STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY SUPERIOR COURT

219-2022-CV-00224

CITY OF DOVER,
CITY OF ROCHESTER,
DEBRA HACKETT,
ROD WATKINS,
KERMIT WILLIAMS,
EILEEN EHLERS,
JANICE KELBLE,
ERIK JOHNSON,
DEBORAH SUGERMAN,
SUSAN RICE,
DOUGLAS BOGEN, and
JOHN WALLACE

v.

DAVID M. SCANLAN,
in his official capacity as the New Hampshire Secretary of State

&

THE STATE OF NEW HAMPSHIRE

DEFENDANTS' REPLY TO PLAINTIFFS' OBECTION TO MOTION TO DISMISS

The Defendants, David Scanlan, in his official capacity as the New Hampshire Secretary of State, and John Formella, in his official capacity as the New Hampshire Attorney General, by and through counsel, for the reasons stated in the previously submitted Memorandum of Law, reply to the Plaintiffs' objection and further explain how the Plaintiffs' claims present a nonjusticiable question and fail to state a claim upon which relief may be granted.

To be blunt, in their Objection to the Motion to Dismiss, the Plaintiffs have spent a significant amount of time presenting questions and arguments that the Defendants did not

present or propose. Whether mistakenly or deliberately, the Plaintiffs' objection fails to comprehend the actual argument made by the Defendants—the public policy decisions regarding the reciprocal harm in allocating single-member districts in redistricting the New Hampshire House of Representatives is a political question. The Plaintiffs claim that the Legislature acted unconstitutionally in its determinations as to how it allocated and managed the reality of Part II, Article 11 forced violations. In making this claim, they admit exactly the point the Defendants were making—that balancing of harms by having to choose amongst several options that all include forced violations is the definition of a political question. Contrary to what the Plaintiffs claim,[1] the Defendants never advanced in the Motion to Dismiss the argument that House redistricting *in its entirety* is a political question.

Indeed, in the Motion to Dismiss, the Defendants identify for the Court the circumstances and precedents where the judicial branch may review or become involved in redistricting questions. But, the argument presented in the Motion to Dismiss—ignored or misunderstood entirely by the Plaintiffs—is that the particular question of balancing harms related to forced violations of single-seat representative districts necessarily relies on public policy determinations that make it a classic political question. Based on the Legislature's articulation of its consideration of the Part II, Article 11 balancing to avoid arbitrarily favoring one town over another—the rational and legitimate making of public policy decisions regarding the reciprocal harm in allocating single-member districts—the issue presented is a nonjusticiable political question under state law. This Court should accordingly dismiss the Plaintiffs' complaint in its entirety.

[1] "The State almost exclusively bases its motion on the "political question" doctrine, advancing the novel proposition that House redistricting—indeed, practically all legislative redistricting—is so political as to be unreviewable by this Court." Objection to Motion to Dismiss, p. 5.

The Plaintiffs acknowledge that forced violations of Part II, Article 11 *will certainly* occur. Complaint ¶ 29. This undercuts their argument that the Part II, Article 11 directive can never be violated. Instead, as forced violations are a reality given the population and boundaries of New Hampshire political subdivisions, the management of the Part II, Article 11 obligation all comes down to the balancing of competing obligations and interests of various towns or wards that are similarly positioned.

The Plaintiffs also correctly identify the reality that New Hampshire courts have jurisdiction over certain aspects of redistricting. Objection to Motion to Dismiss, page 5. But, the Plaintiffs are misguided in spending multiple pages arguing against a claim the Defendants never made. For example, the Plaintiffs mischaracterize the claim related to the "political considerations that the Legislature has the *exclusive* province to weigh and decide"—the Defendants, in the paragraph immediately preceding that statement, specifically acknowledged the judiciary's ability to resolve certain redistricting questions, but *not* political questions.[2]

This Plaintiffs' statement is similarly overbroad and misses the point of the Defendants' argument: "That the Court would fashion a remedy by drawing its own districts belies any assertion that redistricting is exclusively a legislative function or that no remedy lies with this branch." *Id.,* page 8. The Plaintiffs point to several cases—first identified to the court by the Defendants in the Motion to Dismiss—that clarify *in what areas of redistricting* the judiciary has a role. But, the fact that, for example, the Supreme Court adopted a special master's map for congressional districts when no congressional map was passed into law says nothing about the political question at the heart of the Part II, Article 11 balancing obligation.

[2] The Plaintiffs' misguided analysis is in their Objection at page 7.

Similarly, the Plaintiffs point to *Brown v. Scanlan*, Docket No. 2022-CV-00181 (October 5, 2022) in claiming that some redistricting issues are justiciable. The Plaintiffs are correct—one person, one vote population apportionment arguments are justiciable—but failed to note that Judge Colburn's conclusion in that case was that partisan gerrymandering was a political question and therefore *outside* the scope of judicial review under the New Hampshire Constitution and state law. Objection, page 10. Again, the Plaintiffs are misstating or misunderstanding the Defendants' argument and fail to address the potent realities articulated in the Motion to Dismiss.

Repetitively, the Plaintiffs again present the Motion to Dismiss as arguing something it never does: "To accept the State's broad view of the 'political question' doctrine—bereft of any limiting principle—and take that to its logical conclusion would mean no Court ever reviews any redistricting plan, which is an illogical outcome." Objection, page 11. Again, while recounting a parade of horribles, the Plaintiffs are not actually describing the Defendants' position. The Plaintiffs' indignation—evidenced in arguments containing cites to *Merrill v. Sherburne* (1818) and *Marbury v. Madison* (1803)—is misplaced.

Within the scope of managing the reality of Part II, Article 11 forced violations, the political question is the Legislature's balancing of harms—by not discriminating amongst similarly situated towns. The Defendants in no way argue here or in the Motion to Dismiss that the political question doctrine extends to all redistricting cases.

The Defendants note that it is instructive that the Plaintiffs attack straw man arguments the Defendants never proposed rather than answer the substance of the Motion to Dismiss. Perhaps it is because the Plaintiffs misunderstand the simple concept argued—allocating single-member districts is a political question, even while other aspects of redistricting are not—or

because it is easier for the Plaintiffs to attack an argument the Defendants do not make rather than to take the actual argument on its merits. Either way, the failure to address the substance of the Defendants' Motion to Dismiss makes clear that the Plaintiffs cannot effectively oppose the core concept—the rational and legitimate making of public policy decisions regarding the reciprocal harm in allocating single-member districts is a nonjusticiable political question under state law.

Finally, regarding the argument about the failure to state a claim, it is straightforward: the existence of other possible maps does not render the existing map unconstitutional or demonstrate that it is lacking a rational or legitimate basis. Instead, it is the Plaintiffs' burden to establish the absence of a rational or legitimate basis for the challenged plan's failure to satisfy constitutional or statutory criteria. The Plaintiffs simply have not satisfied that burden. They instead insist that their preferred legislative text should prevail, all while never mentioning the legislative record's demonstration of the Legislature's discussion, reasoning, and balancing of this subject. Just as the Plaintiffs (deliberately or mistakenly) misapprehend the Defendants' arguments, the Plaintiffs refuse to acknowledge the evidence of justification and rational consideration in the legislative record—nondiscrimination amongst similarly-situated towns and wards—instead making the subjective claim that they just do not like the result produced by the Legislature. As such, the Plaintiffs' claims are a legal conclusion to which no weight is afforded and should be dismissed.

Respectfully submitted,

DAVID SCANLAN, SECRETARY OF STATE

and

THE STATE OF NEW HAMPSHIRE

By his attorneys,

JOHN M. FORMELLA
ATTORNEY GENERAL

Date: November 28, 2022

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CERTIFICATE OF SERVICE

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

/s/ *Myles Matteson*
Myles Matteson