

**THE STATE OF NEW HAMPSHIRE
THE SUPREME COURT**

CITY OF DOVER & a.

v.

SECRETARY OF STATE & a.

CASE NO. 2024-0259

REPLY BRIEF OF APPELLANTS (PLAINTIFFS)

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

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ARGUMENT

The Plaintiffs’ opening brief explained that in legislative redistricting, there is a hierarchy of law: the United States Constitution ranks above the New Hampshire Constitution, which ranks above the policy preferences of lawmakers. Appellants’ Br. at 22–28. It explained that this Court endorsed this hierarchy, consistent with the opinions of every state supreme court ever to consider the issue. *Id.* It explained that this Court’s precedents require an examination of a constitutional provision’s “purpose and intent,” and that the Secretary of State, Attorney General, and Legislature all understood that the purpose and intent of the 2006 amendment to Article 11 was to provide dedicated representation to as many eligible towns and wards as possible. *Id.* at 8–10, 30. It explained that the Legislature violated Article 11 by not giving dedicated representation to as many eligible towns and wards as possible (despite being shown how to do so), and that the violations at issue were not required by the United States Constitution. *Id.* at 11–13. And it explained that the Superior Court’s opinion granting summary judgment to Defendants rested on a misapplication of inapposite federal cases. *Id.* at 32–37. **The Defendants’ brief does not dispute any of this.**

Instead of addressing the issues raised by the Plaintiffs’ brief, Defendants build their response around a *non sequitur*: if the United States Constitution conflicts with the New Hampshire Constitution in some instances, then the Legislature may violate the New Hampshire Constitution in any instance for any “plausible policy reason.” Appellees’ Br. at 13–14. Put another way, when the constitutions conflict, legislators’ policy preferences leapfrog the state constitution in the hierarchy of law, permitting

them to violate it as they see fit. The defendants identify no authority that supports their position, nor do they attempt to distinguish the unanimous authority from other states rejecting it. In fact, they *concede* that “policy preferences do not trump constitutional requirements.” Appellees’ Br. at 15. Then, at the end of their brief, they abandon their position in favor of one that would require courts to second-guess legislative policy judgments with no standards to guide them.

I. The Legislature’s Preference Not to Follow the New Hampshire Constitution Is Not a Rational Basis for Violating It.

Plaintiffs and Defendants agree that rational basis review applies in this case, but they disagree about what constitutes a rational basis for the Legislature’s undisputed violation of Article 11. Relying on this Court’s opinion in a case about entitlement to COVID emergency funds, not redistricting, Defendants claim that a decision has a rational basis “‘if there is a plausible policy reason for’ the decision,” among other requirements. Appellees’ Br. at 14 (quoting *In re Petition of Whitman Operating Co.*, 174 N.H. 453, 460 (2021)). Here, Defendants make the same mistake the Superior Court made: conflating the question whether the constitution was violated with the question whether a constitutional violation was justified. *Petition of Whitman*, like the cases on which the Superior Court relied, asked the former question. 174 N.H. at 460; Appellants’ Br. at 32–37; Amicus Br. at 27–31. This case is about the latter.

When the New Hampshire Constitution has been violated, as it undisputedly has been here, the relevant question is whether the Legislature

had a rational basis for its violation. As this Court recognized in *City of Manchester v. Secretary of State*, 163 N.H. 689, 702 (2012), “adhering to the 10% rule [for presumptive compliance with the United States Constitution’s requirement of population equality] is, undoubtedly, a rational legislative policy.” That is correct because the United States Constitution ranks above a state constitution in the hierarchy of law. By the same token, violating a state constitutional mandate to effect a goal *lower* on the hierarchy, including nonconstitutional policy preferences, is not a rational basis. *In re Legislative Districting of the State*, 805 A.2d 312, 327 (Md. 2002) (“The premise on which the Special Master proceeded, that the [state 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.”); Amicus Br. at 17–27. Defendants have cited no case, anywhere in the country, in which the pursuit of nonconstitutional considerations was held to be a rational basis for violating a constitutional requirement. To the contrary, every state court faced with a conflict between a state constitutional requirement and nonconstitutional goals has held that the nonconstitutional goals cannot justify a constitutional violation. Appellants’ Br. at 24–26.

II. All Parties Agree That Policy Preferences Cannot Trump Constitutional Requirements.

Defendants concede “that policy preferences do not trump constitutional requirements.” Appellees’ Br. at 15. Nevertheless, they spend the balance of their brief trying to characterize the enacted House plan as a policy choice that the Legislature was entitled to make because perfect

compliance with Article 11 was not achievable.¹ Defendants now expressly argue what was implicit in their earlier briefs in this case: the inability to achieve perfect compliance relieves the Legislature of *any* obligation to comply, giving it a license to make whatever policy decision it chooses. Defendants' position lacks any support (citing a total of three cases and responding to virtually none of the Plaintiffs' authority), lacks any limiting principle, and would render a recently enacted constitutional right illusory.

So eager are Defendants to get away from the requirements of Article 11 that they ignore a mountain of well-established law holding that the inability to achieve perfect compliance does not release the government from constitutional compliance. As Daniel Webster remarked in the context of legislative reapportionment: "If exactness cannot, from the nature of things, be attained, then the nearest practicable approach to exactness ought to be made. *Congress is not absolved from all rule merely because the rule of perfect justice cannot be applied.*" *Denney v. State ex rel. Basler*, 42 N.E. 929, 935 (Ind. 1896) (emphasis added); *see also id.* ("One mandate of the constitution must be respected as well as another, and, as Webster said, if the mandate cannot be absolutely obeyed, it should be observed at least as nearly as may be."); *Brown v. Saunders*, 166 S.E. 105, 108-09 (Va. 1932). Legislative policy discretion simply does not and cannot override constitutional intent, and the inability to achieve perfect compliance with the constitution is not a basis to avoid it. *See State ex rel. Lein v. Sathre*, 113

¹ To be clear, what is unachievable is perfect compliance with Article 11 *and* the United States Constitution at the same time. If there were no requirement that districts have roughly equal population, perfect compliance with Article 11 would be easy.

N.W.2d 679, 685 (N.D. 1962) (“[P]erfect exactness in the apportionment according to the number of inhabitants is neither required nor possible. But there should be as close an approximation to exactness as possible, and this is the utmost limit for the exercise of legislative discretion.”) (quoting *State ex rel. Lamb v. Cunningham*, 53 N.W. 35 (Wis. 1892)). In state after state, an inability to comply perfectly with both the state constitution and federal constitution has been no reason to treat the state constitution as nonbinding. *E.g.*, *Twin Falls County v. Idaho Commission on Redistricting*, 271 P.3d 1202, 1205 (Idaho 2012) (“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.”); Appellants’ Br. at 24–26 (citing cases).

The State ignores numerous other New Hampshire-based indicia of the “as many as possible” intent State Constitution, including the language of the amendment itself and the voter guide. *See* App. I at 28 (voter guide); App. IV at 8 (committee report for CACR 41 endorsing the measure because it “will make sure that our state will have as many small house districts as possible”); App. IV at 10 (stating CACR 41 ought to pass and observing: “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 NH.”). During the 2012 House apportionment, the Legislature itself relied on a document entitled “Guidelines and Legal Principles Applicable to Redistricting the House.” That document stated, “the intent of the 2006 amendment [was] to have as [m]any small house districts as possible.” App. IV at 42. The chair of the Special Committee on Redistricting referenced

these guidelines during his explanation of House redistricting considerations, explaining the interplay between the 2006 amendment and federal “one person, one vote” standard. *Special Committee on Redistricting, Public Hearing on HB 592 and HCO 1* (Dec. 15, 2011), at 137–38, available at https://gencourt.state.nh.us/BillHistory/SofS_Archives/2012/house/HB592H.pdf. And, achieving “as many as possible” was evident in the 2012 House redistricting cycle, which saw a sharp increase in the total number of House districts post-constitutional-amendment. *Compare* Laws 2004, 18:1 (103 House districts), *with* Laws 2012, 9:1 (204 House districts).

III. Defendants Cannot Credibly Dispute That the Purpose and Intent of the 2006 Amendment Was to Provide Dedicated Representation to as Many Eligible Towns/Wards as Possible.

In 2012, the Attorney General told this Court, “In 2006, Part II, Article 11 of the New Hampshire Constitution was amended with the purpose to provide *as many single town districts as possible* while not allowing any town to be represented solely in a floterial district.” App. III at 91 (emphasis added). The Attorney General’s statement was consistent with the language of the amendment itself, the voter guide, several public statements by the Secretary of State, the Legislature’s own redistricting principles, and other indicia of the amendment’s purpose.² Appellants’ Br. 8–10, 17, 21–22, 24; Amicus Br. at 7–14. Defendants have not identified a single piece of evidence that would call that purpose into question or support their view that the

² See, e.g., *Bd. of Trustees, N.H. Judicial Ret. Plan v. Sec’y of State*, 161 N.H. 49, 53 (2010) (contemporaneous remarks and other circumstances shed light on constitutional intent).

amendment should be interpreted to give the Legislature wide latitude to ignore it.

Rather than address the overwhelming evidence that the Legislature and Executive both understood the 2006 amendment to require dedicated representation for as many towns and wards as possible, Defendants make a curious textual argument. They claim that Article 11, which is written as an unqualified mandate, is actually a qualified mandate, giving the Legislature discretion to violate it for political reasons if the United States Constitution prevents perfect compliance. Appellees' Br. at 17.³ To make Article 11 an unqualified mandate, they contend, the Legislature should have qualified it with a phrase like "to the greatest extent possible." The illogic speaks for itself.

In any event, the Supremacy Clause does not work this way; "state law is displaced only to the extent it actually conflicts with federal law." *Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 475 (1996) (quotation omitted). Here, state law requires all eligible towns and wards to receive a dedicated House seat, meaning the House redistricting may deviate from this requirement only to achieve what is required by federal law. Inherent in this is the idea of maximizing the extent to which dedicated House seats are awarded every ten years. *See Health Care for All, Inc. v. Romney*, 2005 U.S. Dist. LEXIS 14187, *26 (D. Mass. July 14, 2005) (observing the "traditional expectation that a regulated entity fully comply with its

³ Defendants appear to concede that Article 11 must be followed strictly if the United States Constitution does not prevent perfect compliance.

governing statutes and regulations, even if absolutely perfect compliance is unattainable” (quotation omitted)).

What is more, phrases like “to the greatest extent possible” are unnecessary to compel maximum compliance. State supreme courts have unanimously required maximum compliance with constitutional mandates that had no such qualifying language. *In re Reapportionment of the Colorado General Assembly*, 332 P.3d 108, 111 (Colo. 2011); *In re Reapportionment of the Colorado General Assembly*, 45 P.3d 1237, 1242 (Colo. 2002); *Stephenson v. Bartlett*, 562 S.E.2d 377, 384, 390 (N.C. 2002); *Hellar v. Cenarrusa*, 664 P.2d 765, 765, 767 (Idaho 1983); *State ex rel. Lockert v. Crowell*, 631 S.W.2d 702, 704, 709 (Tenn. 1982); *Clements v. Valles*, 620 S.W.2d 112, 113–15 (Tex. 1981). There is no basis in the text of Article 11, the history of its amendment, or authority interpreting similar provisions to dispute that when Article 11 can be followed, it must be followed.

IV. Defendants Admit That the Premise of Their Brief Is Incorrect.

In Part IV of their brief, Defendants abandon their central argument, conceding that a House map can still be found unconstitutional under the rational basis standard, even if that map was a product of the Legislature’s political judgment. Their hypothetical examples show why Plaintiffs, not Defendants, should have been awarded summary judgment.

Defendants admit that “a constitutional violation would likely be able to be established” if “the legislature . . . combine[d] two towns into one eight-member district when they could instead be divided by giving one town a

five-member district, the other town a two-member district, and placing on overarching floterial district to account for the excess,” Appellees’ Br. at 19. This case is similar to the hypothetical—especially in Hillsborough and Merrimack Counties, where it is undisputed that two more eligible towns could be given a dedicated representative without affecting the rights of any other town. *See* Appellants’ Br. at 12.⁴ In the Defendants’ hypothetical and in reality, the Legislature’s political judgment that eligible towns should be combined with other towns is irrelevant; Article 11 is violated for reasons other than compliance with the United States Constitution, and that violation is actionable.

But there is more. Defendants also admit that “a constitutional violation may well be found” when an alternative plan “doubled or tripled the number of eligible towns receiving their own districts while remaining compliant with all other constitutional mandates.” Appellees’ Br. at 19. In other words, Defendants contend that a violation’s *existence* depends on its *degree*, even though neither the text nor the history of the amendment suggests this. Regardless, even if Defendants were correct, the undisputed facts show that in Strafford County the Map-a-Thon plan illustrates a feasible way to reduce the number of eligible towns and wards without a dedicated House seat from six to two, while complying with federal and other

⁴ There appears to be no dispute that each county is severable. *See* App. III at 93. The Plaintiffs’ summary judgment filings requested invalidation county by county. *See* App. II at 17. The trial court held that RSA 662:5 is severable, *see* App. III at 9, and Defendants did not appeal.

redistricting mandates.⁵ If the degree of the violation matters, then reducing the number of violations in a county by two-thirds ought to qualify.

The Defendants' hypotheticals highlight a glaring problem with their fallback position: it has no discernible standards for courts to follow. At least the position set forth in Parts I–III of Defendants' brief (which is abandoned in Part IV) gives clear guidance: plaintiffs always lose. Now, Defendants say, "a constitutional violation may well be found," even under the rational basis test, when an alternative plan "doubled or tripled the number of eligible towns receiving their own districts." Appellees' Br. at 19. Why? What if the alternative plan doubled the number of eligible towns receiving their own districts but the Legislature had excellent nonconstitutional policy reasons for rejecting it? What if the alternative plan only increased the number of eligible towns receiving their own districts by 50%? Defendants offer no principled answer. In the Superior Court, they argued that choosing between competing maps is a nonjusticiable political question. Now they invite the courts to second-guess the Legislature's political judgment without any standards to guide them.

There is a standard, however, that this Court has endorsed, that every other state follows, and that respects the roles of the Legislature and the

⁵ The Map-a-Thon plan far more closely resembles the previous 2012 House plan, which gave Rochester Ward 5 and Dover Ward 4 dedicated House seats, *see* Laws 2012, 9:1. In other words, the "least change" from the 2012 plan to the 2022 plan would have maintained those dedicated House seats. Furthermore, Defendants erroneously refer to the Map-a-Thon plan as the Plaintiffs' plan or Plaintiffs' proposed plan, where in fact the Map-a-Thon plan was neither commissioned nor endorsed by Plaintiffs. It serves only as evidence that more dedicated House seats can be awarded while still complying with the applicable hierarchy of redistricting requirements.

Judiciary: require compliance with the state constitution to the greatest extent that compliance with the federal constitution will allow. If the Legislature violates Article 11 to adhere to the federal requirement of “one person, one vote,” then the violation has a rational basis because the federal constitution outranks the state constitution in the hierarchy of law; this was the holding of *City of Manchester*. If the Legislature violates Article 11 to further nonconstitutional policy goals, the violation lacks a rational basis because the state constitution outranks political preferences.

CONCLUSION

The Constitution is a “social contract by which government is established and its power determined ‘when men enter into a state of society.’” *Bowles v. Landaff*, 59 N.H. 164, 195 (1879) (quoting New Hampshire Bill of Rights). Trust in government depends on honoring that social contract. The State breaks that social contract (and undermines public trust) when it repudiates the well-settled understanding of a constitutional mandate in order to justify denying towns, wards, and their voters the right to dedicated representation in the House.

The Superior Court’s decision should be reversed, with directions to enter summary judgment for Plaintiffs. In addition, this Court should direct the Superior Court to stay any remedial proceedings so that the Legislature may have the first opportunity to reapportion the House in compliance with Article 11. The Superior Court should retain jurisdiction for any other remedy that may be needed.

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