STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS SUPERIOR COURT
SOUTHERN DISTRICT

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

&

THE STATE OF NEW HAMPSHIRE

MEMORANDUM OF LAW IN SUPPORT OF THE DEFENDANTS' OBJECTION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

The Defendants, David Scanlan, in his official capacity as New Hampshire Secretary of State, and the State of New Hampshire, respectfully submit this Joint Memorandum of Law in support of their Objection to Plaintiffs' Motion for Preliminary Injunction.

PRELIMINARY STATEMENT

The Plaintiffs, eleven registered New Hampshire voters, bring this action to challenge duly enacted and constitutionally mandated reapportionments of the State Senate and Executive Council districts following the 2020 federal census. The Plaintiffs challenge the reapportioned districts based solely on partisan gerrymandering, a theory that has never been recognized by the New Hampshire Supreme Court under the State Constitution, and one which the United States

Supreme Court has held presents a nonjusticiable political question under the Federal Constitution. *See Rucho v. Common Cause*, 139 S.Ct. 2484 (2019). The Plaintiffs have filed a massive complaint and an even more massive application for a preliminary injunction, the latter of which is supported by more than 700 pages of documents, including three different expert reports. The sheer volume of this material, and the dozens (if not hundreds) of hours of attorney and expert work spent preparing it, reflect the heavy burden the Plaintiffs bear to obtain the extraordinary relief they seek in this case.

That relief, and the novel theory under which the Plaintiffs seek it, would normally require robust briefing and, if necessary, interlocutory consideration by the New Hampshire Supreme Court. If partisan gerrymandering were determined to be a viable cause of action under New Hampshire law—a proposition the Defendants dispute—then the Defendants would typically be afforded an opportunity to conduct discovery and retain one or more experts of their own. But the Plaintiffs seek to eschew these normal features of adversarial litigation and instead invite this Court to grant them what would functionally be expedited merits relief on their novel claims through a prepackaged bench trial. The Plaintiffs seek this relief all in advance of upcoming primary and general elections, for which the candidate filing periods are already open.

The Court should deny the Plaintiffs' motion for myriad reasons. Longstanding equitable considerations emphasized by the United States Supreme Court in, among other cases, *Purcell v. Gonzalez*, and more recently reaffirmed by the New Hampshire Supreme Court in *Norelli v. Secretary of State*, make manifest that the Plaintiffs cannot receive the extraordinary relief they seek in advance of the upcoming elections. Even setting aside the novel nature of the Plaintiffs' legal theories, the redistricting plans they challenge are "entitled to the same presumption of constitutionality as any other statute." *City of Manchester v. Secretary of State*, 163 N.H. 689,

697 (2012) (*per curiam*). In *Purcell*, the U.S. Supreme Court observed that when "the imminence of [an] election" results in "inadequate time to resolve the factual disputes" central to the claims at issue, a court should "of necessity allow the election to proceed without an injunction suspending [the challenged provisions]." 549 U.S. 1, 5–6 (2006) (*per curiam*). Similarly, the New Hampshire Supreme Court acknowledged in *Norelli* that "a constitutional redistricting plan, including one drawn by a state supreme court, must be adopted 'within ample time to permit such a plan to be utilized in the [upcoming election],' in accordance with the provision of the state's election laws." __ A.3d __, 2022 WL 1498345, at *7 (N.H. May 12, 2022) (*per curiam*) (quoting *Scott v. Germano*, 381 U.S. 407, 409 (1965) (*per curiam*)).

Under RSA 655:14, the candidate filing period for the upcoming primary and general elections opened June 1. That filing period closes June 10, three days before the preliminary hearing in this matter. The Secretary of State may only change or extend the filing period "if the elective districts for any office in RSA 662 *have not been amended* according to the most recently completed federal decennial census before the commencement of the filing period." RSA 655:14-c (emphasis added). And even then, the longest extension that would not materially disrupt the Secretary of State's ability to administer the upcoming elections would be to June 17, as discussed in greater detail below. There is, in other words, no time for this Court to provide the extraordinary relief the Plaintiffs seek in this case—much less allow sufficient time for the important legal questions this case presents to be fully briefed and resolved and any subsequent discovery conducted—"within ample time to permit [that relief] to be utilized in the [upcoming election], in accordance with the provision of the state's election laws." *Norelli*, 2022 WL 1498345, at *7. For this reason alone, the Plaintiffs' motion fails.

Nonintervention aside, the Court should also deny the Plaintiffs' motion under the traditional preliminary-injunction factors. The Plaintiffs are not likely to succeed on the merits of their claims because partisan gerrymandering is not a justiciable cause of action under the State Constitution. *Norelli* confirms this. In that case, the New Hampshire Supreme Court made clear that "[p]olitical considerations 'have no place in a court-ordered remedial [redistricting] plan.'" *Norelli*, 2022 WL 1498345, at *9 (quoting *Below v. Gardner*, 148 N.H. 1, 11 (2002) (*per curiam*), and citing *Connor v. Fitch*, 431 U.S. 407, 415 (1977)). To that end, the New Hampshire Supreme Court prohibited the special master from considering "political data or partisan factors, such as party registration statistics, prior election results, or future election prospects." *Norelli v. Secretary of State*, No. 2022-0184 (May 12, 2022 Order at 4). The Plaintiffs' filings in this case demonstrate that the evidence upon which they seek to base their claims consists almost entirely of the above information that the New Hampshire Supreme Court has expressly precluded state courts from considering in redistricting cases. Consequently, under existing precedent, the Plaintiffs' partisan-gerrymandering claims are nonjusticiable.

But even if those claims were justiciable, the Plaintiffs base them on transparently flawed assumptions and speculation that does not come close to meeting Plaintiffs' burden of demonstrating a clear entitlement to the affirmative relief they seek. For this reason, too, the Plaintiffs have not demonstrated a likelihood of success on the merits. And beyond those assumptions and speculation, the Plaintiffs do not identify any likelihood of harm, much less one that is immediate and irreparable, should the injunction they seek not issue. Furthermore, the balance of the equities and the public interest support leaving duly enacted and presumptively constitutional redistricting plans in place for the upcoming elections, rather than unnecessarily disrupting those elections and creating voter confusion after the candidate filing period has

opened and, likely, already closed. Thus, the Plaintiffs have also not met their burden under any of the traditional preliminary-injunction factors.

For all of these reasons, the Plaintiffs are not entitled to preliminary relief in this case at all, let alone on the timeframe they ask this Court to issue one. The Court should therefore deny the Plaintiffs' motion for a preliminary injunction.

BACKGROUND

I. State Senate and Executive Council districting plans.

The twenty-four State Senate districts were reapportioned following the 2020 federal census through Senate Bill ("SB") 240. *See Bill Docket – SB240*, N.H. Gen. Court, *available at* https://www.gencourt.state.nh.us/bill_status/billinfo.aspx?id=1983&inflect=2. The bill was introduced on January 5, 2022. *See id.* It was passed by the Senate on February 16 and by the House two months later on April 21. *See id*. *See id.* The bill was then signed by the Governor on May 6, 2022, with an effective date of the same day. *See id.*

SB 241 reapportioned the five Executive Council districts. *See Bill Docket – SB241*, N.H. Gen. Court, *available at* https://www.gencourt.state.nh.us/bill_status/billinfo.aspx ?id=1984&inflect=2. The bill was introduced on January 5, 2022. *See id.* It was passed by the Senate on March 24, 2022. *See id.* It was approximately a month before the bill was passed by the House on April 21, 2022. *See id.* The bill was then signed by the Governor on May 6, 2022, with an effective date of the same day. *See id.*

II. Procedural history.

The Plaintiffs initiated this action on May 9, 2022, by filing a 38-page, 120-paragraph complaint in this Court against the Secretary of State. *See generally* Pls.' Compl. Through their complaint, the Plaintiffs challenge the State Senate and Executive Council districting plans on a

partisan-gerrymandering theory. *See id.* ¶¶ 99–120. The Plaintiffs contend that partisan gerrymandering violates several provisions of the New Hampshire Constitution. *See id.* In their prayer for relief, the Plaintiffs ask this Court to declare that SB 240 and SB 241 violate the State Constitution, enter corresponding preliminary and permanent injunctive relief, and "[a]dopt plans for New Hampshire's Senate and Executive Council districts that comply with the New Hampshire Constitution." *See id.*, p. 37 (Prayers A–C). The Plaintiffs further seek an award of attorney fees and costs. *See id.* (Prayer D).

On the same day they filed their complaint, the Plaintiffs also filed a motion for preliminary injunction supported by a 50-page memorandum of law. *See* Pls.' Mot. Prelim. Inj. & Mem. of Law. The Plaintiffs attached to those filings a three-page proposed order that, if approved, would enjoin the Secretary of State from enforcing SB 240 and SB 241 and require the parties "to submit, within 7 days, proposed remedial redistricting plans for the New Hampshire State Senate and Executive Council" and allow the parties to file briefs addressing other proposed plans within five days of the plans' submission. *See* Pls.' Proposed Order at 3. In the memorandum in support or their motion, the Plaintiffs made clear that they were asking this Court to "preliminarily enjoin [SB 240 and SB 241] from being used in *any* election, *including the 2022 elections*, and order the adoption of different Senate and Executive Council plans that comply with the New Hampshire Constitution." Pls.' Mem. of Law at 49 (emphases added). Acknowledging that the "[t]he candidate filing period for the State Senate and Executive Council elections is currently scheduled to begin on June 1, 2022, and end on June 10, 2022," Pls.' Mot. Prelim. Inj. ¶ 4, the Plaintiffs asked this Court to "[s]et an hearing on [their] motion to occur no later than May 23, 2022, or as soon as practicable," *id.,* p. 2 (Prayer A).

The Plaintiffs further attached to their preliminary-injunction filings 32 separate exhibits spanning 715 pages. *See* Affidavit of Steven J. Dutton ("Dutton Aff."), Exs. 1–32. Among other things, those exhibits contain affidavits, curricula vitae, and "expert declarations" from three different experts. *See* Dutton Aff., Exs. 13, 15, 16. The "expert declarations" span 99, 22, and 24 pages, respectively. *See id.* Also attached are affidavits from each of the Plaintiffs, *see* Dutton Aff., Exs. 23–33, as well as press reports, official documents, and judicial decisions, *see* Dutton Aff., Exs. 1–12, 14, 17–33.

On May 16, the Clerk of Court generated a summons scheduling a 30-minute preliminary hearing for June 13. On May 19, the Plaintiffs filed a motion to expedite the preliminary hearing or, in the alternative, to enjoin the candidate filing period until the Court had an opportunity to adjudicate the motion for a preliminary injunction. *See* Pls.' Mot. Expedite. The Court denied that motion later that same day. *See* May 19, 2022 Margin Order. On May 25, the State of New Hampshire moved with the Plaintiffs' assent to intervene as a defendant in this matter, which the Court subsequently allowed. After the Plaintiffs filed a motion seeking clarification with respect to the June 13 preliminary hearing, the Court scheduled a status conference for June 3.

III. The effect of changing the current districting plan during an ongoing election cycle.

The relief the Plaintiffs seek, if granted, would significantly disrupt the ongoing 2022 election cycle. As noted, the candidacy filing period prescribed in RSA 655:14 is already open and is scheduled to close by operation of statute on June 10. That filing period has been publicized by the Secretary of State. *See* Affidavit Of Secretary Of State David Scanlan In Support Of The Defendants' Objection To Plaintiffs' Motion For Preliminary Injunction ("Scanlan Aff.") ¶ 10. To the extent the Secretary of State is authorized to extend that period at all, doing so would itself provide a significant logistical challenge. *See id.* Without pursuing extraordinary measures that would have the potential to disrupt or jeopardize the election process

and voters' participation, the Secretary of State believes that the most pertinent date for consideration is June 17, 2022, as the end of the candidate filing period if it is necessary to extend at all. *See id.* This is one week beyond the current statutory filing deadline of June 10, 2022. If necessary, establishing June 17, 2022, as the end of the candidate filing period would allow for a compressed process, but one consistent with the Secretary of State's regular order. *See id.* Any judicial action requiring an additional shift of the filing period would jeopardize the ability of the Secretary of State to administer an orderly election, risks compliance with New Hampshire and federal law, and threatens the ability of our uniformed armed service members deployed overseas to vote (UOCAVA voters). *See id.* ¶¶ 10–17. UOCAVA voters also include military member dependents and many other voters who are living for a time outside the United States. *See id.* ¶ 15. Their votes too may be sacrificed should changes to election procedures eliminate the ability to get ballots abroad and to receive them back in time to be counted on Election Day. *See id.* ¶ 16.

The Secretary of State has limited authority to alter candidate filing periods. *Id.* ¶ 10. The statutory filing period for declarations of candidacy runs from June 1 through June 10, 2022. RSA 655:14. However, the Secretary of State is authorized to change or extend the filing period as necessary to implement revised elective districts where those elective districts have not been amended according to the most recently completed federal decennial census. RSA 655:14-c. As the elective districts have been amended per the enactment of SB 240 and SB 241, it is not clear that RSA 655:14-c is applicable.

Any delay in a filing period for a short period beyond June 17, 2022, would almost certainly necessitate using two or three separate ballots. With 309 polling places, each requiring a unique ballot produced by the Secretary of State, any resort to multiple ballots in order to allow

delayed production would quickly result in an unworkable challenge. *See* Scanlan Aff. ¶¶ 11–17. Splitting ballots by the type of race would double or triple the number of ballots to be produced, complicate the ballot handling process, and require both election officials and voters to handle multiple different ballots throughout the voting process. *See id.* ¶ 12. Multiple ballots increase the risk of counting and reconciliation errors or confusion and increase the workload on election officials. *See id.* ¶¶ 12, 16, 17.

Additionally, the Secretary of State is responsible for printing ballots on suitable paper that is compliant with the requirements of ballot counting devices. *See* RSA 656:15. As a result of recent supply chain disruptions, the Secretary of State's Office has had to spend considerable time and expense securing sufficient paper to cover the expected ballots for the primary and general elections. Scanlan Aff. ¶ 14. Utilizing an extraordinary measure such as putting different types of races on different ballots—should elective maps be confirmed at different times—would threaten to exhaust the secured paper supply before ballot needs are met. *Id.* If paper that is not suitable for use with ballot counting devices is not available in sufficient quantities, ballots would have to be printed on alternate paper that would require hand counting. *Id.* Hand counting ballots at polling places that serve large numbers of voters would be onerous, disruptive, and time consuming. *Id.*

Even with a small change in the candidate filing period—which may not be possible for the Secretary to order under current law—significant deadlines concern the practicalities of formatting and printing hundreds of ballot versions and the obligations imposed by the Federal MOVE Act, 52 U.S.C.S. § 20302(a) concerning absent UOCAVA voters. *Id.* ¶ 15. A valid request from such a voter requires a ballot to be sent to the voter at least 45 days before an election for Federal office. *Id.* ¶ 16. With the New Hampshire State Primary being on September

13, 2022, 45 days prior to that date is July 30, 2022. Any further delay would require a Presidential Designee to grant a hardship exemption from the deadline if the state "has suffered a delay in generating ballots due to a legal contest." 52 U.S.C.S. § 20302(g)(1)(B). However, the granting of a hardship exemption still risks the timely receipt and return of UOCAVA voters' ballots. *Id.* ¶ 16.

In sum, the most important dates to maintain the Secretary of State's regular order are as follows:

- June 10, 2022: Statutory filing deadline.
- June 15, 2022: Party vacancy deadline.
- June 17, 2022: Amended candidate filing deadline.
- June 24, 2022: Ballot print layout and proofing documents submitted to printers.
- July 8, 2022: Printing begins.
- July 29, 2022: Ballots shipped.
- July 30, 2022: UOCAVA ballots must be transmitted to clerks for distribution to UOCAVA voters.

Id. ¶ 15.

It is essential to emphasize that as of the day of this filing the State is the beginning of the election process, and by the hearing date the filing period for candidates will be closed. If relief were ordered, any judicially-drawn maps would have to be crafted and implemented well *before* the end of the filing period, or else that relief would upend the electoral process. *See See id.* ¶ 16–17. In other words, the time for changing elective districts has already passed. *See id.* ¶ 17.

STANDARD OF REVIEW

"The issuance of injunctions, either temporary or permanent, has long been considered an extraordinary remedy." *N.H. Dep't of Envtl. Servs. v. Mottolo*, 155 N.H. 57, 63 (2007) (citation

omitted). "A preliminary injunction is a provisional remedy that preserves the status quo pending a final determination of the case on the merits." *Id.* (citation omitted). To be entitled to preliminary injunctive relief, the Plaintiffs must show that: (1) they are likely to succeed on the merits of their claims; (2) there is an immediate danger that they will suffer irreparable harm absent injunctive relief; and (3) that there is no adequate remedy at law. *Id.* When determining whether to grant injunctive relief, courts also consider the balance of equities, *see N.H. Donuts, Inc. v. Skipitaris*, 129 N.H. 774, 786 (1987), and whether the public interest would be served by granting the injunction, *see UniFirst Corp. v. City of Nashua*, 130 N.H. 11, 14 (1987).

As the moving party, the Plaintiffs bear the burden of demonstrating that a preliminary injunction is warranted. *See Mottolo*, 155 N.H. at 63. While preliminary injunctive relief is always an "extraordinary remedy," *id.*, "some preliminary injunctions are disfavored and require a stronger showing by the movant . . . ." *Fish v. Kobach*, 840 F.3d 710, 723 (10th Cir. 2010). These include "(1) preliminary injunctions that alter the status quo; (2) mandatory preliminary injunctions; and (3) preliminary injunctions that afford the movant all the relief that it could recover at the conclusion of a full trial on the merits." *Id.* at 723–24 (citations omitted).

In this case, the Plaintiffs do "not seek a traditional, prohibitory preliminary injunction, but instead ask[] for a mandatory preliminary injunction, which requires affirmative action by the non-moving party in advance of trial . . . ." *Braintree Labs., Inc. v. Citigroup Glob. Markets Inc.*, 622 F.3d 36, 40–41 (1st Cir. 2010). A mandatory preliminary injunction "alters rather than preserves the status quo," and therefore "should be granted only in those circumstances when the exigencies of the situation demand such relief." *Id.* at 41 (citation and quotation marks omitted). As the New Hampshire Supreme Court has observed, there is "no substantial distinction between mandamus and a mandatory injunction directing performance of official public duties." *Guy J. v.*

Comm'r, N.H. Dep't of Educ., 131 N.H. 742, 747 (1989) (Souter, J.). Such relief is only available "where the petitioner has an apparent right to the requested relief and no other remedy will fully and adequately afford relief." *Appeal of Morrissey*, 165 N.H. 87, 94 (2013) (citation omitted).

Moreover, the Plaintiffs' preliminary injunction motion functionally seeks a ruling on the ultimate merits of the claims in the complaint. *See* Pls.' Mot. for Prelim. Inj., Proposed Order (proposing that this Court: (i) enjoin the State from enforcing the duly enacted State Senate and Executive Council districting plans; and (ii) order parties to submit proposed "remedial redistricting plans"). This also subjects the motion to a "heightened standard." *Fish*, 840 F.3d at 723. Indeed, "it is generally inappropriate for a trial court at the preliminary-injunction stage to give a final judgment on the merits." *Mottolo*, 155 N.H. at 61 (citation and quotation marks omitted). For this reason, too, the "exacting standard" for preliminary injunctive relief "is even more searching" in this case. *Pashby v. Delia*, 709 F.3d 307, 319 (4th Cir. 2013) (citation and quotation marks omitted).

ARGUMENT

I. Longstanding principles of nonintervention provide an independent basis for this Court to deny the Plaintiffs' request for a preliminary injunction.

As discussed above, insufficient time remains for this Court to fashion the remedy the Plaintiffs seek in this case—let alone resolve the important threshold legal issues this case presents and allow the Defendants time to conduct meaningful discovery and seek to retain one or more experts of their own—without upending the upcoming election cycle. Principles of nonintervention unique to elections litigation, reflected in longstanding precedents from the United States Supreme Court and the New Hampshire Supreme Court, confirm that under these circumstances this Court should stay its hand. While these considerations permeate many of the

traditional preliminary-injunction factors, they provide a freestanding basis for this Court to deny the Plaintiffs' motion. This is true regardless of the merits of the Plaintiffs' claims.

In *Purcell*, the United States Supreme Court emphasized that courts faced with requests for preliminary injunctive relief in the lead up to an election "must weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases and [the court's] own institutional procedures." 549 U.S. at 4. This is because "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls," and "[a]s an election draws closer, that risk will increase." *Id.* at 4–5. Because the equitable considerations underlying *Purcell* are similar to those underlying laches, courts will often apply the doctrines interchangeably. *See, e.g.*, *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016) ("Call it what you will—laches, the *Purcell* principle, or common sense—the idea is that courts will not disrupt imminent elections absent a powerful reason to do so."). Yet, unlike laches, which requires proof of delay on behalf of the applicant, *see Tarnawa v. Goode*, 172 N.H. 321, 331 (2019), the central focus under *Purcell* is *solely* the timing of a court's order in relation to an election and its potential disruptive effect, *see, e.g.*, *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1206–08 (2020) (focusing principally on the timing of the district court's order and its effect without consideration of whether the plaintiffs delayed in bringing litigation); *Common Cause R.I. v. Gorbea*, 970 F.3d 11, 16 (1st Cir. 2020) (noting that the "perils of federal courts changing the rules on the eve of an election" are normally sufficient to warrant a stay of preliminary relief); *Thompson v. Dewine*, 959 F.3d 804, 813 (7th Cir. 2020) (invoking *Purcell* without considering delay). Indeed, *Purcell* itself suggests that it might be error if a court does *not* provide due weight to any disruptive effect its decision might have on the electoral

process. *See* 549 U.S. at 4 ("Faced with an application to enjoin the operation of voter identification procedures just weeks before an election, the Court of Appeals *was required* to weigh, in addition to the harms attendant upon issuance and nonissuance of an injunction, considerations specific to election cases and its own institutional procedures." (emphasis added)). While the nonintervention considerations articulated in *Purcell* have become eponymous, *see, e.g.*, *Crookston*, 841 F.3d at 398 (referring the "*Purcell* principle"), they predate *Purcell* by decades and are firmly entrenched in the U.S. Supreme Court's redistricting jurisprudence, *see, e.g.*, *Germano*, 381 U.S. at 409 (observing the Illinois Supreme Court may have the authority to "redistrict the Illinois State Senate; provided that the same can be accomplished within ample time to permit such plan to be utilized in the 1966 election of the members of the State Senate, in accordance with the provisions of the Illinois election laws").

In other words, courts considering elections-related challenges have a freestanding obligation to refrain from issuing disruptive injunctions in the lead up to an election even when a plaintiff diligently seeks injunctive relief. *See Republican Nat'l Comm.*, 140 S. Ct. at 1206–08. The New Hampshire Supreme Court, too, has recognized this obligation for decades. For instance, in *Maclay v. Fuller*, the Court rejected an electoral candidate's attempt to have the judiciary add his name to a ballot in the lead up to election. *See* 96 N.H. 326, 328 (1950) (*per curiam*). The Court observed that the candidate had "[n]o clear right to the relief he seeks" and that "the situation is not subject to satisfactory correction in the short time remaining before the election" as "[n]o sufficient time would remain in which absentee ballots bearing the plaintiff's name could be printed, distributed to voters some of whom are doubtless in distance places, and returned . . by election day." 96 N.H. 326, 328 (1950) (*per curiam*).

The New Hampshire Supreme Court employed similar reasoning in an unpublished October 26, 2017 order in *Petition of New Hampshire Secretary of State*.[1] There, the Court was "persuaded that, regardless of the merits, the timing of the preliminary injunction [issued by the trial court] create[d] both a substantial risk of confusion and disruption of the orderly conduct of the election, and the prospect that similarly situated voters may be subjected to differing voter registration and voting procedures in the same election cycle." *Id.* at *1. The Court noted that it was "not alone in declining to interfere with a fast-approaching election," and that, "'in awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles.'" *Id.* at *1–2 (bracketing omitted) (quoting *Reynolds v. Sims*, 377 U.S. 533, 585 (1964)). The Court thus noted that, "'under certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid.'" *Id.* at *2 (quoting *Reynolds*, 377 U.S. at 585).

The New Hampshire Supreme Court reaffirmed the unique importance that principles of nonintervention play in redistricting lawsuits just weeks ago in *Norelli*. There, the Court emphasized that these principles "advise in favor of resolving [a redistricting] case in a timely and efficient manner so as not to disrupt the upcoming election process." *Norelli*, 2022 WL 1498345, at *7 (citing *Purcell*, 549 U.S. at 4–6, *Republican Nat'l Comm.*, 140 S. Ct. at 1206–07). Short of dieregarding these considerations, the Court in *Norelli* specifically concluded that these principles did not preclude it from intervening in the context of the congressional map both

[1] This order is attached for the Court's convenience as **Exhibit A**.

because it was able to determine that the congressional map at issue—passed following the 2010 federal census—was unconstitutional as a matter of law and because sufficient time remained for the Court to adopt its own two-district map *in advance of the filing period opening on June 1*. *See id.* at *4–10. Crucially, the Court recognized that any remedy had to be in place by June 1, "[g]iven 'the necessity for clear guidance to' the State of New Hampshire," and therefore endeavored to "'adopt a congressional plan in a timely manner' to ensure that the upcoming election proceeds in conformity with the law." *Id.* at *8 (bracketing and ellipses omitted) (internally quoting *Purcell*, 549 U.S. at 5; *Growe v. Emison*, 507 U.S. 25, 37 (1993)).

The Court thus set an ambitious schedule *after* declaring the 2010 congressional map unconstitutional to ensure that a new may would be in place by June 1. *See Norelli v. Secretary of State*, No. 2022-0184 (May 12, 2022 Order).[2] Under that schedule, a special master held proceedings and ultimately produced a report and recommendation on May 27 and the Court held additional oral argument on May 31 and issued an order approving the special master's recommended map later that same day. *Norelli v. Secretary of State*, No. 2022-0184 (May 31, 2022 Order).[3] In its May 31 order, the reiterated the "need for [the Court] to adopt a plan by June 1, 2022," and directed the clerk of court to file "an attested copy of this order and [the special master's report and recommendation], along with the census block equivalency files provided by the special master, with the Secretary of State on or before June 1, 2022." *Id.* at 2.

As the New Hampshire Supreme Court emphasized in *Norelli*, issuing injunctive relief in the form of a redrawn map this close to the election and after the filing period for candidates has opened (and, likely, has expired) would disrupt the administration of the primary and general elections. Such a remedy would upend the Secretary of State's ability to administer those

[2] A copy of this order is attached for the Court's convenience as **Exhibit B**.
[3] A copy of this order is attached for the Court's convenience as **Exhibit C.**

elections, "risking disenfranchisement and election failure," and may ultimately result in the State being unable to meet its obligations to New Hampshire voters in the armed services under UOCAVA. Scanlan Aff. ¶ 17. Again, the period for candidates to declare they are running in the State Primary Election runs from June 1 through June 10, 2022. RSA 655:14. This Court will not hold a hearing on the Plaintiffs' preliminary injunction motion until June 13, after the candidates have already finished declaring as candidates in their State Senate and Executive Council districts. Thus, the relief the Plaintiffs seek would alter the existing State Senate and Executive Council districts *after* all of the candidates have formally declared. Changes in the State Senate or Executive Council districts could shift candidates from one district to another and could conceivably even lead to some candidates running unopposed, meaning that the election process would have to be restarted at some later date, undoubtedly threatening the ability of election officials to meet statutory deadlines under state and federal law. *See Below*, 148 N.H. at 14 (declining to "undertake a wholesale revision" of a redistricting plan "upon which citizens may have relied" and after "the filing period for candidates for the senate has expired").

The remedy the Plaintiffs seek also has the potential to sow significant voter confusion. If the Senate and Executive Council districts are judicially redrawn after the filing period closes, voters will be left unsure of what district they reside in or what candidates they may vote for. The New Hampshire Supreme Court has contemplated, including in a recent case brought by many of Plaintiffs' counsel here, that changes to election procedures resulting in voter confusion can themselves violate the State Constitution. *See N.H. Democratic Party v. Secretary of State*, 174 N.H. 312, 262 A.3d 366, 379–82 (2021); *see also Guare v. State*, 167 N.H. 658, 664–65 (2015) (*per curiam*). Simply put, a court should not intervene unnecessarily in an ongoing electoral process in a way that might itself create constitutional concerns.

Nonintervention considerations are also implicated here because the Plaintiffs' voluminous filings indicate that they believe the requests for relief in this case require significant factual development and analysis, including analysis by multiple experts. Wading through and assessing all of the materials attached to the Plaintiffs' motion will take this Court significant time and effort. Further, while the Plaintiffs are not likely to succeed on the merits of any of their claims for the reasons stated below, researching and analyzing each of the those claims on its merits also takes significant time and effort, as demonstrated by the parties' lengthy pleadings and filings in this case even at this preliminary stage in the proceedings. "When an election is 'imminen[t]' and when there is 'inadequate time to resolve[] factual disputes' and legal disputes, courts will generally decline to grant an injunction to alter a State's established election procedures." *Crookston*, 841 F.3d at 398 (quoting *Purcell*, 549 U.S. at 5–6); *see also Maclay*, 96 N.H. at 328. This case is a paradigmatic example of why that is so.

Further, as previously noted, principles of nonintervention weigh against judicial intervention in this case *regardless* of the ultimate merits of the Plaintiffs' claims. When a plaintiff asks a court to intervene in a state's election procedures shortly before an election is scheduled to occur, "a due regard for the public interest in orderly elections" will alone support a court's decision to deny preliminary injunctive relief even if a plaintiff's claims are ultimately meritorious. *Benisek v. Lamone*, 138 S. Ct. 1942, 1944–45 (2018) (citing *Purcell*, 549 U.S. at 4–5); *see also Riley v. Kennedy*, 553 U.S. 406, 426 (2008) ("[W]e have recognized that practical considerations sometimes require courts to allow elections to proceed despite pending legal challenges."). The New Hampshire Supreme Court emphasized in *Petition of New Hampshire Secretary of State* that it was "persuaded that, *regardless of the merits*, the timing of the preliminary injunction . . . creates both a substantial risk of confusion and disruption to the

orderly conduct of the election." *Petition of N.H. Secretary of State* (**Exhibit A**) at *1 (emphasis added). Thus, while the Defendants dispute whether the Plaintiffs' claims have any merit for the reasons discussed below, this Court can (and should) deny the Plaintiffs' motion regardless of that consideration.

In sum, the equitable principles embodied in *Purcell*, *Maclay*, *Norelli,* and other decisions weigh heavily in favor of nonintervention, regardless of any consideration of the merits of the Plaintiffs' claims. For this reason alone, the Plaintiffs' motion for a preliminary injunction should be denied.

II. The Plaintiffs' claims present nonjusticiable political questions that this Court should decline to address.

The Court should further deny the Plaintiffs' motion because their claims present nonjusticiable political questions. The State Constitution grants the Legislature the authority to determine State Senate districts and Executive Council districts. N.H. Const., Pt. II, Art. 26; N.H. Const., Pt. II, Art. 65. The State Constitution further defines how the Legislature must construct those districts. Part II, Article 26 provides that the Legislature "shall divide the state into single-member districts, as nearly equal as may be in population, each consisting of contiguous towns, city wards and unincorporated places, without dividing any town, city ward or unincorporated place." Part II, Article 65 provides that the Legislature may "divide the state into five districts, as nearly equal as may be, governing themselves by the number of population, each district to elect a councilor."

Here, the Plaintiffs do not allege that the State Senate or Executive Council districts fail to comply with any of the express requirements of Part II, Articles 26 and 65. Rather, the Plaintiffs complain that they do not believe the State Senate and Executive Council districts are favorable to the Plaintiffs' preferred political party. Put differently, the Plaintiffs seek a

judicially-decreed political solution to a legislative political problem. The Plaintiffs ask the Court to impose their preferred political solution rather than leave the decision regarding redistricting in the hands of the political body that is constitutionally authorized to redistrict and is politically accountable to the voters.

Moreover, the Plaintiffs seek to usurp the Legislature's constitutional authority to redistrict based on the assumption that past results *for entirely different political offices* dictate the results of future State Senate and Executive Council elections. *See* Dutton Aff., Exs. 13, 14, & 15 (each of the Plaintiffs' experts bases their assumptions regarding the partisanship of State Senate and Executive Council districts on some combination of United States Presidential, United States Senate, and State Governor elections not on the actual results from State Senate or Executive Council elections). Further, even if the Plaintiffs had based their arguments on past State Senate and Executive Council elections, those past elections would reflect different candidates, different campaigns and electioneering efforts, different primary challenges, different political platforms, and different political exigencies. In other words, the Plaintiffs entirely discount the ability of future political candidates to modify their platforms to attract voters, and the ability of future voters to independently make up their minds, instead assuming that political affiliation is immutable and is alone determinative for future elections. Again, this demonstrates the inherently political nature of the relief the Plaintiffs seek from this Court.

Notably absent from the Plaintiffs' complaint and motion for preliminary injunction is any discussion of the United State Supreme Court's recent opinion regarding the justiciability of political gerrymandering claims under the Federal Constitution. *See Rucho*, 139 S.Ct. 2484. In *Rucho*, the Supreme Court ruled that even if "[e]xcessive partisanship in districting leads to results that reasonably seem unjust," the solution does not lie within the federal judiciary because

"partisan gerrymandering claims present political questions beyond the reach of the federal courts." *Id.* at 2506-07. The Supreme Court reasoned that judges "have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions." *Id*. at 2507. Recognizing that "judicial action must be governed by standard, by rule, and must be principled, rational, and based on reasoned distinctions found in the Constitution or laws," the Supreme Court concluded that "Judicial review of partisan gerrymandering does not meet those basic requirements." *Id*. (cleaned up). The Supreme Court further noted that it has "never struck down a partisan gerrymander as unconstitutional—despite various requests over the past 45 years." *Id*.

The Supreme Court cautioned that judicial interference in legislative redistricting would represent "an unprecedented expansion of judicial power," that would invade "one of the most intensely partisan aspects of American political life." *Id*. Moreover, exercising judicial authority in this manner "would be unlimited in scope and duration—it would recur over and over again around the country with each new round of districting." *Id*. The Supreme Court reasoned that it would be particularly inappropriate for the courts to assume "such an extraordinary and unprecedented role" because courts are an "unelected and politically unaccountable" branch of the government. *Id*.

The Supreme Court's reasoning in *Rucho* applies with equal force to this case. The Plaintiffs bring claims under the State Constitution here that appear to be functionally identical to the claims the U.S. Supreme Court concluded in *Rucho* were nonjusticiable under the Federal Constitution. *Compare id.* at 2491 (noting that the Plaintiffs alleged political gerrymandering in violation of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Elections Clause), *with* Compl. ¶¶ 99–120 (alleging political gerrymandering in violation

of the State Constitution's guarantee of free speech and association, guarantee of equal protection, and Elections Clause). The State Constitution grants redistricting authority to the Legislature—a body of elected officials who are politically accountable to their voters. The New Hampshire Supreme Court has recognized that the power to redistrict—determinations inseparable from political realities and political balancing—properly belongs to the Legislative Branch, not the judicial branch. *See Norelli*, 2022 WL 1498345, at *8 ("In the context of state legislative redistricting, we have observed that reapportionment is primarily a matter of legislative consideration and determination." (cleaned up)).

As was the case in *Rucho*, this Court should not judicially review an allegation of political gerrymandering when there are no state laws or constitutional provisions that would allow the Court to make a determination based on principled, rational, and reasoned distinctions found in those laws. *See Rucho*, 139 S. Ct. at 2507. Indeed, the New Hampshire Supreme Court has expressly *prohibited* courts basing redistricting remedies on political considerations. *See Norelli*, 2022 WL 1498345, at *9 ("Political considerations have no place in a court-ordered remedial redistricting plan." (cleaned up) (quoting *Below*, 148 N.H. at 11)); *cf. Burling v. Chandler*, 148 N.H. 143, 145 (2002) (recognizing that the New Hampshire Supreme Court's function is not to "decide peculiarly political questions involved in reapportionment," and stating that the Court "reluctantly" engaged in judicial redistricting only because of an impasse in the reapportionment process, but noting that the Court must be "indifferent to political considerations, such as incumbency or party affiliations."). To that end, the New Hampshire Supreme Court precluded the special master appointed in *Norelli* from considering "political data or partisan factors, such as party registration statistics, prior election results, or future election prospects." *Norelli v. Secretary of State*, No. 2022-0184 (May 12, 2022 Order at 4). The

Plaintiffs' filings in this case, including the "expert declarations" attached to their motion for a preliminary injunction, demonstrate that their claims turn on precisely these sorts of considerations.

The voters and elected officials in our State may choose to address political gerrymandering through legislation or constitutional amendments. *See*, *e.g.*, *Rucho*, 139 S. Ct. at 2507 (recognizing that Florida, Colorado, Michigan, Missouri, Iowa, and Delaware all approved constitutional amendments or passed legislation that was intended to restrict or prohibit political gerrymandering); *see also Arizona State Legislature v. Arizona Independent Redistricting Com'n*, 576 U.S. 787, 799 (2015) (upholding a ballot initiative that created an independent congressional redistricting commission to perform the Legislature's constitutional redistricting function). However, similar to other states, neither voters nor elected officials have put in place any justiciable criteria relating to political considerations in redistricting. Because this State has not adopted such a law or constitutional amendment, there would be no restraint on judicial intervention, and any judicial action would therefore be "unlimited in scope and duration" and untethered to principled, rational, and reasoned distinctions found in this State's Constitution or laws. *See Rucho*, 139 S.Ct. at 2507.

For all of these reasons, this Court should alternatively deny the Plaintiffs' motion for a preliminary injunction and dismiss the Plaintiffs' claims in their entirety because they present nonjusticiable political questions.

III. Even if political-gerrymandering claims were justiciable under the State Constitution, the Plaintiffs have not met their burden of demonstrating entitlement to preliminary injunctive relief under the traditional preliminary-injunction factors.

The Plaintiffs cannot meet their heavy burden of proving any of the necessary elements to obtain preliminary injunctive relief. The Plaintiffs are not likely to succeed on the merits of their

claims, there is no immediate danger of irreparable harm to the Plaintiffs, there are adequate alternative remedies at law, and the balance of equities is not in the Plaintiffs' favor. *See Mottolo*, 155 N.H. at 63. The Plaintiffs' seek to alter lawfully enacted district maps based on arguments that lack constitutional or statutory authority, and which are not supported by competent evidence regarding the alleged partisan effects of the existing State Senate and Executive Council districts. Rather, the Plaintiffs seek to rewrite a validly enacted, presumptively constitutional state law through judicial intervention on an expedited basis. The Court should not grant the Plaintiffs the "extraordinary remedy" of preliminary injunctive relief to alter the status quo, particularly before the State has a full and fair opportunity to conduct discovery, present all favorable proofs, and present a case on the merits as to why this Court should not lightly tinker with bedrock democratic institutions.

A. The Plaintiffs are not likely to succeed on the merits.

The Plaintiffs assert that the State Senate and State Executive Council districts violate the State Constitution Elections Clause (Part I, Article 11), the State Constitution's guarantee of equal protection (Part I, Articles 1, 10, and 12), and the State Constitution's guarantees of free speech and association (Part I, Articles 22 and 32). Effectively, the Plaintiffs ask this Court to rewrite the State Senate and Executive Council districts that the State Legislature passed through SB 240 and SB 241 based upon the Plaintiffs' allegations that those districts are unfavorable to the Plaintiffs' preferred political party. Thus, the Plaintiffs are asking the Court to determine the partisan makeup of the Senate and Executive Council in derogation of Part II, Article 26 of the State Constitution, which grants the authority to determine senate districts to the Legislature, and Part II, Article 65 of the State Constitution, which grants the authority to determine executive

council districts to the Legislature. The Plaintiffs are unlikely to succeed on the merits of these claims for several reasons.

First, the Plaintiffs cannot demonstrate "an apparent right to the requested relief," *Appeal of Morrissey*, 165 N.H. at 94, when it is far from certain that their claims are justiciable in the first place. As described above, the Defendants contend that the plain language of the State Constitution and the New Hampshire Supreme Court's decisions in redistricting cases amply demonstrate that partisan gerrymandering claims are not justiciable in this State, at least absent a constitutional amendment. But even if this Court were not inclined to resolve that important legal issue at this stage in the proceedings, it certainly should not engage in an "unprecedented expansion of judicial power" in order to grant preliminary injunctive relief on a claim that has never previously been recognized by any New Hampshire court. *Rucho*, 139 S.Ct. at 2507. This is particularly so when the Defendants have not had a full and fair opportunity to conduct discovery, to challenge the Plaintiffs' evidence and expert declarations, to marshal evidence in the Defendants' favor, and to seek and obtain their own expert evidence. For this reason alone, the Plaintiffs have not met their high burden under the likelihood-of-success prong of the preliminary-injunction analysis.

Second, and relatedly, the Plaintiffs are not likely to succeed on the merits because this State's Constitution and laws do not prohibit *the Legislature* from considering partisan interests when determining political districts. *See, e.g.*, *Below*, 148 N.H. at 9 (observing that courts, "[u]nlike legislatures," are constrained in how they approach the "sorts of political and policy decisions" inherent in redistricting). The U.S. Supreme Court noted in *Rucho* that it was unwilling to delve into the intensely political question of partisan districting without any "plausible grant of authority in the Constitution, and no legal standards to limit and direct [the

Court's] decisions." *Rucho*, 139 S. Ct. at 2507. Here, neither the State Constitution nor the State's laws prohibit partisan districting or provide any legal standards regarding whether or to what extent the Legislature may consider partisan interests when redistricting. For example, Plaintiffs allege the districting plans cause "vote dilution" of votes in favor of the Plaintiffs' preferred political party. But as the Supreme Court recognized in *Rucho*, "vote dilution," meaning the "idea that each vote must carry equal weight" "does not extend to political parties" and "does not mean that each party must be influential in proportion to its number of supporters." *Id*. at 2501. Thus, even if Plaintiffs' partisan-gerrymandering claims were justiciable, they have not demonstrated a likelihood of success under such a theory.

Third, the Plaintiffs' allegations of gerrymandering are not supported by any evidence that the district plans in an actual election had the allegedly intended effect of disproportionately favoring candidates of a certain political party. For example, in the two gerrymandering challenges at issue in *Rucho*, the Plaintiffs in each case offered evidence both that the political figures in charge of redistricting intended to favor their own political party, and subsequent voting bore out that intent in actual elections. *Rucho*, 139 S. Ct. at 2491–93 (ultimately dismissing these challenges as nonjusticiable). Here, no State Senate or Executive Council elections have yet taken place using the current districting plans. Thus, the Plaintiffs' claims merely reflect assumptions and speculation that the challenged districting plans would violate the Constitution. Far more is needed to obtain a preliminary injunction, particularly when that objection would affect the balance of powers between the branches of state government. *See, e.g.*, *Priv. Truck Council of Am., Inc. v. State*, 128 N.H. 466, 477 (1986) (observing that an injunction will not issue when it "rests upon purely speculative grounds and, moreover, raises serious issues regarding the separation of powers").

Fourth, all of the Plaintiffs' arguments and evidence are based on the incorrect assumption that each voter in the State is somehow immutably "Democratic" or "Republican." Put differently, the Plaintiffs' arguments assume voters have no free will to evaluate the respective candidates running in a particular election, and the respective political platforms or positions of those candidates. This assumption is fatally flawed for several reasons, not least of which is the fact that a plurality of New Hampshire voters are registered as undeclared, not as Democrats or Republicans. Scanlan Aff. ¶ 9. Indeed, there are approximately twenty percent more voters registered as undeclared than there were voters registered as either Democrats or registered as Republicans. *Id.* Whatever rhetorical benefit the Plaintiffs' focus on "Democrats" and "Republicans" might have in other states is therefore greatly diminished in New Hampshire.

The flaw in the Plaintiffs' assumption is also readily obvious from the data that the Plaintiffs' experts used to project how individual voters or voting districts would vote in future State Senate and Executive Council elections. To determine the "partisanship" of the current State Senate and Executive Council districts, the Plaintiffs looked solely at statewide elections for federal office and state governor. In doing so, the Plaintiffs failed to consider: (i) how this State's voters tend to vote in actual State Senate and Executive Council elections; (ii) whether this State's voters might value different political considerations for different political offices; (iii) that a voter does not immutably belong to any political party; and (iv) that no political party is "entitled" to win any number of political seats based on past performance.

The Plaintiffs argue that the Legislature created a partisan gerrymander for future State Senate and Executive Council elections, but the Plaintiffs did not consider or rely upon *any actual data* from prior State Senate and Executive Council elections. For example, Mr. Chen based his assumptions regarding the partisanship of voters and towns based on elections for

United States President, United States Senate, and New Hampshire Governor. Dutton Aff., Ex. 13. Mr. Scala based his assumptions regarding the partisanship of voters and towns based solely on the 2020 United States presidential election. Dutton Aff., Ex. 15. And Mr. Pegden based his assumptions regarding the partisanship of voters and towns based solely on elections for United States President and New Hampshire Governor. Dutton Aff, Ex. 16.

The failure of the Plaintiffs to consider how New Hampshire voters tend to vote in more local State Senate and Executive Council elections renders the Plaintiffs' arguments speculative. It should be obvious that the powers and responsibilities of the United State President and United States Senators differ tremendously from the powers and responsibilities of State Senators and Executive Councilors. Thus, the political issues that are important to voters for State Senate and Executive Council elections may be quite different from the political issues that are important to those voters for presidential, United States Senate, and gubernatorial elections. The Plaintiffs have not demonstrated how the past choices of New Hampshire voters somehow predicts with any mathematical certainty the way those voters will vote in *future* elections for entirely different political offices. *See*, *e.g.*, *Rucho*, 139 U.S. at 2503 (cautioning that allowing "courts to strike down apportionment plans on the basis of their prognostications as to the outcome of future elections invites findings on matters as to which neither judges nor anyone else can have any confidence" (cleaned up)).

The flaw in this approach is further apparent from Mr. Chen's own expert declaration. Mr. Chen explained that he intentionally did not consider the results of past State Senate elections "because the particular outcome of any Senate election may deviate from the long-term partisan voting trends of that district, due to factors idiosyncratic to the district," including "the presence or absence of a quality challenger, anomalous differences between the candidates in

campaign efforts or campaign finances, incumbency advantage, candidate scandals, and coattail effects." Dutton Aff., Ex. 13 at 22. Even if true, this logic cuts both ways. If partisanship in State Senate elections is not a reliable predictor of statewide partisanship, then statewide partisanship is not a reliable predictor of partisanship in local elections such as State Senate and Executive Council.

In other words, the Plaintiffs are effectively asking this Court to protect one political party in local elections based on the time, money, and effort that that political party sunk into fundamentally different, larger statewide elections. This is particularly problematic where candidates for those larger, statewide elections are more likely to receive significant political contributions and campaigning from outside the State itself. It belies common sense to suggest that one political party is entitled to their preferred districting for local elections based on the votes the party garnered following large, well-funded campaigns for a few candidates for elected offices in the federal government. If the Plaintiffs want their preferred political party to do better in future local elections, the solution cannot be to campaign for more votes for that party's presidential candidate and then to turn to the Court for judicial intervention to extend any success to local elections.

The Plaintiffs' expert opinions are similarly flawed because those experts, like the Plaintiffs themselves, also appear to assume that all voters are immutably Republican or Democratic. To the contrary, voters have free will and make up their minds based on the candidates, issues, and state of the world at the time of each given elections. This is particularly true the further "down the ticket" voters go in a state as small as New Hampshire, where citizens are more likely to personally know the candidates for local elections than they are to personally know the candidates for statewide federal elections.

One does not have to look far into the past to find an election where this State's voters did not immutably vote Republican or Democrat and instead split their votes among the major political parties depending on the particular candidates and political office involved. In the 2020 general election, New Hampshire voters elected a Democratic President, a Democratic United States Senator, and two Democratic members of congress while simultaneously electing a Republican Governor, flipping the State Senate from 58% Democratic to a 58% Republican a majority, and flipping the State House from 57.5% Democratic to a 53.25% Republican majority. *See Results from the 2020 General Election,* New Hampshire Secretary of State, https://www.sos.nh.gov/elections/elections/election-results/2020-election-results/2020-general-election (last visited June 1, 2022). Many of these races—in which candidates from both parties won—were not particularly close: for example, President Biden won the presidential election by nearly 70,000 votes, Senator Shaheen won the U.S. Senate election by nearly 125,000 votes, Representatives Pappas and Kuster won their congressional seats by approximately 20,000 and 40,000 votes, respectively, yet at the same time Governor Sununu won the gubernatorial election by more than 250,000 votes and Republicans took control of the State Senate, the House of Representatives, and the Executive Council. *See id.* In other words, a majority of voters in the same election—and in many instances a significant majority at that—preferred one political party's candidates and platform as they related to representation in the Federal government and a second political party's candidates and platform as they related to representation in State government. This further belies any suggestion that, justiciability aside, the Plaintiffs' federal-elections-based assumptions and predictions entitle them to the extraordinary relief they seek in this case.

Fifth, the Plaintiffs' entire argument relies on some notion that a political party is somehow *entitled* to win a certain quantity of offices in future elections based on that party's past performance in prior elections involving different candidates and political issues. The Plaintiffs have not identified any constitutional right for political parties to be allocated seats in proportion to the anticipated statewide vote for candidates of that party. *Cf. Rucho*, 139 S. Ct. at 2499 (recognizing that the Supreme Court's cases "clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be"). Because neither the State Constitution nor the Federal Constitution require proportional representation of political parties in elected bodies, the Plaintiffs are effectively asking the Court to "make [its] own political judgment about how much representation particular political parties *deserve*—based on the votes of their supporters—and to rearrange the challenged districts to achieve that end." *Id*. The Plaintiffs offer little justification for why a court is empowered to make such a judgment, and current New Hampshire Supreme Court precedent precludes it from doing so.

Indeed, there is something inherently *undemocratic* in what the Plaintiffs propose. The Plaintiffs complain that the Republican-controlled legislature performed its constitutionally required redistricting duties in a manner that is not favorable to Democratic candidates. But that Republican-controlled legislature did not appear out of thin air. Rather, it was the result of a hotly contested election in which, as discussed above, both Republicans and Democrats were elected to state and federal office, often by considerable margins. That an unelected body like the judiciary might nonetheless have the power to undo one of the predictable consequences of such an election and unilaterally allocate power based on its own notions of fairness is difficult to

square with the inherently political nature of both contested elections and the redistricting process. Again, the Plaintiffs have not explained why they have "an apparent right to" such an allocation of political power at all, much less on the timeframe proposed in their motion. *Appeal of Morrissey*, 165 N.H. at 94

Finally, it must be repeated that the Defendants have not had a full and fair opportunity to conduct discovery, to challenge the Plaintiffs' expert and other evidence, and to seek and obtain expert and other evidence favorable to the Defendants. At this exceedingly early juncture of this litigation, the bulk of the evidence before the Court is the pre-packaged bench trial the Plaintiffs' produced. It is antithetical to the adversarial process to reach the merits of the Plaintiffs' claims before the State has had a full and fair opportunity to mount a defense, particularly because: (i) the Plaintiffs are asking for a novel interpretation of the law; (ii) the Plaintiffs' evidence is based on numerous fundamental flaws, identified above; (iii) and the relief the Plaintiffs seek would alter the status quo of imminent State elections, which are a cornerstone of this State's democracy. Again, "it is generally inappropriate for a trial court at the preliminary-injunction stage to give a final judgment on the merits." *Mottolo*, 155 N.H. at 61 (citation and quotation marks omitted). While the standard for merits relief is similar to the standard for a preliminary injunction, there is one significant difference: "a permanent injunction requires showing *actual success* on the merits, whereas a preliminary injunction requires showing a *substantial likelihood of success* on the merits." *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 822 (10th Cir. 2007) (emphasis added). Because Plaintiffs here have shown neither, their motion must necessarily be denied.

For all of these reasons, the Plaintiffs' motion also fails under the success-on-the-merits prong of the preliminary-injunction analysis.

B. The Plaintiffs have no apparent right to the remedies they seek.

Each of these reasons further demonstrates that the Plaintiffs have failed to demonstrate that they have "an apparent right to the requested relief" and that "no other remedy will fully and adequately afford that relief" such that they can obtain the mandatory preliminary injunction they seek. *Appeal of Morrissey*, 165 N.H. at 94 (citation omitted); *see also Maclay*, 96 N.H. at 328 (rejecting a request for mandatory injunctive relief in an election case in part because "[n]o clear right to the relief which [the plaintiff] seeks is apparent").

First, as described above, New Hampshire's Constitution and laws neither prohibit nor provide an avenue for judicial relief for allegations of partisan redistricting. The State Constitution grants the authority to determine State Senate and Executive Council districts solely to the Legislature, and this State has not adopted any constitutional provision or law that prohibits, restricts, or governs when or how the Legislature may consider partisanship when fulfilling its constitutional obligation to redistrict. *Cf. Rucho*, 139 S. Ct. at 2507-08 (discussing constitutional and legislative provisions in six states that have opted to prohibit or restrict partisan considerations during redistricting).

Second, there are other remedies available that will fully and adequately afford the Plaintiffs the relief they seek. Like Florida, Colorado, Michigan, and Missouri, which prohibited or otherwise restricted partisan considerations in redistricting through constitutional amendments, the Plaintiffs could seek an amendment to the State Constitution. Like Iowa and Delaware, which prohibited or otherwise restricted partisan considerations in redistricting through legislative action, the Plaintiffs could seek a legislative solution. As the Supreme Court recognized in *Colby v. Fuller*, 96 N.H. 323 (1950), courts are "governed to no less a degree than election officials by the statutory election machinery provided by the Legislature" and "*must construe the statutes as we find them and are not free to remedy each specific inadequacy as it*

develops." *Colby*, 96 N.H. at 326. Although *Colby* dealt with the statutory process for filling a vacancy on an election ballot, *see id*. at 324-36, the reasoning is equally applicable here.

Again, the State Constitution governs the redistricting process for State Senate and Executive Council districts. The Constitution sets forth various requirements, including that Senate and Executive Council districts must be single member districts that are as nearly equal as possible in population, and Senate districts must additionally consist of contiguous and whole towns, city wards, and unincorporated places. N.H. Const., Pt. II, Arts. 26 & 65. The Plaintiffs seek to read into these constitutional provisions additional requirements that the electorate and elected officials of this State have not seen fit to impose. As the Supreme Court articulated in *Colby*, this Court should adhere to this State's election laws as they are written, and this Court is not free to rewrite Part II, Articles 26 and 65 of the State Constitution or to otherwise deviate from those laws to remedy alleged or perceived inadequacies. *See* 96 N.H. at 326. Rather, "[t]he remedy, if any is to be had, is legislative." *Id*.

Additionally, the Plaintiffs have failed to show their requested relief could be feasibly implemented without causing mass disruption of the election system and without causing more harm than good. *See Maclay*, 96 N.H at 328 ("Moreover, the situation is not subject to satisfactory correction in the short time remaining before election."). As discussed above, as of the day of this filing the State has already begun the election process. Any judicially-drawn maps would have to be crafted and implemented well *before* the end of the filing period. Practically, the time for changing elective districts has already passed, less judicial intervention and the attendant delays result in voters—and the first would be uniformed armed service members deployed overseas—being denied their right to vote.

Finally, this Court may not order what is functionally final relief on the merits of the Plaintiffs' claims through informal preliminary injunction proceedings. "Because preliminary injunctions serve only to preserve the status quo until a trial on the merits is held, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *Mottolo*, 155 N.H. at 61 (citation and quotation marks omitted). "Accordingly, it is generally inappropriate for a trial court at the preliminary-injunction stage to give a final judgment on the merits." *Id.* (same omissions). A trial court should not issue a preliminary injunction that "effectively denie[s] a defendant a full opportunity to develop [its] evidence and arguments against declaratory relief." *Id.* at 62. Nor should a trial court decide a case on the merits "before the defendant ha[s] received discovery from [the plaintiff]." *Id.*

In this case, the Plaintiffs are asking, through their motion for a preliminary injunction, for the same relief that they seek on the merits in their Complaint. *See* Pl.'s Compl. at 37 (seeking declaration that the State Senate and Executive Council districts are unconstitutional, an order enjoining the Defendant from enforcing those district plans, and an order adopting new Senate and Executive Council Districts); Pl.'s M. Prelim. Inj., at 49 (requesting this Court enjoin the Defendant from enforcing the State Senate and Executive Council districts and requesting this Court adopt new districts). And, as discussed above, the Plaintiffs ask this Court to enter that relief on an extraordinarily expedited basis, functionally eliminating any opportunity for the Defendants to conduct discovery, secure experts, and present a developed factual and legal defense. To do so would be error. *See Mottolo*, 155 N.H. at 61–63.

In sum, the Plaintiffs have not demonstrated that they have an "apparent right" to any of the relief they seek in this case. Thus, even if the Plaintiffs had demonstrated a likelihood of

success in the abstract sense—and they have not—they still have not met the even higher burden applicable in cases such as this.

C. The Plaintiffs have failed to show immediate irreparable harm.

The Plaintiffs have also failed to demonstrate a sufficient risk of immediate irreparable harm such that they are entitled to preliminary relief. *Id.* at 63. The only irreparable harm the Plaintiffs allege in this case is the purported violation of their constitutional rights through "vote dilution and discrimination." Pls.' Mot. Prelim. Inj. at 47. As explained above, however, political gerrymandering claims have nothing to do with vote dilution—each voter retains equal voting power, and no claim exists in this case that either redistricting plan violates one person, one vote. The discrimination the Plaintiffs allege is instead grounded in the nature of our political system of government; it is not prohibited by any constitutional provision.

Ultimately, as also discussed above, the solution to the Plaintiffs' alleged harm is political. As the Plaintiffs' own expert recognized, more local elections such as State Senate and Executive Council elections do not necessarily track the same partisan preferences that the electorate may have for state-wide and federal elections. Indeed, the harms the Plaintiffs rely upon in support of their motion are based on flawed assumptions.

Put differently, the Plaintiffs have not provided a non-speculative basis to infer that the harms they identify will come to pass if the duly enacted Senate and Executive Council maps they challenge in this case remain in place for the upcoming election cycle. "Irreparable harm must be shown by the moving party to be imminent, not remote or speculative." *Reuters Ltd. v. United Press Intern, Inc.*, 903 F.2d 904, 907 (2d Cir. 1990); *see also Husky Ventures v. B55 Investments, Ltd.*, 911 F.3d 1000, 1011 (10th Cir. 2018) ("Purely speculative harm will not suffice, but a plaintiff who can show a significant risk of irreparable harm has demonstrated that

the harm is not speculative and will be held to have satisfied this burden." (cleaned up)); *Narragansett Indian Tribe v. Guilbert*, 934 F.2d 4, 6–7 (1st Cir. 1991) ("[S]peculative injury does not constitute a showing of irreparable harm." (citation and quotation marks omitted)). As the New Hampshire Supreme Court has recognized, an injunction will not issue when, as here, it "rests upon purely speculative grounds and, moreover, raises serious issues regarding the separation of powers." *Priv. Truck Council of Am., Inc.*, 128 N.H. at 477. For this additional reason, the Plaintiffs have also failed to meet their burden under the second prong of the analysis.

D. The balance of the equities and the public interest favor denying preliminary injunctive relief in this case.

The balance of the equities and the public interest also tip decidedly in the Defendants' favor in this case. An emergency injunction on the eve of an election causes "harm to the public interest from the chaos that will ensue" if the laws in question "are invalidated by a court order in the crucial final weeks before an election." *Respect Me. PAC v. McKee*, 622 F.3d 13, 16 (1st Cir. 2010). Even if the Plaintiffs could meet their burden with respect to the other preliminary injunction factors—and they cannot—these considerations are entitled to significant, if not controlling, weight given the proximity of September 13, 2022 State Primary Election and November 8, 2022 State General Election. *See Benisek*, 138 S. Ct. at 1944 ("Even if we assume . . . the plaintiffs were likely to succeed on the merits of their claims, the balance of equities and the public interest tilted against their request for a preliminary injunction."); *Purcell*, 549 U.S. at 5 ("We underscore that we express no opinion here on the correct disposition, after full briefing and argument, of the appeals from the District Court's September 11 order or on the ultimate resolution of these cases."); *Colon-Marrero v. Velez*, 813 F.3d 1, 4 (1st Cir. 2016) (noting that, in earlier proceedings, the court concluded that the plaintiff was likely to succeed on her claims in part, but nonetheless "deem[ed] preliminary injunctive relief 'improvident' given

the uncertain feasibility of [effectuating that relief] in the short time remaining before the election").

If an orderly administration of our election is to occur, the window for judicial intervention and any perceived need to redraw elective districts should close before the election is underway and must close when it is underway. As discussed above and in the Secretary's affidavit, there is a narrow band of time where he may pursue increasingly extraordinary measures in response to judicial action to ensure an orderly election. However, the current reality of an election underway offers no hope of pursuing fundamental change—altering the elective districts—and still being able to execute an election guaranteeing voters their constitutional right to participate. The balance of the equities and the public interest also tip in the Defendants' favor because the timeframe under which the Plaintiffs seek preliminary relief deprive the State the ability to test the veracity and sufficiency of the Plaintiffs' allegations through the normal adversarial process, where both parties have adequate time to prepare their case, conduct discovery, and present a prepared trial. Instead, the Plaintiffs prepared their entire case without the knowledge of the Defendants, filed a 38-page complaint and a motion for preliminary relief supported by a 50-page memorandum, only to seek what is effectively a decision on the merits on an expedited basis. Granting the Plaintiffs' requests would represent the very antithesis of the adversarial process that courts rely on in order to reach informed judicial decisions.

Consequently, it is not in the public interest to resolve the Plaintiffs' preliminary injunction motion in the manner the Plaintiffs propose, and the balance of the equities and the public interest tip in the Defendants' favor for this reason as well. The Defendants are entitled to present a full and fair defense to the State's State Senate and Executive Council districts. They

should not be deprived of that opportunity through what is functionally a prepackaged bench trial.

Finally, *the State* will be irreparably harmed if preliminary injunctive relief is granted. "When a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws." *Veasey v. Perry*, 769 F.3d 890, 895 (5th Cir. 2014) (citation and quotation marks omitted). If the injunction were improvidently granted, "the State cannot run the election over again, this time applying [the challenged provisions]." *Id.* And, as noted, the "the State has a significant interest in ensuring the proper and consistent running of its election machinery," which in this case means ensuring that the Legislature, which is the constitutionally authorized branch of government to perform redistricting, performs that function free from unnecessary judicial interference. *See id.* Accordingly, for all of the above reasons, both the balance of the equities and the public interest favor denying the Plaintiffs' motion for a preliminary injunction in advance of the September 13, 2022 State Primary Election and November 8, 2022 State General Election.

CONCLUSION

Imposing the mandatory relief the Plaintiffs seek in this case when the election machinery leading up to the September 13, 2022 primary election and November 8, 2022 general election is already in motion would disrupt those elections and would likely lead to significant voter confusion and potential disenfranchisement. The Court should decline to intervene in the 2022 election cycle, and on this basis alone deny the Plaintiffs' motion for a preliminary injunction.

If, however, the Court is inclined to consider the merits of the Plaintiffs' claims, it should still deny the motion. The Plaintiffs' claims constitute nonjusticiable political questions, and any

judicial action would represent an unprecedented expansion of judicial power that invades the Legislature's constitutional authority to redistrict and undertakes considerations foreclosed by binding precedent. The Plaintiffs are not likely to succeed on the merits of any of their claims and have not demonstrated an apparent right to have this Court rewrite New Hampshire's State Senate and Executive Council districts. Nor are the plaintiff likely to suffer irreparable harm absent an injunction, and the balance of equities and the public interest also tip decidedly against intervening in the 2022 election cycle at this juncture, especially in order to impose the type of mandatory relief the Plaintiffs request.

For all of these reasons, and those stated above, the Court should deny the Plaintiffs' motion for a preliminary injunction.

Respectfully submitted,

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By his attorneys,

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Date: June 1, 2022

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on all counsel of record through the Court's electronic-filing system.

/s/ *Samuel Garland*
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