

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
SOUTHERN DISTRICT

SUPERIOR COURT

Docket No. 226-2022-CV-00126

THERESA NORELLI,
CHRISTINE FAJARDO,
MATT GERDING,
PALANA HUNT-HAWKINS,
And
MACKENZIE MURPHY

v.

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

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs Theresa Norelli, Christine Fajardo, Matt Gerding, Palana Hunt-Hawkins, and Mackenzie Murphy, by and through their undersigned counsel, bring this Complaint for Declaratory and Injunctive Relief and state as follows:

INTRODUCTION

1. This is an action challenging New Hampshire's current congressional districts, which have been rendered unconstitutionally malapportioned by a decade of population shifts. Plaintiffs ask this Court to declare New Hampshire's current congressional districting map unconstitutional; enjoin Defendant from using the map in any future elections; and adopt a new congressional districting map that adheres to the constitutional requirement of one person, one vote in the likely event that the New Hampshire General Court and Governor Chris Sununu ultimately fail to do so.

2. In August 2021, the U.S. Census Bureau delivered to New Hampshire its redistricting data generated from the results of the 2020 Census. Those data confirm the inevitable

reality that the population changes that occurred during the last decade have rendered New Hampshire's congressional map unconstitutionally malapportioned. *See Arrington v. Elections Bd.*, 173 F. Supp. 2d 856, 860 (E.D. Wis. 2001) (three-judge court) (explaining that "existing apportionment schemes become instantly unconstitutional upon the release of new decennial census data" (internal quotation marks omitted)). Specifically, the current configuration of New Hampshire's congressional districts, which was enacted using 2010 Census data nearly a decade ago, violates Part I, Articles 1, 10, 11, and 12 of the New Hampshire Constitution and Article I, Section 2 of the U.S. Constitution. Plaintiffs will be forced to cast unequal votes if the current congressional map is not brought into compliance with constitutional requirements. The current congressional map therefore cannot be used in any upcoming elections, including the 2022 midterm elections.

3. It has become clear that the General Court and Governor Sununu are unlikely to reach agreement on a new congressional map in time for use during the 2022 elections. In early November 2021, New Hampshire Republicans proposed a new congressional map that dramatically altered the existing line between the state's two congressional districts, moving more than *33 times* the number of voters necessary to equalize the populations between the two districts. This proposal would have made the First Congressional District a solidly Republican seat and the Second Congressional District a solidly Democratic seat. In early January 2022, the New Hampshire House of Representatives passed House Bill ("HB") 52, which codified this congressional map. Soon after the House passed HB 52, Governor Sununu publicly advocated against it, urging Republicans to alter the map before sending it to his desk. Nevertheless, the New Hampshire State Senate passed the map on March 17, 2022. True to his word, Governor Sununu immediately stated that he would veto the bill as passed as soon as it reached his desk. And while

Governor Sununu has since proposed his own congressional map—which has, to date, not been formally submitted to the General Court—there is no indication the General Court is interested in compromising with the Governor on this issue.

4. Given Governor Sununu’s stated intent to veto HB 52 as passed, there is now little reason to believe that the members of the General Court will enact a map that he finds acceptable. Indeed, the General Court was well aware that Governor Sununu found HB 52 unacceptable, yet it passed the bill anyway.

5. Today, March 31, 2022, is the “crossover” date, meaning that under the current rules, it is now too late for new legislation—such as the Governor’s newly proposed congressional map—to proceed through the normal legislative process that includes committee hearings and public comment.

6. With no sign of a political compromise on the horizon, the General Court and Governor Sununu appear to be at an impasse with respect to redrawing New Hampshire’s congressional districts in light of the 2020 Census results. As a result, it falls to the judiciary to protect the constitutional rights of Plaintiffs and voters across this state, just as it did when the political branches failed to enact new state legislative districts following the 2000 Census.

7. Accordingly, this Court should assume jurisdiction and establish a schedule that will enable it to draw and adopt a constitutional congressional districting map.

PARTIES

8. Plaintiff Theresa Norelli of 198 Thaxter Road, Portsmouth, New Hampshire 03801 is a former Speaker of the New Hampshire House of Representatives. Ms. Norelli is registered to vote in Portsmouth, New Hampshire and intends to vote in the upcoming congressional election. Under the existing congressional map, Ms. Norelli resides in the First Congressional District, which, as explained below, is significantly overpopulated compared to the Second Congressional

District. If the 2022 elections were held under the existing congressional map, Ms. Norelli would be deprived of her right to an equal vote as guaranteed by the New Hampshire and U.S. Constitutions.

9. Plaintiff Christine Fajardo of 472 E. High Street, Manchester, New Hampshire 03104 is registered to vote in Manchester, New Hampshire and intends to vote in the upcoming congressional election. Under the existing congressional map, Ms. Fajardo resides in the First Congressional District, which, as explained below, is significantly overpopulated compared to the Second Congressional District. If the 2022 elections were held under the existing congressional map, Ms. Fajardo would be deprived of her right to an equal vote as guaranteed by the New Hampshire and U.S. Constitutions.

10. Plaintiff Matt Gerding of 157 High Street, Somersworth, New Hampshire 03878 is registered to vote in Somersworth, New Hampshire and intends to vote in the upcoming congressional election. Under the existing congressional map, Mr. Gerding resides in the First Congressional District, which, as explained below, is significantly overpopulated compared to the Second Congressional District. If the 2022 elections were held under the existing congressional map, Mr. Gerding would be deprived of his right to an equal vote as guaranteed by the New Hampshire and U.S. Constitutions.

11. Plaintiff Palana Hunt-Hawkins of 4 Old Dover Road, Rochester, New Hampshire 03867 is registered to vote in Rochester, New Hampshire and intends to vote in the upcoming congressional election. Under the existing congressional map, Ms. Hunt-Hawkins resides in the First Congressional District, which, as explained below, is significantly overpopulated compared to the Second Congressional District. If the 2022 elections were held under the existing

congressional map, Ms. Hunt-Hawkins would be deprived of her right to an equal vote as guaranteed by the New Hampshire and U.S. Constitutions.

12. Plaintiff Mackenzie Murphy of 20 Brenda Lane, Merrimack, New Hampshire 03054 is registered to vote in Merrimack, New Hampshire and intends to vote in the upcoming congressional election. Under the existing congressional map, Ms. Murphy resides in the First Congressional District, which, as explained below, is significantly overpopulated compared to the Second Congressional District. If the 2022 elections were held under the existing congressional map, Ms. Murphy would be deprived of her right to an equal vote as guaranteed by the New Hampshire and U.S. Constitutions.

13. Defendant David M. Scanlon is the New Hampshire Secretary of State (the “Secretary”) whose business address is New Hampshire Secretary of State’s Office, State House, Room 204, 107 N. Main Street, Concord, New Hampshire 03301 and is named as a Defendant in his official capacity. The Secretary is the chief elections officer in charge of administering New Hampshire’s elections laws. RSA 652:23. His responsibilities include, but are not limited to, preparing ballots for use in all state elections, RSA 656:1; preparing a political calendar for state and town elections, RSA 652:21; publishing the elections manual and procedures for conducting elections, RSA 652:22; and providing information regarding voter registration and absentee ballot procedures, RSA 652:23. The Secretary, personally and through the conduct of his employees and agents, acted under color of state law at all times relevant to this action.

JURISDICTION AND VENUE

14. This Court has jurisdiction to hear this action. RSA 491:7.
15. This Court has jurisdiction to grant Plaintiffs declaratory relief. RSA 491:22.
16. This Court has jurisdiction to grant Plaintiffs equitable relief. RSA 498:1.

17. This Court has personal jurisdiction over the Secretary, who is sued in his official capacity, is an elected official in New Hampshire, and works and resides in New Hampshire. RSA 510:2.

18. Venue is proper in this judicial district under RSA 507:9 because Plaintiff Murphy resides in this district. As a result, the constitutional violations caused by the malapportioned congressional map will occur in this district.

STATEMENT OF FACTS

I. New Hampshire's current congressional districts were drawn using 2010 Census data.

19. On April 23, 2012, nearly a decade ago, Governor John Lynch signed into law Senate Bill ("SB") 202, which adjusted New Hampshire's two congressional districts based on the results of the 2010 Census. The U.S. Department of Justice precleared SB 202 on August 14, 2012.

20. New Hampshire has used SB 202's districting map in every congressional election since 2012.

21. According to the 2010 Census, New Hampshire had a population of 1,316,470, making the ideal population for each of New Hampshire's congressional districts (i.e., the state's total population divided by the number of districts) 658,235 people.

22. Under 2010 Census data, the populations of the two congressional districts contained in SB 202 deviated by just four people.

II. The 2020 Census is complete.

23. In 2020, the Census Bureau conducted the decennial census required by Article I, Section 2 of the U.S. Constitution. On April 26, 2021, the U.S. Secretary of Commerce delivered the results of the 2020 Census to the President. On August 12, 2021, the Census Bureau delivered to New Hampshire its redistricting data file containing the results of the 2020 Census. These data

are commonly referred to as “P.L. 94-171 data,” a reference to the legislation enacting this process, and are typically delivered no later than April of the year following the Census. *See* Pub. L. No. 94-171, 89 Stat. 1023 (1975).

24. The results of the 2020 Census report that New Hampshire’s resident population, as of April 2020, is 1,377,529—an increase of more than 60,000 people from a decade ago.

25. New Hampshire has again been apportioned two congressional districts for the next decade.

26. According to the 2020 Census results, the ideal population for New Hampshire’s congressional districts is 688,765, a 30,000-person increase from a decade ago.

III. As a result of population shifts in the past decade and the publication of the 2020 Census results, New Hampshire’s congressional districts are unconstitutionally malapportioned.

27. In the past decade, New Hampshire’s population has shifted significantly. Because the 2020 Census has now been completed, the 2010 population data used to draw New Hampshire’s congressional districts is obsolete and any prior justifications for the existing maps’ deviations from population equality are no longer applicable.

28. The table below, generated from the P.L. 94-171 data files provided by the Census Bureau in 2010 and 2020, shows how the populations of each of New Hampshire’s congressional districts shifted between 2010 and 2020. It demonstrates that population shifts since 2010 have rendered New Hampshire’s First Congressional District significantly overpopulated and the Second Congressional District significantly underpopulated.

District	2010 Population	2020 Population	Shift from 2010 to 2020	Deviation from Ideal 2020 Population	Percent Deviation
1	658,233	697,737	+39,504	+8,972	1.3%
2	658,237	679,792	+21,555	-8,973	-1.3%

29. As the table above indicates, between 2010 and 2020, the maximum deviation among New Hampshire's congressional districts (i.e., the difference between the most and least populated districts divided by the ideal district population) increased from 0 percent to 2.6 percent.

30. In light of these population shifts, the existing configuration of New Hampshire's congressional districts is unconstitutionally malapportioned. If this district configuration is used in any future elections, Plaintiffs' votes will be unconstitutionally diluted because the First Congressional District, where Plaintiffs live, has a population that is significantly larger than the Second Congressional District.

IV. New Hampshire's political branches have failed to enact a constitutional congressional districting map in time for the 2022 elections.

31. Just as it is responsible for enacting legislation altering the state's legislative districts after each decennial census, *see* N.H. Const. pt. II, arts. 9, 26, 44, the General Court is responsible for enacting legislation creating new congressional maps, which are subject to gubernatorial veto, *see id.* art. 44.

32. New Hampshire's political branches have attempted to engage in this process with respect to congressional districts following publication of the 2020 Census results, but they have reached an impasse.

33. In early November 2021, roughly two-and-a-half months after New Hampshire received its P.L. 94-171 data from the Census Bureau, New Hampshire Republicans proposed a new congressional map that dramatically altered the contours of the state's existing congressional districts. This proposal sought to make New Hampshire's congressional elections noncompetitive by making the First Congressional District a reliably Republican seat and the Second Congressional District a reliably Democratic seat. This proposal significantly redrew the line that

previously separated the state's congressional districts, which has otherwise remained largely the same since the late 19th century.

34. On January 5, 2022, the House passed HB 52, which memorialized this proposed congressional map.

35. Soon after the House passed HB 52, Governor Sununu expressed serious concerns about its contents. He explained that given New Hampshire's "purple" political nature, the state should not have reliable Democratic and Republican congressional seats. Indicating that he did not "like" HB 52, Governor Sununu urged the State Senate to amend the map and said he was "hopeful" that would happen.

36. Despite Governor Sununu's pleas, the State Senate passed HB 52 without amendment on March 17, 2022.

37. After the Senate passed HB 52, Governor Sununu stated he would immediately veto the bill when it reached his desk. A few days later, Governor Sununu proposed his own congressional map, but the General Court has not indicated an interest in compromising.

38. In light of Governor Sununu's threat to veto HB 52 and the General Court's apparent unwillingness to compromise, there is little reason to believe that the Governor and the General Court will reach agreement on a map that resolves the malapportionment that currently exists between the state's two congressional districts.

39. Moreover, today is the crossover date. *See* H. Rec., H. Calendar, 2022 Sess., at 2 (N.H. Mar. 25, 2022), available at https://www.gencourt.state.nh.us/house/calendars_journals/viewer.aspx?fileName=Calendars%5C2022%5CNo%2012%20March%2025%202022.PDF. Pursuant to the current rules of the General Court, it is therefore too late for new legislation—including Governor Sununu's proposed

congressional map—to proceed through the normal legislative process that includes committee hearings and public comment.

40. Meanwhile, time is running out for candidates and voters who want to participate in New Hampshire’s 2022 congressional elections. Candidates seeking to run in either of the state’s congressional districts must file a declaration of candidacy by June 10, 2022. *See* RSA 655:14. Long before they file that document, potential candidates need to know the contours of their districts so that they can speak with voters and assess the viability of their potential campaigns.

41. In light of the impasse between the General Court and Governor Sununu as to New Hampshire’s congressional districts, this Court must intervene to ensure that Plaintiffs and other New Hampshire voters are able to elect their congressional representatives under a constitutional map.

CAUSES OF ACTION

COUNT I

Violation of the Free and Equal Elections Clause of the New Hampshire Constitution

42. Plaintiffs reallege and reincorporate by reference all prior paragraphs of this Complaint as though fully set forth herein.

43. Under the New Hampshire Constitution, “[a]ll elections are to be free, and every inhabitant of the state of 18 years of age and upwards shall have an equal right to vote in any election.” N.H. Const. pt. I, art. 11.

44. When New Hampshire fails to properly “apportion” a statewide districting map based on new census results, use of the existing map in future elections “violate[s] the equal voting rights of New Hampshire citizens” under the Free and Equal Elections Clause. *Below v. Gardner*, 148 N.H. 1, 3 (2002) (per curiam). When such a failure occurs, the task of redistricting “fall[s] to the court.” *Id.*

45. It is now clear that New Hampshire will fail to timely reapportion its congressional districts based on the 2020 Census results. Those results show that, under New Hampshire's current congressional map, the First Congressional District has a significantly larger population than the Second Congressional District.

46. A failure to reapportion New Hampshire's districts based on the 2020 Census would thus force Plaintiffs, who live in the First Congressional District, to vote in an overpopulated district. This result would dilute Plaintiffs' voting strength compared to those living in the Second Congressional District, denying Plaintiffs an equal right to vote.

COUNT II

Violation of the Equal Protection Provisions of the New Hampshire Constitution

47. Plaintiffs reallege and reincorporate by reference all prior paragraphs of this Complaint as though fully set forth herein.

48. Under the New Hampshire Constitution, "[a]ll men are born equally free and independent; Therefore, all government, of right, originates from the people, is founded in consent, and instituted for the general good." N.H. Const. pt. I, art. 1.

49. Moreover, the New Hampshire Constitution guarantees that the government is "instituted for the common benefit, protection, and security, of the whole community, and not for the private interest or emolument of any one man, family, or class of men." *Id.* pt. I, art. 10.

50. The New Hampshire Constitution further guarantees that "[e]very member of the community has a right to be protected by it, in his enjoyment of his life, liberty, and property," and "the inhabitants of this state [are not] controllable by any other laws than those to which they, or their representative body have given their consent." *Id.* pt. I, art. 12.

51. Together, these provisions provide a constitutional right of equal protection, which "ensure[s] that State law treats groups of similarly situated citizens in the same manner." *McGraw*

v. Exeter Region Co-op. Sch. Dist., 145 N.H. 709, 711 (2001). Indeed, the “principle of equality pervades the entire constitution.” *State v. Pennoyer*, 65 N.H. 113, 114 (1889); *see also Rosenblum v. Griffin*, 89 N.H. 314, 321 (1938) (referring to the New Hampshire Constitution’s “organic principle of equality”).

52. Failure to reapportion New Hampshire’s districts based on the 2020 Census would violate these provisions because Plaintiffs would be forced to vote in a district with a significantly larger population than the Second Congressional District. This would result in a dilution of Plaintiffs’ voting strength, denying them equal access to the political process.

COUNT III
Violation of Article I, Section 2 of the U.S. Constitution

53. Plaintiffs reallege and reincorporate by reference all prior paragraphs of this Complaint as though fully set forth herein.

54. Article I, Section 2 of the U.S. Constitution provides that members of the U.S. House of Representatives “shall be apportioned among the several States . . . according to their respective Numbers.” U.S. Const. art. I, § 2, cl. 3. This provision “intends that when qualified voters elect members of Congress each vote be given as much weight as any other vote,” *Wesberry v. Sanders*, 376 U.S. 1, 7 (1964), meaning that state congressional districts must “achieve population equality ‘as nearly as is practicable.’” *Karcher v. Daggett*, 462 U.S. 725, 730 (1983) (quoting *Wesberry*, 376 U.S. at 7–8).

55. Article I, Section 2 requires an even higher standard of exact population equality among congressional districts than what the Fourteenth Amendment requires of state legislative districts. It “permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown.” *Id.* at 730 (quoting

Kirkpatrick v. Preisler, 394 U.S. 526, 531 (1969)). Any variation from exact population equality must be narrowly justified. *See id.* at 731.

56. To comply with this requirement following the 2010 Census, New Hampshire enacted a map that contained a population deviation of just four people. Now, as indicated in the table above, the population deviation among the current congressional districts is nearly 20,000 people.

57. Given the significant population shifts that have occurred since the 2010 Census, New Hampshire's congressional districts—which were drawn based on 2010 Census data—are now unconstitutionally malapportioned.

58. Any future use of New Hampshire's current congressional districting map would violate Plaintiffs' constitutional right to an equal, undiluted vote.

PRAYER FOR RELIEF

Accordingly, Plaintiffs respectfully request that this Court enter judgment in their favor against Defendant, and:

A. Declare that New Hampshire's existing congressional map violates Part I, Articles 1, 10, 11, and 12 of the New Hampshire Constitution and Article I, Section 2 of the U.S. Constitution.

B. Preliminarily and permanently enjoin Defendant, his respective agents, officers, employees, successors, and all persons acting in concert with each or any of them from implementing, enforcing, or giving any effect to New Hampshire's existing congressional map.

C. Establish a schedule that will enable the Court to adopt a new congressional districting map by a date certain should the political branches fail to enact such a map by that time.

D. Adopt a map for New Hampshire's congressional districts that complies with the New Hampshire and U.S. Constitutions.

E. Award Plaintiffs their costs, disbursements, and reasonable attorneys' fees incurred in bringing this action under the Court's inherent equitable power. *See Claremont Sch. Dist. v. Governor*, 144 N.H. 590, 595 (1999).

F. Grant such other or further relief as the Court deems just and proper.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Dated: March 31, 2022

Respectfully submitted,

THERESA NORELLI, CHRISTINE
FAJARDO, MATT GERDING, PALANA
HUNT-HAWKINS, and MACKENZIE
MURPHY

By Their Attorneys,

By /s/ Steven J. Dutton
Steven J. Dutton, NH Bar No. 17101
steven.dutton@mclane.com
McLANE MIDDLETON, P.A.
900 Elm Street
Manchester, New Hampshire 03101
Telephone: (603) 628-1377

Paul Twomey, NH Bar No. 2589
paultwomey@comcast.net
P.O. Box 623
Epsom, New Hampshire 03234
Telephone: (603) 568-3254

John Devaney*
jdevaney@perkinscoie.com
PERKINS COIE LLP
700 Thirteenth Street NW, Suite 800
Washington, D.C. 20005
Telephone: (202) 654-6200

Counsel for Plaintiffs

**Motion for Pro Hac Vice Forthcoming*

Abha Khanna*
akhanna@elias.law
Jonathan Hawley*
jhawley@elias.law
ELIAS LAW GROUP LLP
1700 Seventh Avenue, Suite 2100
Seattle, Washington 98101
Telephone: (206) 656-0177

Aaron Mukerjee*
amukerjee@elias.law
ELIAS LAW GROUP LLP
10 G Street NE, Suite 600
Washington, D.C. 20002
Telephone: (202) 968-4654

RETRIEVED FROM DEMONSTRATION SOFTWARE