THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS **SUPERIOR COURT**
SOUTHERN DISTRICT **No. 2022-CV-00181**

Miles Brown; Elizabeth Crooker; Christine Fajardo; Kent Hackmann; Bill Hay; Prescott Herzog; Palana Hunt-Hawkins; Matt Mooshian; Theresa Norelli; Natalie Quevedo; and James Ward

v.

David M. Scanlan, in his official capacity as the New Hampshire Secretary of State; and the State of New Hampshire

ORDER ON DEFENDANTS' JOINT MOTION TO DISMISS

The plaintiffs have brought this action challenging the constitutionality of two recently enacted laws establishing the boundaries for senate and executive council districts. The defendants, the State of New Hampshire and David M. Scanlan, in his official capacity as the Secretary of State, now move to dismiss. The plaintiffs object. After considering the record, the arguments, and the applicable law, the Court finds and rules as follows.

Legal Standard of Review

In ruling on "a motion to dismiss for failure to state a claim, [the Court] assume[s] the truth of the facts alleged by the plaintiff[s] and construe[s] all reasonable inferences in the light most favorable to the plaintiff[s]." Sivalingam v. Newton, 174 N.H. 489, 494 (2021). The Court "need not, however, assume the truth of statements in the plaintiff[s'] pleadings that are conclusions of law." Id. The Court ultimately "engage[s] in a threshold inquiry that tests the facts in the complaint against the applicable law." Id. "If the alleged facts do not constitute a basis for legal relief," the Court should grant the motion to dismiss. Id.

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Discussion

In May 2022, the governor signed two bills changing the boundaries for New Hampshire's senate and executive council districts. See Laws 2022, ch. 45; Laws 2022, ch. 46. These new district boundaries will be used for the next decade, beginning with the upcoming November 2022 election. The plaintiffs assert that the newly-drawn districts "are partisan gerrymanders[1] that defy the basic principles of representative government." (Compl. ¶ 3.) As a result, the plaintiffs have brought this action in which they: (1) seek a declaration that the newly-drawn districts "violate Part I, Articles 1, 10, 11, 12, 22, and 32 of the New Hampshire Constitution;" (2) seek preliminary and permanent injunctive relief enjoining Mr. Scanlan "from implementing, enforcing, or giving any effect" to those laws; and (3) request the Court to adopt new maps for the senate and executive council districts "that comply with the New Hampshire Constitution." (Id. Prayer ¶¶ A–C.) The defendants now move to dismiss. They assert that the complaint fails to state a claim for which relief may be granted because the issues raised in the complaint present non-justiciable political questions.

"The political question doctrine is essentially a function of the separation of powers, existing to restrain courts from inappropriate interference in the business of the other branches of Government, and deriving in large part from prudential concerns about the respect we owe the political departments." Horton v. McLaughlin, 149 N.H. 141, 143 (2003) (cleaned up). "In the New Hampshire Constitution, the principle of separation of powers is espoused in Part I, Article 37," id., which provides:

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[1] Political or partisan gerrymandering "is the practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition's voting strength." Below v. Gardner, 148 N.H. 1, 9–10 (2002) (cleaned up).

> In the government of this state, the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity.

This clause "prohibits each branch of government from encroaching on the powers and functions of another branch." In re Judicial Conduct Comm., 145 N.H. 108, 109 (2000).

To adhere to the Constitution's commitment to separation of powers, the supreme court has held that "the range of the matters subject to judicial review is limited by the concept of justiciability." Id. at 111. Specifically, "[t]he justiciability doctrine prevents judicial violation of the separation of powers by limiting judicial review of certain matters that lie within the province of the other two branches of government." Burt v. Speaker of the House of Representatives, 173 N.H. 522, 525 (2020). "A controversy is nonjusticiable — i.e., involves a political question — where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department[.]" Id. "Where there is such commitment, [the Court] must decline to adjudicate the matter to avoid encroaching upon the powers and functions of a coordinate political branch." Id. "Deciding whether a matter has in any measure been committed by the Constitution to another branch of government is itself a delicate exercise in constitutional interpretation[.]" Id.

The Court, therefore, will begin by examining the text of the relevant constitutional provisions. Part II, Article 26 governs senate districts. It states:

> And that the state may be equally represented in the senate, the legislature shall divide the state into single-member districts, as nearly equal as may be in population, each consisting of contiguous towns, city wards and unincorporated places, without dividing any town, city ward or unincorporated place. The legislature shall form the single-member districts . . . at the regular session following each decennial federal census.

N.H. CONST. pt. II, art. 26 (emphases added). As reflected by the phrase "as equal as may be in population," the "overriding constitutional principle" embodied by this provision is "one person/one vote." Below, 148 N.H. at 9. In addition, Part II, Article 26 also mandates that: "(1) senate districts be comprised of 'contiguous' towns, city wards and unincorporated places; (2) no town, city ward or unincorporated place may be divided unless the town, city ward or unincorporated place requests division by referendum; and (3) each senate district must elect only one senator." Id. (citation omitted). "[T]hese additional requirements, however, are secondary" to the "one person/one vote" requirement," id., as there may be situations "where perfect compliance with all of these mandates is impossible," City of Manchester v. Sec'y of State, 163 N.H. 689, 706 (2012).

Part II, Article 60 establishes the executive council. It provides: "There shall be biennially elected, by ballot, five councilors, for advising the governor in the executive part of government." N.H. CONST. pt. II, art. 60. Originally, there were only five counties in New Hampshire, and "[t]he natural result was that one from each county was taken." Edwin C. Bean, Introductory Note to 9 Laws of New Hampshire, at vii (Edwin C. Bean ed. 1921). "[B]ut when the number of counties was increased" in the State, "it became necessary" for the legislature "to provide for councilor districts" pursuant to Part II, Article 65. Id. Under that provision, "[t]he legislature may, if the public good shall hereafter require it, divide the state into five districts, as nearly equal as may be, governing themselves by the number of population, each district to elect a councilor[.]" N.H. CONST. pt. II, art. 65 (emphasis added). The legislature first used the authority delegated to it under Part II, Article 65 in 1828, see Laws 1828, ch. 104, and has been

drawing the boundaries for executive council districts ever since. As with senate districts, the legislature's "overriding objective" when establishing executive council districts is to obtain "substantial equality of population among the various districts." City of Manchester, 163 N.H. at 700–01 (cleaned up).

The clear language of both Article 26 and Article 65 demonstrates that our State Constitution "commits" the authority to draw the boundaries for senate and executive councilor districts to the legislature. Burt, 173 N.H. at 525; see also Monier v. Gallen, 122 N.H. 474, 476 (1982) (explaining that "[r]eapportionment is primarily a matter of legislative consideration and determination"). In exercising that authority, the legislature must adhere to the explicit requirements outlined in each article, the most important of which is equal population in each district. See Below, 148 N.H. at 9; Op. of Justices, 106 N.H. 233, 234 (1965). If the legislature fails to draw districts that comply with the mandatory requirements of each article, "it is . . . appropriate to provide judicial intervention," as "[c]laims regarding compliance with these kinds of mandatory constitutional provisions are justiciable." Baines v. N.H. Senate President, 152 N.H. 124, 132 (2005). However, "political considerations are tolerated in legislatively-implemented redistricting plans," Burling v. Chandler, 148 N.H. 143, 156 (2002), and therefore the Court must "tread lightly in this political arena" as to not "materially impair the legislature's redistricting power." In re Below, 151 N.H. 135, 150 (2004). Thus, "the Court's jurisdiction in this area is significantly limited," Horton v. McLaughlin, No. 2001-E-121, 2001 N.H. Super. LEXIS 16, at *30 (July 17, 2001), aff'd, 149 N.H. 141 (2003), as "judicial relief becomes appropriate only when [the] legislature fails to reapportion according to constitutional requisites in a timely fashion after having had an adequate

opportunity to do so," City of Manchester, 163 N.H. at 697; see, e.g., Monier, 122 N.H. 474; see generally Harper v. Hall, 868 S.E.2d 499, 572 (N.C. 2022) (Newby, C.J., dissenting) ("The role of the judiciary through judicial review is to decide challenges regarding whether a redistricting plan violates the objective limitations in Article II, Sections 3 and 5 of our constitution or a provision of federal law.").

Here, the plaintiffs do not claim that either of the redistricting plans violate any of the mandatory, express requirements of Article 26 and Article 65. Nor could they.[2] "Finding no explicit constitutional provision prohibiting partisan gerrymandering," the plaintiffs "creatively attempt to mine the [Bill] of Rights [found in Part I] to find or create some protection" against the practice. Harper, 868 S.E.2d at 581 (Newby, C.J., dissenting). For example, the plaintiffs claim that the redistricting plans violate Part I, Article 11, which states: "All elections are to be free, and every inhabitant of the state of 18 years and upwards shall have an equal right to vote in any election." The plaintiffs also maintain that the redistricting plans violate their state constitutional rights to equal protection, free speech, and free assembly. However, none of the Part I articles cited by the plaintiffs have any language concerning redistricting. It is therefore unsurprising that the plaintiffs have not cited any New Hampshire authority supporting their position

[2] New Hampshire's population was 1,377,529 according to the 2020 census. Thus, the ideal size of each senate district would be 57,397.04 people. According to the complaint, the smallest senate district by population (District 1) has 55,947 people and the largest district (District 13) has 60,252 people. (Compl. ¶ 56.) The 4,305 difference in size between the largest and smallest senate districts results in a deviation of 7.5%. This deviation is under the 10% threshold and therefore the new senate districts satisfy the constitutional requirement of "one person/one vote." See City of Manchester, 163 N.H. at 701 (observing that "an apportionment plan with a maximum population deviation under 10%" satisfies constitutional requirement and is presumptively constitutional). Likewise, the ideal size of each executive council district would be 275,505.8 people. According to the complaint, the largest executive council district by population is 277,888 and the smallest is 274,409. (Compl. ¶ 87.) This means that the new executive council districts have a maximum population deviation of 1.26%, which is well under the 10% threshold. See City of Manchester, 163 N.H. at 701. It is also clear, based on even a cursory review of each redistricting map, that each senate and executive council district is contiguous.

that their Part I rights can be used to essentially add a "no gerrymandering" requirement to the explicit provisions concerning redistricting found in Part II. Cf. Levitt v. Att'y Gen., 104 N.H. 100, 107 (1962) (rejecting argument that redistricting provisions in Part II were "invalidated because the broad reservation stated in Article 11 of the Bill of Rights"); Town of Canaan v. Sec'y of State, 157 N.H. 795, 800 (2008) (rejecting argument that "[d]ecennial reapportionment," as authorized under Part II, "violate[s] the essential right to vote freely for the candidate of one's choice" presumably found in Part I, Article 11); Thompson v. Kidder, 74 N.H. 89 (1906) (rejecting argument that explicit provision of constitution permitting estate tax was invalid because it conflicted with other provisions). In the absence of such authority, the Court rejects the plaintiffs' position that their Part I rights make their political gerrymandering claims justiciable. Rather, the Court believes that if the citizens of this State intended to require the legislature to meet additional criteria in drawing legislative and executive council districts, they would have explicitly provided those requirements alongside the existing ones in Part II of the constitution. This is precisely what the citizens of several other states have done in their state constitutions. See Rivera v. Schwab, 512 P.3d 168, 187 (Kan. 2022) (citing various state constitutional provisions that "outright prohibit[] partisan favoritism in redistricting").

In sum, Articles 26 and 65 of Part II of the State Constitution clearly commit to the legislature the authority to draw senate and executive councilor districts, with few explicit requirements. "[I]n the absence of a clear, direct, irrefutable" violation of those explicit redistricting requirements, "the complexity in delineating state legislative district boundaries and the political nature of such endeavors necessarily preempt judicial intervention." City of Manchester, 163 N.H. at 697 (emphases added; cleaned up).

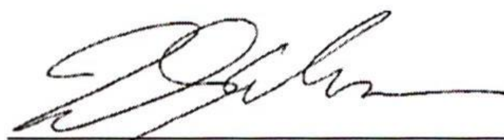
Indeed, "[o]ur State Constitution vests the authority to redistrict with the legislative branch, and for good reason." In re Below, 151 N.H. at 150. "A state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality." Id. As such, "[i]t is not the [C]ourt's function to decide the peculiarly political questions involved in reapportionment." Id. at 151 (cleaned up). Accordingly, once the legislature performs its decennial redistricting duties in compliance with the explicit requirements of Articles 26 and 65, this Court should not reexamine or "micromanage all the difficult steps the legislature [took] in performing the high-wire act that is legislative district drawing." City of Manchester, 163 N.H. at 704 (cleaned up).

Conclusion

Based on the foregoing, the Court concludes that the only justiciable issues it can address concerning senate and executive council redistricting are whether the newly-enacted districts meet the express requirements of Articles 26 and 65. Because the newly-drawn districts meet those express requirements, the Court must decline to consider the plaintiffs' challenge to the constitutionality of the districts based on claims of excessive political gerrymandering as such claims present non-justiciable political questions. See Rucho v. Common Cause, 139 S. Ct. 2484, 2506–07 (2019) (holding "that partisan gerrymandering claims present political questions beyond the reach of the federal courts"); Rivera, 512 P.3d at 187 (holding that political gerrymandering claims were not justiciable). The defendants' joint motion to dismiss is therefore GRANTED.

So ordered.

Date: October 5, 2022



Hon. Jácalyn A. Colburn,
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
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