THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2024-0259

City of Dover & a.

v.

Secretary of State, & a.

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE STRAFFORD COUNTY SUPERIOR COURT

BRIEF FOR THE APPELLEES

NEW HAMPSHIRE SECRETARY OF STATE
AND
THE STATE OF NEW HAMPSHIRE

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(Fifteen-minute oral argument requested)

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ISSUES PRESENTED

I. Whether the rational or legitimate basis test articulated in *City of Manchester* can be satisfied by rational policy preferences of the Legislature.

II. Whether Part II, Article 11 of the New Hampshire Constitution requires strict mathematical maximization of the whole number of towns and wards with their own representative district.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

This appeal arises from a challenge brought by the cities of Dover and Rochester, as well as numerous individual plaintiffs, challenging the decennial redistricting of the New Hampshire House of Representatives following the 2020 federal census. The facts underlying the case are largely uncontested and are also largely immaterial to the legal questions presented in this appeal.

As the Superior Court summarized:

> In 2021, the State House of Representatives ("House") redistricting process began with the introduction of House Bill 50 ("HB 50) (Law 2022, ch. 9, RSA 662:5) (the "enacted plan"). … 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. … 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. These same towns and wards did not receive their own dedicated House seat in the enacted plan. … 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. … 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. … The Legislature did not adopt the plaintiffs' proposed plan and instead adopted HB 50, which the Governor signed into law as RSA 662:5.

Add.2-3.[1]

Plaintiffs filed a legal challenge to HB 50/RSA 662:5 which sought "declaratory and injunctive relief" declaring the redistricting plan chosen by the legislature to be "in violation of the New Hampshire Constitution, Part II, Article 11." App.1 6. They did not raise any challenge under federal equal protection principles nor under Part II, Article 9 of the New Hampshire Constitution. *See* App.1 6-24.

The case ultimately proceeded to resolution on cross-motions for summary judgement. In ruling on these cross-motions, the superior court (*Howard*, C.J.) addressed four preliminary issues.

First, the court found Plaintiffs lacked standing to "vindicate alleged injuries" to non-party towns. Add.9. Given this lack of standing and the fact that redistricting is conducted county by county, the superior court determined that it would "confine[] 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 from even one town or ward (Cheshire, Grafton, and Rockingham)." Add.11.

Second, the court denied Defendants' request that the case be dismissed as raising a non-justiciable political question. Add.11-12.

Third, the court held that under *City of Manchester*, the burden of proof to establishing unconstitutionality rested with Plaintiffs at all times and did not shift to Defendants. Add.12-14.

[1] "Add." refers to the addendum following the Plaintiffs' appellate brief; "App.1" through "App.4" refers to the appendixes filed by the Plaintiffs.

Finally, the court considered the "nature or character" of the rational or legitimate basis requirement from *City of Manchester*. Add.17. The court considers whether, in discussing a "hierarchy" of laws in *City of Manchester*, this Court had limited lower courts to considering only constitutional mandates when determining if the legislature had a rational or legitimate basis for their chosen redistricting plan. The superior court concluded in the negative; writing that the reference to "hierarchy of appliable law" in *City of Manchester*, "was meant only to bolster [the court's] conclusion that 'adhering to the 10% rule is, undoubtedly, a rational legislative policy.'" Add.17. "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, or any number of consistently applied legislative policies." *Id.* (internal citations omitted).

Moving to the merits, the superior court observed that incorporating the changes Plaintiffs had standing to advocate for would result in a "net gain" of six more towns/wards having a dedicated district. Add.17-20. For context, the adopted state plan provided "ninety-six other towns and wards with dedicated districts[.]" Add.20. The court then examined each of the three relevant counties in turn and determined for each that Plaintiffs failed to bear their burden of proving the legislature lacked a rational or legitimate basis for the choices made.

As to Strafford County, the court observed that the legislature could have rationally chosen HB 50 over the plan proposed by the plaintiffs as it provided Durham (the largest town) with a dedicated district, ensuring that

the small town of Madbury was subsumed within a large district with Durham, and used one fewer floterial district. Add.22-24.

As to Hillsborough County, the court noted the "dramatic changes to the countywide map" necessitated by Plaintiffs attempts to give 33 instead of 31 towns a dedicated district, and that these changes would "present a host of unknown consequences[.]" Add.24. Given this, the court explained: "To enforce such dramatic changes to give two towns their own dedicated district would ignore that it is primarily the Legislature, not the courts, that must make the necessary compromises to effectuate state constitutional goals and statutory policies within the limits imposed by federal law." Add.25 (internal citation omitted). The court observed that the Plaintiffs' claims here are unlike a situation "where Goffstown and Weare could together have an eight-member district" and the constitution would dictate that they instead "have five- and two-member districts, respectively, with one floterial district to account for the populations in excess of the ideal[.]" *Id.* at 25.

As to Merrimack County, the court observed that Plaintiffs again increase the number of towns with dedicated districts by two through the making of "significant county-wide changes." Add.26. In explaining the lack of constitutional violation here, the court discussed community of interest considerations, writing:

> 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 Bedford form a three-member district, that Danbury, New London, and Wilmot 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.

Add.26-27.

Having reached these conclusions, the superior court denied Plaintiffs' motion for summary judgment and granted Defendant's motion for summary judgment. Add.28. Plaintiffs thereafter filed this appeal.

Plaintiffs do not challenge the superior court's ruling on standing. Nor do they challenge the ruling that policy preferences exist which could rationally lead a legislator to prefer HB 50's map over the map the Plaintiffs advocated. The issue raised on appeal is limited to whether policy choices not directly tied to constitutional mandates can, as a matter of law, provide a sufficient rational or legitimate basis for a Legislature's decision to provide less than the strict mathematical maximization of the

whole number of towns and wards which could have their own district without violating any other provisions of the state or federal constitutions.

SUMMARY OF THE ARGUMENT

Plaintiffs claim that House Bill 50, codified in RSA 662:5 and dividing the state into state representative districts, should be declared unconstitutional as it fails to comply with Part II, Article 11 of the New Hampshire Constitution.

Part II, Article 11 in relevant part provides: "When the population of any town or ward … 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." This provision uses mandatory language, without any of the qualifying language found in other constitutional provisions. *See, e.g.,* N.H. Const. Part. II, Art. 9 (providing that representation "shall be as equal as circumstances will admit"). As such, it is indisputably impossible to create a redistricting plan which strictly complies with the constitutional mandate. Neither House Bill 50 nor the redistricting map proposed by the plaintiffs strictly complies with Part II, Article 11 because a map cannot be drawn which provides every eligible town and ward with its own district while also complying with other federal and state constitutional mandates.

Given this unique circumstance—where all maps are going to be noncompliant, and some deviation from strict application of the constitutional text must be tolerated—this Court has adopted a standard "akin to the well-established rational basis standard" for determining whether a plaintiff has established the noncompliant map chosen by New Hampshire's legislative branch is in violation of Part II, Article 11 and must be declared unconstitutional. *City of Manchester v. Secretary of State*,

163 N.H. 689, 698 (2012). "To prevail, the petitioners must establish that [the redistricting plan] was enacted without a rational or legitimate basis." *Id.* (internal citation omitted).

Plaintiffs do not contest application of this standard. Instead, the thrust of Plaintiffs' argument is that policy considerations cannot provide the rational or legitimate basis needed to satisfy the *City of Manchester* standard because policy considerations cannot be used to justify a failure to comply with constitutional mandates. This argument, while rhetorically appealing, misapprehends the nature of the *City of Manchester* standard. The Legislature need not have a rational or legitimate basis to justifying noncompliance with the strict statutory language. Noncompliance is indisputably inevitable. The Legislature needs a rational or legitimate basis for choosing one noncompliant map over another noncompliant map. And policy considerations can provide such a rational or legitimate basis.

ARGUMENT

I. STANDARD OF REVIEW AND BURDEN OF PROOF

When reviewing challenges to the constitutionality of legislative enactments, the Court begins with a presumption of constitutionality and departs therefrom only "upon inescapable grounds." *City of Manchester v. Secretary of State*, 163 N.H. 689, 696 (2012) (internal citation omitted). Particularly in the redistricting context, courts should "defer to legislative enactments not only because they represent the duly enacted and carefully considered decision of a coequal and representative branch of government, … but also because the legislature is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions." *Id.* at 696-97 (internal citations omitted). "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.* at 697 (internal citations omitted).

Because of this presumption of constitutionality, "the party challenging [the legislative enactment] bears the burden of proof." *Id.* at 698. When the constitutional challenge alleges a violation of Part II, Article 11—as the plaintiffs in this case do—the plaintiffs bear this burden by establishing the legislatively enacted redistricting plan "was enacted without a rational or legitimate basis." *Id.* In other words, the court applies "a standard of review akin to the well-established rational basis standard." *Id.*

This well-established rational basis standard of review calls for courts to uphold governmental decisions "if there is a plausible policy reason for" the decision, the facts upon which the decision was "apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship" between the decision and the "goal is not so attenuated as to render the [decision] arbitrary or irrational." *In re Petition of Whitman Operating Co.*, 174 N.H. 453, 460 (2021) (internal citation omitted). In the context of a rational basis review, courts make no independent examination of the factual basis relied upon by the governmental decision maker. *Cmty. Res. For Justice, Inc. v. City of Manchester*, 154 N.H. 748, 757 (2007) (internal citation omitted). Rather, the court is to "inquire only as to whether the legislature could reasonably conceive to be true the facts upon which it is based." *Id.* (internal citation omitted). Under rational basis review, the defenders of a governmental decision maker have "no obligation to produce evidence to sustain the" decision. *Id.* at 761. It is the petitioners advocating for a finding of unconstitutionality who "have the burden to negative every conceivable basis which might support the classification." *Id.* at 757 (internal citation omitted).

II. POLICY CONSIDERATIONS CAN PROVIDE A RATIONAL OR LEGITIMATE BASIS FOR CHOOSING ONE NONCOMPLIANT MAP OVER ANOTHER.

As discussed above, this Court was clear in *City of Manchester* that when faced with a challenge to the constitutionality of a redistricting plan under Part II, Article 11, a rational basis review is to be employed. 163

N.H. at 698. A rational basis review asks if the legislature had "plausible *policy reason* for" the legislative decision made. *In re Petition of Whitman Operating Co.*, 174 N.H. at 460 (emphasis added). Applying this standard in *City of Manchester*, this Court concluded that "adhering to the 10% rule is, undoubtedly, a rational legislative *policy*." 163 N.H. at 702 (emphasis added).

Despite this clearly articulated standard for the necessary rational basis review, Plaintiffs request this Court hold that "a nonconstitutional policy preference cannot be a rational or legitimate basis for violating an explicit, mandatory constitutional requirement." PB 28. Plaintiffs reason that this must be true given the hierarchy of laws pursuant to which federal constitutional provisions take precedence over state constitutional provisions and legislators cannot pass laws that violate constitutional provisions simply because they desire to do so for policy reasons. PB 22-28.

While it is not incorrect that policy preferences do not trump constitutional requirements, this point is immaterial to the resolution of this case and Plaintiffs' reliance on it misunderstands the nature of the rational basis review to be conducted. It is uncontested that all redistricting plans which comply with equal protection mandates—including both House Bill 50 and the plan advanced by the Plaintiffs—fail to comply strictly with Part II, Article 11's direction that all eligible towns and wards "shall have [their] own district of one or more representative seats." N.H. Const. Part II, Art. 11. As this Court wrote in *City of Manchester*: "[T]he legislature could not have adopted a plan with an overall deviation of under 10% in which every town, ward or place having a population within a reasonable deviation from

the ideal population has its own district." 163 N.H. at 702. As such, the question being asked in *City of Manchester* was not whether the Legislature had a rational or legitimate basis to justify its failure to comply with the mandatory language of Part II, Article 11. Noncompliance was indisputably inevitable. The question being asked in *City of Manchester* was whether the Legislature had a rational or legitimate basis for choosing one noncompliant map over another noncompliant map.

Given that the choice is between two noncompliant maps, the Plaintiffs' request is essentially for this Court to substitute its judgment for the political judgment of the Legislature—the branch of government to which the constitution commits redistricting authority. Deciding which towns and wards receive the political benefit of their own district, in the context of a redistricting process that cannot possibly give every eligible town and ward its own district, is necessarily a political decision to be made by the Legislature based on policy considerations, some of which may have constitutional underpinnings, and some may not.

III. PART II, ARTICLE 11 CONTAINS NO REQUIREMENT OF STRICT MATHEMATICAL MAXIMIZATION OF THE WHOLE NUMBER OF TOWNS AND WARDS WITH THEIR OWN INDIVIDUAL DISTRICTS.

Recognizing that even their own map fails to provide every eligible town and ward its own district, the Plaintiffs argue that Part II, Article 11 contains a requirement that the Legislature "maximize" the number of towns and wards that receive their own legislative district. PB 28-29. In other words, according to the plaintiffs, noncompliant maps which mathematically maximize the whole number of towns and wards receiving

individual districts do not 'violate' the constitution despite their noncompliance. In support of this contention, Plaintiffs point to no statutory language. Instead, they read this maximization requirement into the constitution based upon the purported intentions of those who proposed and advocated for the amendment. PB 28-32. The problem with this argument is that it ignores the plain language of the constitutional provision which was adopted through a vote of the people of New Hampshire.

Part II, Article 11 contains no language requiring or even suggesting that the provision is satisfied through maximization of the whole number of towns or wards with their own districts. As Plaintiffs themselves zealously argue, its language is absolute. The language adopted does not say towns and wards are to be giving their own districts "to the greatest extent possible" or "in the greatest proportion which can be achieved while maintaining compliance with all other constitutional mandates." Instead, it is silent regarding how the Legislature is to decide which towns and wards should receive their own districts when presented with the impossibility of giving every town and ward such a district.

For example, is it better to give the largest whole number of towns and wards their own districts? Or is it better to maximize the number of people living in towns and wards that have their own district? Is it better to prioritize towns over wards based on their more salient political identities or should towns and wards to be treated equally? Is it better to prioritize given higher or lower population towns? The constitutional language does not dictate these choices and, as such, they are necessarily left to the sound political judgment of the legislature so long as the legislative choices are based on rational or legitimate, nondiscriminatory policy preferences.

Recognizing the existence of this political question unanswered by the Constitution, this Court made clear in *City of Manchester* that courts cannot "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." 163 N.H. at 698 (internal citation omitted). This holding is both logically consistent with the language of New Hampshire's Constitution and is consistent with the basic principles of rational basis review. *See Cmty. Res. For Justice, Inc. v. City of Manchester*, 154 N.H. 748, 762 (2007) ("[T]he fact that other means are better suited to the achievement of governmental ends therefore is of no moment.").

IV. THE APPLICATION OF THE STANDARD ESTABLISHED IN *CITY OF MANCHESTER* DOES NOT RENDER ARTICLE 11 UNENFORCABLE.

Plaintiffs argue that affirming the superior court's order in this case will render Article 11 "a dead letter[.]" PB 37. Plaintiffs take issue with the basic principles of rational basis review, discussed under Issue I above, and hypothesize that application of rational basis review in this context would lead to a situation where the size of the legislature could be increased above that provided for in Part II, Article 9, or where towns could be divided despite the prohibition against such divisions in Part II, Article 9. These arguments represent a considerable overstatement of the breath of both *City of Manchester* and the superior court's ruling below.

City of Manchester applied rational basis review to claims that redistricting maps violate Part II, Article 11's direction to give every

eligible town and ward their own individual representative district. *City of Manchester v. Secretary of State*, 163 N.H. 689 (2012). In so doing, the Court made no holdings with relation to claimed violations of Part II, Article 9. Nor is *City of Manchester* likely to have any such application as Article 9 does not present the same unique circumstances as Article 11, with which strict compliance is indisputably impossible.

Furthermore, it is not difficult to conceive of situations where a successful constitutional challenge could be brought under Article 11 even with the application of rational basis review. For example, if the legislature were to combine two towns into one eight-member district when they could instead be divided by giving one town a five-member district, the other town a two-member district, and placing one overarching floterial district to account for the excess, a constitutional violation would likely be able to be established. Or, if the legislature were to adopt a plan that failed to make any effort to prioritize giving towns and wards their own districts such that litigants could present an alternative plan which doubled or tripled the number of eligible towns receiving their own districts while remaining compliant with all other constitutional mandates, a constitutional violation may well be found.

But that is far from the situation here. As the superior court found, Plaintiffs' plan made only marginal gains in the whole number of towns and wards with their own districts, and they made these gains only through profound modifications of the redistricting map as a whole. Given the permissive standard of review established in *City of Manchester* and the important policy considerations requiring courts to defer to the legislature absent a "clear, direct, irrefutable constitutional violation[,]" *City of*

Manchester v. Secretary of State, 163 N.H. at 697, this is simply insufficient to establish a constitutional violation.

CONCLUSION

Compliance with the New Hampshire Constitution's redistricting requirements necessitates political balancing: it is not possible to redistrict under Part II, Article 11 in a manner that provides every eligible town and ward with its own district, and someone has to decide which towns and wards will receive their own district and which will not. This is a political decision, and the Constitution commits the authority to make this decision to the state's legislative branch, not the state's judiciary. As such, it was appropriate for the superior court in this case to apply general principles of rational basis review, as directed to do by this Court's precedent, and conclude that rational or legitimate policy considerations existed which would support the legislature's chosen plan.

As such, the State respectfully requests that this Honorable Court affirm the judgment below.

The State requests a fifteen-minute oral argument.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I, Mary A. Triick, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 3,767 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

November 12, 2024 *<u>/s/ Mary A. Triick</u>*
Mary A. Triick

CERTIFICATE OF SERVICE

I, Mary A. Triick, hereby certify that I am filing this brief electronically and that a copy is being 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; I am serving or have served all other parties by mailing or hand-delivering a copy to them.

November 12, 2024 *<u>/s/ Mary A. Triick</u>*
Mary A. Triick