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

DEFENDANTS' SURREPLY IN SUPPORT OF 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, submit the following Surreply in support of Defendants' Objection to Plaintiffs' Motion for a Preliminary Injunction. For the reasons stated in the Defendants' Objection and Memorandum of Law in support of their Objection, the Plaintiffs are not entitled to the extraordinary relief they seek in their Motion. The intent of this Surreply is to narrowly respond to certain misstatements and

mischaracterizations that the Plaintiffs make in their Reply in Support of Plaintiffs' Motion for Preliminary Injunction.

1. **The Plaintiffs failed to state a claim for "viewpoint discrimination and retaliation.**"

The Plaintiffs mistakenly assert in their Reply that the Defendants did not "answer" the Plaintiffs' "viewpoint discrimination and retaliation claim."[1]

To the contrary, the Defendants' Objection clearly explains that, consistent with the United States Supreme Court's decision in *Rucho v. Common Cause*, 139 S.Ct. 2484 (2019), the Plaintiffs' claims present nonjusticiable political questions. One of the claims that the Supreme Court expressly rejected in *Rucho* was that allegedly partisan gerrymandered districting plans infringed upon the plaintiffs' First Amendment rights by "discriminat[ing] against supporters of the opposing party on the basis of political viewpoint." *Rucho*, 139 S.Ct. at 2504. This is the same "viewpoint discrimination and retaliation" claim that the Plaintiffs' now assert, albeit under the State Constitution's protections of free speech and assembly rather than the First Amendment.[2] See N.H. CONST., Pt. I, Arts. 24 & 32.

The Supreme Court rejected this argument, noting that "there are no restrictions on speech, association, or any other First Amendment activities" in the challenged district plan, and the "plaintiffs are free to engage in those activities no matter what the effect of a plan may be on their district." *Rucho*, 139 S.Ct. at 2504. The Supreme Court criticized the plaintiffs' alleged First Amendment claims because if "partisanship in districting should be regarded as simple discrimination against supporters of the opposing party on

[1] Plaintiffs' Reply at 1, 8.
[2] Plaintiffs' Complaint, ¶¶114-20 (alleging that the challenged district plans "engage in viewpoint discrimination by retaliating against Democratic voters in a manner that dilutes their voting strength").

the basis of political viewpoint," then "any level of partisanship in districting would constitute an infringement of their First Amendment rights." *Id.* In other words, "it would be idle to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it." *Id.* (quoting *Gaffney*, 412 U.S. 735, 752 (1973) (cleaned up)). Moreover, the Supreme Court recognized that this claim was nonjusticiable because the First Amendment "provides no standard for determining when partisan activity goes too far." *Id.*

Thus, all of the Plaintiffs' claims present nonjusticiable political questions because the State Constitution committed the authority to redistrict to the Legislature; the State Constitution in no way proscribes the State Legislature from considering partisan factors as part of the redistricting process, let alone in "clear, direct, [and] irrefutable terms," *see City of Manchester v. Secretary of State*, 163 N.H. 689, 697 (2012); and the State Constitution does not provide discoverable and manageable standards for judicial intervention because it "provides no standard for determining when partisan activity has gone too far," *see Rucho*, 139 S.Ct. at 2504.

2. **The Defendants have no obligation to produce evidence to defend themselves on the merits at this stage of litigation.**

The Plaintiffs claim that they do not "seek what is functionally final relief on the merits of their claims,"[3] but then contradict themselves by *repeatedly* criticizing the Defendants for not producing evidence "on the merits."[4]

[3] Plaintiffs' Reply at 14.

[4] Plaintiffs' Reply at 1 (alleging that "Defendants offer no evidence of their own to support their position on the merits); at 3 (criticizing Defendants for "offer[ing] no evidence that would rebut Plaintiffs' merits evidence"); at 3 (claiming Defendants "hav[e] no evidence to offer."

To be clear, the Defendants have no burden to produce evidence related to the factual merits of the Plaintiffs' claims at the outset of litigation, and particularly when there are multiple dispositive legal issues that need to be resolved before the parties even proceed to discovery. The Plaintiffs appear to argue that, even though the Defendants have objected on legal grounds, that the Defendants should be forced to produce evidence, including potentially hiring expensive experts, before the Defendants even get a ruling on their dispositive arguments. The Plaintiffs further appear to argue that they are somehow entitled to the extraordinary affirmative relief they seek because the Defendants were not able to conduct discovery, retain experts, and respond in full to a prepackaged bench trial—all in a matter of weeks. The Plaintiffs provide no competent support for this incredible suggestion.

Furthermore, the Plaintiffs clearly confuse the "volume" of evidence they have produced with its applicability to the constitutional questions before this Court. None of the Plaintiffs' evidence is relevant to whether this Court should deny preliminary injunctive relief consistent with the judicial nonintervention policy articulated in *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (*per curiam*). None of the Plaintiffs' evidence is relevant to whether the Plaintiffs' claims are nonjusticiable under the State Constitution's separation of powers principles. *See* N.H. CONST., Pt. I, Art. 37. And none of the Plaintiffs' evidence is relevant to whether the Plaintiffs' claims, which the New Hampshire Supreme Court has never recognized, are cognizable under the State Constitution.

Rather, the Plaintiffs act as if they have "proven" their case through purported expert evidence that the Plaintiffs prepared privately before initiating this litigation, and

before the Defendants have even had an opportunity to conduct discovery; to investigate the purported experts' data, methodologies, and conclusions; to depose those experts; to retain defense experts who can review and rebut the Plaintiffs' experts data, methodologies, and conclusions; and to discover and produce other evidence favorable to the Defense. This discovery process is a fundamental part of adversarial litigation where there are disputed facts, and as explained in greater detail in the Defendants' Joint Objection, the discovery process must occur before the Plaintiffs get relief on the merits of their claims—particularly because the Plaintiffs seek relief based on an unrecognized cause of action that would constitute an unprecedented expansion of judicial power in this State.

3. **The Plaintiffs ignore all of the harm the Secretary of State identified that would occur if the Court invalidates the current districts before the impending elections**.

In their Reply, the Plaintiffs do not contest any of the Secretary of State's Affidavit regarding the timing of elections, the preparation of ballots, the printing of ballots, and the delivery of ballots to overseas voters and polling places. Nevertheless, the Plaintiffs narrowly focus on only two particular deadlines, which the Plaintiffs take out of context. The Plaintiffs assert that the election process would not be harmed because "ballot printing does not begin for a month, and ballots will not be shipped to overseas voters until the end of July."[5] The Plaintiffs conveniently ignore the remainder of the Secretary of State's Affidavit, which the Plaintiffs grossly mischaracterize by suggesting that "by Defendants' own telling, there is adequate time for implementation of

[5] Plaintiffs' Reply at 20-21.

new, constitutional Senate and Executive Council plans prior to the printing and distribution of ballots to New Hampshire voters."[6]

In particular, the Plaintiffs entirely ignore the lengthy, labor-intensive process that the Secretary of State undertakes to create ballots, review proofs, and finalize ballots, all of which must occur *prior* to those ballots being sent for printing. The Secretary of State testified that for the upcoming State primary, the Secretary of State's Office is responsible for preparing 618 different ballots, with 9 different formats for each ballot.[7] The Secretary of State's Office is responsible for assembling proofs for each of those 618 different ballots, in each of the 9 different ballot formats.[8] The Secretary of State's Office is responsible for ensuring that every single ballot lists the correct candidates for the respective district and additionally complies with a myriad of statutory requirements.[9]

The Plaintiffs have offered no evidence to rebut the Secretary of State's testimony, and they have offered no credible explanation for how the integrity of this State's elections would not be threatened by changing districts *after* the candidacy declaration has lapsed, and *during* the period when the Secretary of State is preparing, reviewing, proofing, and printing all 618 ballots and all 9 versions of each of those ballots, which collectively contain thousands of different candidates. The Secretary of State was clear that the relief the Plaintiffs seek would require "significant portions" of "election procedures, actions, and timelines" to be "altered, reworked, redistributed, and

[6] Plaintiffs' Reply at 21.
[7] Affidavit of Secretary of State David Scanlan in Support of the Defendants' Objection to Plaintiffs' Motion for Preliminary Injunction ("Scanlan Aff."), ¶12.
[8] Scanlan Aff., ¶13.
[9] Scanlan Aff., ¶¶11, 13.

redone" in a "compressed timeline," which would therefore "threaten the ability to administer a fair, transparent, and well-run election."[10]

The Tennessee Supreme Court recently considered a similar issue and overturned a lower court's injunction, which modified the deadlines for declarations of candidacy during the candidacy period, because that injunctive relief would harm election officials and the public interest. *Moore v. Lee*, 644 S.W.3d 59, 64 (Tenn. 2022). The plaintiffs in *Moore* challenged the constitutionality of a state senate district reapportionment and sought injunctive relief that included changing the candidate filing deadline. *Id*. at 60. The defendants submitted affidavits from election officials that testified that changing the candidacy period would negatively impact the ability of election officials to prepare, review, and approve ballots; to comply with federal law regarding overseas ballots; and to satisfy a myriad of other election responsibilities. *Id*. at 64-65. From this evidence, the Supreme Court found it "clear" that a delay in the candidate filing deadline "will have a significant detrimental impact on the work of our state and county election officials, risks voter confusion, and potentially compromises the integrity of our state's elections." *Id*. at 65.

4. **The Plaintiffs' case is based almost entirely on outlier decisions from foreign jurisdictions that do not interpret the New Hampshire Constitution.**

The Plaintiffs entire legal theory is based on a recent nonbinding decision of the North Carolina Supreme Court: *Harper v. Hall*, 868 S.E.2d 499 (N.C. 2022).[11] However, a thorough review of that case, when properly viewed in the context of the development of state constitutional law regarding elections, demonstrates that *Harper* is

[10] Scanlan Aff., ¶16.
[11] Notably, *Harper v. Hall* is not even a final decision. A petition for a writ of certiorari challenging the North Carolina Supreme Court's decision was filed and docketed with the United States Supreme Court.

both an outlier that does not support the Plaintiffs' arguments regarding this State's Constitution, and inconsistent with the New Hampshire Supreme Court decisions regarding the constitutional guideposts for redistricting.

The *Harper* Court determined that certain districts constituted partisan gerrymanders in violation of the North Carolina Constitution's guarantee of equal protection, guarantee of free speech and assembly, and free elections clause. However, it is notable that every state protects free speech in their respective state constitutions, and many states, like New Hampshire, did so before the adoption of the First Amendment.[12] Thirty states have constitutional provisions guaranteeing free elections with an equal right to vote.[13] And more than half of states have provisions guaranteeing equal protection of the law. Political gerrymandering has existed in this country since its inception. *See Rucho*, 139 S.Ct. at 2494 (describing accusations of districting for partisan advantage during the "very first congressional elections"). Thus, given the large number of states that have had these types of provisions for decades and centuries, it is notable that so few states have reached beyond the plain language of these provisions, which do not explicitly mention partisan gerrymandering, to rule that they prohibit partisan gerrymandering.

The Plaintiffs attempt to disguise the general lack of support for their position by citing to numerous cases that invalidate districts on partisan gerrymandering theories *based on constitutional provisions or laws that expressly prohibit partisan*

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[12] *See* David Schultz, *State Constitutional Provisions on Expressive Rights*, Free Speech Center at Middle Tennessee State University, Sep. 2017, available at https://www.mtsu.edu/first-amendment/article/874/state-constitutional-provisions-on-expressive-rights (last visited June 20, 2022).
[13] *See Free and Equal Elections Clauses in State Constitutions*, National Conference of State Legislatures, Nov. 4, 2019, https://www.ncsl.org/research/redistricting/free-equal-election-clauses-in-state-constitutions.aspx (last visited June 17, 2022) (quoting and citing constitutional provisions).

gerrymandering. *See, e.g.*, *Harkenrider v. Hocul*, __ N.E.3d __, 2022 WL 1236822 (N.Y. May 27, 2022) (regarding districts that allegedly violated Article II, Section 4 of the New York Constitution, which prohibits districts from being "drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other political candidates or political parties"); *Adams v. Dewine*, __ N.E.3d __, 2022 WL 129092, at *1-2 (Ohio Jan. 14, 2022) (regarding districts that allegedly violated Article XIX of the Ohio Constitution, which prohibits districts from being drawn in a manner that "unduly favors or disfavors a political party or its incumbents"); *League of Women Voters of Florida v. Detzner*, 172 So.3d 363, 369 (Fla. 2015) (regarding districts that allegedly violated Article III, Section 20(a) of the Florida Constitution, which prohibits drawing districts with the "intent to favor or disfavor a political party or an incumbent"). Unsurprisingly, the Plaintiffs repeatedly fail to mention when citing these cases whether the respective court based its decisions on state-specific gerrymandering prohibitions that do not exist in this State's Constitution or laws.

Even in the few cases where courts reached beyond the plain language of the applicable state constitution and invalidated alleged partisan gerrymanders based on constitutional provisions that did not expressly prohibit considering partisan factors, the courts only did so after full discovery and trial proceedings followed by the state supreme courts construing the respective state constitutions. *See Harper*, 868 S.E.2d at 514 (North Carolina Supreme Court reversed a lower court ruling, which issued following discovery and a trial, that partisan gerrymandering was not cognizable under the state's constitution); *League of Women Voters v. Commonwealth*, 178 A.3d 737, at 766-67 (Pa. 2018) (Pennsylvania Supreme Court assumed plenary jurisdiction, but remanded to the

lower court to "conduct all necessary and appropriate discovery, pre-trial and trial proceedings so as to create an evidentiary record" sufficient to decide the plaintiffs' claims). Furthermore, in each of these cases, the respective supreme court's decision was based, in part, on constitutional history specific to the constitutions of those states. *Harper*, 868 S.E.2d at 540-41 (construing certain provisions of the North Carolina Constitution based on historical evidence demonstrating the intent of the electorate that adopted those provisions); *League of Women Voters v. Commonwealth*, 178 A.3d at 793 (construing certain provisions of the Pennsylvania Constitution based on historical evidence demonstrating the intent of the electorate that adopted those provisions).

Here, there has been no discovery, there has been no trial, and the Plaintiffs have produced no evidence regarding the meaning and intent of provisions in *this* State's Constitution that the Plaintiffs claim apply.

Second, with respect to this State's Constitution, the New Hampshire Supreme has already weighed in on the appropriate constitutional guideposts for redistricting in *City of Manchester v. Secretary of State*, 163 N.H. 689 (2012). In that case, the petitioners alleged that a redistricting plan was unconstitutional because it did not reflect "community of interest" factors. *City of Manchester*, 163 N.H. at 707. The Supreme Court turned to the plain language of the State Constitution and ruled that "[n]othing in the New Hampshire Constitution requires a redistricting plan to consider 'communities of interest" because the "phrase appears nowhere in the state constitutional provisions governing redistricting." *Id*. The Supreme Court reasoned that, "had the framers of the State Constitution and its amendments wished, they could have proposed such things as defining and preserving communities of interest, or ruling that legislative districts be

compact," and they could have agreed to include those factors as "constitutional guideposts." *Id*. (quotation omitted). Because they did not, the Supreme Court ruled that the State Constitution imposes no such requirement.

The same reasoning applies here. If the framers of the State Constitution and its amendments wished, they could have included provisions in the State Constitution that prohibit or restrict the Legislature from considering partisanship when exercising its constitutional redistricting authority, just as numerous other states have done. *See, e.g.*, Defendants' Motion to Dismiss, at 12 n.3 (identifying 17 states that have adopted constitutional provisions or other laws that were intended to restrict or prohibit political gerrymandering, including by prohibiting favoring a political party, prohibiting considering partisan data, ensuring competitiveness, or adopting independent or bipartisan redistricting commissions). But because the State Constitution does not prohibit or restrict the Legislature from considering partisanship when exercising its constitutional redistricting authority, the Plaintiffs' claims fail as a matter of law.

WHEREFORE, NH Secretary of State, respectfully requests that this Honorable Court:

A. Deny the Plaintiffs' request for a preliminary injunction; and

B. Grant such other and further relief as justice may require.

Respectfully submitted,

DAVID SCALAN, SECRETARY OF STATE

By his attorneys,

JOHN M. FORMELLA
ATTORNEY GENERAL

Date: June 20, 2022 /s/ *Myles B. Matteson*

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and

THE STATE OF NEW HAMPSHIRE

By its attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion was sent via the Court's electronic filing system to all parties of record.

Date: June 20, 2022

/s/ *Brendan Avery O'Donnell*
Brendan Avery O'Donnell