

HILLSBOROUGH, SS
SOUTHERN DISTRICT

STATE OF NEW HAMPSHIRE

SUPERIOR COURT

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' REPLY IN SUPPORT OF
DEFENDANTS' JOINT MOTION TO DISMISS**

The Defendants, David Scanlan, in his official capacity as New Hampshire Secretary of State, and the State of New Hampshire, submit the following Reply to the Plaintiffs' Objection to the Defendants' Joint Motion to Dismiss the Plaintiffs' Complaint for Declaratory and Injunctive Relief. For the reasons stated in this Reply and in the Defendants' prior pleadings, which are incorporated herein by reference, the Plaintiffs' claims present a nonjusticiable political question and must be dismissed.

The New Hampshire Supreme Court has expressly precluded courts from considering political data or partisan factors in redistricting cases. *See Norelli v. Secretary of State*, ___ N.H.

___, 2022 WL 1498345, at *9 (N.H. May 12, 2022); *Below v. Gardner*, 148 N.H. 1, 11 (2002) (*per curiam*). Rather, the New Hampshire Supreme Court has recognized that the power to redistrict—a determination that is inseparable from political realities and political balancing—properly belongs to the Legislative Branch, not the Judicial Branch. *See Norelli*, 2022 WL 1498345, at *8; *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”). The Supreme Court further recognized that the Legislative Branch may take political considerations into account when creating redistricting plans. *Burling*, 148 N.H. at 156.

The Plaintiffs ask this Court to flout all of these Supreme Court precedents, something that this Court cannot and should not do. This is particularly true because the Supreme Court has not given any guidance regarding when or how a state court may invalidate a duly enacted Legislative redistricting plan based on alleged partisan gerrymandering, what standards the Court should use to make those decisions, or whether or how the Court may thereafter craft a remedial districting plan. To the extent that this State’s Judicial Branch is going to interfere in legislative redistricting based on alleged partisan gerrymandering, something the United States Supreme Courts has said would represent “an unprecedented expansion of judicial power” that would invade “one of the most intensely partisan aspects of American political life,” that is a decision that the New Hampshire Supreme Court must make. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019).

As the Defendants explain in detail in their Motion to Dismiss, the Plaintiffs’ claims are nonjusticiable political questions because the State Constitution does not provide any judicially discoverable and manageable standards for resolving the Plaintiffs’ claims. The Plaintiffs’ appear to concede this point because, rather than point the Court to standards for resolving the

Plaintiffs' claims that are set forth in this State's Constitution, the Plaintiffs were only able to point to "rulings of courts in other states," including rulings from states that have express constitutional and statutory prohibitions on the consideration of partisan data when redistricting. *See* Pls. Obj. at 26.

Furthermore, the Plaintiffs' erroneously interpret the United States Supreme Court's decision in *Rucho* to mean that every State Court "can and should assume the mantle of policing impermissible partisan gerrymandering." Pls. Obj. at 30. To the contrary, *Rucho* did not say that all state courts automatically have the jurisdiction and the constitutional "toolkit" to consider partisan gerrymandering causes of action, even where the constitution and statutes in a state have no prohibitions or judicially discoverable standards. Rather, *Rucho* said that where state constitutions and state statutes *have* prohibitions and standards for adjudicating claims of partisan gerrymandering—New Hampshire does not—courts are obligated to interpret and uphold those laws. If New Hampshire wants to prohibit, limit, or regulate partisan gerrymandering, the proper way to do that is through legislative action or a constitutional amendment. *See* Defs' Mot. Dismiss, Memorandum of Law, at 12 n.3 (identifying 17 states that have amended their constitutions or passed legislation prohibiting and regulating partisan gerrymandering). Conversely, it is not proper to ask the Judicial Branch to prohibit, limit, or regulate partisan gerrymandering, which effectively asks the court to usurp a process that the Constitution vested in the Legislative Branch, and which would require the court to create entirely new standards for how, when, and under what circumstances the Legislature can consider partisan data that the New Hampshire Supreme Court has already stated the Legislature may properly consider.

It is readily apparent that our State Constitution contains no judicially discoverable and manageable standards for resolving the Plaintiffs' claims. The Plaintiffs argue that the State Constitution somehow guarantees a political party the "opportunity to aggregate their votes to elect such a governing majority." However, the State Constitution does not provide for such a right, and it certainly contains no standards for determining whether a districting plan violates such a right. For example, suppose it were possible to prove that 60% of this State's electorate support political party A, and 40% support political party B. If a redistricting plan contains districts in which each district contains perfect proportional representation of these two parties, 60% of the voters in each district would support political party A, and thus political party A would be projected to elect their preferred representative in every single district. No standard in our State Constitution appears to prohibit this. Or is the Legislature somehow required to manipulate districts so that political party B is favored to win 40% of districts? No standard in our State Constitution appears to require this. Nor does our State Constitution provide for whether or how a redistricting plan must address third-party voters or voters who are not registered to a major political party. For example, there are currently more undeclared voters than there are registered democratic party voters or republican party voters.¹ No part of our State Constitution addresses to what extent undeclared voters have a right to an "opportunity to aggregate their votes" or how a districting plan could possibly guarantee that right.

In sum, it would be improper for this Court to set about creating entirely new standards for how, when, and under what circumstances the Legislature may consider partisan data that the New Hampshire Supreme Court has already determined that the Legislature may consider partisan data when exercising its constitutional authority to redistrict. Therefore, this Court

¹ See *Party Registration/Names on Checklist History*, New Hampshire Secretary of State, available at [Party Registration/Names on Checklist History | New Hampshire Secretary of State \(nh.gov\)](https://www.nh.gov/secretary-of-state/party-registration-names-on-checklist-history) (last visited July 29, 2022).

should dismiss the Plaintiffs' claims as nonjusticiable because the State Constitution vests authority to redistrict with the Legislative Branch, and the State Constitution neither prohibits considering partisan data during redistricting nor sets forth any standards for judicial intervention to resolve claims of alleged partisan gerrymandering.

WHEREFORE, the Defendants respectfully request that this Honorable Court:

- A. Dismiss the Plaintiffs' Complaint in its entirety; and
- B. Grant such further relief as justice may require.

Respectfully submitted,

DAVID SCANLAN, SECRETARY OF STATE

By his attorneys,

JOHN M. FORMELLA
ATTORNEY GENERAL

Date: August 9, 2022

/s/ Myles B. Matteson

Myles B. Matteson, Bar #268059

Assistant Attorney General

Matthew G. Conley, Bar #268032

Attorney

New Hampshire Department of Justice

33 Capitol Street

Concord, NH 03301-6397

(603) 271-3658

myles.b.matteson@doj.nh.gov

matthew.g.conley@doj.nh.gov

and

THE STATE OF NEW HAMPSHIRE

By its attorneys,

JOHN M. FORMELLA
ATTORNEY GENERAL

Date: August 9, 2022

/s/ Brendan Avery O'Donnell

Brendan Avery O'Donnell, Bar #268037

Attorney

Samuel R.V. Garland, Bar #266273

Senior Assistant Attorney General

New Hampshire Department of Justice

33 Capitol Street

Concord, NH 03301-6397

(603) 271-3658

brendan.a.odonnell@doj.nh.gov

samuel.rv.garland@doj.nh.gov

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/ Myles Matteson

Myles Matteson