mot. & Mem. Law in Supp. Summ. J.); #38 (Defs.' Obj.); #40 (Pls.' Response); see also court index #34 (Defs.' Mot. Summ. J.); #36 (Pls.' Obj.); #41 (Defs.' Response)). The court held a hearing on this matter on February 7, 2024. For the following reasons, the plaintiffs' motion for summary judgment is DENIED and the defendants' motion is GRANTED.

Background

The following facts are derived from the parties' consolidated statements of material fact, (court index #37, #39), and the exhibits appended to the parties' motions and memoranda. In 2021, the State House of Representatives ("House") redistricting process began with the introduction of House Bill 50 ("HB 50") (Laws 2022, ch. 9, RSA 662:5) (the "enacted plan"). (Court index #39 ¶ 1). During the legislative process leading to the bill's passage, a non-partisan

coalition called "Map-a-Thon" submitted proposed House redistricting plans to the legislature. (Id. ¶ 9). One such Map-a-Thon plan, for which the plaintiffs now advocate (hereinafter the "plaintiffs' proposed plan" or "map"), provided 15 towns and wards with dedicated House seats. Those same towns and wards did not receive their own dedicated House seat in the enacted plan. (Id. ¶¶ 8, 12). To achieve this result, in addition to changing the districts of these 15 towns and wards, the plaintiffs' proposed plan changes the makeup of other districts throughout each county at issue. (Compare court index #32 at Ex. G (plaintiffs' proposed plan) with id. at Ex. H (enacted plan)). In addition to other consequences, as the defendants point out, the plaintiffs' proposed plan does not provide dedicated districts to the Towns of Durham and Campton, unlike the enacted plan. (See court index #37 ¶ 21). The Legislature did not adopt the plaintiffs' proposed plan and instead adopted HB 50, which the Governor signed into law as RSA 662:5. (See court index #39 ¶¶ 2, 16).

The plaintiffs' challenge is rooted in Part II, Article 11 of the State Constitution, which requires that "[w]hen the population of any town or ward, according to the last federal census, is within a reasonable deviation from the ideal population for one or more representative seats the town or ward shall have its own district of one or more representative seats." N.H. CONST., pt. II, art. 11.[1] "Deviation" from the "ideal population" is a concept central to the more common challenge to a redistricting plan, which is based on the Equal Protection Clause's requirement for substantial population equality among the various districts, in keeping with the foundational principle of one person/one vote. See City of Manchester v. Sec'y of State, 163 N.H. 689, 699 (2012) (citing Reynolds v. Sims, 377 U.S. 533, 579 (1964)). "To calculate the ideal population

[1] The directive embodied in Article 11 is sometimes referred to as the "single-member district requirement." This term is something of a misnomer and is probably more accurately described as the "dedicated district requirement." Although there may be a definitional distinction in terminology, for purposes of this order the terms "single-member district" and "dedicated district" are used interchangeably.

of a single-member district, the state population is divided by the total number of representatives." Id. (citations omitted). "Once the ideal population is calculated, it is then possible to determine the extent to which a given district deviates from the ideal." Id. "Relative deviation is the most commonly used measure and is derived by dividing the difference between the district's population and the ideal population by the ideal population." Id.

New Hampshire's Constitution also permits the use of "floterial districts," which are "district[s] that 'float[] above' several distinct single- or multi-member districts." Id. at 695 (citing Burling v. Speaker of the House, 148 N.H. 143, 150 (2002)); see also N.H. CONST., pt. II, art 11 (permitting the use of floterial districts). "In a single-member district, one representative is elected by the district's voters; in a multi-member district, voters elect more than one representative." Id. In the enacted plan, for example, Strafford County District No. 11 is a three-member traditional (i.e., non-floterial) district encompassing Dover Ward 4 as well as the Towns of Lee and Madbury. See RSA 662:5, IX. In addition to this three-member district, the enacted plan also includes a single-member floterial district representing not only Dover Ward 4, Lee, and Madbury, but also the Town of Durham, while Durham itself separately has a four-member district dedicated solely to Durham. See id. "Calculating the relative deviation of floterial districts requires using another method to calculate deviation—the component method." City of Manchester, 163 N.H. at 700 (citing Burling, 148 N.H. at 163, Appendix C (setting forth component method formula)). "Using the relative deviation, one can calculate the overall range of deviation for a state-wide plan by adding the largest positive deviation in the state and the largest negative deviation in the state without regard to algebraic sign." See id. at 700 (explaining by way of example that where district with greatest positive deviation from ideal population in entire state is +21.54% and greatest negative deviation for any district is -18.97%,

this "yields an overall range of deviation of 40.51%").

Both the plaintiffs' proposed maps and the enacted plan are organized on a county-by-county basis. (See court index #37 ¶¶ 14–15); RSA 662:5. In other words, each county in the enacted plan has the same total number of representatives as it does in the plaintiffs' proposed plan. Both the enacted plan and the plaintiffs' proposed plan utilize 400 House seats statewide. (See court index #39 ¶ 4); see also RSA 662:5. The total population of New Hampshire according to the 2020 federal census was 1,377,529. (Court index #39 ¶ 3).

Using the above-described calculations, the "ideal" population for a representative district is 3,444 (1,377,529 total population divided by 400 House seats). The enacted plan presents an overall statewide deviation of 10.13%, while the plaintiffs' proposed map presents an overall statewide deviation of 9.94%. (See court index #39 ¶¶ 5, 14). As the court will explain in greater detail below, however, this reduction in the overall statewide deviation is not the basis of the plaintiffs' challenge, and the plaintiffs do not allege that the weight of their votes has been unconstitutionally diluted. (See court index #37 ¶ 12). Instead, according to the plaintiffs, overall statewide deviation in the enacted plan is relevant to a burden-shifting framework for redistricting challenges, and it serves as evidence that reduction in the overall statewide deviation cannot justify RSA 662:5's failure to provide certain towns or wards with dedicated districts. Notably, neither the enacted plan nor the plaintiffs' proposed plan provides a dedicated district to every town and city ward with a population greater than or within a reasonable deviation of 3,444. (See court index #37 ¶¶ 16–17; see also court index #39 ¶ 8 (setting forth list of 55 towns with population which "met or exceeded the ideal House seat population (3,444), but were not provided a dedicated House seat by" RSA 662:5), and ¶ 12 (of those 55 towns and wards, providing a list of 15 towns and wards the plaintiffs' proposed map provides dedicated

districts)).

The plaintiffs brought this action for declaratory and injunctive relief, essentially arguing that their proposed plan shows that the Legislature's failure to provide the 15 identified towns and wards with dedicated representative seats lacks sufficient justification, thus rendering the enacted plan unconstitutional. (See court index #1). Among other things, the plaintiffs ask this court to declare that in passing the enacted plan, the Legislature "violated Part II, Article 11 by failing to minimize the enacted violations of Part II, Article 11 of the State Constitution in the affected towns/wards stated in [their] Complaint." (Id. ¶ 92(c)). In response to discovery requests concerning any possible explanation for the Legislature's decisions in this respect, the defendants asserted legislative privilege. (See court index #33 ¶ 18). At the February 7, 2024 hearing, the defendants represented that the legislative record is silent as to any such reasoning, at least as to the Legislature's decision to provide a dedicated district to Durham instead of other towns in Strafford County.

Standard of Review

As a challenge to a state legislative redistricting plan based on alleged violations of state constitutional provisions, there are a number of principles and standards that guide the court in resolving this dispute. First, as with any motion for summary judgment, "[s]ummary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." RSA 491:8-a, III. "In reviewing cross-motions for summary judgment, [the court] consider[s] the evidence in the light most favorable to each party in its capacity as the nonmoving party and, if no genuine issue of material fact exists, [the court] determine[s] whether the moving party is entitled to

judgment as a matter of law." Monadnock Reg'l Sch. Dist. v. Monadnock Dist. Educ. Ass'n, NEA-NH, 173 N.H. 411, 416 (2020).

Furthermore, a legislatively enacted redistricting plan is a statute and as such, the court begins with the presumption that the plan is constitutional, and the court will not declare it invalid "except on inescapable grounds." City of Manchester, 163 N.H. at 696. "This means that [the court] will not hold the statute to be unconstitutional unless a clear and substantial conflict exists between it and the constitution." Id. (cleaned up). "It also means that when doubt exists as to the constitutionality of a statute, those doubts must be resolved in favor of its constitutionality." Id. Deference to a legislatively enacted redistricting plan is especially appropriate because "[o]ur State Constitution vests the authority to redistrict with the legislative branch, and for good reason." Id. at 697 (quoting Petition of Below, 151 N.H. 135, 150 (2004)). "A state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies with the constitutionally mandated framework of substantial population equality." Id. (quoting Connor v. Finch, 431 U.S. 407, 414–15 (1977)). "Both the complexity in delineating state legislative district boundaries and the political nature of such endeavors necessarily preempt judicial intervention in the absence of a clear, direct, irrefutable constitutional violation." Id. (citation omitted).

Analysis

At issue in this case is Part II, Article 11 of the State Constitution, which provides in full:

> When the population of any town or ward, according to the last federal census, is within a reasonable deviation from the ideal population for one or more representative seats the town or ward shall have its own district of one or more representative seats. The apportionment shall not deny any other town or ward membership in one non-floterial representative district. When any town, ward, or unincorporated place has fewer than the number of inhabitants necessary to entitle it to one representative, the legislature shall form those towns, wards, or unincorporated places into representative districts which contain a sufficient

> number of inhabitants to entitle each district so formed to one or more representatives for the entire district. In forming the districts, the boundaries of towns, wards, and unincorporated places shall be preserved and contiguous. The excess number of inhabitants of a district may be added to the excess number of inhabitants of other districts to form at-large or floterial districts conforming to acceptable deviations. The legislature shall form the representative districts at the regular session following every decennial federal census.

N.H. CONST., pt. II, art. 11.

The plaintiffs argue that their respective towns or wards, as well as several others throughout the State, have sufficient population to entitle the town or ward to its own district of one or more representative seats under this provision, and the enacted plan impermissibly fails to provide them with such a district without sufficient justification. (See court index #32 at 1). They contend that the enacted map includes 55 such "violations"; that they proposed to the Legislature a map which reduced the number of violations to 41 violations, which complies with other House redistricting criteria; and that there is no rational or legitimate explanation for the violations. (See id.; see also court index #40 at 3).

The defendants disagree. First, they argue that the plaintiffs lack standing to assert claims on behalf of towns or wards in which no plaintiff resides. (See court index #34 ¶¶ 32–36; #41 at ¶¶ 6–11). The defendants also argue that the instant challenge presents a non-justiciable political question. (See court index #34 ¶¶ 53–59). At the February 7, 2024 hearing, the defendants conceded that the legislative record fails to reflect the Legislature's actual reasoning for any of the alleged violations. Instead, citing the impossibility of perfect compliance with all constitutional redistricting provisions, the defendants argue that the plaintiffs have failed to establish the absence of a rational or legitimate basis for the challenged plan's failure to provide the plaintiffs and their towns or wards with their own dedicated district. (See id. ¶¶ 49–52 (identifying potential post-hoc rationalizations for the alleged violations)). The court will

address each argument, in turn.

I. Standing

The parties agree that the plaintiffs at least have standing to challenge alleged constitutional violations affecting their own respective towns and wards. However, the defendants argue that the plaintiffs lack standing to challenge alleged violations affecting towns or wards in which no plaintiff resides, including the Towns of Chesterfield, Hinsdale, Canaan, Hanover, Bow, Plaistow, and Milton (hereinafter the "non-party towns"). (See id. ¶¶ 32–36). In response, the plaintiffs note that assessing the constitutionality of statewide maps "inherently involves disputed propositions of constitutional law equally applicable across the state" and that the towns or wards represented by a plaintiff "are identically situated" to the non-party towns. (Court index #36 at 3–6). The plaintiffs further note that the enacted plan contains no severability clause and the court's remedy "must" consider the statewide map as a whole. (See id.). At the February 7, 2024 hearing, the plaintiffs noted that if so required, they could find plaintiffs from the non-party towns, buttressing their contention that declining to address alleged violations as to the non-party towns at this stage would result in an avoidable "piecemeal process[.]"

With one caveat discussed in greater detail below, the court finds plaintiffs' arguments unpersuasive and concludes that they lack standing to vindicate alleged injuries to the non-party towns. In City of Manchester, the supreme court expressly observed that petitioners from one district lacked standing to assert violations of the dedicated district requirement as to towns in which the petitioners did not reside. See 163 N.H. at 707; see also In re Reapportionment of Towns of Hartland, Windsor & W. Windsor, 624 A.2d 323, 335 (1993) ("[P]etitioners have no standing to raise [challenge to district crossing county lines where joined towns lacked common

interests] because they do not reside in the challenged district."). While principles of standing are important in all contexts, the court finds them especially important in a redistricting challenge, where courts "tread lightly . . . lest [the court] impair the legislature's redistricting power." City of Manchester, 163 N.H. at 697 (citations omitted). Moreover, the court finds significant the fact that no voters from the non-party towns saw fit to come to court to redress any alleged injury. Instead, two municipalities and individuals primarily located in the seacoast area ask this court to throw out the election maps of these other parts of the State. The court declines to do so.

The court rejects the suggestion that because these plaintiffs could – theoretically – find additional plaintiffs from the non-party towns, the court should nonetheless redress alleged constitutional violations as to those non-party towns. The plaintiffs cite no law in support of the proposition that joining additional plaintiffs after a hearing on cross-motions for summary judgment, which the parties agreed would resolve the merits of this case, cures their failure to do so at an earlier stage. Further, the plaintiffs provide no reason why they could not find a plaintiff from the non-party towns at an earlier stage of this case.

The court also rejects the plaintiffs' suggestion that RSA 662:5 is not severable. While they are correct that the "legislation itself . . . contains no severability clause," they agree that, as a factual matter, the maps for which the plaintiffs advocate were generated on a county-by-county basis such that "[n]o county map in the Map-a-Thon Redistricting Plan depended on the maps for other counties," except to the extent a change in one county's map would impact the statewide population deviation. (See court index #37 ¶¶ 14–15). RSA 662:5 is similarly organized county-by-county. Further, the plaintiffs themselves provide a brief authored by the Attorney General's Office in City of Manchester concurring with the House's argument in that

case that "if any provisions of RSA 662:5 (2012) are determined to be unconstitutional, those provisions are severable by county." (Court index #36 at 234 (brief of Attorney General in City of Manchester v. Secretary of State, 163 N.H. 689 (2012)).

Because of this conclusion, however, the court agrees with the plaintiffs that it must consider, to some extent, non-party towns located in a county in which at least one plaintiff resides. Indeed, to remedy an alleged violation for the plaintiff from Hooksett requires consideration of an alleged violation to Bow, which may result in either remanding the entire Merrimack County map to the Legislature or imposing a court-ordered map for Merrimack County. See City of Manchester, 163 N.H. at 698 (Courts "must consider not only the specific violations claimed, but also those claims within the context of the entire plan[.]"). This approach comports with other redistricting cases identified by the plaintiffs where plaintiffs hailed from only a portion of the affected districts, but to remedy those violations required changes to the entire redistricting plan. See, e.g., Adamson v. Clayton Cnty. Elections & Registration Bd., 876 F. Supp. 2d 1347 (N.D. Ga. 2012); Brown v. Jacobsen, No. CV2192HPJWDWMBMM, 2022 WL 122777, at *1 (D. Mont. Jan. 13, 2022).

Accordingly, the court confines its analysis to those counties from which at least one plaintiff resides (Hillsborough, Merrimack, and Strafford), and it declines to consider those counties with alleged violations from which there is no party representative for even one town or ward (Cheshire, Grafton, and Rockingham).

II. Political Question Doctrine

The defendants reassert their argument that the plaintiffs' claims present a non-justiciable political question, (see court index #34 ¶¶ 53–59), which the court previously rejected in denial of the defendants' motion to dismiss, (see court index #19 (Order, June 30, 2023) at 3–6). The

court rejects defendants' argument now for the same reasons articulated in the court's June 30, 2023 Order. Additionally, since that order issued, the New Hampshire Supreme Court cited a redistricting challenge under Part II, Article 11's dedicated district requirement as an example of a justiciable controversy in concluding that partisan gerrymandering claims, by contrast, present a non-justiciable political question. See Brown v. Sec'y of State, No. 2022-0629, 2023 WL 8245078, at *4–6, *12–16 (N.H. Nov. 29, 2023) (citing City of Manchester, 163 N.H. at 696–97). Accordingly, the court re-affirms its conclusion that the instant challenge does not involve a political question and is justiciable.

III. Burden of Proof

The parties dispute the applicable burden of proof, both as to whether the burden at any point shifts to the defendants to justify alleged constitutional violations, and what constitutes a "rational and legitimate basis" sufficient to justify such a violation. In support, the parties seize upon different language in City of Manchester, the only New Hampshire case dealing with a redistricting challenge of this nature. The defendants maintain that "[t]he burden at all times rests with the petitioners to establish that the legislature acted without a rational basis in enacting the" challenged plan. City of Manchester, 163 N.H. at 698 (citing Parella v. Montalbano, 899 A.2d 1226, 1232–33 (2006)).

The plaintiffs, on the other hand, look to certain out-of-state cases relied upon in City of Manchester's discussion of the applicable burden of proof for the proposition that after establishing a constitutional violation, the burden shifts to the State to justify those violations. See 163 N.H. at 698 (quoting In re Town of Woodbury, 861 A.2d 1117, 1120 (Vt. 2004) ("If a plan is consistent with the fundamental constitutional requirement that districts be drawn to afford equality of representation, we will return it to the Legislature only when there is no

rational or legitimate basis for any deviations from other constitutional or statutory criteria."); In re Reapportionment of Towns of Hartland, 624 A.2d 323, 327 (Vt. 1993)). Indeed, under an equal protection challenge based on relative weight of votes, an apportionment plan with a maximum population deviation larger than 10% "creates a prima facie case of discrimination and therefore must be justified by the State." Id. at 701 (quoting Voinovich v. Quilter, 507 U.S. 146, 161 (1993)). Such a plan is "presumptively unconstitutional *under the Equal Protection Clause*," see id. at 703–04 (emphasis removed and added), whereas a plan with an overall population deviation under that threshold creates a rebuttable presumption that the plan is constitutional, see id. at 701 (citations omitted).

The court recognizes that the City of Manchester court's reference to Town of Woodbury arguably leaves open the question of the circumstances under which a court will return a map to the Legislature based on "deviations from other constitutional or statutory criteria," where, as the plaintiffs allege in this case, the enacted plan is *inconsistent* with the fundamental constitutional requirement that districts be drawn to afford equality of representation (i.e., the plan fails to satisfy the Equal Protection Clause, see Reynolds, 377 U.S. at 579). However, the court is not convinced that the New Hampshire Supreme Court intended that a showing of population deviation serves as a vehicle for shifting the burden to the State to explain deviations from *other* statutory or constitutional criteria where the challenge at issue is not based on population deviation. (See court index #37 ¶ 12 (plaintiffs concede they do not challenge enacted plan based on population deviation but use this fact to establish presumptive unconstitutionality of enacted plan)). This point carries even more weight where, as in this case, the plaintiffs' proposed plan improves the overall statewide deviation from 10.13% to 9.94%, an improvement that could be characterized as *de minimis*, and the plaintiffs do not reside in the districts affected

by this change. (See court index #39 ¶¶ 5, 14). The court does not agree that the City of Manchester court intended for such a modest distinction to serve as a burden-shifting device for challenges not based on the Equal Protection Clause, or to eliminate the enacted plan's presumption of constitutionality vis-à-vis any other constitutional provision in the absence of such a challenge.

Notably, in discussing and applying the burden of proof and standard of review with respect to challenges based on "other statutory or constitutional criteria," neither the Town of Woodbury court nor the Parella court, upon both of which our Supreme Court relied in City of Manchester, conducted a threshold inquiry regarding population deviation before turning to the other criteria. See Town of Woodbury, 861 A.2d at 1120–25 (not discussing the Reynolds v Sims-type of inter-district population deviation and rejecting challenge based on challenger's failure to establish "the absence of social, economic, or political ties among the towns in the challenged district") (emphasis removed); Parella, 899 A.2d at 1240–58 (*after* addressing challenges to other criteria under rational or legitimate basis standard, addressing challenge based on overall population deviation of 9.91% under Reynolds v Sims without suggesting this number had any bearing on the standard of review as to those other challenges, either parties' burden (or lack thereof) as to other challenges, or the presumption of constitutionality).

Moreover, City of Manchester presented a unique circumstance justifying greater discussion of population deviation because the challengers in that case argued that the Legislature "needlessly adhered to the 10%" rule at the expense of providing certain towns or wards with their own dedicated districts pursuant to Part II, Article 11. 163 N.H. at 702. The Supreme Court rejected each of the challengers' proposed alternative maps as they presented population deviations greater than 10%, while the enacted map's deviation was under that

threshold. See id. at 702–705 (reasoning that court could not "fault the legislature for giving primacy to the principle of one person/one vote" and holding that "adhering to the 10% rule is, undoubtedly, a rational legislative policy"). Accordingly, the court agrees with the defendants that "[t]he burden at all times rests with the [plaintiffs] to establish that the Legislature acted without a rational basis in enacting the challenged redistricting plan." Id. at 698.

Next, the parties dispute the nature or character of what constitutes a "rational or legitimate basis" sufficient to justify a violation of the dedicated district requirement under Part II, Article 11. (Compare court index #32 at 11 (plaintiffs argue as a matter of law "non-constitutional policy concerns fall well short of the 'rational or legitimate basis' justifying unnecessary violations of Part II, Article 11") with court index #34 ¶¶ 28, 49 (defendants argue plaintiffs must prove absence of justifications such as "prioritizing providing single-member districts to larger municipalities and minimizing the number and size of floterial districts," and where it is impossible to provide every eligible town with dedicated district, Legislature is "free to consider the respective features and populations of each town, ward, and place, the size of multimember districts, and the quantity of floterial districts")).

As explained above, the challenge at issue in City of Manchester was unique in that the "rational or legitimate basis" that justified the failure to provide certain eligible towns or wards with their own dedicated district was keeping the overall statewide deviation range under the 10% threshold. Id. at 701–03. After concluding that "adhering to the 10% rule is, undoubtedly, a rational legislative policy," the Supreme Court noted that "population equality must be the predominant factor in redistricting plans." Id. The plaintiffs seize on one aspect of the Court's reasoning in support of this conclusion, in which the Court noted that "[t]here is a hierarchy of applicable law governing the development of a plan for apportioning the legislature . . . . The

United States Constitution is the paramount authority." Id. at 703 (quoting Twin Falls County v. Idaho Com'n, 271 P.3d 1202, 1204 (2012) (abrogated on other grounds as stated in Durst v. Idaho Com'n for Reapportionment, 505 P.3d 324, 333, 340, cert denied sub nom. Ada Cnty., Idaho v. Idaho Com'n for Reapportionment, 143 S. Ct. 208 (2022)); see also Durst, 505 P.3d at 328 (further explaining under the hierarchy that "the requirements of the [State] Constitution rank second; and, if the requirements of both the State and Federal Constitution are satisfied, statutory provisions are to be considered") (quoting Twin Falls, 271 P.3d at 1204)). The plaintiffs seek a declaration that "[i]n redistricting or reapportioning the House, the State must follow the hierarchy of authority, prioritizing constitutional compliance over any non-constitutional considerations and minimizing violations of Part II, Article 11 of the State Constitution, even where perfect compliance is impossible." (Court index #32 at 15).

Indeed, this quotation, read in a vacuum, lends credence to the plaintiffs' argument. The discussion of the merits in City of Manchester does not directly answer how courts are to apply this "hierarchy" because the "rational and legitimate basis" at issue in that case—adherence to the state *and* federal constitutional principle of one person/one vote—finds itself on a higher rung of this hierarchy than does the dedicated district requirement in Part II, Article 11. 163 N.H. at 702–07. But in rejecting a separate challenge based on "community of interest" considerations—a phrase which "appears nowhere in the state constitutional provisions governing redistricting of the House"—the court observed that such policy considerations "are important not because they are constitutionally required—they are not—but because they are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines." Id. at 708 (quoting Shaw v. Reno, 509 U.S. 630, 647 (1993)); see also Shaw, 509 U.S. at 645 (noting review of racial gerrymandering claims under the Equal Protection Clause).

Similarly, an enacted map which, on its face, presumptively violates the principal of one person/one vote under the Equal Protection Clause may be justified by "[a]ny number of consistently applied legislative policies," such as "making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives." See Karcher v. Daggett, 462 U.S. 725, 741 (1983). Thus, even in the more rigorously reviewed context of a one person/one vote challenge, see id., or in the context of a racial gerrymandering claim, see Shaw, 509 U.S. at 647, both of which arise under the Fourteenth Amendment to the United States Constitution, criteria on a lower rung of the "hierarchy" or considerations that are not constitutionally required at all may justify reapportionment plans otherwise in violation of those higher authorities. The court therefore concludes that the "hierarchy" of redistricting considerations is not applied as rigidly as the plaintiffs suggest, and that City of Manchester's reference to the "hierarchy of applicable law governing" redistricting was meant only to bolster its conclusion that "adhering to the 10% rule is, undoubtedly, a rational legislative policy." Id. at 702–03. Accordingly, a "rational or legitimate basis" sufficient to justify violations of State constitutional requirements must encompass at least as much as that which justifies the violation of federal constitutional provisions, namely, either "community of interest" considerations, see Shaw, 509 U.S. at 647, or "[a]ny number of consistently applied legislative policies," see Karcher, 462 U.S. at 741.

IV. Merits

The court now turns to the remaining challenges, which concern the reapportionment plan for the Counties of Strafford, Merrimack, and Hillsborough. The parties appear to disagree as to what constitutes a "violation" of Part II, Article 11's dedicated district requirement. See N.H. CONST., pt. II, art. 11. As noted above, this provision states that "[w]hen the population of

any town or ward, according to the last federal census, is within a reasonable deviation from the ideal population for one or more representative seats the town or ward shall have its own district of one or more representative seats." Id. The plaintiffs take the position that this provision is violated when any town or ward whose population "met or exceeded the ideal House seat population" for a dedicated House seat does not receive one or more under an enacted plan, but that such a violation only results in a remedy where the "violation" lacks sufficient justification. (See court index #1 ¶ 36–57; #32 at 15–16; #39 ¶¶ 8, 12). In other words, the plaintiffs' theory is that "the State must minimize constitutional violations, even where perfect compliance is impossible." (Court index #32 at 12).

Although they do not supply an alternative construction as to what constitutes a "violation" of this provision, the defendants deem this interpretation "not reasonable" insofar as where, as here, perfect compliance is not possible, reasoning that "no redistricting plan could pass constitutional muster" under such an interpretation and concluding that the requirement therefore cannot be "absolute." (See court index #34 ¶¶ 40–45). Instead, the defendants argue, "Part II, Article 11 requires the Legislature to balance the Constitutional preference for single-member districts with . . . competing redistricting requirements, but the Legislature is not required to mathematically maximize the number of eligible towns, wards, and places receiving single-member districts." (Id. ¶ 44).

To the extent this is a disagreement as to the proper interpretation of what constitutes a violation of the dedicated district requirement, as opposed to disagreement as to the standard of judicial review or a burden-shifting framework, the court concludes that it need not resolve this disagreement because even assuming for the sake of argument that the plaintiffs' interpretation is correct, as explained below, the plaintiffs fail to establish the absence of a rational or legitimate

basis for the alleged violations under their interpretation. See Doe v. Att'y Gen., 175 N.H. 349, 355 (2022) (courts "decide constitutional questions only when necessary"). However, the court notes one agreement and one disagreement with the plaintiffs' construction. First, the court agrees that the 2006 amendment to Part II, Article 11 to include the dedicated district requirement reflects a policy of "insuring some voice to political subdivisions, as subdivisions," Reynolds, 377 U.S. at 581, and that the legislative history leading to that amendment supports this construction, see CACR 41 (2006) (enacted), Pls.' Hrg. Ex 1. But the court disagrees with the plaintiffs' construction in that it limits the provision's applicability to those towns or wards with a population *greater* than the ideal population, as opposed to including those with populations "*within a reasonable deviation from* the ideal population for one or more representative seats," N.H. CONST., pt. II, art. 11 (emphasis added), as the defendants point out, (see court index #39 ¶ 8). Indeed, the plain language of this provision includes not only towns or wards with populations greater than the ideal, but also towns or wards with populations lower than the ideal, provided the population is still within a "reasonable deviation from the ideal population for one or more representative seats." See id.

Before turning to the "specific violations claimed," the court considers "those claims within the context of the entire plan, keeping in mind the difficulties in satisfying the various legal requirements statewide." City of Manchester, 163 N.H. at 698 (citation omitted). The plaintiffs provide a list of 55 towns and wards, which "met or exceeded the ideal House seat population (3,444), but were not provided a dedicated House seat by Laws 2022, ch. 9." (Court index #39 ¶ 8). Including those towns or wards whose alleged constitutional violations the plaintiffs lack standing to challenge (as noted above), the plaintiffs' proposed statewide map provides dedicated seats to 15 towns and wards which otherwise did not in the enacted plan.

(See court index #39 ¶ 12). The plaintiffs characterize this as a "net gain" of 14 (conceding that the plaintiffs' proposed map denies a dedicated district to Durham, unlike the enacted map). (See id.) However, due to the plaintiffs' erroneous interpretation of Part II, Article 11 identified above, their proposed map also denies a dedicated district to Campton (population 3,343), for which the enacted map provided a dedicated district. (See id. ¶ 8; see also court index #32, Ex. H § 7.1). The plaintiffs do not argue that Campton's population is not within a reasonable deviation of 3,444. Thus, at most, the plaintiffs' proposed statewide map presents a "net gain" of 13 towns or wards with dedicated districts as compared to the enacted plan.

Moreover, after confining the court's analysis to those counties in which one or more plaintiff resides (Strafford, Hillsborough, and Merrimack), this brings the plaintiffs' purported "net gain" down to eight. (Compare court index #39 ¶ 12 with court index #37 ¶ 2). And if the court disregards all non-party towns and wards (thus further excluding the Towns of Bow and Milton), this brings the "net gain" to six. The City of Manchester court emphasized that courts "will not reject a redistricting plan simply because the petitioners have devised one that appears to satisfy constitutional and statutory requirements to a greater degree than the plan approved by the Legislature," noting that a legislatively enacted redistricting plan "is not unconstitutional simply because some 'resourceful mind' has come up with a better one." 163 N.H. at 698 (quoting Gaffney v. Cummings, 412 U.S. 735, 750–51 (1973)). Even if the Legislature failed to provide these "net" six towns or wards with dedicated districts, it succeeded in providing ninety-six other towns and wards with dedicated districts—no small achievement given the complexities of the redistricting process. See RSA 662:5.

Furthermore, the plaintiffs accomplish this "net gain" of six dedicated House seats through relatively significant changes to the county maps, the consequences or implications of

which are not reflected in the summary judgment record. (Compare court index #32, Ex. H (enacted plan with charts and maps) with id., Ex. G (plaintiffs' proposed plan with charts and maps)). To illustrate the gravity of this point, the court contrasts this situation against an example used by a legislator during the 2006 constitutional amendment process resulting in the addition of the dedicated district requirement to Part II, Article 11, which was included in the amendment's legislative history provided by the plaintiffs:

> Goffstown and Weare together have eight [representatives], I believe. The situation is Weare, in the present population, should have two; Goffstown should have, I believe, five; and then there is a population that is surplus from that amount that should be formed for an additional seat. Now, it could be that we will have an immensely popular person from Weare, even though it is a smaller town, and they may be elected. But it is probable that it is a five to two probability that the member will be elected from Goffstown. *But, it is still a better situation than potentially having all eight elected from Goffstown*.

(Pl.'s Hrg. Ex. 1 (CACR 41 (2006) (enacted)) at 014) (emphasis added). The plaintiffs do not identify a discrete district where, like in this example, a large, multi-member district spanning multiple towns could have been broken up to afford "some voice to political subdivisions, as subdivisions" without collateral effects outside the challenged district. See Reynolds, 377 U.S. at 581. Instead, the plaintiffs' proposal presents significant variations from the enacted map as a consequence of increasing overall compliance with the dedicated district requirement. (Compare court index #32 at Ex. H with id. at Ex. G).

Notably, the record is nearly devoid of evidence of "community of interest" considerations, such as social, cultural, ethnic, economic, religious, political, or other specific characteristics of any towns or wards. See City of Manchester, 163 N.H. at 707–08. As a result, considering "not only the specific violations claimed, but also those claims within the context of the entire plan, keeping in mind the difficulties in satisfying the various legal requirements statewide" leads the court to approach these significant changes with skepticism and deference to

the legislature. See id. at 698.

With this backdrop, the court now turns to the plaintiffs' specific challenges to the enacted maps for the Counties of Strafford, Hillsborough, and Merrimack.

A. Strafford County

The plaintiffs challenge the enacted map for Strafford County, arguing that even though the alternative map they presented to the Legislature provided dedicated districts to the Towns of Milton, Lee, and Barrington as well as Dover Ward 4 and Rochester Ward 5, the enacted map failed to do so despite the sufficient population of those districts. (See court index #32 at 4–6). In response, the defendants note that the plaintiffs' proposed plan does so at the expense of Durham's dedicated district. (See court index #32 ¶ 50). They argue that the Legislature either could have simply prioritized providing a dedicated district to Durham, the largest individual town or ward in the County (population 15,590), or conversely, that it could have declined to pair the comparatively smaller Town of Madbury (population 1,919)[2] with Durham to avoid Durham voters overshadowing Madbury voters. (Id.). Finally, the defendants suggest the presence of "a large State university" in Durham could justify the Legislature's decision. (Id.).

The enacted map provides 12 towns or wards with their own dedicated districts. See RSA 662:5. The plaintiffs' proposed map, by contrast, provides 16 towns or wards with dedicated districts, including each of the Strafford County plaintiffs' towns and wards (Dover Ward 4, Rochester Ward 5, Barrington, and Lee), as well as the Town of Milton (from which there is no plaintiff in this action). (See court index #31 at Ex. G § 11.2). Notably, while the Town of Strafford has a population of 4,230, which is thus sufficient for one dedicated district

[2] The parties do not provide an express agreement on Madbury's population. The court arrived at this number by subtracting the population of Durham from the population of the Durham-Madbury district proposed in plaintiffs' Exhibit G. (Compare court index #37 ¶ 22 with court index #32, Ex. G § 11.2).

under the plaintiffs' interpretation, neither the plaintiffs' proposed map nor the enacted map provides the Town of Strafford with its own dedicated district. (See id.; see also id. at Ex. H § 11.2).

As noted above, however, plaintiffs' proposed map does not accomplish this without consequence, including taking away Durham's dedicated four-member district and placing it in a five-member district with Madbury. (Compare court index #32 at Ex. H § 11 with id. at Ex. G § 11). The plaintiffs cite no case in which a court has required the creation of a new constitutional violation to vindicate other existing constitutional violations—whether in the redistricting context or otherwise. To the contrary, the court "will not reject a redistricting plan simply because the petitioners have devised one that appears to satisfy constitutional and statutory requirements to a greater degree than the plan approved by the Legislature." City of Manchester, 163 N.H. at 698. With a smaller population, as the defendants point out, Madbury voters have a comparatively stronger voice as a subdivision in the smaller, three-member district of 11,877 with Lee and Dover Ward 4 in the enacted plan than Madbury does in a five-member district of 17,408 with Durham in the plaintiffs' proposed plan. See Reynolds, 377 U.S. at 381. The Legislature rationally could have considered both Durham's and Madbury's interests in this respect when it enacted RSA 662:5 (Laws 2022, ch. 9, HB 50). See City of Manchester, 163 N.H. at 698.

While the court finds unpersuasive the defendants' suggestion that the presence (or absence) of a large State university in a particular district provides a rational or legitimate basis to justify violation of any redistricting criteria, the court does find significant the fact that Durham has the highest population, and thus the greatest number of representatives, of any single town or ward in Strafford County. Moreover, beyond the defendants' reference to the presence

of a university in Durham, the summary judgment record is silent as to the presence or absence of communities of interest in or among any of the districts in either the enacted plan or the plaintiffs' proposed plan.

Additionally, the enacted map utilizes one fewer floterial district than does the plaintiffs' proposed map. Although Part II, Article 11 expressly permits the discretionary use of floterial districts, prior to the 2006 amendment to this provision, the New Hampshire Supreme Court had admonished the use of floterial districts as "an unsound redistricting device" for its potential to run afoul of the one person/one vote principle. Burling, 148 N.H. at 150–58. Accordingly, the court concludes that plaintiffs have failed to meet their burden to establish the lack of a rational or legitimate basis for the Legislature's decision to enact the map codified in RSA 662:5. See City of Manchester, 163 N.H. at 698.

B. Hillsborough County

The plaintiffs next challenge the enacted map for Hillsborough County, arguing that the Legislature could have, but failed to provide, dedicated districts to the Towns of New Ipswich and Wilton. Both the enacted map and the plaintiffs' proposed map fail to provide dedicated districts to the Towns of Peterborough, Brookline, Hillsborough, and New Boston. (Court index #39 ¶¶ 8, 12). Even more so than with Strafford County, however, the plaintiffs' proposed map accomplishes their desired result by making dramatic changes to the countywide map for Hillsborough County, having some effect on every town or ward in the County other than the City of Nashua and the Towns of Hudson, Lichfield, and Pelham. (Compare court index #32 at Ex. G, § 8.3 with id. at Ex. H, § 8.3).

For example, Bedford has a dedicated seven-member district in the enacted plan, while the plaintiffs' proposal trims that to a dedicated six-member district, with excess population from

Bedford forming a single-member floterial district with the excess population from Goffstown. Similarly, the Town of Merrimack has an eight-member dedicated district in the enacted plan, and the plaintiffs' proposed map lowers this to a seven-member dedicated district, with the excess population from Merrimack forming a floterial district with the Town of Amherst. Moreover, there are dramatic changes to the makeup of both traditional and floterial districts throughout Hillsborough County, particularly with respect to the City of Manchester.

Unlike the example articulated in the legislative record leading to the 2006 amendment to Part II, Article 11, where Goffstown and Weare could together have an eight-member district and instead would have five- and two-member districts, respectively, with one floterial district to account for the populations in excess of the ideal, the plaintiffs' proposed map requires significant changes to other districts in the challenged counties in order to maximize compliance with the dedicated district requirement. (Pl.'s Hrg. Ex. 1 (CACR 41 (2006) (enacted)) at 014). These changes present a host of unknown consequences not reflected in the summary judgment record. Without understanding the many implications that these proposed changes would have as a consequence of providing New Ipswich and Wilton with their own dedicated districts, the court cannot conclude that the Legislature lacked a rational or legitimate basis for enacting the map for Hillsborough County in RSA 662:5.

Here, the Legislature may have utilized "community of interest" considerations for its grouping of towns or wards either in fashioning the traditional and floterial districts in the enacted plan or in declining to draw the districts the plaintiffs proposed. To enforce such dramatic changes to give two towns their own dedicated district would ignore that it "is primarily the Legislature, not the [c]ourt[s], that must make the necessary compromises to effectuate state constitutional goals and statutory policies within the limits imposed by federal law." City of

Manchester, 163 N.H. at 697. Indeed, the fact that the plaintiffs needed to make such dramatic changes to the enacted map, only to increase the number of towns or wards afforded their own dedicated district from 31 to 33, is itself an indication that the Legislature went to great lengths to make those compromises.

Further, as the defendants point out, the plaintiffs' proposal increases not only the number of floterial districts, but it also increases the average population within a floterial district as well as the average number of towns and wards included within a floterial district. (See court index #34 ¶ 51). The Legislature rationally could have decided to limit the use of floterial districts in this manner. That the plaintiffs "have devised [a plan] that appears to satisfy constitutional and statutory requirements to a greater degree than the plan approved by the Legislature" is an insufficient basis to reject the Legislature's plan. See id. at 698. The plaintiffs have failed to meet their burden to establish the absence of a rational or legitimate basis for the Legislature's many decisions that went into enacting the plan for Hillsborough County. See id.

C. Merrimack County

Finally, the plaintiffs challenge the enacted map for Merrimack County. The only purportedly affected town in Merrimack County represented by a plaintiff in this action is Hooksett, though the plaintiffs argue that Bow likewise could have but did not receive a dedicated district. (See court index #39 ¶¶ 8, 12). The enacted plan provides 15 towns and wards with their own dedicated districts. See RSA 662:5. As with Strafford and Hillsborough Counties, however, the plaintiff increases this number from 15 to 17 (or 16, as no plaintiff has standing to challenge an alleged constitutional violation against Bow) by making significant county-wide changes.

For example, to provide a single member district to Hooksett, the plaintiffs' proposed

map splits up the single-member district for Sutton and Wilmot, as well as the two-member district for New London and Newbury. The summary judgment record does not establish the absence of community of interest considerations between these towns. Likewise, the summary judgment record does not reflect the presence of such factors in the plaintiffs' proposed alternative districts for these towns—the plaintiffs propose that Newbury, Henniker, and Bradford form a three-member district, that Danbury, New London, and Wilmot form a two-member district, and that Salisbury, Sutton, Warner, and Webster form a two-member district, with excess population forming a floterial district with Boscawen, Canterbury, and Loudon. Thus, the Legislature rationally could have relied on the presence of community of interest considerations in forming these districts in the enacted plan, or it could have relied on the absence of such a connection in the alternative districts in the plaintiffs' proposed plan. The plaintiffs have failed to prove the absence of such a rational or legitimate explanation for the Legislature's judgments. See City of Manchester, 163 N.H. at 698.

In sum, the plaintiffs have failed to establish that the Legislature lacked a rational or legitimate basis in enacting the redistricting plan codified in RSA 662:5. See id. Accordingly, the plaintiffs have failed and the defendants have succeeded in establishing entitlement to judgment as a matter of law. RSA 491:8-a, III. While the court is sympathetic to the plaintiffs' efforts in "insuring some voice to political subdivisions, as subdivisions," Reynolds, 377 U.S. at 581, the court's role in the redistricting process is limited and deferential. "Redistricting is a difficult and often contentious process. A balance must be drawn. Trade-offs must be made." Id. at 706 (citation omitted). Like in City of Manchester, the plaintiffs have failed to persuade the court that "the '[t]rade-offs' the legislature made in enacting [RSA 662:5] were unreasonable." See id.

Conclusion

Consistent with the foregoing, the court DENIES the plaintiffs' motion for summary judgment (court index #31) and GRANTS the defendants' motion (court index #34).

SO ORDERED.

DATE: April 8, 2024

Mark E. Howard
Chief Justice, Presiding

Clerk's Notice of Decision
Document Sent to Parties
on 04/08/2024