8. Attorney Alan Cronheim, NH Bar #545, of the law firm Sisti Law Offices, 78 Fleet St., Portsmouth, NH 03801, (603) 433-7117, is an active member in good standing of the Bar of this State and will be associated with Mr. Gaber in the representation of *Amicus Curiae* Campaign Legal Center in this matter and can be present at oral argument, although counsel are not seeking argument time.

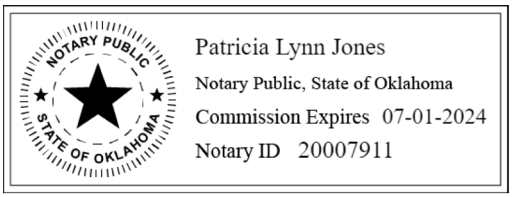
Dated: January 20, 2023

Respectfully submitted,

Mark P. Gaber
Campaign Legal Center
1101 14th St. NW, Suite 400
Washington, DC 20005
(202) 736-2201
mgaber@campaignlegalcenter.org

State of Oklahoma County of Kay

Sworn to and subscribed before me this 20th day of January, 2023. by MARK GABER



Notarized Online with NotaryLive.com

Notary Public
My commission expires: 07/01/2024

CERTIFICATE OF SERVICE

I certify that on January 20, 2023, I served the foregoing on all counsel of record via the Court's electronic filing system in accordance with the Rules of this Court.

/s/ *Alan Cronheim*
Alan Cronheim

This document is signed by

	**Signatory**	CN=Patricia Lynn Jones, DNQ=A01410D0000017EA1117C4D000150B5, O=Oklahoma, C=US
	Date/Time	Fri Jan 20 20:20:30 UTC 2023
	Issuer-Certificate	CN=IGC CA 1, OU=IdenTrust Global Common, O=IdenTrust, C=US
	Serial-No.	850783523718489891679465460189352881 83
	Method	urn:adobe.com:Adobe.PPKLite:adbe.pkcs7.sha1 (Adobe Signature)

EXHIBIT A

Allison Walter

From: Conley, Matthew <Matthew.G.Conley@doj.nh.gov>
Sent: Thursday, January 19, 2023 8:44 AM
To: Allison Walter; O'Donnell, Brendan; Garland, Samuel
Cc: Hayden Johnson
Subject: RE: Response Requested RE: Brown v. Scanlan - Amicus Brief in NH Supreme Court

Good morning Allison,

Yes, we assent to filing an amicus brief.

Thank you,

Matthew G. Conley
Attorney
Attorney General's Office
33 Capitol Street
Concord, NH 03301-6397
Phone: (603) 271-6765

From: Allison Walter <awalter@campaignlegalcenter.org>
Sent: Wednesday, January 18, 2023 11:03 AM
To: Conley, Matthew <matthew.g.conley@doj.nh.gov>; O'Donnell, Brendan <brendan.a.odonnell@doj.nh.gov>; Garland, Samuel <samuel.rv.garland@doj.nh.gov>
Cc: Hayden Johnson <HJohnson@campaignlegalcenter.org>
Subject: Response Requested RE: Brown v. Scanlan - Amicus Brief in NH Supreme Court

---

Good morning, counsel:

We hope you are doing well. I represent Campaign Legal Center and we plan to file an amicus brief this Friday, January 20 in the New Hampshire Supreme Court in support of Appellants in *Brown v. Scanlan*, case no. 2022-0629.

We understand that you are counsel of record for Appellees and the applicable amicus rules require us to obtain both parties' consent before filing the brief. Do you consent to our filing?

Let us know if you have any questions.

Thank you,
Allison

Allison Walter

From: Daniel Osher <dosher@elias.law>
Sent: riday, Novem er 4, 2022 4:41 M
To: steven.dutton@mclane.com; paultwomey@comcast.net; jdevaney@per inscoie.com; A ha hanna; Jonathan Hawley; Aaron Mu erjee; Hayden Johnson
Cc: Allison Walter; Mar Ga er
Subject: Re: Brown v. Scanlan - Amicus Brief in NH Supreme Court

Daniel Osher
Elias Law Group LLP
202-968-4594 | (he/him/his)

From: Hayden Johnson <HJohnson@campaignlegalcenter.org>
Sent: Tuesday, November 1, 2022 12:55:17 PM
To: steven.dutton@mclane.com <steven.dutton@mclane.com>; paultwomey@comcast.net <paultwomey@comcast.net>; jdevaney@perkinscoie.com <jdevaney@perkinscoie.com>; Abha Khanna <akhanna@elias.law>; Jonathan Hawley <jhawley@elias.law>; Daniel Osher <dosher@elias.law>; Aaron Mukerjee <amukerjee@elias.law>
Cc: Allison Walter <awalter@campaignlegalcenter.org>; Mark Gaber <MGaber@campaignlegalcenter.org>
Subject: Brown v. Scanlan - Amicus Brief in NH Supreme Court

Counsel:

We hope you are doing well. CLC plans to file an amicus brief addressing the justiciability issues in the appeal of the Brown v. Scanlan decision. Over the last year we've filed similar briefs in North Carolina, Ohio, and other state court cases.

We understand that New Hampshire's amicus rules require us to obtain both parties' consent and to file our brief at the same time as your opening brief. Do you consent to our filing? And do you presently know the timeline for your briefing schedule?

We're happy to discuss further.

Thank you,

Hayden

--

Hayden Johnson
Legal Counsel
he/him/his (← Why am I listing my pronouns? Learn more here.)

hjohnson@campaignlegalcenter.org | 918.557.8435

Campaign Legal Center
1101 14th St. NW, Suite 400
Washington, DC 20005
campaignlegalcenter.org

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

CASE NO. 2022-0629

Miles Brown, et al.,

v.

David M. Scanlan, et al.

Appeal from Judgment of the Hillsborough County Superior Court South

---

VERIFIED APPLICATION OF HAYDEN JOHNSON TO APPEAR *PRO HAC VICE* PURSUANT TO SUPREME COURT RULE 33

Pursuant to Rule 33 of this Court, the undersigned attorney, Hayden Johnson, hereby submits the following verified application to appear *pro hac vice* as counsel for *Amicus Curiae* Campaign Legal Center in the above-captioned matter. In support of this application, counsel states as follows:

1. Mr. Johnson resides in Denver, CO 80211. He is an attorney at Campaign Legal Center with offices at 1101 14th St. NW, Ste. 400, Washington, D.C. 20005. His telephone number is (918) 557-8435 and email address is hjohnson@campaignlegalcenter.org.
2. Mr. Johnson, along with other Campaign Legal Center attorneys and a member of the Bar of this Court, will represent *Amicus Curiae* in the above-captioned matter. *Amicus Curiae* Campaign Legal Center is located at 1101 14th St. NW, Suite 400, Washington, DC 20005, (202) 736-2200.

3. Mr. Johnson is an active member in good standing in the following jurisdictions:

    a. U.S. District Court for D.C., Bar No. 1671830, admitted 6/6/22;
    b. D.C. Court of Appeals, Bar No. 1671830, admitted 2/19/20.

4. Mr. Johnson certifies that he: (i) has not been denied admission *pro hac vice* in New Hampshire; (ii) has not had admission *pro hac vice* revoked in New Hampshire; and (iii) has not been otherwise formally disciplined or sanctioned by any court in New Hampshire.

5. No formal, written disciplinary proceedings have been brought against Mr. Johnson by any disciplinary authority in any other jurisdiction within the last five years.

6. Mr. Johnson has not been formally held in contempt or otherwise sanctioned by any court in a written order in the last five years for disobedience to its rules and orders.

7. Mr. Johnson has not previously filed an application to appear *pro hac vice* in New Hampshire.

8. Attorney Alan Cronheim, NH Bar #545, of the law firm Sisti Law Offices, 78 Fleet St., Portsmouth, NH 03801, (603) 433-7117, is an active member in good standing of the Bar of this State and will be associated with Mr. Johnson in the representation of *Amicus Curiae* Campaign Legal Center in this matter. Counsel for *Amicus Curiae* Campaign Legal Center can be present at oral argument, although *Amicus Curiae* Campaign Legal Center is not requesting argument time.

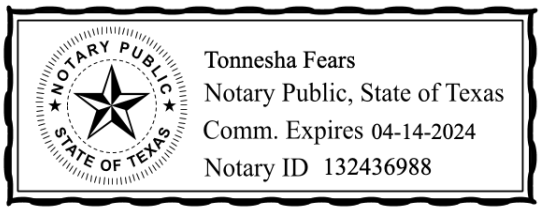
Dated: January 20, 2023

Respectfully submitted,

Hayden Johnson
Campaign Legal Center
1101 14th St. NW, Suite 400

Washington, DC 20005
(202) 736-2201
hjohnson@campaignlegalcenter.org

Sworn to and subscribed before me this 20th day of January, 2023.



Notarized Online with NotaryLive.com

Notary Public
My commission expires: 04/14/2024

CERTIFICATE OF SERVICE

I certify that on January 20, 2023, I served the foregoing on all counsel of record via the Court's electronic filing system in accordance with the Rules of this Court.

/s/ *Alan Cronheim*
Alan Cronheim

This document is signed by

	Signatory	CN=tonnesha fears, DNQ=A01410C000001838A27EAB3000973A9, O=Texas, C=US
	Date/Time	Fri Jan 20 18:51:45 UTC 2023
	Issuer-Certificate	CN=IGC CA 1, OU=IdenTrust Global Common, O=IdenTrust, C=US
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THE STATE OF NEW HAMPSHIRE
SUPREME COURT

CASE NO. 2022-0629

Miles Brown, et al.,

v.

David M. Scanlan, et al.

Appeal from Judgment of the Hillsborough County Superior Court South

---

APPLICATION OF ALLISON WALTER TO APPEAR *PRO HAC VICE* PURSUANT TO SUPREME COURT RULE 33

Pursuant to Rule 33 of this Court, the undersigned attorney, Allison Walter, hereby submits the following verified application to appear *pro hac vice* as counsel for *Amicus Curiae* Campaign Legal Center in the above-captioned matter. In support of this application, counsel states as follows:

1. Ms. Walter resides in Washington, D.C. She is an attorney at Campaign Legal Center with offices at 1101 14th St. NW, Ste. 400, Washington, D.C. 20005. Her telephone number is (202) 736-2200 and email address is awalter@campaignlegalcenter.org.
2. Ms. Walter, along with other Campaign Legal Center attorneys and a member of the Bar of this Court, will represent *Amicus Curiae* in the above-captioned matter. *Amicus Curiae* Campaign Legal Center is located at 1101 14th St. NW, Suite 400, Washington, DC 20005, (202) 736-2200.

3. Ms. Walter is an active member in good standing in the following jurisdictions:

    a. Kansas State Bar, Bar No. 28985, admitted 09/24/21;
    b. U.S. Court of Appeals for the Sixth Circuit, admitted 06/08/22.

4. Ms. Walter certifies that she: (i) has not been denied admission *pro hac vice* in New Hampshire; (ii) has not had admission *pro hac vice* revoked in New Hampshire; and (iii) has not been otherwise formally disciplined or sanctioned by any court in New Hampshire.

5. No formal, written disciplinary proceedings have been brought against Ms. Walter by any disciplinary authority in any other jurisdiction within the last five years.

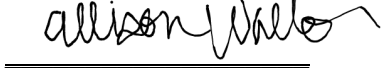
6. Ms. Walter has not been formally held in contempt or otherwise sanctioned by any court in a written order in the last five years for disobedience to its rules and orders.

7. Ms. Walter has not previously filed an application to appear *pro hac vice* in New Hampshire.

8. Attorney Alan Cronheim, NH Bar #545, of the law firm Sisti Law Offices, 78 Fleet St., Portsmouth, NH 03801, (603) 433-7117, is an active member in good standing of the Bar of this State and will be associated with Ms. Walter in the representation of *Amicus Curiae* Campaign Legal Center in this matter. Counsel for amicus curiae Campaign Legal Center can be present at oral argument, although amicus curiae Campaign Legal Center is not requesting argument time.

Dated: January 20, 2023

Respectfully submitted,

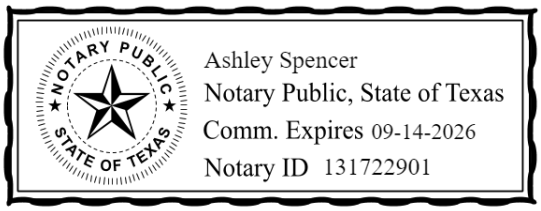


Allison Walter

Campaign Legal Center
1101 14th St. NW, Suite 400
Washington, DC 20005
(202) 736-2200
awalter@campaignlegalcenter.org

Sworn to and subscribed before me this 20th day of January, 2023.

Notary Public
My commission expires: 9/14/2026



Notarized Online with NotaryLive.com

CERTIFICATE OF SERVICE

I certify that on January 20, 2023, I served the foregoing on all counsel of record via the Court's electronic filing system in accordance with the Rules of this Court.

/s/ *Alan Cronheim*
Alan Cronheim

This document is signed by

	Signatory	CN=Ashley D Spencer, DNQ=A01410D0000017F6F96509400008B48, O=Texas, C=US
	Date/Time	Fri Jan 20 17:11:52 UTC 2023
	Issuer-Certificate	CN=IGC CA 1, OU=IdenTrust Global Common, O=IdenTrust, C=US
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THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Docket No. 2022-0629

Miles Brown & a.

v.

Secretary of State

ASSENTED TO SECOND NOTICE OF AUTOMATIC EXTENSION OF TIME TO FILE BRIEF

Appellees David M. Scanlan, the New Hampshire Secretary of State and John M. Formella, the New Hampshire Attorney General, with the assent of counsel for Appellants, hereby provide notice pursuant to Supreme Court Rule 21 (6-A) of an automatic extension of time for filing its brief in this matter. In furtherance of this notice, Appellees state:

1. On December 6, 2022, the Court issued an order containing a briefing schedule, pursuant to which Appellants' brief was due on or before January 5, 2023 and Appellee's opposing brief was due on or before February 6, 2023.

2. On December 13, 2022, the Appellants filed an assented to notice of automatic extension of time to file brief extending the briefing schedule no more than fifteen (15) days. On that same day, the Court indicated that the

Appellants' brief would be due on January 20, 2023 and Appellees' would be due on February 21, 2023.

3. Appellees require an additional fifteen (15) days to file their brief.

4. Pursuant to this notice and Rule 21 (6-A)'s limitation to extend briefing dates no more than 15 days, the briefing will now be as follows:

a. Appellees' brief will be due on March 8, 2023.

b. Any reply brief will be due on March 28, 2023.

WHEREFORE the Appellees respectfully request that that this Honorable Court:

A. Enter an Order extending the deadline for Appellees' brief for fifteen days to March 8, 2023 and the deadline for any reply brief to March 28, 2023.

Respectfully submitted,

DAVID M. SCANLAN, NEW HAMPSHIRE SECRETARY OF STATE

By his attorneys,

JOHN M. FORMELLA
ATTORNEY GENERAL

Date: February 21, 2023

/s/ Matthew G. Conley
Matthew G. Conley [Bar #268032]
Attorney
New Hampshire Office of the
Attorney General
Civil Bureau
33 Capitol Street
Concord, New Hampshire 03301-
6397
(603) 271-3650

Certification

I, Matthew G. Conley, hereby certify that this Appearance was sent to all parties of record through the Court's e-filing system.

Date: February 21, 2023

/s/ Matthew G. Conley
Matthew G. Conley [268032]
Attorney

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

CASE NO. 2022-0629

Miles Brown & a.,

Plaintiffs-Appellants,

v.

Secretary of State & a.,

Defendants-Appellees.

Rule 7 Appeal from Final Judgment of Hillsborough County
Superior Court, Southern District

BRIEF OF PLAINTIFFS-APPELLANTS

Steven J. Dutton (17101)
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250 Massachusetts Ave. NW
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Washington, DC 20001

*Admitted *pro hac vice*

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TABLE OF AUTHORITIES

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Cases

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QUESTIONS PRESENTED

1. Whether the Superior Court erred in concluding that the only justiciable question that New Hampshire courts may entertain in a challenge to a Senate redistricting plan is whether the plan complies with the express requirements of Part II, Article 26 of the New Hampshire Constitution. PAII148–52.[1]

2. Whether the Superior Court erred in concluding that the only justiciable question that New Hampshire courts may entertain in a challenge to an Executive Council redistricting plan is whether the plan complies with the express requirements of Part II, Article 65 of the New Hampshire Constitution. PAII148–52.

3. Whether New Hampshire courts have authority to entertain a claim that a Senate or Executive Council redistricting plan is an unlawful partisan gerrymander. PAII133–58.

[1] "PAI" and "PAII" refer to the two volumes of the Appendix to Plaintiffs-Appellants' brief. "PD" refers to the Addendum to Plaintiffs-Appellants' brief, which contains the appealed decision.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS[2]

New Hampshire Constitution

Part I, Article 1

Part I, Article 10

Part I, Article 11

Part I, Article 12

Part I, Article 22

Part I, Article 32

Part II, Article 26

Part II, Article 65

Statutes

RSA 662:2

RSA 662:3

[2] Per Supreme Court Rule 16(3)(c), given the number and length of the authorities cited, Plaintiffs-Appellants provide the full text of these authorities in the appendix to their brief. PAII333–39.

INTRODUCTION

This Court has repeatedly stressed that, even when the State Constitution "commits to the legislature [] exclusive authority" for a matter, the judiciary remains "available for adjudication of issues of constitutional or other fundamental rights." *Burt v. Speaker, N.H. House of Representatives*, 173 N.H. 522, 526 (2020) (quoting *Horton v. McLaughlin*, 149 N.H. 141, 145 (2003)). This fundamental principle of checks and balances ensures that no one branch improperly distorts or amplifies its own power in defiance of democratic norms. But in direct contravention of this basic tenet, the Superior Court below found that, because redistricting is a legislative task on which Part II of the State Constitution sets express limitations, redistricting plans enacted by the Legislature are entirely immune from challenge—even if they violate fundamental rights protected by Part I. This was error, and it must be reversed.

The state's judiciary has a "constitutional responsibility to protect the voting rights of the people." *In re Below*, 151 N.H. 135, 150 (2004) (per curiam) ("*Below II*"). The Superior Court's decision contravenes that responsibility and the State Constitution's guarantees of the fundamental rights of free and equal elections, equal protection, free speech, and free association. Simply put, partisan gerrymanders are incompatible with democracy. They replace the will of the people as the determinant of elections with the naked political manipulations of the party in power. The framers of the State Constitution were worried about this very problem, recognizing that those in power often find it impossible to "resist

[the] bewitching influence" of ever-expanding power and warned that "[w]herever power is lodged there is a constant propensity to enlarge its boundaries." *An Address of the Convention for Framing a New Constitution of Government for the State of New Hampshire, to the Inhabitants of Said State* 5 (1781). They drafted the State Constitution with that concern front of mind, conscientiously including a provision that expressly guarantees a right of free and equal elections that, in addition to having no parallel in the U.S. Constitution, has demonstrable roots in efforts to combat district manipulation for partisan gain. To now read that document as foreclosing judicial enforcement of this provision—as the Superior Court did—is at odds with its text and the clear intent of its authors.

The Superior Court's conclusion that the issue presented a political question is at odds not just with the State Constitution, but legal precedent. A claim's mere relevance to partisan politics does not "mean [it] presents a political question." *Baker v. Carr*, 369 U.S. 186, 209 (1962). Nor is this a case where what is at issue are the sort of minor "political considerations [that] are tolerated in legislatively-implemented redistricting plans," *Burling v. Chandler*, 148 N.H. 143, 156 (2002). Here, Plaintiffs challenge the illegitimate enterprise of entrenching partisan control of government through distortion of the electoral process and dilution of certain citizens' voting strength because of their political views. As this Court has indicated, that raises serious constitutional concerns. *Id.* at 150 (noting that districts "designed to minimize or cancel out the voting strength" of "political elements of the voting population" would not be

"constitutionally permissible") (quoting *Fortson v. Dorsey*, 379 U.S. 433, 349 (1965)).

Because Part I of the State Constitution "protects the people from" precisely those sorts of "governmental excesses and [] abuses," *State v. Ball*, 124 N.H. 226, 231 (1983), and because it is the judiciary's "duty to interpret [those] provisions and to determine whether the legislature has complied with them," *Hughes v. Speaker, N.H. House of Reps.*, 152 N.H. 276, 289 (2005), Plaintiffs' claims are justiciable. Indeed, the U.S. Supreme Court's recent decision foreclosing federal partisan-gerrymandering claims expressly affirmed that active policing by state courts would ensure that "complaints about districting [do not] echo into a void." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019). And as courts in several other states have demonstrated, partisan-gerrymandering claims give rise to standards that are discoverable and manageable. Defendants' suggestion otherwise runs headlong into this Court's admonishment that courts "would shirk our duty were we to decline to act . . . merely because our task is a difficult one." *Monier v. Gallen*, 122 N.H. 474, 476 (1982) (per curiam).

This Court should reverse the decision below.

STATEMENT OF CASE AND FACTS

I. Plaintiffs challenge the Senate and Executive Council plans under Part I of the State Constitution.

On May 6, 2022, Plaintiffs filed suit challenging New Hampshire's newly created redistricting plans for the Senate (S.B. 240 (2022), codified at RSA 662:3) and Executive Council (S.B. 241

(2022), codified at RSA 662:2) (together, "the Challenged Plans") as partisan gerrymanders. Plaintiffs allege that the plans "crack" and "pack" Democratic voters in a manner that can be explained only by an overriding intent to entrench Republican control of both bodies in future elections notwithstanding the will of the voters. As the complaint alleges, the Challenged Plans are so extreme that Republicans can *lose* the statewide popular vote and still win *super*majorities in both chambers. PAI26, PAI34.

Plaintiffs allege that the Challenged Plans violate three rights under the State Constitution. First, they allege a violation of Part I, Article 11's Free and Equal Elections Clause, which guarantees that "[a]ll elections are to be free, and every inhabitant of the state of 18 years of age and upwards shall have an equal right to vote in any election." In direct contradiction of this clause, the overriding purpose and effect of the Challenged Plans is to prevent Democratic voters from freely choosing their legislators or equally participating in the political process. *See* PAI35–36.

Second, Plaintiffs allege a violation of the right of equal protection arising from Part I, Articles 1, 10 and 12, which "demands that all persons similarly situated should be treated alike." *State v. LaPorte*, 134 N.H. 73, 76 (1991) (internal quotation marks omitted). The Challenged Plans violate these provisions by targeting Democratic voters for differential treatment by diluting their voting strength. *See* PAI36–38.

Third, Plaintiffs allege a violation of the guarantees of free speech and free association protected by Part I, Articles 22 and 32.

Specifically, the Challenged Plans discriminate and retaliate against Democratic voters due to their political viewpoints and affiliations, making it harder for those voters to elect their preferred candidates. PAI38–39.[3]

II. Plaintiffs moved for preliminary relief based on overwhelming evidence that the Challenged Plans are extreme partisan outliers.

Immediately after initiating this suit, Plaintiffs filed a motion for preliminary injunction seeking relief in advance of the 2022 elections. In support of that motion, Plaintiffs presented a substantial amount of evidence—including three expert reports—demonstrating that the Challenged Plans could be explained only by an intent to entrench Republican Party control over the Senate and Executive Council and that they would durably produce that effect.

From a quantitative perspective, University of Michigan political science professor Dr. Jowei Chen and Carnegie Mellon University mathematics professor Dr. Wesley Pegden demonstrated that the Challenged Plans are extreme partisan outliers. Dr. Chen did so by comparing them to thousands of computer-simulated plans generated using politically neutral traditional redistricting principles. He found that the Challenged Plans were more favorable to Republicans, less competitive, and less compact than virtually every single one of the simulated plans. PAI127–65, PAI172–203.

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[3] After Plaintiffs filed their complaint, the Superior Court sought an interlocutory transfer of this case under Supreme Court Rule 9. This Court declined the transfer. Order, *Brown v. Sec'y of State*, No. 2022-0339 (N.H. June 28, 2022).

This led Dr. Chen to conclude that the Legislature "subordinated" traditional redistricting principles "to achieve an extreme partisan outcome" that "goes beyond any 'natural' level of electoral bias caused by New Hampshire's political geography or the political composition of the state's voters." PAI166–68, PAI204–06.

Dr. Pegden used a computer model to test the "sensitivity" of the Challenged Plans' pro-Republican bias, finding that they were more carefully crafted to benefit the Republican Party than 99.96% of *all possible variations* of either plan. PAI309, PAI314. Based on these results, Dr. Pedgen concluded that the "overarching intent" behind the Challenged Plans was "to maximize political advantage for Republican candidates." PAI303.

From a qualitative perspective, University of New Hampshire political science professor Dr. Dante Scala described in detail how the Challenged Plans' sprawling districts divide communities of interest in a manner that can "only be explained by partisan politics." PAI264. As just one example, Dr. Scala demonstrated how Senate District 9 runs from eastern Hillsborough County to southwestern Cheshire County, "string[ing] together a number of Republican-tilting municipalities" along the way. PAI270. Despite the district being "just one town wide in most places," the "trip from one end of the district to the other is a 90-minute drive of almost 70 miles." PAI270. As drawn, the district divides "three separate public health districts" and "splits four public high school districts." PAI270.

While Defendants filed an objection to Plaintiffs' preliminary-injunction motion, they offered no evidence of their own to rebut

Plaintiffs' substantive claims. *See* PAII3–63. Instead, they asked the Superior Court to avoid the merits altogether by moving to dismiss Plaintiffs' claims as nonjusticiable. PAII103–24.

III. The Superior Court dismissed Plaintiffs' claims as nonjusticiable political questions.

The Superior Court did not rule on Plaintiffs' preliminary injunction motion or consider any of the evidence that Plaintiffs offered in support. Instead, on October 5, 2022, it found Plaintiffs' claims to be "non-justiciable political questions" and dismissed them on the ground that it had no power to reach their merits. PA8.

Specifically, the Superior Court concluded that Part II, Articles 26 and 65 constitute "a textually demonstrable constitutional commitment of the issue" of Senate and Executive Council redistricting to the Legislature. PD3–5 (quoting *Burt*, 173 N.H. at 525), and that "the *only* justiciable issue[]" a court could address is "whether the newly-enacted districts meet the express requirements of Articles 26 and 65." PD8 (emphasis added). Because Plaintiffs' claims were based on the fundamental rights afforded to New Hampshire's citizens by other constitutional provisions, the Superior Court concluded it was without power to entertain the action at all. PD6–7. And while it acknowledged that Plaintiffs sought to adjudicate rights expressly guaranteed by specific provisions in Part I of the State Constitution, the court nonetheless found Plaintiffs' claims nonjusticiable because none of those provisions contain "language concerning redistricting." PD6.

A month after the Superior Court's decision, the State held its

2022 general elections under the Challenged Plans. The results of those elections confirm the Challenged Plans' extreme artificial pro-Republican bias. Despite receiving less than 50% of the total votes in all Senate races, Republicans captured 58% of Senate seats; and despite receiving less than 50% of the total votes in all Executive Council races, Republicans captured 80% of Executive Council seats.[4]

SUMMARY OF ARGUMENT

The Superior Court's order dismissing Plaintiffs' claims as nonjusticiable—which this Court reviews *de novo*, *Burt*, 173 N.H. at 525—should be reversed.

The Superior Court erred in concluding that because Part II contains provisions governing redistricting, plans enacted by the Legislature are entirely insulated from challenge, including when they violate fundamental rights guaranteed to the people by Part I of the State Constitution. First, it misconstrued the political-question doctrine, conflating ordinary judicial review of enacted legislation for compliance with constitutional rights (which Plaintiffs' claims

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[4] These election results—of which this Court can take judicial notice, *see Hillsborough Cty. v. Beaulieu*, 113 N.H. 69, 72 (1973)—are posted publicly by the Secretary of State. *See 2022 Gen. Election Results*, N.H. Sec'y of State, "Election Results," https://www.sos.nh.gov/elections/elections/election-results/2022-election-results-0/2022-general-election-results (accessed Jan. 20, 2023). Full copies of the two relevant documents linked on that webpage, which are entitled "State Senate Districts 1 - 24" and "Executive Council Districts 1 - 5," are included in the Appendix to this brief. *See* PAII304–32.

request) with judicial usurpation of the legislative process of drawing districts in the first instance (which Plaintiffs' claims do not). In doing so, the Superior Court ignored multiple decisions of this Court instructing that, even when the State Constitution gives the Legislature *exclusive* authority in an area of policy, the judiciary still has the duty to adjudicate claims alleging that the Legislature's discharge of that authority violated fundamental rights guaranteed by Part I of the Constitution. *Burt*, 173 N.H. at 526.

Second, the Superior Court misread the express requirements for Senate and Executive Council plans found in Part II, Articles 26 and 65 to preclude claims that those plans violate *separate* rights found in Part I. Nothing in those provisions support that conclusion. Indeed, this is precisely the same error that the trial court made in *Burt*: assuming that a particular assignment of legislative function found in Part II bars courts from entertaining claims that the product of that function violates rights protected by Part I. *Id.*

Third, the Superior Court's related conclusion that it lacks authority to adjudicate Plaintiffs' claims because the Part I provisions upon which they rely do not say the word "redistricting" was also wrong. That position contradicts several of this Court's decisions, particularly those stating redistricting plans *can* violate Part I rights. *See Below v. Gardner*, 148 N.H. 1, 3, 5 (2002) ("*Below I*"); *Burling*, 148 N.H. at 146, 150. Nor can it be squared with the intent of the State Constitution's framers, who chose to include unique language rooted in prior efforts to combat practices that diluted the strength of parts of the electorate to achieve political

gain. Indeed, several courts in other states have interpreted similar constitutional provisions to prohibit partisan gerrymandering.

Finally, this Court should reject Defendants' alternative argument that Plaintiffs' claims do not give rise to discoverable and manageable standards. This Court's precedents and the decisions of other state courts that have considered analogous challenges under similar provisions firmly establish that Plaintiffs' partisan-gerrymandering claims can be adjudicated using manageable standards with which New Hampshire's judiciary is already well acquainted.

ARGUMENT

I. Partisan-gerrymandering claims are justiciable under the State Constitution.

In concluding that it lacked jurisdiction to adjudicate Plaintiffs' claims, the Superior Court made three fundamental errors. First, it misconstrued the political-question doctrine in reasoning that the Legislature's authority to draw redistricting plans in the first instance bars courts from ensuring that such plans do not violate voters' fundamental rights. Second, it misinterpreted the State Constitution's structure by reading Part II, Articles 26 and 65 to preclude claims under other provisions found in Part I. Last, it misinterpreted the Part I rights underlying Plaintiffs' claims by concluding that they do not support redistricting claims due to the absence of language expressly relating to redistricting.

A. The Superior Court misapplied the political-question doctrine.

Plaintiffs do not dispute that the State Constitution assigns the

task of drawing Senate and Executive Council districts to the Legislature. *Below II*, 151 N.H. at 149–51. Nor do they suggest that courts may usurp that authority. The question that this appeal presents is straightforward: whether, in the redistricting context, the judiciary is prohibited from performing *its* fundamental "constitutional duty . . . to review whether laws passed by the legislature are constitutional." *Baines v. N.H. Senate President*, 152 N.H. 124, 129 (2005) (quoting *Below II*, 151 N.H. at 139). This is what New Hampshire's courts routinely do in exercising the judicial power vested in them by the Constitution. *See* N.H. Const. pt. II, art. 72-a. And because nothing in the Constitution or this Court's precedents creates the broad exception to the normal operation of separation of powers that the Superior Court applied, Plaintiffs' claims are justiciable.

In reaching its erroneous conclusion, the Superior Court misconstrued the political-question doctrine. That doctrine—"a function of the separation of powers," *Baines*, 152 N.H. at 128—identifies highly limited circumstances in which a claim might be nonjusticiable: when "there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving" a claim. *Burt*, 173 N.H. at 525 (quoting *Hughes*, 152 N.H. 283).[5] The Superior Court premised its decision

[5] While this Court has recognized other political-question indicia, *Baines*, 152 N.H. at 129, Defendants argued below only these two

entirely on the former scenario, concluding it could not consider any claims outside of Part II, Articles 26 and 65, which commit the "issue[s]" of Senate and Executive Council redistricting to the Legislature. PD3 (quoting *Burt*, 173 N.H. at 525). But in doing so, the Superior Court failed to faithfully apply this Court's precedent.

Under that precedent, a "conclusion that the constitution commits to the legislature exclusive authority . . . *does not end the inquiry into justiciability*." *Burt*, 173 N.H. at 526 (quoting *Horton*, 149 N.H. at 145) (emphasis added). Even in such scenarios, "the court system [remains] available for adjudication of issues of constitutional or other fundamental rights." *Id.* (alteration in original). This Court has recognized that those claims must be justiciable 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." *Monier*, 122 N.H. at 476. Judicial adjudication of claims that the Legislature has violated constitutional rights "does not demonstrate lack of respect due the legislative branch of government"; it simply "fulfills the constitutional responsibility of the judicial branch." *Baines*, 152 N.H. at 129.

Indeed, Plaintiffs have been unable to find a single decision of this Court concluding that a claim that a law violates a right under the State Constitution is a nonjusticiable political question. While

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bases for finding Plaintiffs' claims beyond the reach of the judiciary. *See* PAII110–23.

this Court has found that certain *statutory* claims prompt nonjusticiable political questions, it has on multiple occasions—including in the cases cited by the Superior Court to support its decision below—distinguished those claims from *constitutional* ones, which are justiciable. In *Hughes*, for example, this Court held that while the question of whether a law's passage violated statutory public-meeting requirements was a nonjusticiable political question (because "the legislature's adherence to the rules or statutes prescribing procedure is a matter entirely within legislative control and discretion"), its compliance with the *constitutional* right of access to governmental proceedings under Part I, Article 8 was necessarily justiciable (because the judiciary has a "duty to interpret constitutional provisions and to determine whether the legislature has complied with them"). 152 N.H. at 283–89; *see also Baines*, 152 N.H. at 129–31 (same). Similarly, when this Court concluded in *Horton* that the petitioners' common-law claim for reimbursement of expenses incurred in successfully defending their impeachments was a nonjusticiable political question, it went out of its way to clarify that the claim *would* have been justiciable if it arose from a "constitutional or other fundamental right[]." 149 N.H. at 145 (quoting *In re Jud. Conduct Comm.*, 145 N.H. 108, 111 (2000)). These cases establish a clear rule: While the political-question doctrine counsels against interfering in the Legislature's internal processes, when citizens assert claims that the product of those processes violate their constitutional rights—as Plaintiffs do here—the State Constitution *requires* courts to adjudicate them.

Nothing in this Court's case law supports the Superior Court's assertion that the judiciary cannot entertain partisan-gerrymandering claims because partisan politics is the province of the state's political branches. PD5–6. While this Court has noted that mere "political *considerations* are tolerated in legislatively-implemented redistricting plans," *Burling*, 148 N.H. at 156 (emphasis added), it has never suggested courts are powerless to entertain claims that a political party has violated voters' fundamental rights by warping district lines with the overriding purpose of entrenching its control of the Legislature regardless of the will of the electorate. The State Constitution's toleration of the political considerations made by the Legislature while it balances traditional redistricting principles to equalize the populations within districts does not legitimize extreme manipulation of district lines for anti-democratic purposes. Nor is the admonition that courts avoid taking political considerations into account when creating their own remedial maps—on which the Defendants relied heavily below, *e.g.*, PAII108 (citing *Norelli v. Sec'y of State*, 175 N.H. 186, 203 (2022)—a license to forego adjudication of constitutional claims premised on illicit partisan intent and effects. *See Burling*, 148 N.H. at 150 (describing as constitutionally suspect multimember districts that dilute the voting strength of political groups).

Put simply, a court neither usurps the Legislature's redistricting authority nor injects its own political judgments into the process by adjudicating a claim that the party in control of the Legislature has intentionally drawn a plan to distort the democratic

process and reduce the voting strength of particular voters who might oppose its candidates. It instead performs a fundamental judicial role: ensuring the Legislature has not violated Plaintiffs' constitutional rights. *Below II*, 151 N.H. at 150.

The fact that a New Hampshire court has not previously had the opportunity to determine whether the State Constitution gives rise to a partisan-gerrymandering claim is also not reason to find that the judiciary has no power to adjudicate it. *But see* PD6–7 (faulting Plaintiffs for failing to cite a New Hampshire decision so holding). If the lack of precedent for a given claim made it a political question, the law could never adapt to new circumstances. *See League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 811 (Pa. 2018) ("While it is true that our Court has not heretofore held that a redistricting plan violates the Free and Equal Elections Clause—for example, because it is the product of politically-motivated gerrymandering—we have never precluded such a claim in our jurisprudence."); *Szeliga v. Lamone*, No. C-02-CV-21-001816, slip op. at 26, 28 (Md. Cir. Ct. Mar. 25, 2022) (reproduced at PAII186, PAII 188) (noting "[t]he purpose of the Free Elections Clause relative to partisanship . . . heretofore has not been the subject of judicial scrutiny" but nonetheless finding in favor of plaintiffs' claims).

Ultimately, slamming the courthouse doors to partisan-gerrymandering challenges would contravene the purpose of the very doctrine that gives rise to the political-question inquiry: the separation-of-powers doctrine. The separation-of-powers doctrine is

meant to "protect against a seizure of control by one branch that would threaten the ability of our citizens to remain a free and sovereign people." *Jud. Conduct Comm.*, 145 N.H. at 109 (quoting *In re Mone*, 143 N.H. 128, 134 (1998)). If courts are precluded from hearing partisan-gerrymandering claims, a party controlling the state's political branches will have unchecked power to entrench its position in direct contravention of the fundamental rights that the Constitution confers on New Hampshire citizens—including the promise that New Hampshire's elections will be *free and equal*. N.H. Const. pt. I, art. 11; *see also Burling*, 148 N.H. at 144 ("[T]he right to choose a representative is every man's portion of sovereign power.") (quoting *Luther v. Borden*, 48 U.S. (7 How.) 1, 30 (1849)); *Below*, 148 N.H. at 2 ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.") (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)). This guarantee means little if legislators are left entirely free to draw and manipulate the state's districts—including the seats they themselves occupy—in such a way as to insulate them from the will of the electorate. To use the separation-of-powers doctrine to produce this threat to democratic self-governance is to turn that doctrine on its head.

B. Part II, Articles 26 and 65 do not vitiate Plaintiffs' Part I rights.

The Superior Court's conclusion that "the only justiciable issues it can address concerning senate and executive council redistricting are whether the newly-enacted districts meet the

express requirements of Articles 26 and 65," PD8, finds no support in the text of those provisions or this Court's precedents.

Article 26 provides that during "the regular session following each decennial federal census," the "legislature shall divide the state into single-member districts" that contain populations "as nearly equal as may be in population," are contiguous, and do not divide political subdivisions. Similarly, Article 65 provides that the "legislature may . . . divide the state into five districts, as nearly equal as may be" in population. That language has prompted this Court to conclude, properly, that the Legislature holds the primary authority to craft redistricting plans and the judiciary is not a "part of th[at] legislative process." *Below II*, 151 N.H. at 150; *see also City of Manchester v. Sec'y of State*, 163 N.H. 689, 697 (2012) (per curiam) (explaining it "is primarily the Legislature, not this Court" that balances the policy issues inherent in redistricting) (quoting *In re Town of Woodbury*, 861 A.2d 1117, 1120 (Vt. 2004)).

But this Court has *never* suggested that, in exercising that primary redistricting authority, the Legislature enjoys unchecked power to run roughshod over voters' Part I rights. In fact, it has said the opposite. Once the Legislature enacts a redistricting plan, it is the judiciary's role "to review the constitutionality of [those] existing districts." *Below II*, 151 N.H. at 150; *see also id.* (noting "the court has a constitutional responsibility to protect the voting rights of the people"). This includes ensuring "the electorate['s] equal protection of the laws," by, for example, ensuring that districts are not "designed to . . . minimiz[e] or cancel[] out the voting strength of

racial or political elements of the voting population." *Burling*, 148 N.H. at 144, 150 (first quoting *Silver v. Brown*, 405 P.2d 132, 140 (Cal. 1965), then *Fortson*, 379 U.S. at 439); *see also Op. of the Justs.*, 111 N.H. 146, 151 (1971) (same). Courts' obligation to entertain such claims arises from the established rule that even in the face of a constitutional assignment of decicionmaking authority to the Legislature, the judiciary "remains available for adjudication of issues of constitutional or other fundamental rights." *Burt*, 173 N.H. at 526 (cleaned up).

Concluding otherwise, the Superior Court engaged in the same erroneous reasoning as the trial court in *Burt*. There, plaintiffs alleged that a rule banning possession of deadly weapons inside certain areas of the State House violated their right "to keep and bear arms" under Part I, Article 2-a of the State Constitution. *Id.* at 523. The trial court dismissed the claim as a nonjusticiable political question, reasoning that because the "State Constitution grants both houses of the legislature the authority to settle the rules of proceedings in their own [h]ouse," courts have no power to review the validity of such rules. *Id.* at 524; *see* N.H. Const. pt. II, art. 22 ("The house of representatives shall . . . settle the rules of proceedings in their own house . . ."). But this Court reversed, explaining that the "legislature may not, even in the exercise of its 'absolute' internal rulemaking authority, violate constitutional limitations." *Burt*, 173 N.H. at 528. The plaintiffs' Part I claims were thus "justiciable, and [] the trial court erred when it dismissed the complaint." *Id.*

Burt is directly on point. Here, the Superior Court similarly reasoned that because Part II, Articles 26 and 65 "vest[] the authority to redistrict with the legislative branch," that authority bars voters from claiming such districts violate their Part I rights. PD8 (quoting *Below II*, 151 N.H. at 150). But just as the House's exclusive authority under Part II, Article 22 to write its own rules does not preclude courts from entertaining claims that those rules violate Part I rights, *Burt*, 173 N.H. at 528, neither does the Legislature's authority to draw Senate and Executive Council plans under Part II, Articles 26 and 65. *See also Harper v. Hall*, 868 S.E.2d 499, 534 (N.C. 2022) (rejecting as "startling" the proposition that because "responsibility for reapportionment is committed to the General Assembly," its "decision in carrying out its responsibility are fully immunized from any judicial review"), *cert. granted sub nom. Moore v. Harper*, No. 21-1271, 2022 WL 2347621 (U.S. June 30, 2022).[6]

The other cases cited by the Superior Court do not suggest otherwise. *See* PD7. Those decisions involved claims attacking the validity of one constitutional provision on the ground that it conflicted with another, *Levitt v. Att'y Gen.*, 104 N.H. 100, 107 (1962); *Thompson v. Kidder*, 74 N.H. 89 (1906), or challenging the

[6] The U.S. Supreme Court's review in *Harper* is limited to the question of whether the U.S. Constitution limits state court challenges to *federal congressional* redistricting plans. That question has no relevance to the challenges to state legislative plans here.

U.S. Supreme Court's authorization of decennial reapportionment as a violation of the State Constitution, *Town of Canaan v. Sec'y of State*, 157 N.H. 795, 800 (2008). Nothing in those cases support the theory that the Challenged Plans' compliance with redistricting requirements contained in Part II of the State Constitution *preclude* a judicial inquiry into their compliance with separate rights set forth in Part I.

C. The Superior Court misinterpreted the Part I provisions underlying Plaintiffs' claims.

Beyond incorrectly concluding that Part II redistricting provisions revoke the judiciary's power to entertain redistricting challenges premised on Part I rights, the Superior Court erroneously concluded it lacked power to hear Plaintiffs' claims because "none of the Part I articles cited by the plaintiffs have any language concerning redistricting." PD6. The Superior Court's severely circumscribed construction of those provisions conflicts with this Court's precedents, the State Constitution's history, and other courts' treatment of the same constitutional rights.

1. The Superior Court's narrow construction of the Part I rights underlying Plaintiffs' claims cannot be squared with this Court's precedents.

Partisan gerrymandering directly conflicts with the free-and-equal elections, equal-protection, free-speech, and free-association rights protected by Part I of the State Constitution. Rather than ensuring elections are "free" and "equal," N.H. pt. I, art. 11, partisan gerrymandering severely tilts the electoral scales, replacing the will

of the electorate with those of the party in power. Instead of ensuring "all persons similarly situated [are] treated alike," *LaPorte*, 134 N.H. at 76 (internal quotation marks omitted), partisan gerrymandering defies equal protection by targeting certain voters and diluting their voting strength in relation to over voters. And instead of "inviolably preserv[ing]" free speech, N.H. Const. pt. I, art. 22, and "protect[ing] the right of citizens to associate and to form political parties for the advancement of common political goals and ideas," *Op. of the Justs. (Voting Age in Primary Elections II)*, 158 N.H. 661, 667 (2009), partisan gerrymandering punishes voters *because* of their political views and their associations with a particular political party.

Nothing in this Court's case law supports the Superior Court's decision to ignore these clear constitutional violations simply because the text of these provisions does not contain "language concerning redistricting." PD6. In fact, this Court has said the opposite. In *Below I* and *Burling*, this Court explained that malapportioned redistricting plans violate the Free and Equal Elections Clause. *Below I*, 148 N.H. at 3, 5 (citing Part I, Article 11 as the source of the State Constitution's "guarantee[] that each citizen's vote will have equal weight"); *Burling*, 148 N.H. at 146 (same); *see also* Susan E. Marshall, *The New Hampshire State Constitution: A Reference Guide* 56 (2004) ("In discussing the state constitutional foundation for the one person/one vote standard, the New Hampshire Supreme Court held that [Part I, Article 11] guarantees that each citizen's vote will have equal weight."). It also separately indicated in *Burling* that Part I prohibits the Legislature from

enacting redistricting plans that "are designed to or would 'minimize or cancel out the voting strength of racial or political elements.'" 148 N.H. at 150 (quoting *Fortson*, 379 U.S. at 349).

Cases outside the redistricting context also demonstrate the error in the Superior Court's reasoning. While the free-speech and free-association rights protected by Part I say nothing of campaign-finance regulation, N.H. Const. pt. I, arts. 22, 32, this Court has opined that they prohibit certain restrictions on the ability of campaigns to receive donations. *Op. of Justs.*, 121 N.H. 434, 436 (1981). While the provisions underlying the State Constitution's equal-protection guarantees say nothing about trucking regulations, N.H. Const. pt. I, arts. 1, 10, 12, this Court invalidated on equal-protection grounds a law that excepted trucks carrying a specific kind of cargo from a weight limit that otherwise applied to all trucks. *State v. Amyot*, 119 N.H. 671, 673–74 (1979). These provisions also say nothing of taxes, but this Court invalidated under Part I, Articles 1 and 12 (among others) a sales tax that applied to packaged food located in vending machines but not those found on supermarket shelves. *Cagan's, Inc. v. N.H. Dep't of Revenue Admin.*, 126 N.H. 239, 246–47 (1985); *see also State v. Pennoyer*, 65 N.H. 113, 114–15 (1889) (listing several examples in which the Legislature has violated equal protection in contexts not specifically discussed in Part I). And while Part I, Article 11's language is silent on the topic of the voter-registration process, this Court has more than once invalidated voter-registration laws based on the burden they impose on voters. *N.H. Democratic Party v. Sec'y of State*, 174 N.H. 312, 374 (2021);

Guare v. State, 167 N.H. 658, 669 (2015). Just as registration barriers can deny citizens their right to a free and equal vote, so too can a discriminatory redistricting plan. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.").

2. The State Constitution's framers intended to prohibit partisan gerrymandering.

The Superior Court's conclusion that Plaintiffs' claims are nonjusticiable conflicts with the history behind Part I of the State Constitution (and, in particular, its Free and Equal Elections Clause). That history confirms that the State Constitution's framers intended to prevent partisan gerrymandering and place the issue within the judiciary's ambit.

The Free and Equal Elections Clause—which has no analog in the U.S. Constitution—first appeared in the State Constitution on June 2, 1784, when the currently operative constitution replaced the Constitution of 1776. *See* Lawrence Friedman, *The New Hampshire State Constitution* 58 (2d ed. 2015); Marshall, *supra*, at 12, 55. Since then, the provision has always required that "elections . . . be free" and that inhabitants have "an equal right" to elect or vote. Like similar provisions in the constitutions of other states—including Maryland, Massachusetts, North Carolina, Pennsylvania, and Virginia—New Hampshire's Free and Equal Elections Clause mirrors a provision of the English Bill of Rights of 1689, a product of the

Glorious Revolution.[7] *See Harper*, 868 S.E.2d at 540. That provision, which provided the "election of member[s] of parliament ought to be free," was "adopted in response to the king's efforts to manipulate parliamentary elections by diluting the vote in different areas to attain electoral advantage, leading to calls for a free and lawful parliament." *Id.* (citations and internal quotation marks omitted). A "key principle" of these reforms was to prevent "*the manipulation of districts that diluted votes for electoral gain*." *Id.* (emphasis added). By using the same language, New Hampshire's Free and Equal Elections Clause "reflects the principle of the Glorious Revolution that those in power shall not attain electoral advantage through the dilution of votes." *Id.* The framers' statements confirm this fact; in a letter to the people, they wrote specifically of their concern that governmental entities would be unable to "resist [the] bewitching influence" of ever-expanding power, because "[w]herever power is lodged there is a constant propensity to enlarge its boundaries." Address of the Convention, *supra*, at 5.

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[7] New Hampshire "modeled much of [its] constitution on one adopted by Massachusetts four years earlier." *State v. Mack*, 173 N.H. 793, 802 (2020) (quoting *Claremont Sch. Dist. v. Governor*, 138 N.H. 183, 186 (1993)); *see also* Marshall, *supra*, at 1, 55. The primary author of the Massachusetts Constitution, John Adams, derived the commonwealth's Declaration of Rights from several sources, including the bills of rights in the Virginia and Pennsylvania Constitutions, which both drew from the English Bill of Rights of 1689. *See* Robert J. Taylor, *Construction of the Massachusetts Constitution*, 90 Proc. of Am. Antiquarian Soc'y 317, 330–31 (1980); Marshall, *supra*, at 2.

Although the New Hampshire Constitution's original 1784 iteration provided that "[a]ll elections *ought* to be free," *see* Marshall, *supra*, at 229, it was later amended to state that "[a]ll elections *are* to be free"—a command rather than an aspiration. This distinction is significant: the same evolution in North Carolina's free elections clause led that state's highest court to reason that "[t]his change was intended to make it clear that the free elections clause . . . are commands and not mere admonitions to proper conduct on the part of the government." *Harper*, 868 S.E.2d at 542 (quoting *N.C. State Bar v. DuMont*, 286 S.E.2d 89, 97 (N.C. 1982)).

The State Constitution's history thus demonstrates an intent to prohibit partisan gerrymandering. Rather than trust the Legislature to self-regulate, they imposed constraints on the political branches' ability to manipulate districts for naked partisan gain by creating a robust right to free and equal elections. And because the State Constitution confers this explicit right to the people, "the court has a constitutional responsibility to protect" it. *Below II*, 151 N.H. at 150.[8]

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[8] Although the Kansas Supreme Court recently concluded in a split decision that partisan-gerrymandering claims are nonjusticiable under Kansas law, *Rivera v. Schwab*, 512 P.3d 168 (Kan. 2022), the Kansas Constitution does not contain any clause analogous to the Free and Equal Elections Clause—a significant distinction between that case and this one. Indeed, the majority acknowledged that Kansas's doctrinal history differed in important respects from states like North Carolina, *id.* at 186, with which New Hampshire's history is far more aligned.

3. Other state courts' treatment of analogous provisions confirm justiciability.

Claims under similar provisions in other states' constitutions have resulted in decisions providing helpful guidance as to why partisan gerrymandering violates the New Hampshire Constitution's rights to free and equal elections, equal protection, free speech, and free association.

In the states whose constitutions contain provisions resembling New Hampshire's Free and Equal Elections Clause, courts confronting this issue have agreed that such clauses prohibit partisan gerrymandering. *See Harper*, 868 S.E.2d at 542; *Szeliga*, slip op. at 93 (PAII253); *League of Women Voters of Pa.*, 178 A.3d at 815–17. As they explain, the terms "free" and "equal" are "indicative of the framers' intent that all aspects of the electoral process . . . be kept open and unrestricted to the voters of our Commonwealth"; thus, they guarantee "equal participation in the electoral process for the selection of [a voter's] representatives in government." *League of Women Voters of Pa.*, 178 A.3d at 804. And by "chok[ing] off the channels of political change on an unequal basis," partisan gerrymandering denies free and equal elections by preventing election results "from reflecting the will of the people." *Harper*, 868 S.E.2d at 542; *see also Szeliga*, slip op. at 25–28 (PAII185–88) (describing how partisan gerrymandering runs counter to the "pivotal goal of the Free Elections Clause," which is "to protect the right of political participation").

Here too, Plaintiffs allege that the Challenged Plans violate

New Hampshire's Free and Equal Elections Clause because they "artificially warp the outcome of elections . . . in favor of Republican candidates," leading to Republican majorities—or even *super*majorities—in the Senate and Executive Council even when their candidates *lose* the statewide popular vote. PAI6. This durable entrenchment has the intent and effect of thwarting the will of the electorate, defying the guarantee of free and equal elections.

Courts in other states have also found that partisan gerrymandering violates equal protection guarantees, which require providing each member of the electorate with "substantially equal voting power." *Harper*, 868 S.E.2d at 544. That guarantee cannot be squared with partisan gerrymandering, which entails "[c]lassifying voters on the basis of partisan affiliation" and "diminishing or diluting their votes on" that basis, thus depriving "voters in the disfavored party of the [equal] opportunity to aggregate their votes to elect such a governing majority." *Id.*; *see also League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, 192 N.E.3d 379, 420–25 (Ohio 2022) (Brunner, J., concurring) (equal-protection violation occurs when "those in charge of the redistricting act[] with an intent to subordinate adherents of one political party and entrench a rival party in power" and "the plan will have the effect of diluting the votes of members of the disfavored party" in a way that cannot be justified on "legitimate legislative grounds") (internal quotation marks omitted); *Szeliga*, slip. op. at 93 (PAII253) (explaining equal-protection guarantee requires courts to "strictly scrutinize" partisan gerrymanders by subjecting them to "a 'compelling interest'

standard").

These interpretations accord with the New Hampshire Constitution's equal protection guarantee, which "demands that all persons similarly situated should be treated alike." *LaPorte*, 134 N.H. at 76 (internal quotation marks omitted); *see also Pennoyer*, 65 N.H. at 114 (noting the "principle of equality pervades the entire constitution"). If, as Plaintiffs allege, the Legislature has packed and cracked voters likely to support Democratic candidates in future elections in a manner that dilutes their ability to elect candidates to the Senate and Executive Council compared to other voters more likely to support Republican candidates, *see* PAI17–26, PAI29–35, it has treated similarly situated citizens differently on an illegitimate basis. *See Tiews v. Timberlane Reg'l Sch. Dist.*, 111 N.H. 14, 16 (1971) ("Once the state gives citizens the right to vote on a matter of public concern it may not discriminate between classes of voters similarly situated.").

Finally, other states' courts have explained that partisan gerrymandering defies basic free-speech and free-association rights. By engaging in partisan gerrymandering that diminishes the strength of voters likely to support candidates of a rival political party, a legislature "intentionally engages in a form of viewpoint discrimination and retaliation" fundamentally at odds with free speech. *Harper*, 868 S.E.2d at 546; *Szeliga*, slip op. at 93 (PAII253) (the viewpoint discrimination inherent in partisan gerrymandering "requires a 'strict scrutiny' analysis"). That conduct also deliberately punishes certain voters based on their association with a particular

party, frustrating their ability to band together and effect political change compared to citizens with different political views. *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *120 (N.C. Super. Ct. Sept. 3, 2019) (three-judge court) (partisan gerrymandering "debilitat[es]" the disfavored party and "weaken[s] its ability to carry out its core functions and purposes").

This reasoning applies fully to Plaintiffs' analogous free-speech and free-association claims here. Plaintiffs allege that the Challenged Plans impose special burdens on a particular class of voters *because* of their political viewpoints. *Contra* N.H. Const. pt. I, art. 22 (requiring the "inviolabl[e] preserv[ation]" of "[f]ree speech"); *cf. Doyle v. Comm'r, N.H. Dep't of Res. & Econ. Dev.*, 163 N.H. 215, 221 (2012) (explaining content-based speech restrictions trigger strict scrutiny). They also allege that the Legislature has deliberately diluted citizens' voting strength in retaliation for exercising the right to association that Part I, Article 32 protects. *Op. of the Justs. (Voting Age in Primary Elections II)*, 158 N.H. at 667.

Ultimately, these decisions from other states demonstrate that, notwithstanding the fact that the provisions underlying Plaintiffs' claims do not contain express "language concerning redistricting," PD6, partisan gerrymandering violates them. The Superior Court's conclusion that it had no power to entertain Plaintiffs' claims under those provisions was therefore incorrect.

II. Plaintiffs' claims give rise to judicially discoverable and manageable standards.

Because it based its order on the question whether the State

Constitution commits unreviewable redistricting authority to the Legislature beyond the requirements set forth in Part II, Articles 26 and 65, the Superior Court did not address Defendants' alternative argument that Plaintiffs' claims do not give rise to judicially discoverable and manageable standards for resolution. PAII119–23. This Court should reject that argument.

In raising this issue below, Defendants essentially asked the Superior Court to parrot the reasoning set forth in *Rucho*. But that request ignores the *Rucho* majority's explicit call for state judiciaries to assume the mantle of policing impermissible partisan gerrymandering because "[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply." 139 S. Ct. at 2507. That is particularly warranted here, given that the U.S. Constitution contains no provision similar to the State Constitution's Free and Equal Elections Clause. And while Plaintiffs' separate equal-protection, free-speech, and free-assembly claims under the State Constitution resemble at face value those made under "parallel provisions of the federal document" in *Rucho*, this Court has often "deviate[d] from United States Supreme Court pronouncements" to provide *more* protective rights under the State Constitution than the U.S. Constitution. *State v. Ball*, 124 N.H. 226, 233 (1983); *see also* Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 175 (2018) (arguing state courts should not "lockstep" their constitutional interpretations with federal-court interpretations of parallel provisions in the U.S. Constitution because unique federalism

considerations cause federal courts to underenforce those rights). Such deviation is especially warranted here because partisan gerrymandering implicates "the fundamental right to vote." *Guare*, 167 N.H. at 669; *see* Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 Vand. L. Rev. 89, 93–94 (2014) ("Courts that lockstep their state constitutions with the more limited rights inferred within the U.S. Constitution derogate the fundamental and foundational right to vote.").

To the extent the Court seeks guidance from other jurisdictions on the issue of the manageability of partisan-gerrymandering claims, it should look to other *state courts* interpreting analogous constitutional provisions, not federal courts. *See* Sutton, *supra* at 175 (noting "[i]f the court decisions of another sovereign ought to bear on [a state's constitutional] inquiry," it would be "those of a sister state," which "have the most to say about the point"). In addition to providing helpful guidance as to the scope of the rights at issue in this case, *infra* Argument § C.3, other state courts' decisions confirm that New Hampshire's judiciary is fully capable of adjudicating a partisan-gerrymandering claim. Those decisions offer various standards by which a partisan-gerrymandering claim can be manageably adjudicated. *See Harper*, 868 S.E.2d at 552 (applying strict scrutiny when a plaintiff "demonstrate[s] that the plan makes it systematically more difficult for a voter to aggregate his or her vote with other likeminded voters, thus diminishing or diluting the power of that person's vote on the basis of his or her views"); *League of Women Voters of Pa.*, 178 A.3d

at 817 (considering "the degree to which neutral criteria" were "subordinated to the pursuit of partisan political advantage"); *Clarno v. Fagan*, No. 21CV40180, 2021 WL 5632371, at *7 (Or. Special Jud. Panel Nov. 24, 2021) (rejecting partisan-gerrymandering claim because the plan "resulted from a robust deliberative process and careful application of neutral criteria" and "provides no significant partisan advantage to either political party"); *Szeliga*, slip op. 88 (PAII248) (invalidating plan that "subordinates constitutional criteria to political considerations").

Those courts' experiences also confirm that evidence relevant to partisan-gerrymandering claims is readily discoverable and amenable to judicial consideration. For issues relating to intent, parties can offer direct evidence through official statements and witness testimony of those involved in the process, *see Common Cause*, 2019 WL 4569584, at *10–11; *Neiman v. LaRose*, --- N.E.3d ---, 2022 WL 2812895, at *7 (July 19, 2022), as well as circumstantial evidence, such as expert testimony demonstrating the likelihood that a plan's configuration would have resulted from neutral considerations, *see Harper*, 868 S.E.2d at 548–49; *Neiman*, 2022 WL 2812895, at *7–10; *Szeliga*, slip. op. at 89–90, 92–93 (PAII249–50, PAII252–53); *Adams v. DeWine*, 195 N.E.3d 74, 87 (Ohio 2022); *League of Women Voters of Pa.*, 178 A.3d at 818–19, or describing how a plans' irregular districts contravene the state's logical political geography, *League of Women Voters of Pa.*, 178 A.3d at 819; *Clarno*, 2021 WL 5632371, at *3. As for a challenged plan's effect—*i.e.*, the severity of the voting-strength dilution it imposes

upon voters likely to oppose the majority party's candidates and the durability of that effect on future elections—parties can offer expert testimony using objective statistical metrics that are well established among political scientists, *see, e.g.*, *League of Women Voters of Pa.*, 178 A.3d at 820–21; *Harper*, 868 S.E.2d at 547–49; *Adams*, 195 N.E.3d at 91–92; *Neiman*, 2022 WL 2812895, at *7, 9–10; *Clarno*, 2021 WL 5632371, at *5–7, or evidence demonstrating how a plan cracks and packs voters more likely to support the candidates from the minority party, *e.g.*, *Neiman*, 2022 WL 2812895, at *7–9. Defendants can point to no reason why New Hampshire courts would be any less capable than courts in North Carolina, Pennsylvania, Maryland, Ohio, or Oregon to manageably adjudicate partisan-gerrymandering claims.

Finally, contrary to Defendants' suggestion below, the fact that the State Constitution does not provide explicit direction on how courts should draw the line between tolerable partisan considerations and unlawful partisan manipulation of district lines does not render the question unmanageable. New Hampshire's courts regularly and ably confront issues requiring them to interpret broadly worded statutory and constitutional language. And this Court has made clear that the judiciary "would shirk our duty were we to decline to act . . . merely because our task is a difficult one." *Monier*, 122 N.H. at 476. That duty includes giving life to the various open-ended rights set forth in Part I of the State Constitution. Thus, for example, when presented with a claim under Part I, Article 8's guarantee against "unreasonable restrict[ions]" on the public's right

of access to governmental proceedings, this Court was quick to confirm that, that provision's vague language notwithstanding, the claim was "subject to judicially discoverable and manageable standards." *Hughes*, 152 N.H. at 288. The Free and Equal Elections Clause's text provides no less guidance to courts about the scope of its own protections.[9]

CONCLUSION

Quis custodiet ipsos custodes—who watches the watchers? This old maxim has particular relevance to this case. Under the Superior Court's sweeping order, legislative incumbents can perpetuate their own power at the expense of basic constitutional freedoms, unchecked by the coordinate branches usually tasked with safeguarding the balance of power in a functioning democracy. Thus shielded from both electoral consequences and judicial review, the

[9] In the event this Court harbors serious concerns that Plaintiffs' claims may not give rise to discoverable and manageable standards, it should remand this case to the Superior Court for development and consideration of an evidentiary record rather than preemptively decide the issue based on speculation about what that record might be. *See Baker v. Carr*, 369 U.S. 186, 217 (1962) (justiciability determinations should be made based on "the precise facts and posture of the particular case"). Aside from the emergency preliminary-injunction motions practice that occurred immediately upon this case's filing—which the Superior Court did not consider in issuing its order—no evidence has been presented in support of or against Plaintiffs' claims. And because Plaintiffs are the first to present partisan-gerrymandering legal theories under the State Constitution, this Court lacks the guidance of prior litigation that would otherwise help it gauge the discoverability and manageability of Plaintiffs' claims.

Legislature can continue to manufacture permanent Republican majorities by drawing its own lines to benefit its own party, in perpetuity. This result not only defies history and precedent—it runs afoul of New Hampshire's robust civic tradition. Judicial intervention is therefore needed to remedy the distortion of the democratic process and the consequent violation of Granite Staters' fundamental constitutional rights.

This Court should reverse the Superior Court's order dismissing Plaintiffs' claims.

REQUEST FOR ORAL ARGUMENT

Pursuant to Rule 16(3)(h), Plaintiffs request a fifteen-minute argument. If argument is held, Plaintiffs designate Abha Khanna as the lawyer to be heard.

RULE 16(3)(i) CERTIFICATION

Pursuant to Rule 16(3)(i), Plaintiffs certify that the appealed decision is in writing and that a copy of that decision is appended to the end of this brief.

January 20, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Rules 16(11) and 26(7), this brief contains 8,820 words between the Questions Presented and Conclusion sections of this brief, which is less than the 9,500-word maximum permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief. I further certify that this brief complies with Rule 26(2), (3), and (4).

/s/ Steven J. Dutton
Steven J. Dutton

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Plaintiffs-Appellants shall be served to all registered counsel through the New Hampshire Supreme Court's electronic filing system.

/s/ Steven J. Dutton
Steven J. Dutton

ADDENDUM

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THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS
SOUTHERN DISTRICT

SUPERIOR COURT
No. 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; and the State of New Hampshire

ORDER ON DEFENDANTS' JOINT MOTION TO DISMISS

The plaintiffs have brought this action challenging the constitutionality of two recently enacted laws establishing the boundaries for senate and executive council districts. The defendants, the State of New Hampshire and David M. Scanlan, in his official capacity as the Secretary of State, now move to dismiss. The plaintiffs object. After considering the record, the arguments, and the applicable law, the Court finds and rules as follows.

Legal Standard of Review

In ruling on "a motion to dismiss for failure to state a claim, [the Court] assume[s] the truth of the facts alleged by the plaintiff[s] and construe[s] all reasonable inferences in the light most favorable to the plaintiff[s]." Sivalingam v. Newton, 174 N.H. 489, 494 (2021). The Court "need not, however, assume the truth of statements in the plaintiff[s'] pleadings that are conclusions of law." Id. The Court ultimately "engage[s] in a threshold inquiry that tests the facts in the complaint against the applicable law." Id. "If the alleged facts do not constitute a basis for legal relief," the Court should grant the motion to dismiss. Id.

Discussion

In May 2022, the governor signed two bills changing the boundaries for New Hampshire's senate and executive council districts. See Laws 2022, ch. 45; Laws 2022, ch. 46. These new district boundaries will be used for the next decade, beginning with the upcoming November 2022 election. The plaintiffs assert that the newly-drawn districts "are partisan gerrymanders[1] that defy the basic principles of representative government." (Compl. ¶ 3.) As a result, the plaintiffs have brought this action in which they: (1) seek a declaration that the newly-drawn districts "violate Part I, Articles 1, 10, 11, 12, 22, and 32 of the New Hampshire Constitution;" (2) seek preliminary and permanent injunctive relief enjoining Mr. Scanlan "from implementing, enforcing, or giving any effect" to those laws; and (3) request the Court to adopt new maps for the senate and executive council districts "that comply with the New Hampshire Constitution." (Id. Prayer ¶¶ A–C.) The defendants now move to dismiss. They assert that the complaint fails to state a claim for which relief may be granted because the issues raised in the complaint present non-justiciable political questions.

"The political question doctrine is essentially a function of the separation of powers, existing to restrain courts from inappropriate interference in the business of the other branches of Government, and deriving in large part from prudential concerns about the respect we owe the political departments." Horton v. McLaughlin, 149 N.H. 141, 143 (2003) (cleaned up). "In the New Hampshire Constitution, the principle of separation of powers is espoused in Part I, Article 37," id., which provides:

[1] Political or partisan gerrymandering "is the practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition's voting strength." Below v. Gardner, 148 N.H. 1, 9–10 (2002) (cleaned up).

> In the government of this state, the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity.

This clause "prohibits each branch of government from encroaching on the powers and functions of another branch." In re Judicial Conduct Comm., 145 N.H. 108, 109 (2000).

To adhere to the Constitution's commitment to separation of powers, the supreme court has held that "the range of the matters subject to judicial review is limited by the concept of justiciability." Id. at 111. Specifically, "[t]he justiciability doctrine prevents judicial violation of the separation of powers by limiting judicial review of certain matters that lie within the province of the other two branches of government." Burt v. Speaker of the House of Representatives, 173 N.H. 522, 525 (2020). "A controversy is nonjusticiable — i.e., involves a political question — where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department[.]" Id. "Where there is such commitment, [the Court] must decline to adjudicate the matter to avoid encroaching upon the powers and functions of a coordinate political branch." Id. "Deciding whether a matter has in any measure been committed by the Constitution to another branch of government is itself a delicate exercise in constitutional interpretation[.]" Id.

The Court, therefore, will begin by examining the text of the relevant constitutional provisions. Part II, Article 26 governs senate districts. It states:

> And that the state may be equally represented in the senate, 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. The legislature shall form the single-member districts . . . at the regular session following each decennial federal census.

N.H. CONST. pt. II, art. 26 (emphases added). As reflected by the phrase "as equal as may be in population," the "overriding constitutional principle" embodied by this provision is "one person/one vote." Below, 148 N.H. at 9. In addition, Part II, Article 26 also mandates that: "(1) senate districts be comprised of 'contiguous' towns, city wards and unincorporated places; (2) no town, city ward or unincorporated place may be divided unless the town, city ward or unincorporated place requests division by referendum; and (3) each senate district must elect only one senator." Id. (citation omitted). "[T]hese additional requirements, however, are secondary" to the "one person/one vote" requirement," id., as there may be situations "where perfect compliance with all of these mandates is impossible," City of Manchester v. Sec'y of State, 163 N.H. 689, 706 (2012).

Part II, Article 60 establishes the executive council. It provides: "There shall be biennially elected, by ballot, five councilors, for advising the governor in the executive part of government." N.H. CONST. pt. II, art. 60. Originally, there were only five counties in New Hampshire, and "[t]he natural result was that one from each county was taken." Edwin C. Bean, Introductory Note to 9 Laws of New Hampshire, at vii (Edwin C. Bean ed. 1921). "[B]ut when the number of counties was increased" in the State, "it became necessary" for the legislature "to provide for councilor districts" pursuant to Part II, Article 65. Id. Under that provision, "[t]he legislature may, if the public good shall hereafter require it, 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[.]" N.H. CONST. pt. II, art. 65 (emphasis added). The legislature first used the authority delegated to it under Part II, Article 65 in 1828, see Laws 1828, ch. 104, and has been

drawing the boundaries for executive council districts ever since. As with senate districts, the legislature's "overriding objective" when establishing executive council districts is to obtain "substantial equality of population among the various districts." City of Manchester, 163 N.H. at 700–01 (cleaned up).

The clear language of both Article 26 and Article 65 demonstrates that our State Constitution "commits" the authority to draw the boundaries for senate and executive councilor districts to the legislature. Burt, 173 N.H. at 525; see also Monier v. Gallen, 122 N.H. 474, 476 (1982) (explaining that "[r]eapportionment is primarily a matter of legislative consideration and determination"). In exercising that authority, the legislature must adhere to the explicit requirements outlined in each article, the most important of which is equal population in each district. See Below, 148 N.H. at 9; Op. of Justices, 106 N.H. 233, 234 (1965). If the legislature fails to draw districts that comply with the mandatory requirements of each article, "it is . . . appropriate to provide judicial intervention," as "[c]laims regarding compliance with these kinds of mandatory constitutional provisions are justiciable." Baines v. N.H. Senate President, 152 N.H. 124, 132 (2005). However, "political considerations are tolerated in legislatively-implemented redistricting plans," Burling v. Chandler, 148 N.H. 143, 156 (2002), and therefore the Court must "tread lightly in this political arena" as to not "materially impair the legislature's redistricting power." In re Below, 151 N.H. 135, 150 (2004). Thus, "the Court's jurisdiction in this area is significantly limited," Horton v. McLaughlin, No. 2001-E-121, 2001 N.H. Super. LEXIS 16, at *30 (July 17, 2001), aff'd, 149 N.H. 141 (2003), as "judicial relief becomes appropriate only when [the] legislature fails to reapportion according to constitutional requisites in a timely fashion after having had an adequate

opportunity to do so," City of Manchester, 163 N.H. at 697; see, e.g., Monier, 122 N.H. 474; see generally Harper v. Hall, 868 S.E.2d 499, 572 (N.C. 2022) (Newby, C.J., dissenting) ("The role of the judiciary through judicial review is to decide challenges regarding whether a redistricting plan violates the objective limitations in Article II, Sections 3 and 5 of our constitution or a provision of federal law.").

Here, the plaintiffs do not claim that either of the redistricting plans violate any of the mandatory, express requirements of Article 26 and Article 65. Nor could they.[2] "Finding no explicit constitutional provision prohibiting partisan gerrymandering," the plaintiffs "creatively attempt to mine the [Bill] of Rights [found in Part I] to find or create some protection" against the practice. Harper, 868 S.E.2d at 581 (Newby, C.J., dissenting). For example, the plaintiffs claim that the redistricting plans violate Part I, Article 11, which states: "All elections are to be free, and every inhabitant of the state of 18 years and upwards shall have an equal right to vote in any election." The plaintiffs also maintain that the redistricting plans violate their state constitutional rights to equal protection, free speech, and free assembly. However, none of the Part I articles cited by the plaintiffs have any language concerning redistricting. It is therefore unsurprising that the plaintiffs have not cited any New Hampshire authority supporting their position

[2] New Hampshire's population was 1,377,529 according to the 2020 census. Thus, the ideal size of each senate district would be 57,397.04 people. According to the complaint, the smallest senate district by population (District 1) has 55,947 people and the largest district (District 13) has 60,252 people. (Compl. ¶ 56.) The 4,305 difference in size between the largest and smallest senate districts results in a deviation of 7.5%. This deviation is under the 10% threshold and therefore the new senate districts satisfy the constitutional requirement of "one person/one vote." See City of Manchester, 163 N.H. at 701 (observing that "an apportionment plan with a maximum population deviation under 10%" satisfies constitutional requirement and is presumptively constitutional). Likewise, the ideal size of each executive council district would be 275,505.8 people. According to the complaint, the largest executive council district by population is 277,888 and the smallest is 274,409. (Compl. ¶ 87.) This means that the new executive council districts have a maximum population deviation of 1.26%, which is well under the 10% threshold. See City of Manchester, 163 N.H. at 701. It is also clear, based on even a cursory review of each redistricting map, that each senate and executive council district is contiguous.

that their Part I rights can be used to essentially add a "no gerrymandering" requirement to the explicit provisions concerning redistricting found in Part II. Cf. Levitt v. Att'y Gen., 104 N.H. 100, 107 (1962) (rejecting argument that redistricting provisions in Part II were "invalidated because the broad reservation stated in Article 11 of the Bill of Rights"); Town of Canaan v. Sec'y of State, 157 N.H. 795, 800 (2008) (rejecting argument that "[d]ecennial reapportionment," as authorized under Part II, "violate[s] the essential right to vote freely for the candidate of one's choice" presumably found in Part I, Article 11); Thompson v. Kidder, 74 N.H. 89 (1906) (rejecting argument that explicit provision of constitution permitting estate tax was invalid because it conflicted with other provisions). In the absence of such authority, the Court rejects the plaintiffs' position that their Part I rights make their political gerrymandering claims justiciable. Rather, the Court believes that if the citizens of this State intended to require the legislature to meet additional criteria in drawing legislative and executive council districts, they would have explicitly provided those requirements alongside the existing ones in Part II of the constitution. This is precisely what the citizens of several other states have done in their state constitutions. See Rivera v. Schwab, 512 P.3d 168, 187 (Kan. 2022) (citing various state constitutional provisions that "outright prohibit[] partisan favoritism in redistricting").

In sum, Articles 26 and 65 of Part II of the State Constitution clearly commit to the legislature the authority to draw senate and executive councilor districts, with few explicit requirements. "[I]n the absence of a clear, direct, irrefutable" violation of those explicit redistricting requirements, "the complexity in delineating state legislative district boundaries and the political nature of such endeavors necessarily preempt judicial intervention." City of Manchester, 163 N.H. at 697 (emphases added; cleaned up).

Indeed, "[o]ur State Constitution vests the authority to redistrict with the legislative branch, and for good reason." In re Below, 151 N.H. at 150. "A state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality." Id. As such, "[i]t is not the [C]ourt's function to decide the peculiarly political questions involved in reapportionment." Id. at 151 (cleaned up). Accordingly, once the legislature performs its decennial redistricting duties in compliance with the explicit requirements of Articles 26 and 65, this Court should not reexamine or "micromanage all the difficult steps the legislature [took] in performing the high-wire act that is legislative district drawing." City of Manchester, 163 N.H. at 704 (cleaned up).

Conclusion

Based on the foregoing, the Court concludes that the only justiciable issues it can address concerning senate and executive council redistricting are whether the newly-enacted districts meet the express requirements of Articles 26 and 65. Because the newly-drawn districts meet those express requirements, the Court must decline to consider the plaintiffs' challenge to the constitutionality of the districts based on claims of excessive political gerrymandering as such claims present non-justiciable political questions. See Rucho v. Common Cause, 139 S. Ct. 2484, 2506–07 (2019) (holding "that partisan gerrymandering claims present political questions beyond the reach of the federal courts"); Rivera, 512 P.3d at 187 (holding that political gerrymandering claims were not justiciable). The defendants' joint motion to dismiss is therefore GRANTED.

So ordered.

Date: October 5, 2022

Hon. Jacalyn A. Colburn,
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 10/05/2022