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