IN THE

New Hampshire Supreme Court

Case No. 2024-0259

CITY OF DOVER, ET AL.,
Plaintiffs-Appellants,
v.
SECRETARY OF STATE, ET AL.,
Defendants-Appellees.

Rule 7 Mandatory Appeal from Final Order of the
Merrimack County Superior Court
Case No. 219-2022-CV-224

AMICUS BRIEF OF THE COALITION FOR OPEN DEMOCRACY IN SUPPORT OF APPELLANTS AND REVERSAL

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INTEREST OF AMICUS CURIAE

The Coalition for Open Democracy ("Open Democracy") is a nonpartisan 501(c)(3) organization founded in 1997 by a group of campaign finance reform activists, including the legendary Doris "Granny D" Haddock.

The mission of Open Democracy is political equality for all in New Hampshire and the United States. Open Democracy works across partisan lines to stop the influence of wealthy interests in politics, ensure fair redistricting, and protect the freedom to vote. Open Democracy envisions a government accountable to the people, free from the corruption of big money politics.

One of Open Democracy's primary Goals for Reform is to end gerrymandering and modernize voting. To that end, Open Democracy worked closely with Granite Staters around the last census to help communities understand the importance of fair electoral maps and the negative impact that gerrymandering has on voters, reliable elections, and representative democracy.

Open Democracy also participates in ongoing voter education efforts, including education about policies that continue to make sure every voter is able to exercise their freedom to vote

The issues in this case will affect Open Democracy's members, its core mission, and all New Hampshire citizens and voters. Open Democracy's expertise and experience in redistricting in New Hampshire and intimate knowledge of and passion for the standards applied to the same will prove useful to the Court in analyzing the significant issues before it.

SUMMARY OF ARGUMENT

First, as made clear by its history, purpose, and amendment process, Part II, Art. 11 of the New Hampshire Constitution in its current form mandates that every eligible town or ward "shall" have its own district.

Second, this Court provided a roadmap for analyzing the petitioners' claims in this case in *City of Manchester*. Unfortunately, the trial court veered off course at several critical points requiring reversal.

Specifically, because this case is the mirror image of *City of Manchester*, it requires the opposite conclusion. In *City of Manchester*, this Court upheld the legislative map because the challengers failed to present an alternative with fewer Part II, Art. 11violations that also satisfied the 10% rule. Petitioners' map in this case meets all constitutional requirements.

Third, the trial court committed reversible error by conflating the standards of review and factors relevant for

analyzing whether an Equal Protection violation occurred in the first instance with whether a clear, direct, irrefutable violation of Part II, Art. 11 is justified by a legitimate, rational basis.

Thus, this Court should reverse the trial court's decision.

ARGUMENT

I. AS MADE CLEAR BY ITS HISTORY, PURPOSE, AND AMENDMENT PROCESS, PART II, ARTICLE 11 IN ITS CURRENT FORM MANDATES THAT EVERY ELIGIBLE TOWN OR WARD SHALL HAVE ITS OWN DISTRICT.

Historically, the people of New Hampshire have placed a high value on New Hampshire's own form of federalism for at least over half a century. In 1964, New Hampshire voters approved the original amendment to Part II, Article 11 of the New Hampshire Constitution, permitting the redistricting of small towns such that those districts would "be entitled to one or more full time representatives." State of New Hampshire Manual for the General Court No. 39, 701-702 (1965); available at https://archive.org/details/manualforgeneral39newh/ (last visited Sept. 27, 2024). Specifically, on November 3, 1964, on the statewide general election ballot the voters were asked:

Are you in favor of amending the Constitution to empower the general court to district those towns, wards or unincorporated places which are too small to be entitled to one full time representative in the house of representatives so that each such

district will be entitled to one or more full time representatives in the house of representatives, the boundaries of towns, wards and unincorporated places to be preserved and those forming one district to be reasonably proximate to one another?

The voters responded with a resounding, "Yes," by nearly 3 to 1—145,387 to 47,801. *See id.* at 702.

As set forth fulsomely in the Appellant's Brief, the citizens of New Hampshire amended Part II, Art. 11 again in 2006. At that time, the legislature passed Constitutional Amendment Concurrent Resolution 41 ("CACR 41"). Appellant Br. at 8. On November 7, 2006, the voters were asked the following question on the statewide ballot:

"Are you in favor of amending the second part of the Constitution by amending article 11 to read as follows:

> [Art.] 11. [Small Towns; Representative 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-flotarial 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 district, 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 flotarial districts conforming to acceptable deviations. The legislature **shall** form the representative districts at the regular session following every decennial federal census."

State of New Hampshire Manual for the General Court No. 60, 335 (2007) (emphasis added); available at https://archive.org/details/manualforgeneral60newh/ (last visited Sept. 27, 2024) (emphasis added).

Again, New Hampshire voters overwhelmingly approved CACR 41—240,767 to 100,688. *See id.* This then became and remains the operative language of Part II, Art. 11 of the New Hampshire Constitution. Addendum to Brief ("Add.") at 1.

It is well-established that this Court is "the final arbiter of the intent of the legislature as expressed in the words of [a] statute." *In re Guardianship of Williams*, 159 N.H. 318, 323 (2009). And, that when "construing [a] statute's meaning," this Court will "first examine its language, and where possible, ascribe the plain and ordinary meanings to words used. If the language used is clear and unambiguous, [this Court] will not look beyond the language of the statute to discern legislative

intent. [This Court] will, however, construe all parts of the statute together to effectuate its overall purpose and to avoid an absurd or unjust result." *Id*. (citations omitted). "Further, [t]he legislature is not presumed to waste words or enact redundant provisions and whenever possible, every word of a statute should be given effect. We also presume that the legislature does not enact unnecessary and duplicative provisions[, and] we interpret statutes in the context of the overall statutory scheme and not in isolation." *Id.* (citation omitted). Lastly, this Court deems "the legislature's choice of language . . . to be meaningful . . . ." therefore, pertinently, "where the legislature uses different language in related statutes, we assume that the legislature intended something different." *Id*. (citation omitted).

The Legislature spoke plainly and clearly in CACR 41. In five of the six clauses of the article, the Legislature used the command "shall" to direct certain actions involving redistricting, including the operative clause in this case, which provides, "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." However, in one of the clauses, the Legislature chose to use the discretionary word "may" rather than the mandatory "shall" to indicate that, "The excess number of inhabitants of a district

may"—but need not "be added to the excess number of inhabitants of other districts to form at-large or flotarial districts conforming to acceptable deviations." This stands in stark contrast to the mandatory language of every other clause in the article.

Per the plain language canon of statutory construction, as applied consistently by this Court, the Legislature's choice to use mandatory language when directing that a qualifying "town or ward **shall** have its own district" rather than discretionary or permissive language, such as "may," which it clearly knew how to use, as it used "may" elsewhere in the same article, was intentional, and must be given the effect the Legislature intended, as expressed by this deliberate choice of mandatory language. To do otherwise would be to write it out of the Constitution completely.

Fast forward to 2021, the year following the 2020 census. Knowing that the Legislature would be engaging in redistricting, there was tremendous public outcry from individuals, in legislative hearings and at Town meetings, for qualifying towns and wards to have their own New Hampshire House district.

For example, Open Democracy Executive Director, Olivia Zink testified at a March 9, 2021, hearing of the Special House Committee on Redistricting, (Add. at 76-77), that thirty towns

were considering a warrant article calling for their town to the warrant article that day substantially similar to the following:

> Article 45: Non-Partisan Re-Districting: By petition of 25 or more eligible voters of the town of Alton to see if the town will vote to urge that the New Hampshire General Court, which is obligated to redraw the maps of political 141 districts within the state following the federal census, will ensure fair and effective representation of New Hampshire voters without gerrymandering. Additionally, these voters ask the town of Alton to urge the New Hampshire General Court to carry out the redistricting in a fair and transparent way through public meetings, not to favor a particular political party, to include communities of interest, and to minimize multi-seat districts. Furthermore, as the New Hampshire State Constitution, Part 2, Article 11 allows towns of sufficient population to have their own state representatives, not shared with other towns, for the town of Alton to petition the NH General Court for its own exclusive seat(s) in the NH House of Representatives if it does not already have it, ensuring that State Representatives properly represent the town's interests. The record of the vote approving this article shall be transmitted by written notice from the selectmen to Alton's state legislators, informing them of the demands from their constituents within 30 days of the vote. This is a petition article.

(Emphasis omitted.) *See* Alton Town Representatives, "Town of Alton, New Hampshire Annual Town Report 2020," Alton, NH Annual Reports 145, at 140-141 (2021), https://scholars.unh.edu/alton_nh_reports/145 (last visited Sept. 27, 2024); *see also* Gilford Town Representatives, "Annual Report Town of Gilford, New Hampshire for the year ending December

31, 2020," Gilford, NH Annual Reports 157, at 228 (2021), https://scholars.unh.edu/gilford_nh_reports/157 (last visited Sept. 27, 2024); Meredith Town Representatives, "The Town of Meredith, New Hampshire 2020 Annual Report for the Fiscal Year ended December 31, 2020," Meredith, NH Annual Reports 27, at 97 (2021), https://scholars.unh.edu/meredith_nh_reports/27 (last visited Sept. 27, 2024).

All told, evidence was presented to the committee indicating that about 75 towns ultimately passed the warrant article. *See, e.g.*, Add. at 102 ("We helped 74 towns around the state …" with respect to community engagement in the redistricting process.); Add. at 107 ("As in 74 other NH towns, this Resolution was passed overwhelmingly by Meredith's voters.").

Additionally, hundreds of New Hampshire citizens testified during the 2021 legislative redistricting process in support of their town or ward to have its own district. *See, e.g.*, Add. at 79-330. For example, residents of the town of Brookline noted that Brookline was eligible for its own district based on population, as were seven other towns in Hillsborough County. Add. at 98-99. And Resident Aldebran Longabaugh of Alton stated that Alton is entitled to its own district but does not get one. Add. at 105. Also, under the current legislative maps, Alton's three state representatives could all come from Gilmanton and Barnstead

(other towns in the district), leaving Alton itself with no representation. *Id.*

On March 23, 2022, HB 50 was passed and later codified as RSA 662:5. Add. at 2. In the Statement of Intent accompanying the Majority Committee Report, the Majority of the Special Committee on Redistricting expressed its intent that: "This bill, as amended, is the committee's recommendation for apportionment of state representative districts according to the 2020 census. The districts were developed to meet Federal and State constitutional criteria," including, it claimed "districts within counties which were created meeting the usual definition of 'reasonable deviation,' namely 10%." Add. at 15.

Unfortunately, as explained below, the map selected by the Legislature is not consistent with the majority's statement of intent, whereas the petitioners' proposed map is, leading to the conclusion, under this Court's precedent, that, in so doing, the Legislature acted without a rational or legitimate basis.

II. THIS COURT PROVIDED A ROADMAP FOR ANALYZING THE PETITIONERS' CLAIMS IN THIS CASE IN *CITY OF MANCHESTER*. UNFORTUNATELY, THE TRIAL COURT VEERED OFF COURSE AT SEVERAL CRITICAL POINTS REQUIRING REVERSAL.

In *City of Manchester v. Secretary of State*, 163 N.H. 689 (2012), this Court provided the trial court in this case with the

roadmap that contained every signpost it needed to decide the issues necessary to its ruling consistent with this Court's binding precedent. This case is essentially the mirror image of the case before this Court in *City of Manchester*.

There, the Legislature had passed a redistricting plan presumptively constitutional under Equal Protection with a deviation of 9.9%. *Id.* at 701. The challengers argued the plan was unconstitutional under Art. II, Part 11 because the Legislature "adher[ed] too stringently to [Equal Protection] instead of affording more towns, wards, and places their own representatives and that in doing so, the legislature violated Part II, Article 11 of the State Constitution." *Id.* at 701-702.

The challengers there 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. Nor did the challengers "present[ ] evidence that any of their plans have an overall deviation range of under 10%." *Id.* at 706. Rather, the challengers presented as evidence several plans that provided more towns their own districts but raised the deviation above the presumptively constitutional threshold of 10%, as much as to 14% or more, making those plans presumptively unconstitutional under the U.S. Constitution and Part II, Art. 9. *Id.* at 703-705.

On those facts, this Court correctly, and unsurprisingly, held that the Legislative plan was constitutional because the challengers could not show that "the legislature lacked a rational or legitimate basis for adhering to the 10% rule," as it is required by both the State and Federal Constitutions. *Id.* at 702-703.

Applying the same analysis this Court applied in *City of Manchester* to the facts of this case where (1) the stated Legislative intent in enacting the map was "to meet Federal and State constitutional criteria", Add. at 15; (2) the Legislative map has an overall population deviation greater than 10%, if only slightly (10.13%), and contains more violations of Part II, Art. 11 than are necessary to adhere to the 10% rule, Appellant Br. at 11-12; and (3) as evidence that the Legislature lacked a legitimate or rational basis for its choice of map if its intent was to meet Federal and State constitutional criteria, the petitioners provided a map that provided the maximum number of towns and wards their own districts mathematically possible "while still maintaining a deviation range of under 10%" (9.94%), *see* Appellant Br. at 11; Add. 005, this Court should correct the legal and analytical errors committed by the trial court and reach the only conclusion consistent with this Court's precedent and that of every other court to rule on a state redistricting plan on analogous facts returned following a diligent search—that the Legislature's plan is unconstitutional because the petitioner's

proposed map demonstrates that the Legislature lacked a rational or legitimate basis for choosing a map that fails to meet its stated intent to meet Federal and State constitutional criteria when it is clearly possible to create one that does.

A. This Case—the Mirror Image of the City of Manchester—Requires the Opposite Conclusion.

When reviewing a legislative redistricting plan, or the Legislature's failure to redistrict, under the New Hampshire Constitution, this Court has long acknowledged that while the Legislature rightly considers political factors in its districting decisions, the Legislature's considerations are bounded by State and Federal constitutional "requisites" because the "right to an equal vote and to equal representation is [also] too important to allow a state . . . absolute discretion. *In re Below*, 151 N.H. 135, 148, 151 (2004) (discussing the timing of the requirement that the Legislature must redistrict after each census). This Court explained a districting plan is a statute that is entitled to the presumption it is constitutional absent "a clear and substantial conflict . . . between it and the constitution." *City of Manchester*, 163 N.H. at 696.

As this Court confirmed in *City of Manchester*, "A state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the

constitutionally mandated framework of substantial population equality." 163 N.H. at 697. That is because it "is primarily the Legislature, not this Court, that must make the necessary compromises to effectuate state constitutional goals and statutory policies within the limitations imposed by federal law." *Id.* Further, "[b]oth 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.* As a result, "judicial relief becomes appropriate only when a legislature fails to reapportion according to . . . constitutional requisites in a timely fashion after having had an adequate opportunity to do so." *Id.*

In recognition of this deference afforded the Legislature in districting maters, absent allegations of an Equal Protection violation of either the one person, one vote principle or racial gerrymandering, when, like in *City of Manchester* or here, petitioners "contend that [a legislative redistricting plan] violates other state constitutional mandates," this Court applies "a standard of review *akin to* the well-established rational basis standard." 163 N.H. at 698. In other words, "[t]o prevail, the petitioners must establish that the [legislative plan] was enacted without a rational or legitimate basis." *Id.* (internal quotation marks and citation omitted).

This Court further explained that it "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" . . . or because "some resourceful mind has come up with a better one". *Id.* (internal quotation marks and citations omitted). "Although proof of such a plan "may cast doubt on the legality of the Legislature's plan[,] [t]he petitioners' burden . . . is not to establish that some other preferable plan exists, but to demonstrate the absence of a rational or legitimate basis for the challenged plan's failure to satisfy constitutional or statutory criteria" with the "burden at all times [resting] with the petitioners to establish that the legislature acted without a rational basis in enacting the [p]lan." *Id.*

B. In *City of Manchester*, this Court Upheld the Legislative Map Because the Challengers failed to Present an Alternative with Fewer Part II, Art. 11 Violations that Also Satisfied the 10% Rule. Petitioners Map in This Case Fits the Bill.

In *City of Manchester*, the operative legislative statement of intent provided that "the Plan represents 'the culmination of months of research, public input, and discussion concerning how to appropriately apportion New Hampshire House seats [under] ... the 2010 census while complying with federal and state

constitutional requirements.'" 163 N.H. at 694 (quoting the Legislative Statement of Intent).

There, the challengers "fault[ed] the legislature for adopting a plan with an overall range of deviation under 10%. They argue[ed] that the legislature could have adopted a plan with a higher range of deviation that afforded more towns, wards, and places their own representatives and, thus, could have complied more fully with Part II, Article 11 while also complying with the Federal Constitution." Id. at 702.

However, the challengers in *City of Manchester* 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.* Rather, "the thrust of their argument [was] that the legislature needlessly adhered to the 10% rule. Had the legislature only relaxed this rule, the petitioners assert[ed], it could have given more towns, wards, and places their own representatives." *Id.*

Not persuaded, there this Court explained that the challengers had "not shown that the legislature lacked a rational or legitimate basis for adhering to the 10% rule." *Id.*

As this Court explained, "The legislature had a choice to make: adhere to the 10% rule and give fewer towns, wards, and places their own districts or exceed the 10% rule and give more towns, wards, and places their own districts. This is a policy

decision reserved to the legislature." Id. at 704. By identifying the choice between adhering to the 10% rule and maximizing the requirement under Part II, Art. 11 that towns and wards of a certain size "shall" have their own districts as a "policy decision," this Court provided insight and guidance into the sorts of "policy decisions" that are legitimate and rational to weigh against the mandate of Part II, Art. 11—competing constitutional provisions. Importantly, by defining the policy decisions reserved to the legislature in terms of alternative constitutional mandates, this Court did not support subordinating either constitutional provision to policy concerns not enshrined in either the State or Federal constitution, or a statute effectuating a provision of the same.

Next, this Court turned to the question of evidence—what evidence can a petitioner who bears the burden of proof marshal to satisfy the test "akin to . . . the rational basis standard"? *See City of Manchester*, 163 N.H. at 698, 703-704.

In explaining why none of the plans proposed by the challengers in *City of Manchester* were sufficient to persuade this Court "that the [legislative plan] lack[ed] a rational or legitimate basis", this Court defined the characteristics necessary to a plan that may carry the day. 163 N.H. at 703-704.

Specifically, this Court rejected the challengers' primary plan that they claimed had "an overall deviation range of 14%,

and which also gives twenty-four additional towns, wards, and places their own representatives. The petitioners contend[ed] that this plan demonstrates that the legislature could have adopted a plan with a somewhat higher overall deviation that gives more towns, wards, and places their own representatives. Doing so, the petitioners argue, would have represented a better accommodation of all pertinent federal and state constitutional requirements." *Id.* This Court rejected the challengers' unsupported "assumption that a plan with an overall population deviation range of 14% necessarily complies with the Federal and State Constitutions" because "such a plan has been deemed 'presumptively unconstitutional' under the Equal Protection Clause." *Id.* (citations omitted).

This Court explained that the challengers' "other plans also fail[ed] to demonstrate that the [legislative plan] lack[ed] a rational or legitimate basis" because they were either also presumptively unconstitutional under the Equal Protection Clause or otherwise illogical or constitutionally infirm. *City of Manchester*, 163 N.H. at 704.

By explaining that the challengers' offer of proof failed because the maps they proposed either failed to comply with the 10% rule or another constitutional requirement, this Court suggested that had they presented a plan that maximized compliance with Part II, Art. 11 and complied with Part II, Art. 9

and Equal Protection, the existence of that plan combined with the legislature's failure to accept it would have persuaded the Court that the enacted plan lacked a rational or legitimate basis. *See id.*

Petitioners' map in this case fits the description of a map sufficient to persuade this Court that the Legislative Map lacks a rational or legitimate basis. The Petitioners' proposed map would have given more towns, wards, and places their own districts while bringing the deviation range of the Legislative map down from a presumptively unconstitutional range above 10% to a presumptively constitutional range below 10%. *See* Appellant Br. at 11-12. And, like the session of the legislature in *City of Manchester*, the Legislature in this case also expressed its intent that the "districts were developed to meet Federal and State constitutional criteria." Add. at 15. However, unlike the session of the legislature in *City of Manchester*, in this case, the Legislature failed to choose a map that is consistent with its stated intent. See Appellant Br. at 11-12. Opting for a map that fails to achieve the intent of the statute when presented with one that does, defies logic and reason, demonstrating that the Legislature's decision lacks a legitimate or rational basis.

Further, this is not a situation of the sort this Court warned against where petitioners ask this Court to reject HB 50 "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. Rather, here, there are two maps that are facially unconstitutional under Part II. Art. 11. The differences are that the fewer clear and substantial facial violations in the Map-a-thon map are justified because they are the least number of violations achievable consistent with a deviation presumptively constitutional under Part II, Art. 11 and Equal Protection—the only rational basis justifying express violations of Part II, Art. 11 this Court has ever previously recognized. See *id.* at 704.

Due to the challengers' failure of proof in City of Manchester, this Court distinguished two cases on their facts that support striking the Legislative map in this case. Specifically, because "of the petitioner's failure of proof", this Court distinguished *Holt v. 2011 Reapportionment Comm'n*, 38 A.3d 711 (Pa. 2012), on the basis that there, "the court 'focuse[d] primarily on the evidence represented by [the challengers'] alternative plan' and found that this plan 'show[ed] that a redistricting map could readily be fashioned which maintained a roughly equivalent level of population deviation . . . as the Final Plan, while [splitting] significantly fewer political subdivisions.'" *City of Manchester*, 163 N.H. at 706 (quoting Holt, 2012 WL 3375298, at *35).

Here, Petitioners presented, if anything, more persuasive evidence than the petitioners in *Holt*, an alternative map that provided overall more designated districts while decreasing the level of population deviation to a presumptively constitutional level.

Similarly, this Court distinguished *Twin Falls County v. Idaho Comm'n,* 152 Idaho 346 (2012), where the court ruled that a plan with a population deviation under 10% "violated the State Constitution because it divided more counties than were necessary to achieve this deviation," *City of Manchester*, 163 N.H. at 706, expressly noting, "Here, the petitioners have not presented evidence that any of their plans have an overall deviation range under 10%." *Id.*

Petitioners' map in this case does.

Lastly, in upholding the plan enacted by the legislature there, this Court explained that "Part II, Art. 11 sets forth only some of several constitutional criteria that a redistricting plan must satisfy." *Id.* at 706. This Court went on to explain:

> In addition to the overarching criterion of population equality, the redistricting plan must be based upon the last federal decennial census; there may be no fewer than 375 and no more than 400 representatives; no town, ward, or place may be divided unless it requests to be divided by referendum; and the boundaries of towns, wards, and places

> must be preserved and contiguous. N.H. CONST. pt. II, arts. 9, 11, 11–a. As the petitioners conceded at oral argument, perfect compliance with all of these mandates is impossible. "Redistricting is a difficult and often contentious process. A balance must be drawn. Trade-offs must be made." *Beaubien*, 260 Ill.Dec. 842, 762 N.E.2d at 507. The petitioners have failed to persuade us that the "[t]rade-offs" the legislature made in enacting the Plan were unreasonable.

Id.

These then are the "traditional state policies" the "constitutional goals and statutory policies" this Court contemplated the legislature is empowered and best suited to weigh, balance, rationally and legitimately, and among which trade-offs must be made. *City of Manchester,* 163 N.H. at 697, 706.

Further, not only did this Court expressly reject so-called "communities of interest" as a set of stand-alone considerations the legislature is required to consider in making redistricting decisions—while acknowledging they are important in the Equal Protection context as "objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines"—it explained that the New Hampshire Constitution contains "proxies for community of interest" factors "such as its requirement that districts contain contiguous towns, wards, and

places and that the boundaries of towns, wards, and places be preserved . . .” such that these proxies are incorporated into Part II, Art. 11. *City of Manchester*, 163 N.H. at 707.

This Court also made the point that even accepting as true the challengers’ allegations that the legislature’s plan divided communities of interest, this would not “call into question its constitutionality”, making clear that in the face of a plan that complies with Equal Protection and Part II, Art. 9 while giving as many towns, wards, and places as possible their own districts, overriding these constitutional mandates to accommodate “communities of interest”—an interest this Court recognized is a lower priority “a legitimate goal” but not a “constitutional right”— would not be a legitimate, rational basis for choosing a plan when the petitioners here presented a plan that the Court in *City of Manchester* was looking for, one in which “the legislature could have given more towns, wards, and places their own districts while still maintaining a deviation range of under 10%.” *City of Manchester*, 163 N.H. at 702.

From these principles established in this Court’s precedent, it follows that the trial court committed reversible error in this case.

C. The Trial Court Committed Reversible Error by Conflating the Standards of Review and Factors Relevant for Analyzing Whether an Equal Protection Violation Occurred in the

First Instance with Whether a Clear, Direct, Irrefutable Violation of Part II, Art. 11 Is Justified by a Legitimate, Rational Basis.

Unfortunately, although as set out above, in *City of Manchester*, this Court provided the trial court with a clear roadmap for how to analyze the legal questions presented in this case and weigh the evidence against the proper standard, considering the proper factors, the trial court committed reversible error when it conflated this Court's standard for analyzing whether a redistricting plan is constitutional under Art. II, Part 11 with the separate standard for analyzing (1) whether a federal or state Equal Protection violation of either the one person, one vote principle, or racial gerrymandering, has occurred, and (2) only if a violation has occurred, whether the challenged action nonetheless can withstand strict scrutiny, resulting in a decision that, if permitted to stand, will write the constitutional mandates and policies New Hampshire voters overwhelmingly ratified out of Part II, Art. 11, and replace them with the prevailing policy whims of any slimmest majority that happens to control the Legislature after the federal census—if they even choose to abide that mandate.

By way of example, on page 15 of its Order, the trial court took its first wrong turn relevant to this issue. The trial court took out of context this Court's analysis rejecting "communities of

interest" as a constitutionally required part of the redistricting analysis and even going as far as to say that disregarding them would not "call into question" the constitutionality of the legislative plan, because they are relevant to rebutting an inference that a district was gerrymandered on the basis of race not to a Part II, Art. 11 analysis, and turned them into "important" "objective factors" that could serve as a legitimate or rational basis for ignoring Part II, Art. 11's express constitutional mandate. Appellant Add. 016.

Similarly, the trial court erroneously borrowed another construct from step one of the Equal Protection analysis and pronounced, quoting *Karcher v. Daggett*, 462 US. 725, 740 (1983), another racial gerrymandering case, contrary to the list of constitutional and statutory considerations set out in this Court's decision in *City of Manchester*, that "'[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'" qualify as a legitimate, rational basis for violating Part II, Art. 11.

It is clear that the trial court confused this Court's reference to the factors for determining whether an Equal Protection violation occurred or whether a population deviation was justified by legitimate, non-discriminatory reasons, and

imported those reasons—relevant to rebutting a prima facie case of an Equal Protection violation in a racial gerrymandering case like *Karcher*, but that the plaintiff could then disprove or undermine with evidence of discriminatory purpose in a burden shifting analysis—into its analysis of whether a facial violation of an express constitutional mandate on which the petitioner bears the burden at all times is tolerable consistent with the rule of law.

This was reversible error.

In *City of Manchester*, when this Court invoked *Karcher* and *Shaw v. Reno*, 509 U.S. 630 (1993) (also a racial gerrymandering case), it did so appropriately to analyze the Equal Protection issue and distinguish and reject "communities of interest" as a relevant constitutional factor under Part II, Art. 11, not to provide—in dicta—a limitless list of hypothetical "rational bases" bounded only by the imaginations of lawyers and jurists that would justify violating an express constitutional mandate like Part II, Art. 11. See *City of Manchester*, 163 N.H. at 700-701, 708.

Rather, it is the list of constitutional and statutory criteria set out by this Court in *City of Manchester* that forms the universe of legitimate and rational factors that legislature is empowered and best suited to weigh, balance, rationally and

legitimately, and among which trade-offs must be made. *See,* 163 N.H. at 697, 706.

Otherwise, if allowed to stand, the limitless list of whimsical considerations that the trial court's Order would allow to override express constitutional mandates would write this and nearly every other mandate out of the New Hampshire Constitution—rendering them instead merely permissible, discretionary, rather than the mandates the plain language of Part II, Art.11, as ratified by the voters, makes clear they were intended to be.

CONCLUSION

For the reasons stated herein and in the Opening Brief of Appellants, this Court should reverse the trial court's decision.

September 27, 2024

By: /s/ S. Amy Spencer

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 26 of the New Hampshire Supreme Court, I certify that this brief complies with the 9,500-word limit imposed by Rule 16(11). The amicus brief contains 6,332 words, exclusive of pages containing the table of contents and table of citations.

Dated: September 27, 2024 */s/ S. Amy Spencer*

CERTIFICATE OF SERVICE

I am filing this amicus brief electronically. I certify that a copy of this amicus brief is being or has been served on all other parties or their counsel, in accordance with the rules of the Supreme Court, as follows: I am serving registered e-filers through the court's electronic filing system.

Dated: September 27, 2024 */s/ S. Amy Spencer*