

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
SOUTHERN DISTRICT

SUPERIOR COURT

Docket No. 226-2022-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

MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Rule 48(b) of the Rules of the Superior Court of New Hampshire, Plaintiffs Miles Brown, Elizabeth Crooker, Christine Fajardo, Kent Hackmann, Bill Hay, Prescott Herzog, Palana Hunt-Hawkins, Matt Mooshian, Theresa Norelli, Natalie Quevedo, and James Ward respectfully move for an order preliminarily enjoining implementation of New Hampshire Senate Bills 240 and 241 (2022) (the “Challenged Redistricting Plans”). In support of their motion, Plaintiffs state as follows:

1. Governor Sununu signed the Challenged Redistricting Plans into law on May 6, 2022. Plaintiffs filed this suit just hours later.
2. As explained in detail in the accompanying memorandum of law, the Challenged Redistricting Plans are partisan gerrymanders that defy the basic foundations of New Hampshire’s democratic system by intentionally entrenching Republican control of the Senate and Executive

Council despite the wishes of New Hampshire voters. A preliminary injunction is appropriate and necessary to protect Plaintiffs' rights under the New Hampshire Constitution. Plaintiffs therefore respectfully request that the Court preliminarily enjoin Defendant from implementing the Challenged Redistricting Plans and order the implementation of plans that comply with the New Hampshire Constitution.

3. New Hampshire's primary elections for State Senate and Executive Council are scheduled for September 13, 2022, and the general elections are scheduled for November 8, 2022.

4. The candidate filing period for State Senate and Executive Council elections is currently scheduled to begin on June 1, 2022, and end on June 10, 2022. However, this court has the authority to delay this period if appropriate. *Below v. Gardner*, 148 N.H. 1, 14, 26 (2002) (explaining how the court enjoined and extended the candidate filing period until the court implemented a new Senate plan).

5. Plaintiffs request an expedited hearing on this motion pursuant to Rule 13(b).

WHEREFORE, Plaintiffs respectfully pray that this Honorable Court:

A. Set a hearing on this motion to occur no later than May 23, 2022, or as soon as practicable.

B. Enter the accompanying Proposed Order as an Order of the Court;

C. Order proceedings to develop proper remedial redistricting plans for the State Senate and Executive Council; and

D. Grant such other relief as is just and proper.

Dated: May 9, 2022

Respectfully submitted,

MILES BROWN, ELIZABETH CROOKER,
CHRISTINE FAJARDO, KENT
HACKMANN, BILL HAY, PRESCOTT
HERZOG, PALANA HUNT-HAWKINS,
MATT MOOSHIAN, THERESA NORELLI,
NATALIE QUEVEDO, and JAMES WARD

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

Counsel for Plaintiffs

**Motions for Pro Hac Vice Forthcoming*

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

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

CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2022, I served the foregoing through the Court's electronic filing system on all parties and counsel of record.

/s/ Steven J. Dutton
Steven J. Dutton

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**MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION**

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I. Introduction

As the New Hampshire Supreme Court has recognized, “[p]olitical 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) (per curiam) (quoting *Gerrymandering, Black’s Law Dictionary* (7th ed. 1999)). Political gerrymandering—and the unfair, unconstitutional vote dilution and political retaliation that it involves—is the subject of this lawsuit.

As part of the recent redistricting cycle, the General Court enacted two brazen partisan gerrymanders that are intended to, and will, entrench Republican Party control over the State Senate and Executive Council—without regard to the actual wishes of the voters. Senate Bill 240, which created a new redistricting plan for the Senate (the “Senate Plan” or “2022 Senate Plan”), was designed to provide Republicans with an artificial electoral advantage. The General Court achieved this through textbook examples of “packing” and “cracking”: packing voters who have previously supported Democratic candidates into a small number of districts in which they overwhelmingly outnumber those who have supported Republican candidates, while cracking the remaining Democratic voters among districts in which they have little or no opportunity to influence elections. As a result, the number of districts in which a Republican is likely to be elected is *double* the number of districts likely to be won by a Democrat, even though just over half of the state’s electorate has supported Republican candidates in recent statewide elections. Indeed, under the 2022 Senate Plan, Republicans can win supermajority control of the Senate even while *losing* the statewide vote.

Republicans in the General Court employed the same strategy when crafting Senate Bill 241, which created a new redistricting plan for the Executive Council (the “Executive Council Plan” or “2022 Executive Council Plan”). The Executive Council Plan packs many of New

Hampshire's Democratic strongholds into a single contorted district where a Democrat is virtually guaranteed to win. It then divides the remaining Democratic areas of the state among the remaining four districts—which, as a result, Republican candidates are very likely to sweep. Even though Republican statewide candidates have received support from just over half of the state's electorate in recent years, the Executive Council Plan is structured to give Republicans control of 80% of the Executive Council's seats.

Because the Senate and Executive Council Plans (together, the “Challenged Plans”) are intended to, and will, entrench Republican control and dilute the voting strength of the state's Democrats, they violate fundamental rights guaranteed by the New Hampshire Constitution. The Challenged Plans deny Plaintiffs and other Democratic voters their right to “free” and “equal” votes by intentionally diluting their ability to translate their votes into representation. N.H. Const. pt. I, art. 11. By intentionally treating Democratic voters differently from Republican voters and subjecting them to disfavored treatment, the Challenged Plans violate the New Hampshire Constitution's guarantee of equal protection. *Id.* pt. I, arts. 1, 10, 12. And because this disfavored treatment is imposed on the basis of voters' political affiliations and voting histories, the Challenged Plans constitute viewpoint discrimination and retaliation in violation of Plaintiffs' and other Democratic voters' rights to free speech and association. *Id.* pt. I, arts. 22, 32.

These politically gerrymandered maps are “incompatible with democratic principles” and defy “the core principle of republican government, namely, that the voters should choose their representatives, not the other way around.” *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 791, 824 (2015) (cleaned up). If allowed to take effect, the Challenged Plans will subject Plaintiffs to the irreparable harms of unconstitutional vote dilution and political retaliation. And permitting their use in future elections will gravely harm the public interest by

subverting the democratic system on which New Hampshire’s government is structured. Because federal courts cannot redress Plaintiffs’ claims, state courts—*this* Court—must police partisan gerrymandering to avoid “condemn[ing] complaints about [such] districting to echo into a void.” *Harper v. Hall*, 868 S.E.2d 499, 510 (N.C. 2022) (quoting *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019)), *stay denied sub nom. Moore v. Harper*, 142 S. Ct. 1089. Accordingly, to prevent irreparable harm to Plaintiffs, New Hampshire voters, and the public interest, this Court should immediately enjoin Defendant from implementing the Challenged Plans and order the use of new Senate and Executive Council maps that comply with the New Hampshire Constitution.

II. Background

A. After rejecting redistricting reforms and taking control of the General Court, Republicans proclaimed their intent to draw partisan redistricting plans.

Before the 2020 general elections, New Hampshire’s government was politically split, with Republican Christopher Sununu serving as Governor and Democrats holding majorities in both chambers of the General Court. In 2019, the Democratic-controlled General Court introduced and passed legislation intended to free the state’s redistricting process from partisan whims: House Bill 706 would have created an independent redistricting commission, designed to create fair maps for all New Hampshire voters. But Governor Sununu vetoed this bill, claiming that gerrymandering is “rare in New Hampshire” and that the “process is fair and representative of the people in our State.” *Aff. of Steven Dutton* (“Dutton Aff.”) Ex. 1. The next year, Governor Sununu again vetoed legislation meant to end partisan control of the redistricting process. *Dutton Aff.* Ex. 2.

After the 2020 general elections, Republicans gained control of both chambers of the General Court. Contrary to Governor Sununu’s assurances that those in control of the redistricting process would not abuse their power for partisan gain, Republicans immediately made clear that they would use their power to tilt the state’s districting plans in their favor. During the first meeting

of the New Hampshire Republican Party after the new General Court was seated in January 2021, party chairman Stephen Stepanek proclaimed that because “we [now] control redistricting,” he could “stand here today and guarantee you that we will send a conservative Republican to Washington, D.C. as a [Congressperson] in 2022.” Dutton Aff. Ex. 3 at 6.

After receiving redistricting data from the U.S. Census Bureau, New Hampshire Republicans went to work and drew plans that would entrench their party in power. During this process, they freely admitted that they employed political data to tilt their plans in Republicans’ favor. For example, when Representative Bob Lynn was asked by one of his Democratic colleagues on the House Special Committee on Redistricting whether Republicans used political data to draw an initial proposal for congressional districts, he responded, “[I]f your questions is ‘were political considerations that were in the mix,’ of course they were . . . Was that something that was taken into account? Of course it was.” Dutton Aff. Ex. 4 at 32. Representative Lynn returned to this theme a couple weeks later, stating that “political affinity would seem to be *among the most important considerations*” in that plan’s drawing. Dutton Aff. Ex. 5 at 34 (emphasis added).

B. True to their word, Republicans enacted Senate and Executive Council plans that systematically advantage Republicans.

Consistent with its stated intent to gerrymander the state’s redistricting maps—and notwithstanding unanimous public testimony in opposition—the Republican-controlled General Court enacted, and Governor Sununu signed, plans for the Senate and Executive Council that exhibit extreme, durable, and undeniable pro-Republican biases.

The Senate Plan, as enacted, was first publicly proposed by Senate Election Law and Municipal Affairs Chairman James Gray the day before the New Year’s holiday. Dutton Aff. Ex. 6 at 21–22. At the Committee’s January 10, 2022, hearing on the plan, not a single member of the

public testified in support. Dutton Aff. Ex. 7 at 2. Those who testified told the Committee that the Senate Plan “did little to address the suggestions and recommendations citizens made” during prior public hearings, and that gerrymanders like the Senate Plan would “run the risk of losing credibility with voters.” *Id.* Yet, just a few weeks later, the Committee voted along party lines to approve the plan. Dutton Aff. Ex. 8.

The experience in the New Hampshire House of Representatives was similar: The Senate Plan faced “universal testimony in opposition” during an April 14 hearing of the House Special Committee on Redistricting. Dutton Aff. Ex. 9 at 1. Members of the public objected to the plan’s “sprawling districts” that “are not compact”; stated that it “ignores communities of interest like regional high schools and [] high school” administrative units; and testified that it would “lock[] in a supermajority for Republicans,” rendering Granite Staters’ votes “meaningless.” Dutton Aff. Ex. 10 at 7, 21–22, 28. Nevertheless, the Committee passed the Senate Plan along party lines the same day of the hearing, with the full House following a week later. *Id.* at 44–46. Governor Sununu signed the Senate Plan into law on May 6, 2022. Dutton Aff. Ex. 11.

The Senate did not even bother to provide an opportunity for public testimony on the Executive Council Plan before passing it. After the 2020 census results indicated that the prior Executive Council plan’s overall population deviation had actually *decreased* over the last decade, “Republicans initially proposed not changing the Executive Council districts” at all. Dutton Aff. Ex. 9 at 3. But on March 24, 2022, without any notice, Senator Gray offered the Executive Council Plan on the floor of the Senate, which immediately passed it. Dutton Aff. Ex. 12. As explained in more detail below, this plan dramatically altered the shapes of the existing Executive Council districts.

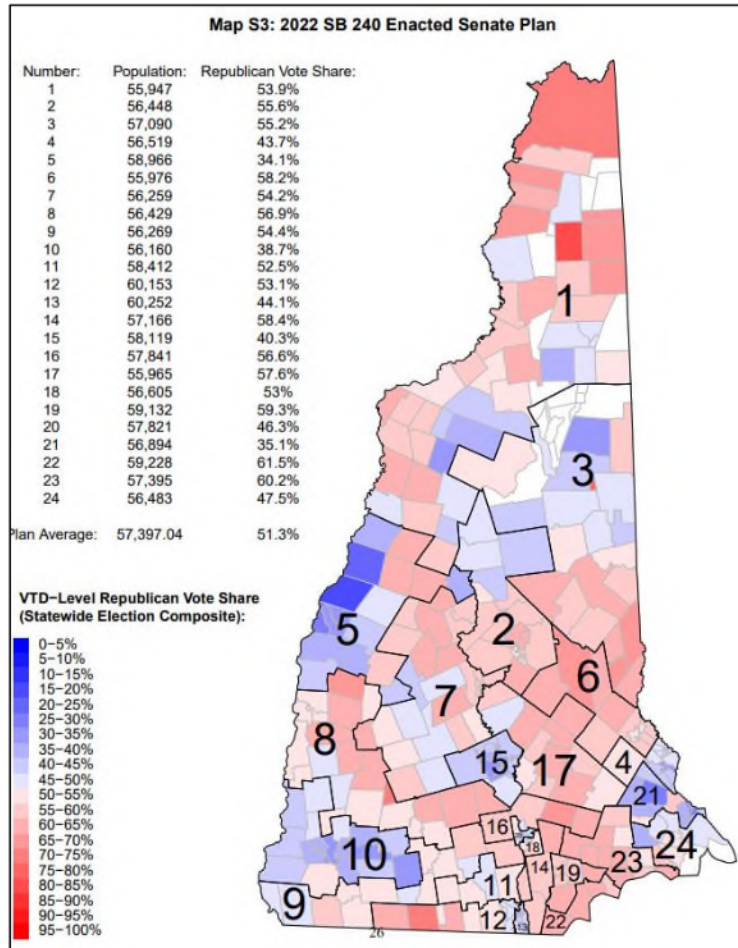
The House Special Committee on Redistricting’s hearing on April 14 was thus the first

opportunity for the public to comment on the Executive Council Plan. And again, the public testimony was unanimously in opposition: Members of the public complained that the General Court blatantly packed Democratic voters into Executive Council District 2 to make the other districts friendlier to Republican candidates, paying little attention to communities of interest. Dutton Aff. 9; *see also* Dutton Aff. Ex. 10 at 22–23, 33–34, 41. The committee passed the plan along party lines that same day, as did the full House a week later. Dutton Aff. Ex. 12. Governor Sununu signed the Executive Council Plan into law on May 6, 2022. Dutton Aff. Ex. 11.

A review of the Senate and Executive Council Plans below confirm what members of the public told the General Court: Both plans are unfair partisan gerrymanders designed to entrench Republican control at the expense of free and fair elections.

1. The Senate Plan is an intentional and effective partisan gerrymander.

The General Court achieved a remarkably pro-Republican tilt in the Senate Plan by intentionally packing and cracking Democratic voters. The General Court’s predominant partisan intent is made obvious by comparing the plan’s irregularly shaped districts with the partisan leanings of the towns and wards that comprise them. Expert statistical analysis further confirms that partisan intent predominated in the drawing of this map, showing that New Hampshire’s political geography makes the Senate Plan’s pro-Republican bias extremely unlikely, meaning that the only reason the General Court would have chosen this plan was to entrench Republican control in the Senate.



Dutton Aff. Ex. 13 (“Chen Aff.”) at 26.

- a. **The Senate Plan’s irregularly shaped district lines indicate careful drafting based on the partisan leanings of New Hampshire’s towns and wards.**

A comparison of the Senate Plan’s irregular district lines with the partisan leanings of New Hampshire’s towns and wards reveals an unmistakable pattern: Democratic enclaves throughout the state are packed into a small number of districts, leaving an artificially large number of districts dominated by Republican voters. Because the Senate Plan’s district numbering does not follow a coherent geographic pattern, the discussion below organizes the Senate Plan into three “regions”: the southwestern region, the southeastern region, and the northern region.

Ultimately, the General Court’s efforts to benefit Republican candidates was successful.

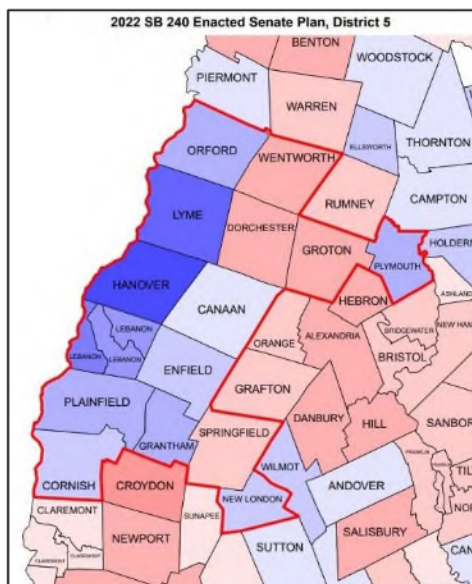
The Senate Plan will give Republicans a majority of seats even if they win only 47.3% of the statewide vote. Chen Aff. ¶ 53. Indeed, Republicans can amass a *two-thirds supermajority* of seats by winning just 48.7% of the statewide vote. *Id.* Meanwhile, to obtain a mere majority of districts under the Senate Plan, Democrats must amass 53% of the statewide vote. *Id.* ¶ 54.

i. The Senate Plan’s Southwestern Region (Three Democratic Districts, Six Republican Districts).

The Senate Plan’s southwestern region packs Democratic-leaning communities into three Democratic districts and divides the remaining portion of this region into twice as many Republican districts. The discussion below first examines the three Democratic districts, and then considers the region’s six Republican districts.

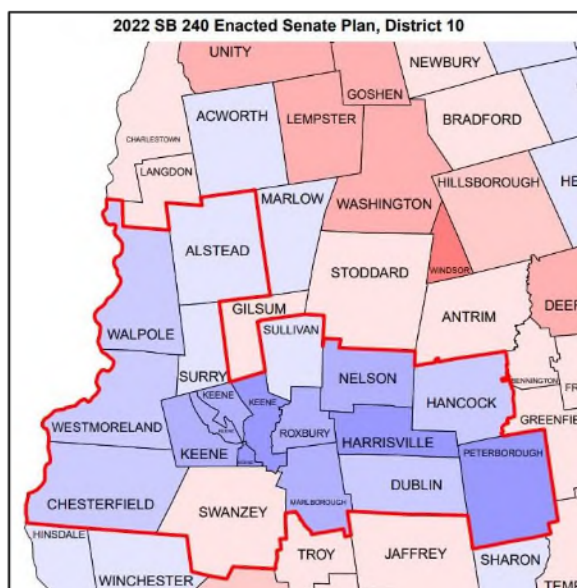
Senate District 5 (65.9% Democratic Vote Share).¹ Senate District 5, which sits on the state’s western border and resembles a “C,” is packed with heavily Democratic towns and wards. As in the prior Senate plan, District 5 is centered around the Democratic strongholds of Hanover and Lebanon on the western border. *See* Dutton Aff. Ex. 14. However, unlike in the prior Senate plan—which extended District 5 south to the Republican-leaning areas of Claremont and Charlestown—the 2022 Senate Plan excises those Republican-leaning areas from District 5 and creates eastward-reaching fingers traveling into the Democratic areas of Plymouth (previously in District 2) and New London (previously in District 8). District 5’s irregular shape cannot be justified by an effort to maintain communities of interest: as currently drawn, the district splits three separate counties, three different public health networks, and two different regional high school districts. Dutton Aff. Ex. 15 (“Scala Aff.”) ¶¶ 19–21.

¹ The “vote share” figures provided in this memorandum come from the expert analysis by Dr. Jowei Chen, who generated these figures by compiling the two-party election results of every U.S. presidential, U.S. Senate, and gubernatorial election in New Hampshire between 2016 and 2020. *See id.* ¶¶ 29–31, 90–92.



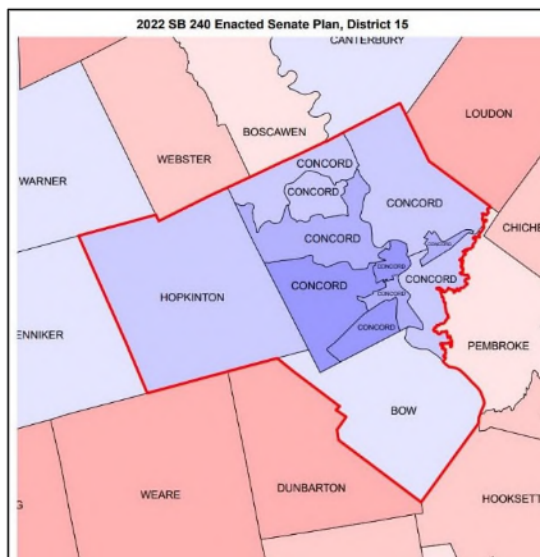
Chen Aff. at App. B.

Senate District 10 (61.3% Democratic Vote Share). District 10 comprises the vast majority of Democratic towns and wards in Cheshire County, yet it excludes all but one of the county’s Republican-leaning towns (which are instead placed in the heavily Republican Districts 8 and 9). In the place of those Republican-leaning Cheshire County towns, District 10 reaches into Hillsborough County and picks up the heavily Democratic towns of Hancock and Peterborough. The result is a district that splits four public high school districts. Scala Aff. ¶ 34.



Chen Aff. at App. B.

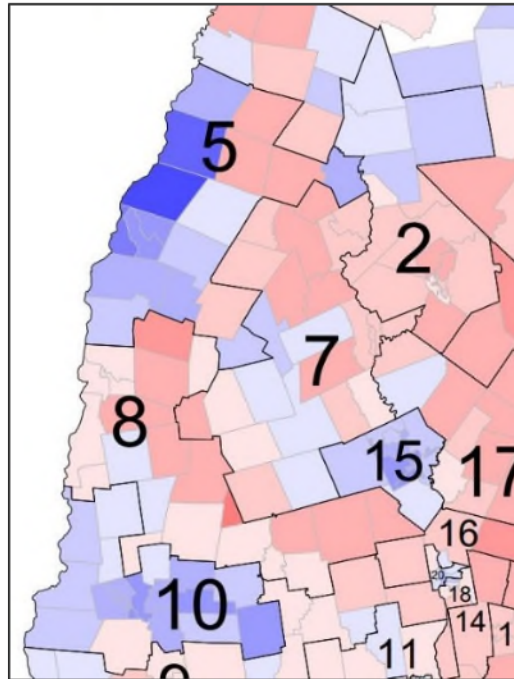
Senate District 15 (59.7% Democratic Vote Share). District 15, which exclusively contains heavily Democratic areas, packs the voters of Concord and Hopkinton into the last of the three Democratic districts in this region of the plan.



Senate Districts 2 (55.6% Republican Vote Share), 7 (54.2% Republican Vote Share), and 8 (56.9% Republican Vote Share). Districts 2, 7, and 8 collect the heavily Republican towns and wards in the northern part of this region left behind by the Democratic vote sinks of Districts 5, 10, and 15. District 2, which rounds out the northern part of this region, collects the heavily Republican areas of western Belknap County and uses them to offset Democratic strongholds in Grafton and Carroll Counties (specifically, Thornton, Campton, Holderness, and Sandwich). As discussed further below, by grabbing these Democratic areas to the north, District 2 makes Districts 1 and 2—which split the North Country—significantly more Republican.

Meanwhile, District 7 “sprawls across half of New Hampshire’s ten counties.” Scala Aff. at ¶ 22. Anchored around the northwest half of Merrimack County, District 7 selectively grabs Republican-leaning towns from southern Grafton County, southeastern Sullivan County, western

Belknap County, and northern Hillsborough County. Conspicuously, the only northwest Merrimack County town *not* included in District 7 is overwhelmingly Democratic New London, which forms one of District 5's previously described arms. By trading New London for Republican towns, the General Court made District 7 solidly Republican. But in so doing, District 7 divides five public health networks and five regional high school districts. *Id.*



Chen Aff. at 26.

Finally, District 8—which resembles a capital “L”—“is drawn meticulously to create a Republican-friendly district in the Democratic-leaning western part of the state.” *Id.* ¶ 27. It snakes from the Vermont border to the center of the state, traversing four separate counties along the way. District 8 contains most of Sullivan County—except the Democratic towns in the north, which instead form one of District 5's arms. South of Sullivan County, District 8 takes a sharp eastward turn, carefully grabbing Republican-leaning towns in northern Hillsborough County and a single Republican town in Merrimack County (Dunbarton). By taking this eastward turn, the district carefully avoids Cheshire County's heavily Democratic towns, which, as described above, are

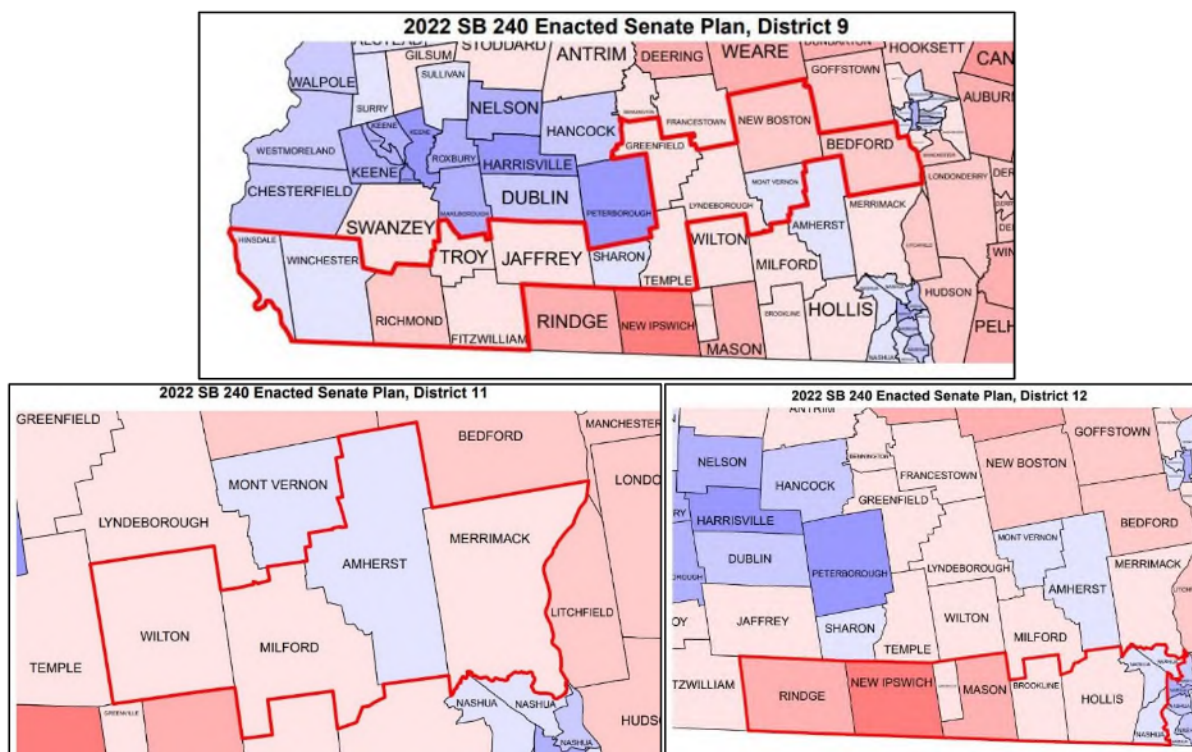
instead packed into District 10. District 8 ends up dividing three public health networks and five regional high school districts, and unnecessarily connects residents who live “more than an hour away” from each other. *Id.* ¶ 26.

Senate Districts 9 (54.4% Republican Vote Share), 11 (52.5% Republican Vote Share), and 12 (53.1% Republican Vote Share). In each of Districts 9, 11, and 12, Republican-leaning towns are paired with a small number of Democratic-leaning towns, cracking the Democratic voters in this area such that they will have no influence in Senate elections.

Perhaps the most irregularly shaped of all the Senate Plan’s districts, District 9 picks up where District 8 leaves off by collecting the remaining Republican towns in southern Cheshire County and connecting them with the Democratic-leaning towns of Hinsdale and Winchester. District 9 then snakes eastward into Hillsborough County, “string[ing] together a number of Republican-tilting municipalities.” *Scala Aff.* ¶ 29. District 9 cannot be explained by an effort to connect communities of interest. Its narrow corridor divides “three separate public health districts” and “four public high school districts,” connecting areas that differ significantly when it comes to “wealth and social class.” *Id.* ¶¶ 30–31. On the eastern end lies Bedford, a wealthy suburban area where the median income is nearly double what it is for the state as a whole and the college graduation rate is nearly double the statewide rate. *Id.* ¶¶ 31–33. Meanwhile, residents of the western end of the corridor, who live “an hour’s drive away,” live in small, rural towns and have “average or below-average household incomes.” *Id.* ¶ 33. These residents “might wonder with justification how well their interests will be represented by a senator whose power center is far from their homes.” *Id.*

Meanwhile, Districts 11 and 12 divide the heavily Democratic areas in the south-central portion of the state in a manner that neutralizes those residents’ votes: District 11 pairs heavily

Democratic Amherst with Republican Wilton, Milford, and Merrimack, while District 12 pairs the Democratic western Nashua wards with Republican strongholds to the west.



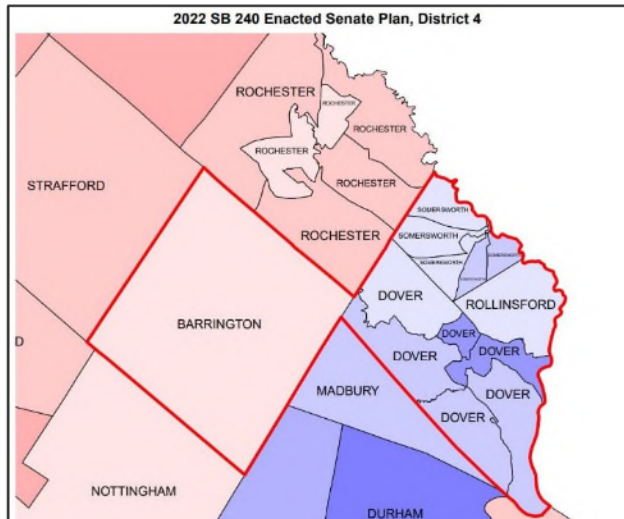
Chen Aff. at App. B.

ii. The Senate Plan's Southeastern Region (Five Democratic Districts, Eight Republican Districts).

The Senate Plan's southeastern region similarly packs Democrats into five districts in which they are almost guaranteed to win, allowing the creation of eight heavily Republican districts.

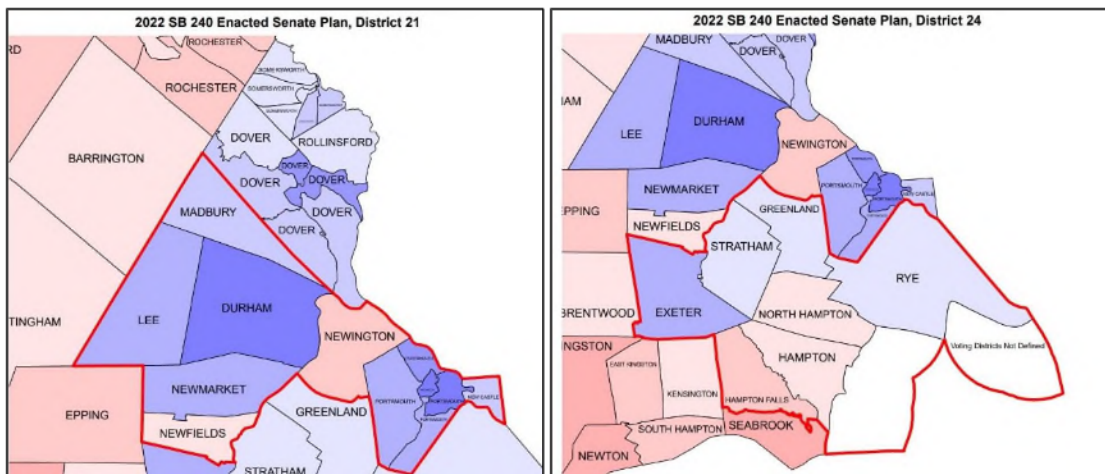
Senate Districts 4 (56.3% Democratic Vote Share), 21 (64.9% Democratic Vote Share), and 24 (52.5% Democratic Vote Share). The Senate Plan carefully packs the heavily Democratic portions of the Seacoast into three districts: Districts 4, 21, and 24. District 4, located on the eastern side of the state, packs Democratic voters into a highly irregular shape resembling a bowtie. To get from one wing of the district to the other, a resident of District 4 must drive along

a single, two-lane road.



Chen Aff. at App. B.

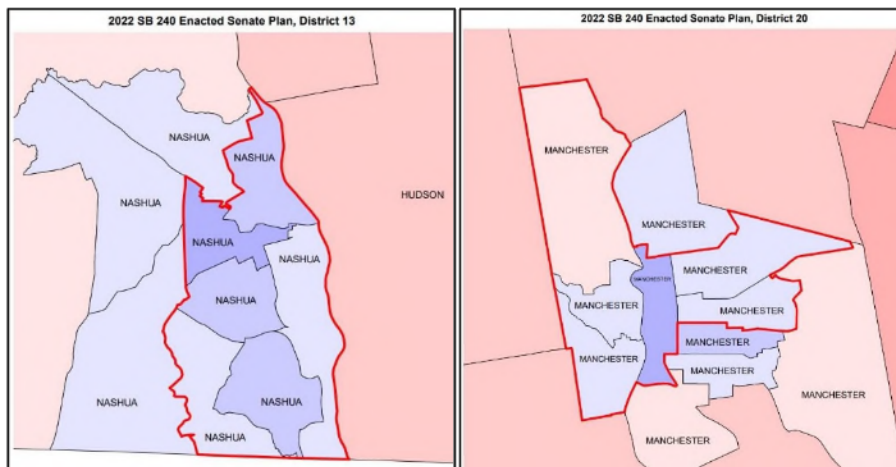
Districts 21 and 24 collect the Seacoast's remaining Democratic strongholds. District 21 breaks off the heavily Democratic southern Strafford County towns of Madbury, Lee, and Durham, connecting them with the Rockingham County Democratic strongholds of Newmarket and Portsmouth. District 24 picks up the remaining Democratic-leaning towns in the Seacoast, including Exeter, Stratham, Greenland, and Rye.



Id.

Senate Districts 13 (55.9% Democratic Vote Share) and Senate District 20 (53.7%

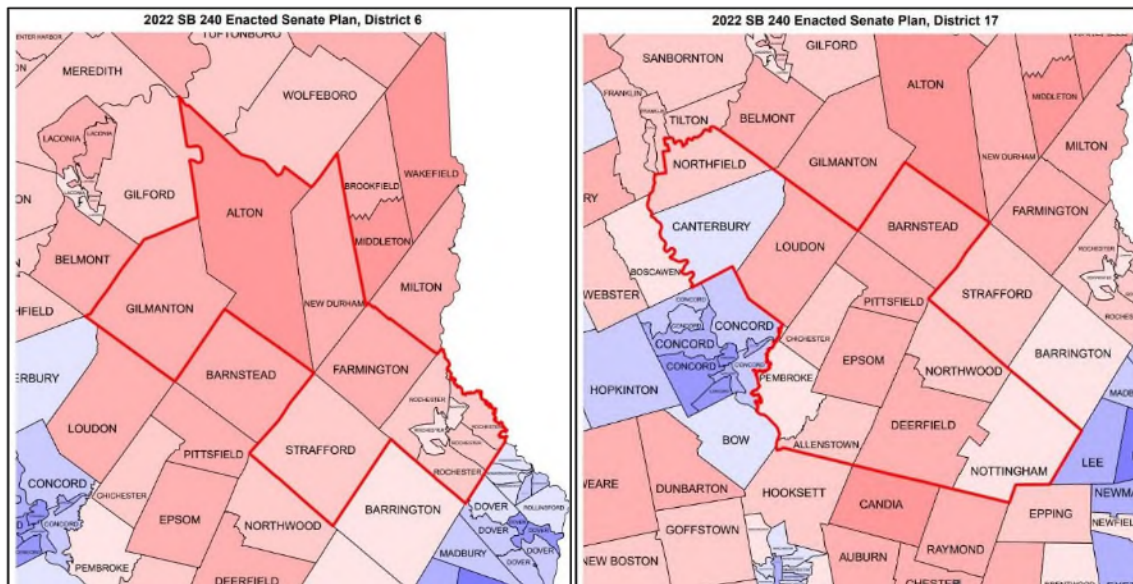
Democratic Vote Share). Districts 13 and 20 respectively cover the remaining two Democratic cities in this portion of the plan, Nashua and Manchester. Each consists exclusively of wards from these two cities.



Id.

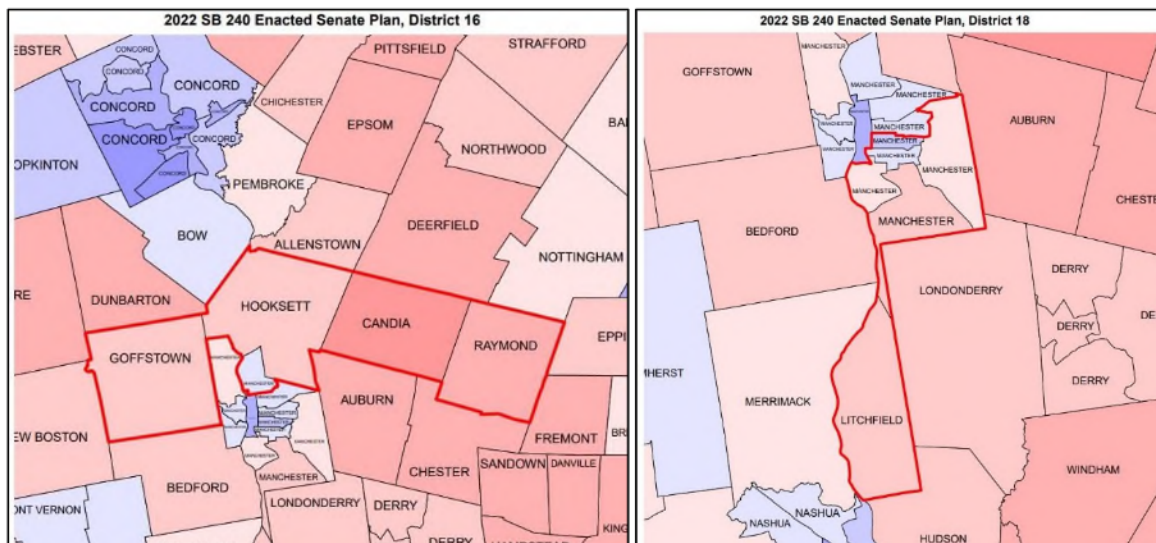
Senate Districts 6, 14, 16, 17, 18, 19, 22, and 23 (53% – 61.5% Republican Vote Share). Having confined the Democratic-leaning portions of the southeastern region of the map to just five districts, the General Court was able to draw the remainder of this region with eight districts dominated by Republican voters.

Districts 6 and 17 split the northern portion of this region, with the former starting in Rochester and jetting northeastward, picking up a few towns in the eastern portions of Belknap County and splitting a public health network. *Scala Aff.* ¶ 41. In so doing, District 6 separates Rochester from the remaining, heavily Republican portions of northern Strafford County, which, as discussed below, were placed into District 3 to offset Carrol County’s Democratic voters. Meanwhile, District 17 fills the area left behind by Democratic-packed Districts 4, 15, and 21.



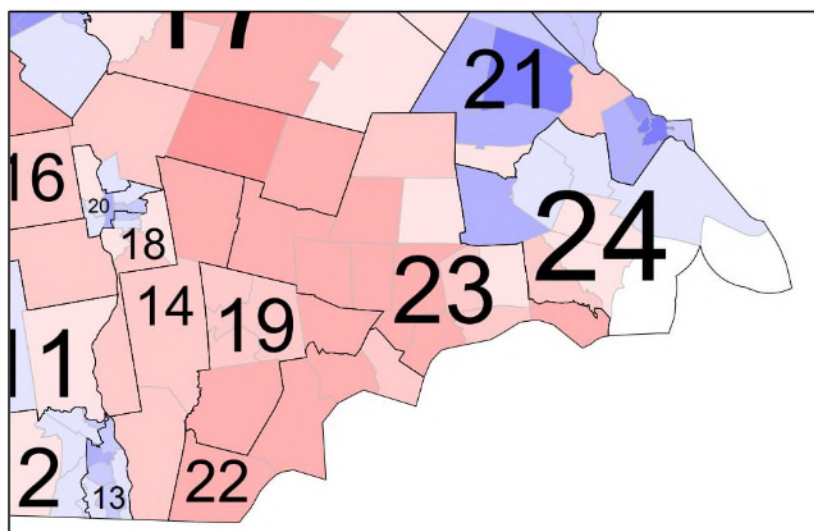
Chen Aff. at App. B.

Further south, Districts 16 and 18 favor Republican candidates by picking off Manchester wards and connecting them with nearby towns that overwhelmingly support Republicans. District 16 breaks off Democratic Manchester Ward 1 and connects it to heavily Republican towns to the north. District 18 neutralizes Democratic votes in Manchester Wards 5 through 9 by pairing them with overwhelmingly Republican Litchfield.



Id.

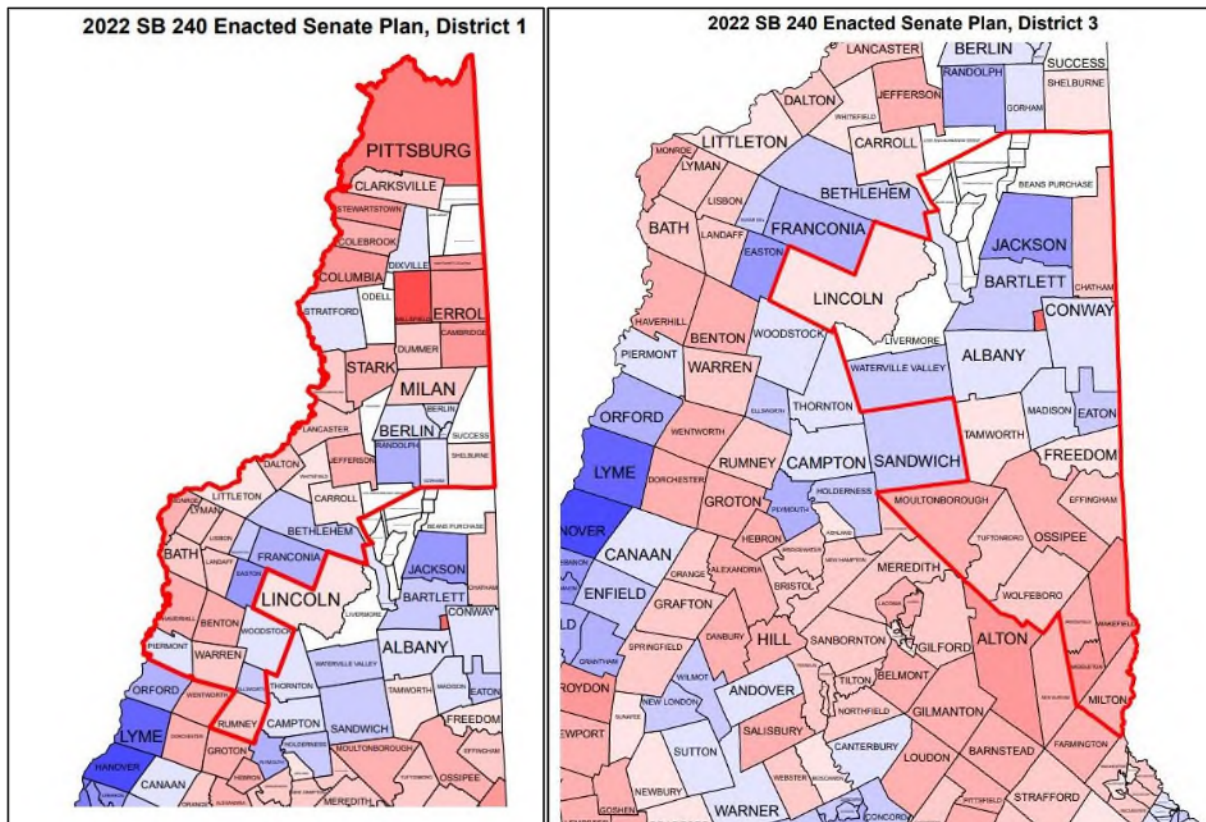
Districts 14, 19, 22, and 23 round out this region of the plan, filling in the heavily Republican region left behind by Districts 13, 20, and 24, which are so efficiently packed with Democratic voters that Districts 14, 19, 22, and 23 each boast Republican vote shares of no less than 58.4%. *Id.* at 26.



Id.

iii. The Senate Plan's Northern Region (Zero Democratic Districts, Two Republican Districts).

Finally, in the Senate Plan's northern region, Districts 1 (53.9% Republican Vote Share) and 3 (55.2% Republican Vote Share) are drawn to divide Democratic areas and pair them with heavily Republican towns so that Democratic candidates have little or no opportunity to prevail. The plan cracks northern Grafton County's Democratic towns among Districts 1, 2, and 3, offsetting them with heavily Republican towns elsewhere. District 1 pairs its portion of these Grafton County voters with Republican towns in Coös County to the north; District 2 pairs its portion of Democratic voters with Republican towns in Belknap County to the south; and District 3 pairs its portion with Republican towns in Carroll and Strafford Counties to the southeast.



Chen Aff. at App. B.

b. Statistical analyses of the Senate Plan confirm that it is intended to, and will, entrench Republican power.

Dr. Jowei Chen. Dr. Jowei Chen’s statistical analysis of the Senate Plan confirms that it was intended to artificially benefit Republicans and will have that effect. Dr. Chen is a professor of political science at the University of Michigan. He is one of the “foremost political science scholars on the question of political geography and how it can impact the partisan composition of a legislative body,” and he “helped pioneer the methodology of using computer simulations to evaluate the partisan bias of a redistricting plan.” *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *17 (N.C. Super. Ct. Sept. 3, 2019) (internal quotation marks omitted).

Numerous courts considering partisan gerrymandering claims have credited his work. *Id.*²

To see what New Hampshire’s senate districts would look like if partisan considerations were *not* taken into account, Dr. Chen produced a sample of 1,000 computer-simulated districting plans using foundational redistricting criteria: population equality, contiguity, geographic compactness, and keeping towns and wards whole (as the New Hampshire Constitution explicitly requires, *see* N.H. Const. pt. II, art. 26). Chen Aff. ¶ 19. “By randomly drawing districting plans with a process designed to strictly follow nonpartisan districting criteria, the computer simulation process gives us an indication of the range of districting plans that plausibly and likely emerge when map-drawers are not motivated primarily by partisan goals.” *Id.* ¶ 17. And comparing the Senate Plan’s characteristics to those of the simulated plans helps determine the extent to which subordination of these nonpartisan redistricting criteria was motivated by partisan goals. *Id.* ¶ 15.

As Dr. Chen concludes, the Senate Plan is an extreme statistical outlier on a host of standard measures. For example, the Senate Plan’s districts are remarkably noncompact. Using two commonly used, objective compactness measurements, the average compactness of the districts in the Senate Plan is lower than *every single one* of Dr. Chen’s 1,000 simulated plans. *Id.* ¶¶ 22–24.

The extent to which the Senate Plan benefits Republicans also makes it an extreme

² *See, e.g., Harper*, 868 S.E.2d at 516 (noting lower court’s reliance on Dr. Chen’s analyses); *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 818 (Pa. 2018) (finding “Dr. Chen’s expert testimony” to be “[p]erhaps the most compelling evidence” in invalidating Pennsylvania’s congressional plan as unconstitutional partisan gerrymander); *Raleigh Wake Citizens Ass’n v. Wake Cnty. Bd. of Elections*, 827 F.3d 333, 344 (4th Cir. 2016) (“[T]he district court clearly and reversibly erred in rejecting Dr. Chen’s expert testimony.”); *League of Women Voters of Mich. v. Benson*, 373 F. Supp. 3d 867, 907 (E.D. Mich.) (three-judge court) (“[T]he Court has determined that Dr. Chen’s data and expert findings are reliable.”), *vacated on other grounds sub nom. Chatfield v. League of Women Voters of Mich.*, 140 S. Ct. 425 (2019); *Common Cause v. Rucho*, 279 F. Supp. 3d 587, 666 (M.D.N.C. 2018) (three-judge court) (“Dr. Chen’s simulation analyses not only evidence the General Assembly’s discriminatory intent, but also provide evidence of the 2016 Plan’s discriminatory effects.”), *vacated on other grounds*, 138 S. Ct. 2679; *City of Greensboro v. Guilford Cnty. Bd. of Elections*, 251 F. Supp. 3d 935, 943 (M.D.N.C. 2017) (relying on “computer simulations by Dr. Jowei Chen” to find impermissible partisan intent).

statistical outlier, which can be “directly attributed to the map-drawer’s clear efforts to favor the Republican Party.” *Id.* ¶ 79. Using the most common statistical methods for measuring whether a map is a partisan outlier—that is, a map that performs more favorably than would be expected given a state’s political geography—the Senate Plan dramatically favors the Republican Party. The Senate Plan’s “mean-median difference”—a measurement that examines a plan’s partisan bias by calculating the difference between the average and median Republican vote shares of all districts—is higher than that of *every single one* of the 1,000 simulated plans. *Id.* ¶ 51. Dr. Chen got the same result with respect to the Senate Plan’s “lopsided margins measure,” a partisan-bias measurement that examines the difference between the average margin of victory in Republican-leaning and Democratic-leaning districts: every single one of the 1,000 simulated plans had a lower lopsided margins measure, indicating that the Senate Plan has “extreme packing of Democrats into a small number of Democratic-favoring districts” that is not the result of “New Hampshire’s political geography.” *Id.* ¶ 58. And the Senate Plan’s “partisan symmetry” analysis—a partisan-bias measurement that compares how the parties would fare under the Senate Plan if their statewide vote share was perfectly equal—is *again* more favorable to Republicans than every single one of the 1,000 simulated plans. *Id.* ¶ 62. “These results confirm that the [Senate] Plan exhibits a degree of pro-Republican partisan bias that cannot be explained by New Hampshire’s voter geography or by strict adherence to traditional districting criteria.” *Id.* ¶ 51.

The Senate Plan also skews New Hampshire’s districts to favor Republicans in an unusually durable manner. Sorting the Senate Plan’s districts from most Republican to least Republican, Dr. Chen compared the partisan makeup of each district to those in the simulated plans. He found that the seven districts in the middle of this spectrum “are more heavily Republican than over 99% of the corresponding districts in each of the 1,000 computer-simulated plans.” *Id.*

¶ 37. Indeed, six of those seven districts are more heavily Republican than *every single one* of their corresponding districts in the simulated plans. *Id.* “It is thus clear” that these districts “crack Democratic voters by eliminating what would normally have been a more politically competitive or even Democratic-favoring district in nearly all the computer-simulated plans.” *Id.* ¶ 38. Meanwhile, the Senate Plan’s least-competitive districts contain far more Democratic voters than the corresponding districts in the simulated plans, meaning Democratic voters in the Senate Plan are much more likely to live in districts where their votes have little to no effect on the outcome of the election. Specifically, the six least-Republican districts and the second, third, and fourth most-Republican districts in the Senate Plan are “less Republican than their corresponding districts in more than 95% of the computer-simulated plans.” *Id.* ¶ 40. By placing a disproportionate number of Democratic voters in uncompetitive districts, the Senate Plan makes it dramatically more likely that Republicans will outnumber Democrats in competitive districts.

The Senate Plan is also remarkably *noncompetitive*. There is not a single district in the Senate Plan where the margin between the percentage of Democratic and Republican voters is less than 5%. *Id.* at 26. By contrast, the simulated plans “frequently” contained competitive districts with “nearly even numbers of Democratic and Republican voters.” *Id.* ¶ 44. More than a quarter of *all* the districts in the simulated plans had a Democratic-Republican margin equal to or less than 5%, and over 98% of the simulated plans had between five and nine such districts, making the Senate Plan “clearly anomalous” in this respect. *Id.* ¶ 45. There can be no question that the Senate Plan’s lack of competitiveness benefits Republicans: Not a single one of the simulated plans contained as many seats with a Republican vote share over 52.5% as the Senate Plan does. *Id.* ¶ 47. Dr. Chen finds that it is “statistically impossible” to create a plan this noncompetitive without incorporating partisan considerations. *Id.* ¶ 45.

Finally, the Senate Plan’s bizarrely shaped districts cannot be explained by an attempt to achieve population equality. Even Senator Gray publicly lamented that the Senate Plan, which contains 7.5% overall deviation, *id.* ¶ 19(a), should have lower population deviation. *See* Dutton Aff. Ex. 10 at 2. What is more, the Senate Plan’s population inequality is *itself* evidence of an intent to dilute Democratic voting strength, as the plan “systematically under-populates Republican Senate districts, but not Democratic Senate districts,” therefore disproportionately diluting the voting strength of those living in districts favorable to Democrats. Chen Decl. ¶ 72.

The findings above lead Dr. Chen to conclude that “partisanship predominated in the drawing of the 2022 [Senate] Plan,” and that the intent to confer Republicans with an electoral advantage “subordinated” other partisan-neutral, traditional redistricting principles. *Id.* ¶ 75. He further concludes that, by subordinating those principles, the General Court “was able to achieve an extreme partisan outcome” in “favor [of] the Republican Party” that goes “beyond any ‘natural’ level of electoral bias caused by New Hampshire’s political geography or the political composition of the state’s voters.” *Id.* ¶¶ 75, 79.

Dr. Wesley Pegden. Analysis by Dr. Wesley Pegden further confirms that benefitting Republicans was the Senate Plan’s predominant purpose. Dr. Pegden is an associate professor of Mathematical Sciences at Carnegie Mellon University. He is an expert in probability; he has published numerous papers on discrete mathematics and probability in high-impact, peer-reviewed journals; and courts considering partisan gerrymandering claims have credited his work.³

Dr. Pegden employs a “sensitivity” analysis to determine whether a given redistricting plan

³ *See, e.g., Harper*, 868 S.E.2d 499 at 519 (noting lower court’s reliance on Dr. Pegden’s analysis); *League of Women Voters of Pa.*, 178 A.3d at 776 (finding Dr. Pegden’s expert testimony to be “credible” in invalidating Pennsylvania’s congressional plan as unconstitutional partisan gerrymander); *Common Cause*, 2019 WL 4569584, at *42 (giving “great weight” to Dr. Pegden’s “testimony, analysis, and conclusions” in invalidating North Carolina’s congressional plan as an unconstitutional extreme partisan gerrymander).

was carefully crafted to achieve a partisan outcome. Using a computer algorithm, Dr. Pegden makes millions of small random changes to the plan, swapping precincts at the edges of each district while maintaining equal compliance with nonpartisan districting principles. *See* Dutton Aff. Ex. 16 (“Pegden Aff.”) at 3–5. If the plan was not meant to maximize partisan advantage, these tiny random changes should not consistently decrease the plan’s partisan bias; but if they do, there is strong evidence that the plan was selected *because* of its partisan bias. *Id.*

Here, Dr. Pegden completed 32 “runs” in which he made 34 million random changes to the Senate Plan. *Id.* at 4. Each of the plans that resulted from these changes had to maintain the same level of compliance with nonpartisan redistricting principles as the Senate Plan. Specifically, each simulated plan had to have contiguous districts, could not split more counties than the Senate Plan, could not split more cities than the Senate Plan (and could not split towns or wards), and had to have similar population deviation. *Id.* at 5–6. In each of the 32 runs, the Senate Plan showed more pro-Republican partisan bias than 99.999% of the simulated plans. *Id.* at 9.

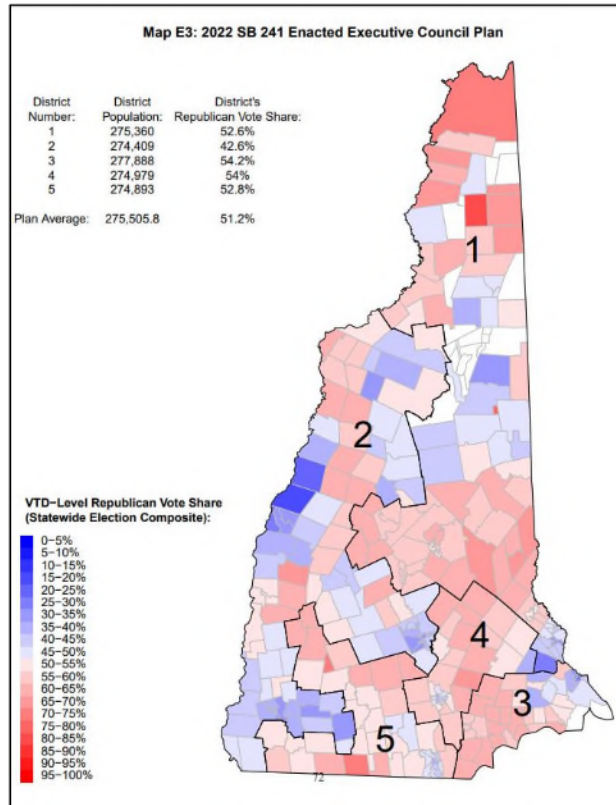
Taking his analysis even further, Dr. Pegden used mathematical theorems that he has published in peer-reviewed journals to translate the results above into a rigorous statement about how the Senate Plan compares to *all* possible plans that would satisfy neutral redistricting criteria. *Id.* at 4–5. Applying those theorems, Dr. Pegden found that, for each of his 32 runs, the Senate Plan is more carefully crafted to achieve partisan advantage than at least 99.975% of *all possible plans*. *Id.* at 9. Given these results, Dr. Pegden concludes that the General Court’s “overarching intent” in drawing the Senate Plan was to “maximize political advantage for Republican candidates.” *Id.* at 3.

2. The Executive Council Plan is an intentional and effective partisan gerrymander.

The New Hampshire Executive Council is a five-member body with wide powers to limit actions taken by the governor. *See* N.H. Const. pt. II, art. 60. The Executive Council, which has a “negative” power on the Governor, *id.* pt. II, art. 47, is responsible for, among other things, approving nominees for various offices (including judicial appointments, heads of state agencies, and state board members and commissioners) and state contracts. *See id.* pt. II, arts. 46–47, 56; *see also, e.g.*, RSA 21-I:2; RSA 21-O:11; RSA 326-D:3; RSA 430:54(h).

As Governor Sununu acknowledged, the Executive Council districting plan enacted a decade ago contained extremely irregular districts. Most notable was Executive Council District 2, which the Governor described as a “weird snake” spanning from the Vermont border to the Seacoast, collecting Democratic towns and cities such as Keene, Concord, and Dover along the way. Dutton Aff. Ex. 17 at 4. Unfortunately, the 2022 Executive Council Plan makes matters even worse by further packing District 2 with Democratic voters, making the other four districts more favorable to Republicans. As one commentator put it, “[i]nstead of the current snake, District 2 [has] become an equally reptilian, Komodo dragon standing on its head, with one leg extending into Keene and Peterborough and the other into Merrimack County to Concord.” Dutton Aff. Ex. 18 at 2.

By contorting District 2 such that it picks up a critical mass of the state’s Democratic voters, the General Court was able to craft a plan that ensures Republicans will control four out of the Executive Council’s five seats. The only reasonable explanation for the Executive Council Plan’s bizarre district shapes is an intent to entrench Republican control of that body. And as with the Senate Plan, this intent is made clear by an inspection of each Executive Council district, as well as map-simulation analyses by Drs. Chen and Pegden.



Chen Aff. at 72.

a. The Executive Council Plan’s irregularly shaped district lines indicate careful drafting according to the partisan leanings of New Hampshire’s towns and wards.

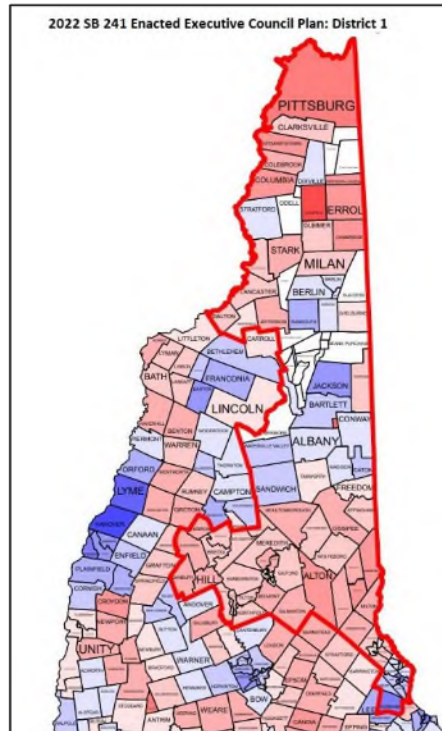
In enacting the Executive Council Plan, the General Court drew contorted district lines that systematically correspond to the partisan leans of wards and towns. The General Court’s efforts were successful: Under the Executive Council Plan, Republicans can win a majority of districts with just 48.4% of the statewide vote. *Id.* ¶ 116. Meanwhile, to obtain a majority, Democrats must amass at least 51.6% of the statewide vote. *Id.* ¶ 117.

District 1. The Executive Council Plan’s configuration of District 1 departs significantly from its prior version. Previously, District 1 covered all of the North Country. *Scala Aff.* ¶ 45. Given the large size of Executive Council districts, this former configuration of District 1 was relatively “coherent,” covering a “predominantly rural” area. *Id.* By contrast, the 2022 Executive

Council Plan “bisects northern rural New Hampshire,” separating Coös and Carroll Counties (which remain in District 1) from most of Grafton County (which now sits in District 2). *Id.* ¶ 47. To replace the voters shifted to District 2, District 1 extends farther south along the eastern border, picking up most of the towns in Strafford County but splitting the Democratic portions of the Seacoast with Districts 3 and 4. *Id.* ¶¶ 47–48.

This division of the northern half of the state follows a clear partisan pattern. By breaking off Grafton County and moving it into District 2, the Executive Council Plan shifts Democratic-leaning areas out of District 1 (which already leaned Republican) and into District 2 (which was already packed with Democratic voters). Having increased District 1’s Republican vote share from 50.5% to 52.6%, *Chen Aff.* at 72; *id.* at Map E4, the General Court made the district much “friendlier” to the Republican incumbent Joseph Kenney, *Scala Aff.* ¶ 50. Indeed, to further benefit Kenney, the 2022 Executive Council Plan shifts Kenney’s longtime electoral competitor Michael Cryans—a Democrat who defeated Kenney for the District 1 seat in 2018—into District 2, where must now compete with Democratic incumbent Cinde Warmington. *See Dutton Aff.* Ex. 19.

District 1’s irregular shape cannot be explained by neutral redistricting criteria, and certainly not by an effort to connect communities of interest. Quite unlike the rural areas in the north, the southeastern towns recently added to District 1 are among the “fastest-growing, most prosperous” in the state. *Scala Aff.* ¶ 48. Moreover, the district divides four different public health networks and five different public high school districts. *Id.* ¶ 49. Put simply, the regions cobbled together into District 1 have “a distinctly different set of characteristics and interests.” *Id.* ¶ 50.

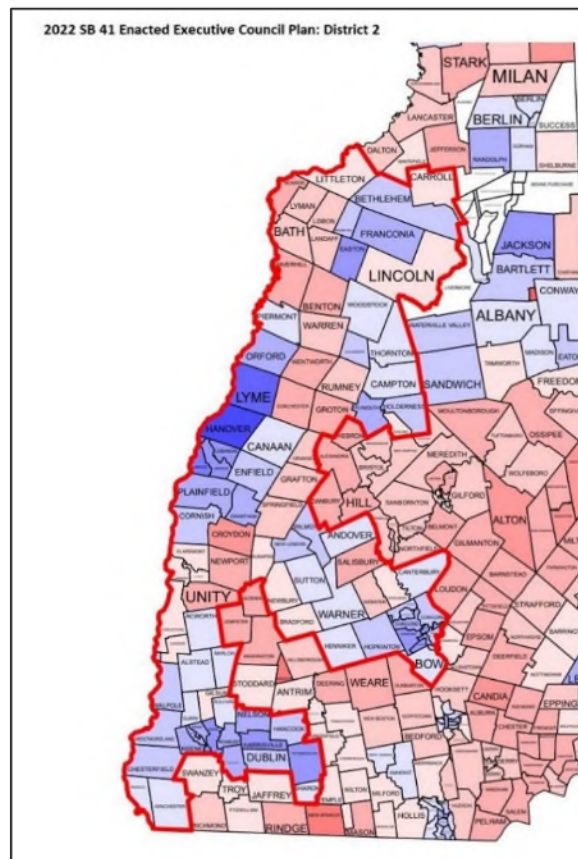


Chen Aff. at App. D.

District 2. As discussed above, prior to enactment of the 2022 Executive Council Plan, District 2 had a highly irregular, horizontal shape in the form of a corridor that traveled the width of the state. Dutton Aff. Ex. 20. Rather than fixing District 2’s unusual shape, the 2022 Executive Council Plan flipped the district 90 degrees and tacked on three eastward-reaching appendages that grab Democratic strongholds, thus forming the rough shape of an “E.”

The district begins in the southwestern corner of the state and travels north along the western border through the Democratic strongholds of Hanover and its surrounding towns and the remainder of Grafton County (which, as discussed above, previously sat in District 1). Two arms jet eastward to carefully collect heavily Democratic areas. The southern of these two arms selectively grabs not only the Democratic-leaning towns in Cheshire County (excluding the more Republican towns, which are placed in District 5), but also the most heavily Democratic towns in western Hillsborough County: Hancock, Peterborough, and Sharon. The northern of the two arms

reaches into Merrimack County to grab the Democratic stronghold of Concord while carefully excluding the Republican-leaning areas to the north, east, and south. The result is a district that packs Democratic voters even more than its prior version, “clear[ing] the way to draw the 1st, 4th, and 5th districts in a manner friendlier to Republican incumbents.” Scala Aff. ¶ 51. In so doing, the 2022 Executive Council Plan increases District 2’s Democratic vote share by nearly three percentage points, to 57.4%. Chen Aff. at 72, Map E4.

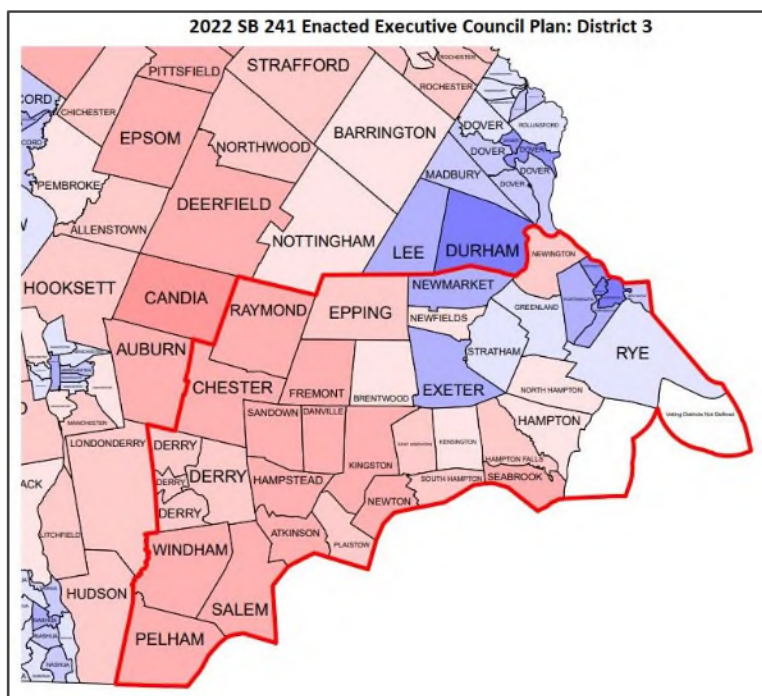


Id. at App. D.

As with District 1, District 2’s bizarre shape cannot be explained by an effort to connect communities of interest. While it encompasses much of the Connecticut River Valley area, the district carves out Republican-leaning municipalities in the region, shifting them to Districts 1 and 5. Scala Aff. ¶ 52. Similarly, by pairing Cheshire and Sullivan Counties with an urban area like

Concord, District 2 connects “entirely different part[s] of the state,” the former being “largely rural, slow-growing, and more working-class.” *Id.* ¶ 54. Public health networks and school districts also offer no justification for District 2’s shape, as the district divides five of the former and eight of the latter. *Id.* ¶ 55.

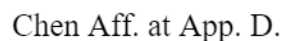
District 3. District 3 sits in the southeast corner of the state, connecting a third of the Democratic Seacoast towns and wards (the other two-thirds are split between Districts 1 and 4) with the heavily Republican area of western Rockingham County. The Republican voters in the western portion of the district overwhelmingly offset the Democratic votes in the east, resulting in a Republican vote share of 54.2%. *Chen Aff.* at 72.



Id. at App. D.

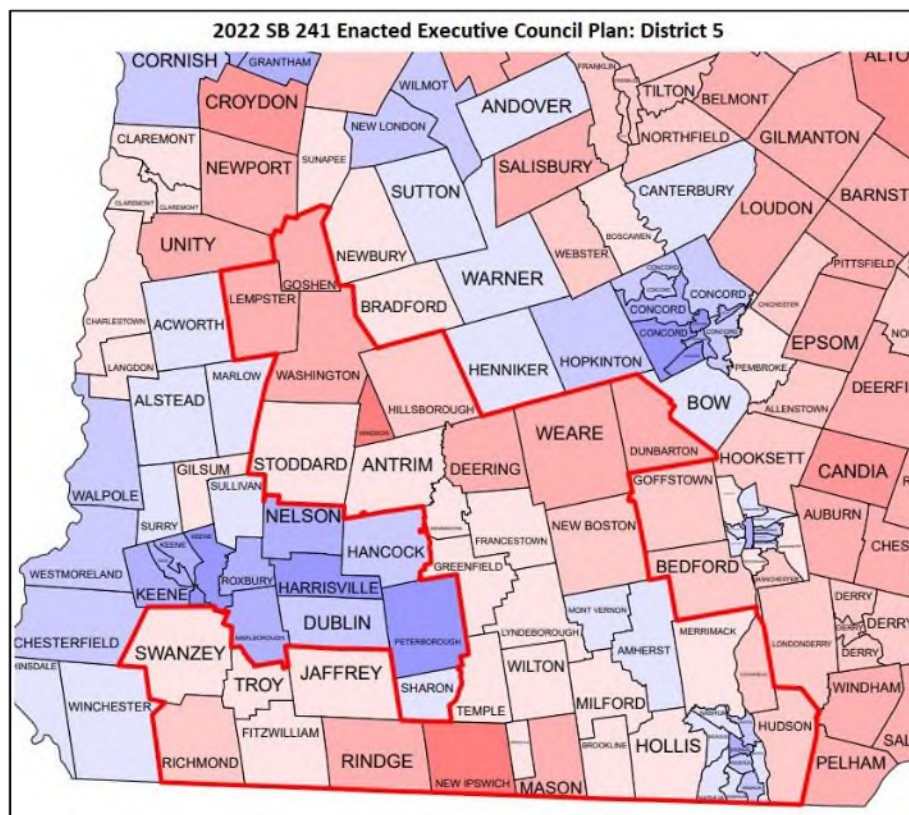
District 4. District 4, sitting in the southeastern corner of the state, connects the Manchester area with almost exclusively Republican-leaning towns to the northeast belonging to four different counties. Some of these Republican-leaning towns are “shorn off” from the Greater Concord area, while others “are orphaned from their home counties of Rockingham and Strafford.” *Scala Aff.*

District 4 cannot be explained by an effort to connect communities of interest. By cobbling together the orphan Republican towns described above, the district divides nearly half of all of New Hampshire's public health networks and divides seven regional high school districts. *Scala Aff.* ¶ 62.



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Hancock, Peterborough, and Sharon are severed from their home county of Hillsborough and packed into the Democratic ‘vote sink’ in the 2nd district.” Scala Aff. ¶ 66. By replacing those Democratic towns with Republican towns to the north, District 5 becomes a safe Republican seat, with 52.8% of its voters supporting Republicans. Chen Aff. at 72. District 5’s bizarre shape cannot be justified by an effort to connect communities of interest, as it divides five different public health networks and five regional high school districts. Scala. Decl. ¶ 67.



Chen Aff. at App. D.

b. Statistical analyses of the Executive Council Plan confirm that it is intended to, and will, entrench Republican power.

Dr. Chen. To demonstrate that an intent to entrench Republican control was the General Court’s predominant consideration in creating the Executive Council Plan, Dr. Chen performed the same analysis on the Executive Plan that he performed for the Senate Plan. *See supra* Section II(B)(1)(b). To demonstrate what New Hampshire’s political geography is likely to produce when

partisan considerations are removed from the districting process, Dr. Chen generated 1,000 computer-simulated Executive Council district plans using the partisan-neutral criteria discussed above. Chen Aff. ¶ 80. Having compared the 2022 Executive Council Plan to his simulated plans, Dr. Chen found that the General Court “clearly subordinated” the traditional redistricting criterion of compactness in service of Republican advantage, and that the 2022 Executive Council Plan’s pro-Republican tilt is an “extreme partisan outlier” at both the individual district and statewide levels. *Id.* ¶¶ 129–30. *Not a single one* of the 1,000 simulated plans generated by Dr. Chen exhibited a worse average-compactness score than the Executive Council Plan under either of the compactness metrics he used. *Id.* ¶¶ 85–86.

The Executive Council Plan’s partisan bias is also an extreme statistical outlier. Like the Senate Plan, the Executive Council Plan’s lopsided-margins measure is more extreme than *every single one* of Dr. Chen’s 1,000 simulated plans. *Id.* ¶ 121. Its pro-Republican mean-median difference is more extreme than nearly 95% of the simulated plans. *Id.* ¶ 114. And its partisan symmetry measure is more extreme than 99.8% of the simulated plans. *Id.* ¶ 126.

The same anomalies arise when considering the districts individually, where multiple districts exhibit “extreme partisan characteristics that are rarely or never observed” in the simulated plans. *Id.* ¶ 96. The plan’s second-most-Democratic district, District 1, is more favorable to Republicans than the corresponding district in *every single one* of the 1,000 simulated plans. *Id.* ¶ 99. “It is thus clear that District 1 cracks Democratic voters by eliminating what would normally have been a more politically competitive or even Democratic-favoring district in all the computer-simulated plans.” *Id.* ¶ 100. Similarly, the Executive Council Plan’s median district, District 5, is more heavily Republican than nearly 95% of the plans’ median districts. *Id.* ¶ 101. “Under a partisan-blind mapdrawing process following traditional districting principle[s], this district would

almost always have been more politically competitive or even slightly Democratic-leaning.” *Id.* As for the most (and only) Democratic-leaning district in the plan, District 2, it has far more Democratic voters than *any* district in *any* of the 1,000 simulated plans. *Id.* ¶ 103. These results very clearly demonstrate a packing and cracking strategy: The “unnaturally low Republican vote share in District 2, already a safe Democratic district,” allows Districts 1 and 5 “to have higher Republican vote shares than nearly all of their computer-simulated counterpart districts.” *Id.* ¶ 103.

Also like the Senate Plan, the Executive Council Plan is remarkably noncompetitive. Its four safe Republican seats is an entirely unexpected result given New Hampshire’s political geography. *Id.* ¶ 108. Indeed, *not a single one* of the 1,000 simulated plans contained as many pro-Republican seats the way the Executive Council Plan does. *Id.* ¶ 110.

Based on the results just discussed, Dr. Chen concludes that “partisanship predominated” during the process of drawing the Executive Council Plan, and that the General Court clearly intended “to achieve an extreme partisan outcome that would not have normally occurred under a partisan-neutral districting process following traditional districting principles.” *Id.* ¶ 131.

Dr. Pegden. Dr. Pegden also performed his simulations analysis to show how partisan considerations predominate in the Executive Council Plan. Again, Dr. Pegden performed 32 runs on the Executive Council Plan using the same partisan-neutral criteria discussed above. *See supra* Section II(B)(1)(b). In 32 runs, the Executive Council Plan showed more pro-Republican partisan bias than 99.9984% of the millions of simulated plans. Pegden Aff. at 14. Indeed, the Executive Council Plan is more carefully crafted to achieve partisan advantage than at least 99.96% of *all* possible variations. *Id.* Given these results, Dr. Pegden concludes that the General Court’s “overarching intent” in creating the Executive Council Plan was “to maximize political advantage for Republican candidates.” *Id.* at 3.

III. Legal Standard

To determine whether such an injunction is warranted, this Court considers whether “(1) a present threat of irreparable harm exist[s]; (2) no adequate, alternative remedy at law exist[s]; (3) there [is] a likelihood of success on the merits by a balance of the probabilities; and (4) the public interest would not be adversely affected if the court grant[s] the preliminary injunction.” *Thompson v. N.H. Bd. of Med.*, 143 N.H. 107, 108 (1998).

IV. Argument

In the absence of preliminary injunctive relief, New Hampshire’s use of the Challenged Plans during the 2022 elections and beyond will deny Plaintiffs and hundreds of thousands of other Granite State voters their most basic constitutional right. “[V]oting is of the most fundamental significance under our constitutional structure. Other rights, even the most basic, are illusory if the right to vote is undermined.” *N.H. Democratic Party v. Sec’y of State*, 174 N.H. 312, 262 A.3d 366, 374 (2021) (cleaned up). This right includes the “guarantee[] that each citizen’s vote will have equal weight.” *Below*, 148 N.H. at 5 (citing N.H. Const. pt. I, art. 11). In other words, the “fundamental right to vote includes the right to enjoy ‘substantially equal voting power and substantially equal legislative representation.’” *Harper*, 868 S.E.2d at 546 (quoting *Stephenson v. Bartlett*, 562 S.E.2d 377, 382 (N.C. 2002)).

The Challenged Plans violate Plaintiffs’ and other New Hampshire voters’ fundamental rights by intentionally sorting them into districts in a manner that artificially dilutes Democrats’ voting strength while boosting that of Republicans. As the New Hampshire Supreme Court has suggested, this is something the General Court may not do. *See Burling v. Chandler*, 148 N.H. 143, 150 (2002) (per curiam) (noting the General Court may not draw multimember districts that “are designed to or would ‘minimize or cancel out the voting strength or racial or political elements of the population’” (emphasis added) (quoting *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965))).

Indeed, by intentionally crafting districting plans for the purpose of benefitting one political party over another, the General Court has run afoul of three separate doctrines under the New Hampshire Constitution. First, the Challenged Plans deny Plaintiffs and other Democratic voters their right to vote freely and equally in violation of the Free and Equal Elections Clause. N.H. Const. pt. I, art. 11. Second, they treat Democratic voters differently than similarly situated Republican voters in violation of the guarantee of equal protection. *Id.* pt. I, arts. 1, 10, 12. Third, by selectively burdening Democratic voters because of their political affiliations and voting history, the General Court has engaged in unconstitutional viewpoint discrimination and retaliation. *Id.* pt. I, arts. 22, 32.

A. Plaintiffs are likely to succeed in proving that the Challenged Plans violate the New Hampshire Constitution.

1. The Challenged Plans violate the Free and Equal Elections Clause.

By intentionally warping the outcomes of Senate and Executive Council elections in favor of one political party, the Challenged Plans violate the New Hampshire Constitution’s requirement that “[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. 1, art. 11.

The Free and Equal Elections Clause—which has no analogue in the U.S. Constitution—is irreconcilable with the practice of partisan gerrymandering. By producing electoral results that unfairly benefit a particular political party instead of reflecting the wishes of the electorate, partisan gerrymanders deny a large group of voters their right to freely elect candidates of their choice on equal footing with other voters. In other words, contrary to the New Hampshire Constitution’s requirement that government originate “from the people” and be “founded in consent,” N.H. Const. pt. I, art. 1, partisan gerrymanders *thwart* the will of the people, operating to entrench one party’s power, regardless of the actual desires of the people. *See also id.* pt. 1, art. 8 (requiring

“[g]overnment” to “be open, accessible, accountable, and responsive”).

For this reason, courts in other states have held that partisan gerrymanders violate constitutional provisions similar to New Hampshire’s Free and Equal Elections Clause. As the North Carolina Supreme Court recently explained, “a legislative body can only reflect the will of the people if it is elected from districts that provide one person’s vote with substantially the same power as every other person’s vote.” *Harper*, 868 S.E.2d at 509. Thus, partisan gerrymanders violate the North Carolina Constitution’s requirement that elections be “free” because they “prevent elections from reflecting the will of the people impartially and by diminishing or diluting voting power on the basis of partisan affiliation.” *Id.* at 542; *see also Common Cause*, 2019 WL 4569584, at *2 (elections are free when designed “to ascertain, fairly and truthfully, the will of the people”). The Pennsylvania Supreme Court has also adopted this reasoning, holding that partisan gerrymandering violates the Pennsylvania Constitution’s guarantee of “free and equal elections” because it denies voters “an equal opportunity to translate their votes into representation.” *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 804 (Pa. 2018).

While New Hampshire courts have not had occasion to announce a standard by which partisan gerrymandering claims under the Free and Equal Elections Clause should be measured, these decisions from other state courts provide instructive guidance. A plaintiff can demonstrate a violation of North Carolina’s free elections clause by first proving that “a districting plan systematically makes it harder for individuals because of their party affiliation to elect a governing majority than individuals in a favored party of equal size.” *Harper*, 868 S.E.2d at 546. This prima facie showing may be demonstrated by examining “the redistricting plan as a whole” or by identifying specific districts that “ignore traditional redistricting principles to achieve a partisan outcome that otherwise would not occur.” *Id.* at 547. If this threshold showing is made, the burden

shifts to the government to satisfy “strict scrutiny” by showing that “the plan is narrowly tailored to advance a compelling governmental interest.” *Id.* at 547. That compelling interest must be something other than benefitting a political party because “[a]chieving partisan advantage incommensurate with a political party’s level of statewide voter support is neither a compelling nor a legitimate government interest.” *Id.*

Similarly, a plaintiff can demonstrate a violation of Pennsylvania’s free and equal elections clause by showing that “neutral [redistricting] criteria have been subordinated, in whole or in part, to extraneous considerations such as gerrymandering for unfair partisan political advantage.” *League of Women Voters of Pa.*, 178 A.3d at 817. Alternatively, they can do so by offering statistical analyses showing that a districting plan “unfairly dilute[s] the power of a particular group’s vote,” regardless of compliance with neutral redistricting principles. *Id.*

A common denominator underlies these various standards: a redistricting plan denies voters a free and equal vote if it is intended to, and does, confer a systematic benefit to one political party at the expense of another, and that effect is not necessary to serve a compelling interest. Applying that standard here, the Challenged Plans are plainly unconstitutional. Both warp the state’s electorate to artificially boost the political fortunes of Republican candidates notwithstanding the wishes of the electorate, and their configurations are not necessary to achieve any legitimate—let alone compelling—government interest.

The Senate Plan. The partisan intent motivating the Senate Plan is readily apparent on its face. As described in detail above, *see supra* Section II(B)(1)(a), the Senate Plan contains bizarrely shaped districts whose lines are carefully manipulated to correspond to the partisan makeup of towns and wards. Eight of the plan’s districts carefully grab Democratic areas of the state such that each contains an overwhelming number of Democratic voters. Meanwhile, the other 16 districts

divide the remaining pockets of Democratic voters such that Republicans candidates can easily prevail in each. In crafting these districts, the General Court excessively divided communities of interest and produced remarkably noncompact district shapes. *Id.*

Expert analyses confirm what the Senate Plan’s irregularly shaped districts suggest: The plan cannot be explained by anything other than an intent to entrench Republican control. By generating 1,000 simulated plans using partisan-neutral criteria, Dr. Chen demonstrated that the Senate Plan’s pro-Republican bias is extremely unlikely to occur without an intent to achieve that result. On several metrics, the Senate Plan is an *extreme* statistical outlier. Not a single one of Dr. Chen’s 1,000 simulated plans contained as great a degree of pro-Republican bias. *See* Chen Aff. ¶¶ 51, 57, 63. Indeed, a majority of the Senate Plan’s individual districts are themselves extreme statistical outliers in light of their partisan tilt. *Id.* ¶¶ 35–41. These findings permit just one conclusion: “[P]artisanship predominated in the drawing of the 2022 [Senate] Plan.” *Id.* ¶ 75.

Dr. Pegden’s analysis shows the same. The Senate Plan contains greater pro-Republican bias than 99.999% of the millions of simulated plans that similarly comply with partisan-neutral redistricting criteria. Pegden Aff. at 9. In fact, the Senate Plan contains greater pro-Republican bias than 99.975% of all *possible* plans satisfying those criteria. *Id.*

The Senate Plan will have the effect that the General Court intended. If used in future elections, the Senate Plan will result in Republicans obtaining *supermajority control* of the Senate even if they do not win a majority of the statewide vote, making it a “durable” partisan gerrymander. Chen Aff. ¶ 63. This cannot be of any surprise to the General Court; they were explicitly told that this would result if they enacted the Senate Plan. Dutton Aff. Ex. 10 at 7 (testimony that the plan would “lock[] in a supermajority for Republicans”).

The Senate Plan cannot survive any level of scrutiny, let alone strict scrutiny. There is no

government interest—compelling or otherwise—that can justify the Senate Plan’s pro-Republican warping of New Hampshire’s election results. The bias is not necessary to achieve population equality among districts, as Drs. Chen and Pegden generated millions of plans with less pro-Republican bias that nonetheless achieved similar population deviations. Chen Aff. ¶¶ 48–63; Pegden Aff. at 9. Nor is the Senate Plan’s partisan bias necessary to draw geographically compact districts, as Drs. Chen and Pegden generated millions of plans with less partisan bias that nonetheless achieved equal or greater district compactness scores. Chen Aff. ¶¶ 23–24; Pegden Aff. at 9. The bias does not result from New Hampshire’s natural political geography, as that geography, “combined with the application of traditional districting principles, almost never resulted in a simulated Senate plan containing 15 relatively safe Republican-favoring districts with over a 52.5% Republican vote share.” Chen Aff. ¶ 78. Finally, “keeping communities of interest together cannot justify the State Senate map,” and in fact “disparate communities were pieced together in an effort to achieve partisan gain.” Scala Aff. ¶ 43.

In sum, because the Senate Plan is the result of an intent to benefit Republicans at the expense of Democrats, because it will have that effect, and because that effect is not necessary to achieve any compelling governmental interest, the Senate Plan violates the New Hampshire Free and Equal Elections Clause.

The Executive Council Plan. The Executive Council plan violates the Free and Equal Elections for the same reasons. As with the Senate Plan, the Executive Council Plan’s district shapes make plain the General Court’s intent to pack and crack Democratic voters. District 2 is carefully manipulated to include a swath of Democratic-leaning municipalities but exclude Republican-leaning ones. Meanwhile, the other four districts meticulously divide the state’s remaining Democratic strongholds, ensuring that each district’s Republican vote share stays

sufficiently high to ensure a Republican victory. The result is districts that are not only oddly shaped, but also inexplicable when considering the state’s communities of interest.

What these district shapes suggest is confirmed by the expert analyses of Drs. Chen and Pegden, both of whom conclude that the plan is the result of a predominant motive to boost Republican electoral prospects. Not a single one of the 1,000 plans generated by Dr. Chen contained four safe Republican districts the way the Executive Council Plan does. Chen Aff. ¶ 110. Nor does a single one of those 1,000 simulated plans contain the level of pro-Republican bias contained in the Executive Council Plan using the lopsided-margins measure. *Id.* ¶ 121. The Executive Council Plan’s partisan bias is more extreme than nearly 95% of Dr. Chen’s simulated plans when considering the mean-median measure, and 99.8% of the same plans when considering the partisan-symmetry measure. *Id.* ¶¶ 114, 126. Again, these findings permit just one conclusion: “[P]artisanship predominated in the drawing of the 2022 [Executive Council] Plan.” *Id.* ¶ 131.

As Dr. Pegden shows, the Executive Council Plan contains stronger pro-Republican bias than more than 99.9984% of millions of plans that equally (or better) comply with partisan-neutral criteria. Pegden Aff. at 14. In fact, the Executive Council Plan contains stronger pro-Republican bias that 99.96% of *all possible* plans satisfying those criteria. *Id.*

The Executive Council gerrymander is effective. In a state where Republican and Democratic candidates roughly split the statewide vote, the Executive Council Plan will result in Republicans controlling the Executive Council even when they fail to amass half of the statewide vote. Chen Aff. ¶ 116. As a result, the Executive Council Plan is a “durable” partisan gerrymander. *Id.* ¶ 127.

The Executive Council Plan cannot satisfy strict scrutiny. The plan’s pro-Republican bias is not necessary to achieve any legitimate—let alone compelling—nonpartisan state interest. As

with the Senate Plan, this level of bias is not necessary to achieve population equality, as Drs. Chen and Pegden produced millions of plans with less partisan bias that contained essentially equal or greater population equality. Chen Aff. ¶¶ 111–28; Pegden Aff. at 14. Nor is it necessary to achieve geographically compact districts, as Dr. Chen and Dr. Pegden also produced millions of plans with less partisan bias that achieved equal or better compactness scores. Chen Aff. ¶¶ 85–86; Pegden Aff. at 14. The bias does not result from New Hampshire’s natural political geography, as that geography “combined with the application of traditional districting principles, almost never resulted in a simulated Executive Council plan containing four relatively safe Republican-favoring districts and one relatively safe Democratic-favoring district.” Chen Aff. ¶ 135. Finally, “keeping communities of interest together cannot justify the Executive Council map,” as “the First, Second, and Fourth districts divide communities of interest and combine communities with few shared interests,” while the Fifth District’s edges and tails “include[] disparate communities in a manner consistent with a classic partisan gerrymander.” Scala Aff. ¶¶ 68–69.

In sum, because the Executive Council Plan was the result of a predominant intent to entrench Republican control of the Executive Council, because it will have that effect, and because the effect is not necessary to achieve a compelling state interest, the Executive Council Plan violates the Free and Equal Elections Clause.

2. The Challenged Plans violate the New Hampshire Constitution’s equal protection guarantee.

In addition to violating the Free and Equal Elections Clause, the Challenged Plans separately violate the New Hampshire Constitution’s guarantee of equal protection. While it is not the judiciary’s “function to decide the peculiarly political questions involved in reapportionment, [] it *is* [its] duty to insure the electorate equal protection of the laws.” *Burling*, 148 N.H. at 144 (quoting *Silver v. Brown*, 405 P.2d 132, 140 (Cal. 1965)).

The New Hampshire Constitution guarantees that “[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. 1, art. 1. It also requires that government be “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. 1, art. 10. And it 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 which they, or their representative body have given their consent.” *Id.* pt. 1, art. 12. Together, these provisions provide a constitutional guarantee of equal protection of law, which “ensure[s] that State law treats groups of similarly situated citizens in the same manner.” *McGraw v. Exeter Region Coop. 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 New Hampshire Constitution’s “organic principle of equality”). When appropriate, the New Hampshire Constitution’s equal protection guarantee can extend beyond that of the U.S. Constitution. *State v. Ball*, 124 N.H. 226, 231–32 (1983) (“[O]ur court has stated that it has the power to interpret the New Hampshire Constitution as more protective of individual rights than the parallel provisions of the United States Constitution.”). Given the fundamental nature of the right at stake, this is such an appropriate situation.

While the New Hampshire Supreme Court has not had an opportunity to adjudicate an equal protection claim in the partisan gerrymandering context, it has made clear that the New Hampshire Constitution “guarantees that each citizen’s vote will have equal weight.” *Below*, 148 N.H. at 5. Just as a redistricting plan might deny a group of voters their right to an equally weighted

vote by subjecting them to malapportioned districts, *see id.*, so too can it also deny voters the same right by sorting them into districts such that it is disproportionately harder for them to translate their votes into representation. “The fundamental right to vote on equal terms includes the right to substantially equal legislative representation,” and that “necessarily encompasses the opportunity to aggregate one’s vote with likeminded citizens to elect a governing majority of election officials who reflect those citizens’ views.” *Harper*, 868 S.E.2d at 544 (cleaned up). “Designing districts in a way that denies voters substantially equal voting power by diminishing or diluting their votes on the basis of party affiliation deprives voters in the disfavored party of the opportunity to aggregate their votes to elect such a governing majority,” thus denying them the ability to vote on equal terms with others. *Id.* In other words, a districting plan that is gerrymandered on a partisan basis “treats similarly situated persons differently” by diluting certain voters’ ability to achieve representation due to no reason other than their political views. *McGraw*, 145 N.H. at 712; *see also Common Cause*, 2019 WL 4569584, at *115 (“[T]he intentional classification of voters based on partisanship in order to pack and crack them into districts is an impermissible distinction among similarly situated citizens aimed at denying equal voting power.” (cleaned up)); *see also Rivera v. Schwab*, No. 2022-CV-000089 (Wyandotte Cty., Kan. Dist. Ct. Apr. 25, 2022), slip. op. at *178-82 (copy attached at Dutton Aff. Ex. 21) (adopting same analysis and finding partisan gerrymander violated equal protection), *appeal docketed* No. 125092 (Kan.).

Again, although New Hampshire courts have not had occasion to settle on an applicable standard for an equal protection claim in the partisan gerrymandering context, other state’s laws provide helpful guidance. In North Carolina, a districting plan denies voters their right of equal protection if it “diminishes or dilutes a voter’s opportunity to aggregate with likeminded voters to elect a governing majority”—or, in other words, it “systematically makes it harder for on group of

voters to elect a governing majority than another group of voters of equal size.” *Harper*, 868 S.E.2d at 544. Such a plan violates the guarantee of equal protection of law unless it can satisfy strict scrutiny. *Id.*

Here, the Challenged Plans violate the New Hampshire Constitution’s equal protection provisions because it systematically makes it more difficult for Democrats to achieve a majority in the Senate and Executive Council than it is for Republicans to achieve the same feat, and this result cannot satisfy strict scrutiny, let alone any level of judicial scrutiny.

The Senate Plan. In the Senate Plan, Plaintiffs’ and other Democrats’ votes are unfairly diluted compared to their Republican counterparts. Even if New Hampshire voters voted equally for Republicans and Democrats in state senatorial elections, the Senate Plan would *still* result in Republicans having supermajority control of the chamber. *Chen Aff.* ¶ 53. Indeed, Republicans need not even win the statewide vote to achieve this result. *Id.* By contrast, Democrats cannot achieve mere majority control of the chamber without amassing far more than half of the statewide vote. *Id.* ¶ 54. The Senate Plan thus “systematically makes it harder for” Democrats “to elect a governing majority than another group of voters of equal size.” *Harper*, 868 S.E.2d at 544. In other words, the Senate Plan treats Plaintiffs and other Democratic voters differently than Republican voters—by diminishing the former group’s voting strength and boosting the latter’s—even when these groups are similarly situated. And as already explained, *see supra* Section IV(A)(1), the Senate Plan’s dilution of Democrats’ voting strength cannot satisfy strict scrutiny.

The Executive Council Plan. The same is true of the Executive Council Plan, which entrenches Republican control regardless of the wishes of the electorate. As discussed, while Republicans can reliably win 80% of Executive Council seats, Democrats must win well more than half just to obtain a mere majority. By treating Democratic voters differently than Republican

voters and diluting the voting strength of the former and boosting that of the latter, the Executive Council Plan violates Plaintiffs' right to equal protection. And as already explained, *see supra* Section IV(A)(1), because the Executive Council Plan's pro-Republican bias is not necessary to achieve any compelling state interest, it cannot satisfy strict scrutiny.

In sum, because the Senate and Executive Council Plans systematically make it easier for Republicans to translate their votes into control of the Senate and Executive Council—while making it harder for Democrats to do the same—and because neither plan can satisfy strict scrutiny, they both violate the New Hampshire Constitution's guarantee of equal protection.

3. The Challenged Plans violate the New Hampshire Constitution's guarantees of free speech and assembly.

In addition to denying Plaintiffs both free and equal elections *and* their right to equal protection, the Challenged Plans engage in unconstitutional viewpoint discrimination and retaliation against Plaintiffs and other New Hampshire Democrats. The New Hampshire Constitution closely guards the freedoms of speech and association, which are as protective as the First Amendment to the U.S. Constitution. *See* N.H. Const. pt. I, art. 22 ("Free speech and Liberty of the press are essential to the security of Freedom in a State: They ought, therefore, to be inviolably preserved."); *id.* pt. I, art. 32 ("The people have a right, in an orderly and peaceable manner, to assemble and consult upon the common good, give instructions to their representatives, and to request of the legislative body, by way of petition or remonstrance, redress of the wrongs done them, and of the grievances they suffer."); *Op. of Justs.*, 121 N.H. 434, 436 (1981) (explaining that "the New Hampshire Constitution guarantees the same right to free speech and association" as the First Amendment). These rights are cornerstones of our democratic system: "Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views."