

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2022-0184, Theresa Norelli & a. v. Secretary of State, the court on April 11, 2022, issued the following order:

Pursuant to our constitutional, statutory, and common-law obligations and authority, see N.H. CONST. pt. II, art. 73-a; RSA 490:4 (2010); Boody v. Watson, 64 N.H. 162, 169-73 (1886), we invoke our supervisory jurisdiction and order the Clerk of Hillsborough County Superior Court South to transfer to this court the record of the superior court proceedings in docket no. 226-2022-CV-00126, Theresa Norelli et al. v. David M. Scanlon [sic] in his official capacity as the New Hampshire Secretary of State. Pending further order of this court, jurisdiction over the case shall be vested exclusively in the supreme court. All further pleadings and filings shall refer to supreme court case no. 2022-0184, Theresa Norelli & a. v. Secretary of State. See Sup. Ct. R. 28(2), (3).

We take this supervisory action because the case is one in which “the parties desire[,] and the public need requires[,] a speedy determination of the important issues in controversy.” Monier v. Gallen, 122 N.H. 474, 476 (1982) (quotation omitted); see also Appeal of McDonough, 149 N.H. 105, 109-10 (2003); Petition of Mone, 143 N.H. 128, 132 (1998). Our exercise of original jurisdiction here is consistent with prior redistricting and election cases. See, e.g., Petition of Below, 151 N.H. 135, 138-39 (2004) (Below II); Appeal of McDonough, 149 N.H. at 109-10; Burling v. Speaker of the House, 148 N.H. 143, 145 (2002); Below v. Secretary of State, 148 N.H. 1, 4 (2002) (Below I); Monier, 122 N.H. at 476.

The statutory filing period for declarations of congressional candidacy runs from June 1 through June 10, 2022, see RSA 655:14 (2016), absent any extension of that filing period by the Secretary of State, see RSA 655:14-c (2016). The primary election will take place on September 13, 2022. See RSA 653:8 (2016); RSA 652:5 (2016). Accordingly, we must take certain preliminary steps in this case now so that, in the event that the legislative process fails to produce a fully enacted congressional redistricting plan, we will be prepared to resolve the case in a thorough and efficient manner.

Our invocation of jurisdiction over this case in no way precludes the legislature from enacting a redistricting plan. See Monier, 122 N.H. at 476 (explaining that judicial relief becomes appropriate only when a legislature fails to reapportion according to constitutional requirements after the legislature has had an adequate opportunity to do). We will terminate this proceeding if a congressional reapportionment plan is validly enacted at any time prior to the

close of this case. See Below I, 148 N.H. at 30-31 (reproducing court’s order dated May 24, 2002); see also Below II, 151 N.H. at 149-51.

In addition to the superior court plaintiffs and the Secretary of State, the following shall be considered parties in this court if they so choose by filing a brief in response to this order: the Speaker of the New Hampshire House of Representatives; the House of Representatives; the President of the New Hampshire Senate; the Senate; and the Governor. A copy of this order shall be provided by the clerk’s office to each of them.

On or before April 25, 2022, interested parties and any person seeking to participate as an intervenor or amicus curiae shall file simultaneous briefs, not to exceed 14,000 words, addressing each of the preliminary issues set forth in section V below. Sections I through IV provide context for those issues.

I. Constitutionality of the Existing Congressional Districts

Article I, Section 2 of the United States Constitution provides that the United States House of Representatives “shall be composed of Members chosen every second Year by the People of the several States.” According to the United States Supreme Court, that provision “means that, as nearly as is practicable, one [person’s] vote in a congressional election is to be worth as much as another’s.” Wesberry v. Sanders, 376 U.S. 1, 7-8 (1964). In cases involving redistricting of the New Hampshire Senate and the New Hampshire House, we have interpreted Part I, Article 11 of the New Hampshire Constitution as guaranteeing that each citizen’s vote will have equal weight. See Below I, 148 N.H. at 5 (Senate); Burling, 148 N.H. at 146 (House).

The plaintiffs’ complaint alleges that the existing congressional districts, which were established by the legislature in 2012 following the 2010 decennial census, see RSA 662:1 (2016), no longer comply with those constitutional requirements of one person/one vote as a result of uneven population growth within the state, as shown by the 2020 census. In particular, the plaintiffs allege that the population of the First Congressional District is 17,945 greater than the population of the Second Congressional District, which they assert is a malapportionment that unconstitutionally dilutes their votes.

II. Time Frame for Judicial Relief, if Necessary

The plaintiffs contend that judicial intervention is appropriate now because there is no realistic possibility that the legislature will validly enact a congressional redistricting plan in time for declarations of candidacy to be filed in accordance with RSA 655:14.

In prior cases, this court did not assume actual redistricting responsibility until after the legislature had recessed without having enacted a redistricting plan. See Below I, 148 N.H. at 4; Burling, 148 N.H. at 146. Those cases recognized, however, that the court’s schedule also needed to account for the Secretary of State’s schedule, including the time required for him to prepare, print, and distribute ballots. See Below I, 148 N.H. at 30-31 (reproducing court’s order dated May 24, 2002); Burling, 148 N.H. at 182-83 (reproducing court’s order dated May 23, 2002).

III. Criteria for Redistricting by the Court

In Below I, we took on the “unwelcome obligation” of redrawing state senate districts in 2002 because the redistricting plan (SB 1) passed by the legislature was vetoed by the Governor, the veto was not overridden, and no other redistricting plan was validly enacted. Below I, 148 N.H. at 4-5 (quotation omitted). In determining which map to use as the starting point for the court-drawn plan in 2002, we expressly “decline[d] to use SB 1 as our template” because, “[e]ven though SB 1 was passed by the legislature, it did not become law.” Id. at 12. “Only fully enacted plans,” we explained, “have the virtue of political legitimacy” to warrant judicial deference. Id. at 13 (quotation omitted).

Having determined that each of the parties’ proposed redistricting plans in Below I had “calculated partisan political consequences,” and having identified “no principled way” to choose among the partisan political plans, we “devised a redistricting plan consistent with neutral State and federal constitutional principles.” Id. (quotation and brackets omitted). We explained our approach as follows:

The goal of the court’s plan is to remedy the constitutional deficiencies in the existing senate districts. In devising the plan, we are guided primarily by the State and federal constitutional principles of one person/one vote. Also, we use as our benchmark the existing senate districts because the senate districting plan enacted in 1992 is the last validly enacted plan and is the “clearest expression of the legislature’s intent.” Colleton County Council v. McConnell, 201 F. Supp. 2d 618, 649 (D.S.C. 2002)]. We consider the 1992 senate plan to be the best evidence of State redistricting policy. In addition, by using the existing senate districts, we are able to ensure, to the greatest extent practicable, that each senatorial district contains roughly the same constituents as the last validly enacted plan. And, we adhere to the New Hampshire constitutional requirements that each senate district be a single-member district comprised of contiguous towns, city wards and unincorporated places and that each town, city ward and

unincorporated place not be divided. N.H. CONST., pt. II, art. 26.

With these principles in mind, we have determined that to remedy the population deviations in existing districts, it is preferable that the core of those districts be maintained, while contiguous populations are added or subtracted as necessary to correct the population deviations.

Id. (emphasis in original).

The redistricting approach adopted in Below I is a “least change” approach. See id. at 14 (“Further, unlike the plans submitted by the parties, the court’s plan imposes the least change for New Hampshire citizens in that it changes the senate districts for only 18.82% of the State’s population (232,565 citizens).”); id. at 28 (explaining that the court’s amended plan, which was developed in response to a motion to reconsider the court’s June 24, 2002 opinion, “furthers the court’s goal of imposing the least change for New Hampshire citizens in that it changes the senate districts for even fewer people than the court’s June 24 plan”); see also Johnson v. Wisconsin Elections Comm’n, 2021 WI 87, ¶73, 967 N.W.2d 469, 490 (Wis. 2021) (citing Below I as one of “numerous cases during the last two redistricting cycles” that applied the “least change” approach), subsequent opinion at 2022 WI 14, ¶¶11-51, 2022 WL 621082, at *4-11 (Wis. 2022) (applying the “least change” approach to congressional redistricting and state legislature redistricting), rev’d in part on other grounds sub nom. Wisconsin Legislature v. Wisconsin Elections Commission, 595 U.S. ___, 2022 WL 851720 (decided March 23, 2022) (per curiam) (reversing the 2022 decision of the Wisconsin Supreme Court as to state legislature redistricting, but not as to congressional redistricting).

IV. Appointment of Special Master

We anticipate that the evaluation of proposed plans against the redistricting criteria that we will establish (if necessary), as well as the selection or drawing of congressional district maps pursuant to those criteria, will involve fact finding and technological expertise. RSA 490:8 (2010) provides that “[q]uestions of fact pending before the [supreme] court may be heard and determined by one or more justices, or by a master or referee as the court may order.” The court intends to appoint Professor Nathaniel Persily, of Stanford Law School, to serve as special master in this case. A copy of his curriculum vitae is attached to this order.

In evaluating the suitability of Professor Persily or some other person to serve as special master, the parties should understand that a special master appointed by the court acts as a judicial officer with the attendant obligation of impartiality. See Tuftonboro v. Willard, 89 N.H. 253, 260-61 (1938) (stating

that the impartiality obligation of Part I, Article 35 of the New Hampshire Constitution applies to court-appointed masters, referees, and auditors); see also N.H. Sup. Ct. R. 38 (definition of “judge” in the Code of Judicial Conduct includes “a referee or other master”). Accordingly, ex parte communications with a special master are prohibited. See N.H. Sup. Ct. R. 38 (Rule 2.9 of the Code); N.H. R. Prof. Cond. 3.5. As a judicial officer, neither the special master nor staff members acting at his or her direction may be subjected to cross-examination, and all confidential computer and other confidential files prepared by or for the special master in connection with this case are entitled to the same level of protection from production or disclosure as are the confidential materials of the court itself. Cf. Below I, 148 N.H. at 33-34 (reproducing court’s order dated June 7, 2002, which appointed a “technical advisor”); Burling, 148 N.H. at 186-87 (reproducing court’s order dated June 7, 2002, which appointed a “technical advisor”).

V. Briefing and Hearing Schedule

On or before April 20, 2022, the Secretary of State shall submit a statement identifying which, if any, of the material facts alleged in the plaintiffs’ complaint are disputed by him.

On or before April 25, 2022, interested parties and any person seeking to participate as an intervenor or amicus shall file briefs addressing each of the following preliminary questions:

1. Would use of the existing congressional districts, see RSA 662:1, for the 2022 election be unconstitutional either as a violation of one person/one vote or as otherwise alleged in the complaint?
2. To determine the time frame for any judicial relief,
 - A. What is the last date by which the court will have assurance that a congressional reapportionment plan will be validly enacted in time for the 2022 primary election for the purpose of nominating candidates for the United States House of Representatives? See Below I, 148 N.H. at 30 (reproducing court’s order dated May 17, 2002); Burling, 148 N.H. at 181 (reproducing court’s order dated May 17, 2002).
 - B. And, from the Secretary of State, what amount of time does he believe is required to prepare, print, and distribute ballots in advance of the primary election?

3. If we conclude that use of the existing congressional districts for the 2022 election would be unconstitutional,
 - A. Should we apply the “least change” approach to congressional redistricting in this case, as we did for state senate redistricting in Below I?
 - B. If “least change” is the correct approach, what measurement or factors should we use to assess “least change?”
 - C. If “least change” is not the correct approach, what approach should we take for congressional redistricting in this case, and what measurement or factors should we use to assess that approach?
4. Regarding the appointment of a special master,
 - A. Does the party, intervenor, or amicus object to the appointment of Professor Nathaniel Persily as special master? If so, what are the specific grounds for the objection?
 - B. Does the party, intervenor, or amicus propose the appointment of someone else as special master? If so, who (name and contact information) should be appointed instead, and what are that person’s qualifications to serve as special master?
 - C. And, from the Secretary of State and any other interested party that is a State body or State official, is there a New Hampshire Maptitude license to make available for the special master to use for his or her work on this case, or, instead, might it be necessary for the special master to purchase a New Hampshire Maptitude license for this case if the special master does not already have one?

Oral argument on one or more of the preliminary issues will be held before the justices of the supreme court on May 4, 2022, at 1:00 p.m.

Depending on the court’s resolution of those issues, and subject to the scheduling availability of the special master, a hearing before the special master will be held on May 19, 2022, at 1:00 p.m.

Oral argument on the special master's report and recommendation will be held before the justices of the supreme court on May 24, 2022, at 1:00 p.m.

MacDonald, C.J., and Hicks, Bassett, Hantz Marconi, and Donovan, JJ., concurred.

**Timothy A. Gudas,
Clerk**

Distribution:

Hillsborough County Superior Court South, 226-2022-CV-00126

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