STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS. SUPERIOR COURT
SOUTHERN DISTRICT

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

REPLY IN SUPPORT OF PLAINTIFFS'
MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

I. Introduction 1

II. Argument 2

A. Plaintiffs are likely to succeed on the merits of their claims. 2

1. By intentionally entrenching Republican control of the Senate and Executive Council, the General Court has violated the New Hampshire Constitution. 2

2. Plaintiffs' claims are justiciable. 8

3. Plaintiffs have a clear right to relief against the General Court's unconstitutional conduct and no other judicial remedy is available. 13

B. In the absence of an injunction, Plaintiffs will suffer irreparable harm. 15

C. The equities and public interest favor granting preliminary injunctive relief. 16

III. Conclusion 21

I. Introduction

Plaintiffs filed this suit challenging New Hampshire's State Senate and Executive Council redistricting plans (the "Challenged Plans") the day they were signed into law. The following business day, Plaintiffs filed this motion for a preliminary injunction. The motion is supported by overwhelming evidence that the Challenged Plans were intended to, and will, warp New Hampshire's election results in a manner that dilutes the voting strength of, and discriminates against, voters seeking to elect Democratic candidates. Plaintiffs seek immediate relief so that they are not subjected to unconstitutional vote dilution, viewpoint discrimination, and political retaliation during this year's elections.

Defendants' objection to Plaintiffs' motion fails to rebut or call into question Plaintiffs' evidence, and Defendants offer no evidence of their own to support their position on the merits. Instead, Defendants rely upon mischaracterizations of Plaintiffs' claims and criticisms of Plaintiffs' experts that are not only unfounded but also defy well-established political science methodologies. Further, Defendants focus on only a subset of Plaintiffs' claims in this litigation: their objection is concerned with Plaintiffs' vote-dilution claims, leaving the merits of Plaintiffs' separate viewpoint-discrimination and retaliation claim unanswered.

Contrary to Defendants' theory, Plaintiffs' partisan gerrymandering claims are justiciable in this court. The U.S. Supreme Court's conclusion that *federal* courts cannot adjudicate partisan gerrymandering claims explicitly anticipated such claims could nonetheless be heard by state courts under "state statutes and state constitutions." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019). Because it is the judiciary's fundamental role to adjudicate claims that the General Court has violated New Hampshire citizens' constitutional rights, this Court can and must adjudicate Plaintiffs' claims.

Finally, Defendants' argument that it is too late to provide Plaintiffs relief for this year's election cannot be squared with the fact that New Hampshire's primary election is still more than *three months* away. Denying Plaintiffs the relief they seek because New Hampshire waited nearly a year to enact the Challenged Plans would be deeply inequitable to Plaintiffs, who brought their claims as quickly as the law permitted, and would create a dangerous precedent that the General Court can insulate its redistricting plans from review by delaying enactment. What is more, Defendants' evidence does not support their overblown concerns about the administrative burdens of implementing new redistricting plans in time for this year's elections.

The Court should grant Plaintiffs' motion for preliminary injunction.

II. Argument

A. Plaintiffs are likely to succeed on the merits of their claims.

1. By intentionally entrenching Republican control of the Senate and Executive Council, the General Court has violated the New Hampshire Constitution.

As Defendants repeatedly note, *e.g.*, Defs.' J. Obj. to Mot. for Prelim. Inj. ("Obj.") at 2, 18, Plaintiffs' motion offered voluminous evidence of the Challenged Plans' intent and effect. Plaintiffs offered statements by Republican legislators and leaders of the New Hampshire Republican Party making clear that, having obtained control of the legislative process for this redistricting cycle, they intended to gerrymander the state's redistricting plans in their favor. Pls.' Mem. of Law in Supp. of Mot. for Prelim. Inj. ("Mot.") at 3–4. Plaintiffs also offered evidence demonstrating that the General Court eschewed communities of interest to draw districts whose irregular shapes can be explained only by an effort to connect towns and wards based solely on the partisan voting patterns of the voters residing in them. *Id.* at 4–18 (Senate); *id.* at 24–31 (Executive Council). Plaintiffs further offered statistical evidence by multiple experts demonstrating that an intent to entrench Republican control of the Senate and Executive Council

is the only possible explanation for the Challenged Plans' configurations. *Id.* at 18–23 (Senate); *id.* at 31–33 (Executive Council).

Despite asking for and receiving additional time to respond to this motion, Defendants offer no evidence that would rebut Plaintiffs' merits evidence. They offer no evidence rebutting Plaintiffs' claim that the districts in the Challenged Plans can be explained only by an attempt to entrench Republican control. They offer no evidence rebutting Plaintiffs' claim that the Challenged Plans eschew traditional redistricting principles by containing non-compact districts and unnecessarily dividing communities of interest. And they offer no evidence rebutting Plaintiffs' claim that the Challenged Plans will result in artificial control of the Senate and Executive Council by members of the Republican Party.

Instead, Defendants complain that they have not had enough time to gather evidence responsive to Plaintiffs' claims. Obj. at 25, 32. But that is not Plaintiffs' fault. Defendants could have asked the Court for leave to take discovery on Plaintiffs' motion. Instead, they forwent such a request and submitted an opposition without merits evidence.

Having no evidence to offer, Defendants resort to misguided arguments and insignificant efforts to poke holes in Plaintiffs' overwhelming evidence. They criticize Plaintiffs' claims of vote dilution on the ground that such rights do "not extend to political parties." *Id.* at 26 (quoting *Rucho*, 139 S. Ct. at 2501); *see also id.* at 31. But Plaintiffs do not assert their claims on behalf of any political party. Instead, they argue (and their evidence demonstrates) that the Challenged Plans intentionally diminish the ability of *voters*, including Plaintiffs, to translate their votes into electoral success while boosting the ability of a different subset voters to do the same. In other words, the General Court has drawn districts "designed to" "minimize or cancel out the voting strength of . . . political elements of the voting population." *Burling v. Chandler*, 148 N.H. 143,

150 (2002) (per curiam) (quoting *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965)). The New Hampshire Constitution's promise of free and equal elections, equal protection guarantees, and prohibition on viewpoint discrimination and retaliation prohibit the General Court from intentionally diminishing Plaintiffs' voting strength in this way. Mot. at 35–47.

Similarly, Defendants' argument that political parties in New Hampshire are not entitled to an allocation of seats "in proportion to the anticipated statewide vote for candidates of that party" is a red herring. Obj. at 31. Plaintiffs do not, and have not, argued that any political party is entitled to any proportion of seats in the Senate or Executive Council. Instead, Plaintiffs' claims are premised on the basic principle that "voters are entitled to have substantially the same opportunity to electing a supermajority or majority of representatives as the voters of the opposing party would be afforded" under similar circumstances. *Harper v. Hall*, 868 S.E.2d 499, 549 (N.C. 2022). "What matters here" is "that each voter's vote carries roughly the same weight when drawing a redistricting plan that translates votes into seats in a legislative body." *Id.* But as Plaintiffs' uncontroverted evidence demonstrates, the Challenged Plans make it substantially easier for Republicans to amass majority (and even supermajority) control of the Senate and Executive Council even with less than a majority of votes, while making it substantially harder for Democrats to do the same. Defendants' assertion notwithstanding, this should never be a "predictable consequence[]" of an election in New Hampshire. Obj. at 31. A party's victory in a single election does not give it carte blanche to entrench its power for the *next decade*.

The mere fact that the General Court may "consider[] partisan interests when determining political districts," *id.* at 25, by no means forecloses Plaintiffs' claims. Plaintiffs do not assert that the Challenged Plans are unconstitutional because the General Court drew them with politics in mind. The Challenged Plans are unconstitutional because an intent to entrench partisan advantage

subordinated all other considerations in their drawing, resulting in districts intentionally designed to divorce electoral outcomes from the actual wishes of the electorate.

Defendants also ask this Court to deny Plaintiffs' requested relief because "no State Senate or Executive Council elections have yet taken place using the current districting plans." *Id.* at 26. Anything short of actual election results from the Challenged Plans, Defendants contend, is simply too "speculati[ve]" to support an injunction. *Id.* This wait-and-see approach cannot be squared with the law or principles of equity. Plaintiffs are under no legal obligation prove that their asserted injuries are absolutely certain to occur. As Defendants themselves acknowledge, all Plaintiffs must show is "a significant risk of irreparable harm." *Id.* at 36–37 (quoting *Husky Ventures v. B55 Inv., Ltd.*, 911 F.3d 1000, 1011 (10th Cir. 2018)). *Private Truck Council of America, Inc. v. State*, 128 N.H. 466 (1986), relied upon by Defendants, does not support their position. There, the court declined to issue an injunction because it was not clear whether New Hampshire would impose or collect the taxes against which the injunction was sought. *Id.* at 477. Here, there is no question that Defendants will enforce the Challenged Plans in the absence of an injunction. And as Plaintiffs' voluminous evidence demonstrates, that enforcement will cause them injury (which is unquestionably irreparable, *see* Mot. at 47–48; *infra* Section II(B)). Indeed, if Defendants' argument was correct, no court could *ever* enjoin a new districting plan during the first election of the redistricting cycle. Surely the law does not give New Hampshire a free pass for one fifth of a redistricting cycle, no matter how discriminatory or dilutive their redistricting plans may be.

Defendants also mischaracterize Plaintiffs' claims as assuming "that each voter in the State is somehow immutably 'Democratic' or 'Republican.'" Obj. at 27, 29. That is false. The data on which Plaintiffs' experts rely comprise election results for several different elected positions from several different election years. Aff. of Steven Dutton in Supp. of Pls.' Mot. for Prelim. Inj. ("First

Dutton Aff.") Ex. 13 ¶¶ 29, 90; Dutton Aff. Ex. 16 at 7. These large composites of election results take into account that voters in New Hampshire sometimes vote for both parties on the same ticket because they reflect the *candidates* New Hampshire voters supported in a given election, not the party with which they affiliate. Thus, the fact that "there are approximately twenty percent more voters registered as undeclared" than affiliated with a major party makes no difference to Plaintiffs' claims. Obj. at 27. What matters is *which candidates* a towns' voters supported in different elections over time, which is accurately reflected in the data Plaintiffs' experts used.

Defendants' argument that Plaintiffs' experts should have used district-level Senate and Executive Council election results in their analyses, rather than statewide election results, defies well-settled political science methodology and relevant case law. As an initial matter, this argument misunderstands the purpose of the analyses performed by Plaintiffs' experts. Drs. Chen, Pegden, and Scala used these statewide election results primarily to demonstrate the *intent* behind the Challenged Plans. By using these data to compare the Challenged Plans to computer-simulated plans using non-partisan criteria, Drs. Chen and Pegden found that both plans were extreme outliers in terms of their pro-Republican skew, meaning they cannot be explained by anything other than an intent to benefit Republicans. The primary goal of their analyses, in other words, "is not to predict the future but to understand the very recent past" by "determin[ing] whether the enacted maps were carefully optimized for partisanship with data available at the time they were drawn." Second Aff. of Steven Dutton in Supp. of Pls.' Mot. for Prelim. Inj. ("Second Dutton Aff."), Ex. 1, at 1. Similarly, Dr. Scala used past statewide election results to identify how the Challenged Plans' division of clear communities of interest can only be understood when considering the general partisan makeup of the communities those plans' districts connect.

To be sure, these data *also* demonstrate the warping effect the Challenged Plans will have

on future election outcomes. Contrary to Defendants' assertions, it is proper for Plaintiffs and their experts to rely on these data for such purposes. Political scientists and courts overwhelmingly agree that statewide election results are far more appropriate than district-level results in such analyses. "Political scientists have long observed that voters tend to exhibit predictable partisan patterns in their voting behavior." Second Dutton Aff., Ex. 2 ¶ 6. Particularly in the context of evaluating *new* redistricting plans, district-level results from prior elections tell us nothing about future outcomes because the voters in the districts have substantially changed. For these reasons, "political scientists have long" rejected the argument Defendants offer here, and instead have "used statewide election results in order to measure and compare the partisanship of legislative districts." *Id.* Unsurprisingly, courts have done the same. *See Harper*, 868 S.E.2d at 516-17, 519–21, 552–58 (accepting identical expert analyses based on statewide election results to determine that redistricting plans were unconstitutional partisan gerrymanders); *Harkenrider v. Hochul*, No. 60, 2022 WL 1236822, at *10 (N.Y. Apr. 27, 2022) (affirming invalidation of congressional plan based on expert testimony using statewide election results); *Szeliga v. Lamone*, No. C-02-CV-21-181, slip op. at 63, 89–90 (Md. Cir. Ct. Mar. 25, 2022) (copy provided at Second Dutton Aff. Ex. 3) (same). Defendants fail to cite a single court decision rejecting such analyses on the ground that they use statewide election results instead of district-level results.

Moreover, as Dr. Chen explains, the varying levels of success of Democratic and Republican candidates in different statewide races in 2020 that Defendants identify, *see* Obj. at 30 (arguing these results call into question Plaintiffs' experts' analyses), "is precisely why" he "analyzed the partisanship" of the Challenged Plans "separately under each statewide election held in New Hampshire" between 2016 and 2020. Second Chen. Aff. ¶ 7. "By performing a separate analysis using each statewide election," Dr. Chen "evaluated the extent to which the [Challenged]

Plans exhibited partisan outlier districts under a wide range of very different electoral conditions." *Id.* Regardless of whether the election was "very Republican-favorable" or "more Democratic-favoring," the Challenged Plans consistently "exhibited the *same* extreme partisan outlier patterns." *Id.* (emphasis added). In other words, by using a large set of election results containing widely different partisan outcomes, Plaintiffs' experts demonstrated that the Challenged Plans would artificially benefit Republicans regardless of the particular sways of an individual election.

Finally, Defendants' objection ignores Plaintiffs' separate viewpoint-discrimination and retaliation claim. The evidence offered with Plaintiffs' motion demonstrates that the Challenged Plans were drafted with the intent of burdening particular voters because of the way that they have previously voted. *See* Mot. at 45–47. Defendants leave this independent basis for enjoining the Challenged Plans unanswered.

In sum, Defendants' arguments do nothing to diminish the overwhelming weight of Plaintiffs' evidence that the Challenged Plans were enacted for the purpose of entrenching artificial Republican control in the Senate and Executive Council, and that they will have that effect.

2. Plaintiffs' claims are justiciable.

Defendants offer no convincing reason why this Court should conclude that New Hampshire's judiciary lacks the power to protect voters against deliberate distortions of the state's democratic process. As "the final arbiter of State constitutional disputes," the judiciary has the "constitutional duty" to "review whether laws passed by the legislature are constitutional." *Baines v. N.H. S. President*, 152 N.H. 124, 129 (2005) (cleaned up). "While it is appropriate to give due deference to a co-equal branch of government as long as it is functioning within constitutional constraints, it would be a serious dereliction" by the courts "to deliberately ignore a clear constitutional violation." *Id.* (quoting *Consumer Party of Pa. v. Commonwealth*, 507 A.2d 323, 333 (Pa. 1986)). Nonetheless, to ensure against "judicial violation of the separation of powers,"

the justiciability doctrine "limit[s] judicial review of certain matters that lie within the province of the other two branches of government." *Id.* at 128. Thus, a case presents a political question only if (1) "there is a textually demonstrable constitutional commitment of the issue to a coordinate political department," or (2) there is no "judicially discoverable and manageable standard[] for resolving it." *Hughes v. Speaker of the N.H. H.R.*, 142 N.H 276, 283 (2005) (quoting *Pet. of Jud. Conduct Comm.*, 151 N.H. 123, 128 (2004)). Neither of these conditions apply to Plaintiffs' claims of unconstitutional partisan gerrymandering.

First, the New Hampshire Constitution does not unilaterally commit redistricting matters to the General Court. Defendants do not appear to argue to the contrary. They gesture at the fact that the New Hampshire Constitution confers the General Court with the power to draw statewide redistricting plans in the first instance, Obj. at 19, 22, 34 (citing N.H. Const. pt. II, arts. 26, 65), but they do not (and cannot) assert that such plans are unreviewable. In other words, "[t]he mere fact that responsibility for reapportionment is committed to the [General Court] does not mean that [its] decisions in carrying out its responsibility are fully immunized from any judicial review." *Harper*, 868 S.E.2d at 534. On multiple occasions, including just last month, the New Hampshire Supreme Court has enjoined use of existing redistricting plans enacted by the General Court on the ground that they were unconstitutional. *See Norelli v. Sec'y of State*, No. 2022-1084, 2022 WL 1498345 (N.H. May 12, 2022); *Below v. Gardner*, 148 N.H. 1 (2002); *Burling*, 148 N.H. 143. Here, Plaintiffs claim that the Challenged Plans violate the limitations on state governmental action set by the New Hampshire Constitution, specifically Parts 1, 10, 11, 12, 22, and 32 of Article I. Because "[i]t is the role of this court in our co-equal, tripartite form of government to interpret the Constitution and to resolve disputes arising under it," those claims are justiciable. *Monier v. Gallen*, 122 N.H. 474, 476 (1982).

Second, Plaintiffs' partisan gerrymandering claims are governed by known and manageable standards. An issue is not a political question simply because its resolution requires measuring compliance with broadly worded constitutional provisions. If that were the case, courts would lack the power to enforce most of the New Hampshire Constitution. Courts cannot "shirk [their] duty" to interpret the constitution simply because that "task is a difficult one." *Id.* But that is precisely what Defendants ask this Court to do.

Plaintiffs offer several manageable standards by which New Hampshire courts can measure partisan gerrymandering claims. *See* Mot. at 35–47. These mirror the standards under which courts in multiple states have measured claims of partisan gerrymandering. *See Harper*, 868 S.E.2d at 544, 546–57; *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 817 (Pa. 2018). Defendants do not engage with these standards, let alone explain why they are not known or manageable.

Instead, Defendants lean entirely on the U.S. Supreme Court's decision in *Rucho*, which held that partisan gerrymandering claims are beyond the power of *federal* courts. Obj. at 20–23. But *Rucho*'s holding does not apply to state constitutional partisan gerrymandering claims in state courts. Indeed, the *Rucho* Court's decision explicitly stated that state courts can and will police partisan gerrymandering under "state statutes and state constitutions," rebutting the argument that the Court's conclusion that such claims were beyond the limited jurisdiction of federal courts would "condemn complaints about districting to echo into a void." 139 S. Ct. at 2507; *see also Harper*, 868 S.E.2d at 533 ("*Rucho* was substantially concerned with the role of federal courts in policing partisan gerrymandering, while recognizing the independent capacity of state courts to review such claims under state constitutions as a justification for judicial abnegation at the federal level.").

Consistent with the U.S. Supreme Court's expectation, multiple state courts have concluded that partisan gerrymandering cases are squarely within their jurisdiction to protect voters against unconstitutional legislation. *See Harper*, 868 S.E.2d at 532–33 (rejecting the state's invitation to extend *Rucho* to state law partisan gerrymandering claims); *Harkenrider*, 2022 WL 1236822, at *9–11 (invalidating statewide redistricting plan on partisan gerrymandering grounds under state constitution); *Szeliga*, No. C-02-CV-21-1816, slip op. at 43 (same); *Adams v. Dewine*, Nos. 2021-1428 & 20201-1449, 2022 WL 129092, at *1–2 (Ohio Jan. 14, 2022) (same); *League of Women Voters of Pa.*, 178 A.3d at 804 (same); *League of Women Voters of Fla. v. Detzner*, 172 So.3d 363, 371–72 (Fla. 2015) (same).

Defendants also fail to explain their assertion that allowing New Hampshire voters to challenge redistricting plans that dilute their voting strength by artificially entrenching one party's control would result in an "unprecedented expansion of judicial power." Obj. at 21. Plaintiffs are simply asking this Court to perform "the most fundamental of [its] sacred duties: protecting the constitutional rights of the people" from "overreach" by the government. *Harper*, 868 S.E.2d at 510. Far from an improper expansion of judicial power, this Court's review of the Challenged Plans' constitutionality is part of its basic "constitutional duty." *Baines*, 152 N.H. at 129.

Contrary to Defendants' false assertion, Obj. at 21–22, Plaintiffs' claims are *not* the same as those asserted in *Rucho*. Plaintiffs' first cause of action is a claim under the New Hampshire Constitution's Free and Equal Elections Clause, which has no analog in the U.S. Constitution. Compl. ¶¶ 100–05. This is precisely the sort of unique state constitutional provision the *Rucho* Court had in mind when indicating that claims such as Plaintiffs' should be heard. 139 S. Ct. at 2507 (explaining federal courts could not follow the lead of the Supreme Court of Florida's then-recent invalidation of a plan under the "Fair Districts Amendment to the Florida Constitution"

because "there is no 'Fair Districts Amendment' to the Federal Constitution"). In fact, New Hampshire's Free and Equal Elections Clause is virtually identical to the constitutional provisions that other state courts have used to invalidate redistricting plans on partisan gerrymandering grounds. *See Harper*, 868 S.E.2d at 510 ("All elections shall be free." (quoting N.C. Const. art. I, § 10)); *League of Women Voters of Pa.*, 178 A.3d at 766 n.34 ("Elections shall be free and equal . . ." (quoting Pa. Const. art. I, § 5)); *Szeliga*, No. C-02-CV-21-1816, slip op. at 3 ("[E]lections ought to be free and frequent . . ." (quoting Md. Const. Decl. of Rts. Art. 7)).

Defendants' attempt to rely on the New Hampshire Supreme Court's recent decision in *Norelli*, Obj. at 22–23, fares even worse. There, after concluding that existing congressional districts were unconstitutionally malapportioned, the court explained that it would have to draw a remedial plan in the absence of timely legislative action. *See Norelli*, 2022 WL 1498345, at *1. In describing the approach it would take in drawing its remedial plan, the court remarked that "[p]olitical considerations 'have no place in a court-ordered remedial [redistricting] plan.'" *Id.* at *9 (quoting *Below*, 148 N.H. at 11). But the fact that courts should not take political considerations into account when drawing a *remedial* plan, after finding liability, has no bearing on whether courts can prevent a political party from entrenching its control in the General Court or Executive Council. Defendants cite no authority for their suggestion that courts are somehow incompetent to analyze such evidence.

Finally, the possibility that New Hampshire could adopt *additional* "constitutional amendments or legislation" meant to "restrict or prohibit political gerrymandering," Obj. at 23, does not render Plaintiffs' claims nonjusticiable. The New Hampshire Constitution already prohibits denying the people equal voting strength, N.H. Const. pt. I, art. 11; equal protection, *id.* pt. I, arts. 1, 10, 12; and free speech and association, *id.* pt. I, arts. 22, 32. No additional statutory

or constitutional provisions are needed to vindicate these rights.

As the U.S. Supreme Court envisioned in *Rucho*, New Hampshire courts have the power to protect voters against violations of their fundamental rights under the New Hampshire Constitution. Plaintiffs' claims are justiciable.

3. Plaintiffs have a clear right to relief against the General Court's unconstitutional conduct and no other judicial remedy is available.

In asserting that Plaintiffs have "no apparent right" to a judicial remedy against unconstitutional conduct by the General Court, Obj. at 25, 33–35, Defendants ignore a basic guarantee under the New Hampshire Constitution: that "[e]very subject of this State is entitled to a certain remedy, by having recourse to the laws" in a "complete[]" manner "promptly, and without delay." N.H. Const. pt. I, art. 14. Plaintiffs have demonstrated that the Challenged Plans violate their fundamental rights as New Hampshire voters. They are therefore entitled to complete and prompt relief.

Defendants are wrong to suggest Plaintiffs have "other remedies available" to them. They suggest that instead of seeking relief against the General Court's unconstitutional actions in court, Plaintiffs should seek changes in the law through "constitutional amendments" or "a legislative solution." Obj. at 33. This argument fundamentally misunderstands the requirement that a party have "no adequate, alternative remedy *at law*" before obtaining a preliminary injunction. *Thompson v. N.H. Bd. of Med.*, 143 N.H. 107, 108 (1998) (emphasis added). That question asks whether this *Court* can provide Plaintiffs with a different form of relief that would redress their injuries, not whether Plaintiffs can seek to change the law.

More fundamentally, Defendants' argument that a change in the law could redress Plaintiffs' injuries misses the point. That is the case for any plaintiff complaining of any unconstitutional conduct. Here, the New Hampshire Constitution *already* prohibits the General

Court from intentionally "minimiz[ing] or cancel[ing] out the voting strength" of voters who have historically supported a particular "political" group. *Burling*, 148 N.H. at 150 (quoting *Fortson*, 379 U.S. at 439). There is no reason why Plaintiffs should be required to seek *new* rights through the political process to obtain relief against conduct that is already unconstitutional. The argument is also particularly brazen in this case, where Plaintiffs have proffered substantial evidence demonstrating that the General Court has purposefully entrenched Republican control of the Senate, a body whose consent is necessary to the constitutional or legislative action Defendants envision. *See Harper*, 868 S.E.2d at 509 ("[I]t is no answer to say that responsibility for addressing partisan gerrymandering is in the hands of the people, when they are represented by legislators who are able to entrench themselves by manipulating the very democratic process from which they derive their constitutional authority.").

Contrary to Defendants' incorrect assertion, Plaintiffs' motion for preliminary injunction does not seek "what is functionally final relief on the merits" of their claims. Obj. at 35. Plaintiffs merely seek protection against irreparable vote dilution, viewpoint discrimination, and political retaliation while this Court goes through the process of adjudicating Plaintiffs' claims; that is the "purpose of a preliminary injunction." *Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 576 (5th Cir. 1974). While this motion requires the Court to make a judgment about the likelihood that Plaintiffs will ultimately succeed, that conclusion by no means binds the Court in reaching a final judgment.

Relatedly, Defendants' attempt to artificially increase Plaintiffs' burden in seeking preliminary relief because it would alter the "status quo" misunderstands the law. *See* Obj. at 11–12, 32, 35. If, like here, "the currently existing status quo itself is causing one of the parties irreparable injury, it is necessary to alter the situation so as to prevent the injury"; the "focus always

must be on *prevention of injury* by a proper order, not merely on preservation of the status quo." *Canal Auth. of Fla.*, 489 F.2d at 576 (emphasis added). Just a few days ago, a federal court rejected the same arguments Defendants offer here and enjoined the use of a recently enacted congressional redistricting plan to protect voters from vote dilution in violation of the Voting Rights Act. Order at 150–51, *Robinson v. Ardoin*, No. 3:22-cv-211-SDD-SDJ (M.D. La. June 6, 2022), ECF No. 173. As that court explained, "[e]specially in the context of Plaintiffs' fundamental voting rights, . . . prevention of injury, not fealty to the status quo, is paramount." *Id.* The same applies here: because the status quo threatens Plaintiffs with irreparable injury, the focus of this Court's inquiry should be the latter, not the former.

B. In the absence of an injunction, Plaintiffs will suffer irreparable harm.

Plaintiffs have explained how the Challenged Plans, if used in this year's election, will cause them irreparable harm in the form of vote dilution, viewpoint discrimination, and retaliation. Mot. at 47–48. Defendants do not appear to question that such injuries would be irreparable. *See* Obj. at 36–37.

Instead, Defendants repeat the arguments already refuted above. *Id.* at 36–37. They again argue Plaintiffs have not demonstrated a likelihood that their votes will be diluted. *Id.* at 36. But Plaintiffs' unrebutted evidence make clear that the Challenged Plans are designed precisely to have that effect. *See* Mot. at 6–33; *supra* Section II(A)(1). Defendants' separate assertion that "political gerrymandering claims have nothing to do with vote dilution," Obj. at 36, is simply wrong: partisan gerrymandering "devalue[s]" the votes cast by a particular group of citizens, affording them "less opportunity to elect representatives to seats, compared to an equal number of voters in the favored party." *Harper*, 868 S.E.2d at 549. That is the definition of vote dilution.

Similarly, Defendants' unexplained assertion that viewpoint discrimination and political retaliation are somehow consistent with "the nature of our political system of government," Obj.

at 36, cannot be squared with foundational case law holding that such conduct is "egregious[ly]" inconsistent with free speech. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829–30 (1995). "[C]itizens form parties to express their political beliefs and to assist others in casting votes in alignment with those beliefs." *Harper*, 868 S.E.2d at 545. When a state engages in gerrymandering intended to diminish the strength of voters with a particular viewpoint, it has the effect of "debilitat[ing]" their efforts to effect political change. *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *122 (N.C. Super. Ct. Sept. 3, 2019) (alterations in original) (quoting *Gill v. Whitford*, 138 S. Ct. 1916, 1939 (2018) (Kagan, J., concurring)). Not only is such discrimination and retaliation unconstitutional, it also "unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

Finally, Defendants repeat their argument that Plaintiffs' experts relied on the wrong election data to evaluate the Challenged Plans. Obj. at 36–37. As explained, *supra* Section II(A)(1), this argument not only finds no basis in any case law, but also flies in the face of well-settled political science methodology.

C. The equities and public interest favor granting preliminary injunctive relief.

Defendants do not appear to contest that equity and the public interest support vindicating citizens' voting rights and protecting New Hampshire's democratic system from manipulation. *See* Mot. at 48. Instead, they argue that Plaintiffs' motion should be denied because it is now too late to alter the Senate or Executive Council district lines in advance of this year's election. *See* Obj. at 12–19, 37–39. Plaintiffs do not dispute that, by the time this Court addresses Plaintiffs' motion, the candidate filing period for Senate and Executive Council seats will have closed. *See* Mot. at 48–49; RSA 655:14. That fact, however, is not dispositive on this Court's equitable powers to vindicate the fundamental rights of Plaintiffs and other New Hampshire voters.

In the context of this case, denying relief due to the timing of Plaintiffs' motion would be

deeply inequitable and encourage gamesmanship in future redistricting cycles. Plaintiffs brought their claims and this motion as quickly as the law allowed. They had to wait to file this suit until the Challenged Plans were signed into law; filing any sooner would no doubt have subjected Plaintiffs' claims to allegations of unripeness. Despite receiving the state's redistricting data from the Census Bureau in August 2021, the General Court waited until May 2022—nearly a year later—to pass the Challenged Plans. *See* Mot. at 4–6. Once the Governor signed those plans into law, Plaintiffs wasted no time: they filed their complaint within a matter of hours, and this motion the next business day.[1] Plaintiffs have done everything they can to present their motion in a timely manner.

Ultimately, the decision to grant a preliminary injunction is "controlled by established principles of equity." *DuPont v. Nashua Police Dep't*, 167 N.H. 429, 434 (2015). Subjecting Plaintiffs and other New Hampshire voters to irreparable vote dilution and discrimination because the *State* waited until May of this year to enact the Challenged Plans would not only be inequitable, it would also send a message to the General Court that it can obtain a free pass in the first election of a redistricting cycle by waiting to enact new plans until the last minute. In other words, in a case where plaintiffs filed their suit "the same day" the challenged plans are enacted, "[d]elaying a remedy in this election cycle – permitting an election to go forward on unconstitutional maps – would set a troubling precedent for future cases raising similar partisan gerrymandering claims, as well as other types of challenges, such as racial gerrymandering claims." *Harkenrider*, 2022 WL 1236822, at *12 n.18. Pursuant to this concern, New York's highest court recently affirmed an injunction against a congressional plan on partisan gerrymandering grounds even though the

[1] Defendants incorrectly claim that "Plaintiffs initiated this action on May 9, 2022." Obj. at 5. That is wrong. As the Court's file stamp on the complaint shows, Plaintiffs filed this suit on May 6 at 6:43 p.m., the same day Governor Sununu signed the Challenged Plans into law.

candidate filing period had at that point already closed. *See id.* This Court can, and should, do the same.

In invoking the *Purcell* doctrine, Obj. at 13–14, 18, 37–39, Defendants again improperly attempt to import a doctrine specifically limiting the power of *federal* courts. *Purcell* is a federal doctrine, created by federal courts, as a tool to restrain federal judicial interference in the administration of "state election rules in the period close to an election." *Andino v. Middleton*, 141 S. Ct. 9, 10 (2020) (Kavanaugh, J., concurring). The doctrine, which is chiefly concerned with principles of federalism, does not apply to a state court's ability to vindicate voters' rights under their own constitution. *See Harkenrider*, 2022 WL 1236822, at *11 n.16 ("The *Purcell* doctrine cautions *federal* courts against interfering with state election laws when an election is imminent and does not limit state judicial authority where, as here, a *state* court must intervene to remedy violations of the State Constitution.").

The New Hampshire cases Defendants cite do not support their position. In *Petition of New Hampshire Secretary of State*, the trial court had issued a preliminary injunction altering the voter-registration process a mere "two weeks before the November 6 election." Order at 1, No. 2018-0208 (N.H. Oct. 26, 2018). Here, the primary election remains more than *three months* away. Further, there the court pointed to the fact that the trial court's injunction could cause voter confusion because "similarly situated voters may be subjected to differing voter registration and voting procedures in the same election cycle." *Id.* By contrast, enjoining the Challenged Plans and requiring the use of constitutional plans will not cause any voters to encounter differing voting experiences. If anything, it will ensure that similarly situated voters are *not* treated differently. Mot. at 43.

Maclay v. Fuller, 96 N.H. 326 (1950), also offers Defendants no support. Obj. at 14. There,

on October 30—days before Election Day—the New Hampshire Supreme Court concluded that it could not provide relief to the plaintiff, who claimed he had been wrongly left off the ballot, because absentee ballots had already been "*printed and distributed*." *Maclay*, 96 N.H. at 328 (emphasis added). Here, we are several months away from the next election, and ballot printing will not begin for another month. Obj. at 10.

This case is also nothing like the New Hampshire Supreme Court's recent *Norelli* litigation. *See* Obj. at 15–16. *Norelli* involved a claim that New Hampshire's congressional districts were unconstitutionally malapportioned because the state had failed to enact a new plan using the results of the 2020 Census. 2022 WL 1498345, at *1. Unlike here, the *Norelli* plaintiffs were able to file suit in March—months before the candidate filing period—because by then it was clear there was no chance of legislative compromise. *Id.* This permitted the New Hampshire Supreme Court to schedule proceedings in a manner that enabled it to adopt a remedial plan prior to the June 1 beginning of the candidate filing period. *See id.* at *2.

Plaintiffs do not suggest that it was unwise for the *Norelli* court to endeavor to adopt a new plan before June 1. But nothing in that decision suggests that once the filing period begins, no court can order the implementation of a new redistricting plan. To the contrary, the New Hampshire Supreme Court has extended the candidate filing deadline to as late as the end of July of an election year to allow for adoption of a remedial redistricting plan. *Burling*, 148 N.H. at 160 (implementing remedial state house plan and dissolving "injunction against the house filing period . . . as of 12:01 a.m. July 31, 2002"); *see also Below*, 148 N.H. at 14 (implementing remedial senate plan and dissolving "injunction against the senate filing period . . . as of 12:01 a.m. June 26, 2002").

Finally, Defendants offer no reason to believe that vindicating Plaintiffs' and other New

Hampshire voters' fundamental rights could "sow significant voter confusion." Obj. at 17. They assert that altering the district lines will make voters "unsure of what district they reside in or what candidates they may vote for," *id.*, but those issues will be settled once the final plans are in place. After all, New Hampshire voters and candidates did not know which districts they lived in until just a month ago. Defendants' additional suggestion that fixing unconstitutional defects in the Challenged Plans could produce unconstitutional burdens on New Hampshire voters is not supported by the cases they cite. *See id.* This case involves nothing like confusing registration forms that subject unwitting individuals to criminal penalties, *N.H. Democratic Party v. Sec'y of State*, 174 N.H. 312 (2021), or registration instructions that are inconsistent with actual law, *Guare v. State*, 167 N.H. 658, 664–65 (2015).

Defendants' more specific arguments about the feasibility of relief in this case do not stand up to scrutiny. New Hampshire's September 13 primary election is still more than three months away. In fact, no state has a later primary date than New Hampshire except for Louisiana, which holds its primary election on the day of the November general election.[2] While Plaintiffs do not question the Secretary's sincerity in seeking an orderly election process, Scanlan Aff. ¶ 13, nothing in his affidavit suggests that altering the Challenged Plans to comply with the New Hampshire Constitution will cause such a disruption to the electoral process that it warrants subjecting Plaintiffs and other New Hampshire voters to vote dilution and discrimination. For example, while Defendants warn that the prospect of distributing multiple ballots to voters would create serious difficulties, Obj. at 16–17, neither they nor the Secretary's affidavit explain why sending multiple ballots to voters would be necessary in the first place. Indeed, Defendants concede that, even under the Secretary's "regular order," ballot printing does not begin for a month, and ballots will not be

[2] *See* NCSL, *2022 State Primary Election Dates and Filing Deadlines*, https://www.ncsl.org/research/elections-and-campaigns/2022-state-primary-election-dates-and-filing-deadlines.aspx (last visited June 9, 2022).

shipped to overseas voters until the end of July. *Id.* at 10. Thus, by Defendants' own telling, there is adequate time for implementation of new, constitutional Senate and Executive Council plans prior to the printing and distribution of ballots to New Hampshire voters.

III. Conclusion

Plaintiffs have demonstrated that their claims are likely to succeed. They face an immediate threat of irreparable injury. And the equities and public interest support preliminary injunctive relief. The Court should grant Plaintiffs' motion for a preliminary injunction.

Dated: June 10, 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

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

Counsel for Plaintiffs

**Appearing Pro Hac Vice*

CERTIFICATE OF SERVICE

I hereby certify that on June 10, 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