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

PLAINTIFFS-APPELLANTS' NOTICE OF SUPPLEMENTAL AUTHORITY

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Pursuant to Rule of the Court 16(7), Plaintiffs notify the Court of additional authority relevant to this appeal.

In re 2021 Redistricting Cases. On April 21, 2023, the Alaska Supreme Court issued an opinion in the case of *In re 2021 Redistricting Cases*, Nos. 18332/18419, slip op. (Alaska Apr. 21, 2023) (attached as Exhibit 1). The Alaska Supreme Court's holdings and reasoning are relevant to the arguments in this appeal. In its opinion, the court confronted and rejected the contention that partisan-gerrymandering claims under the Alaska Constitution are nonjusticiable. Instead, after considering the history of the Alaska Constitution and the intent of its framers, the court expressly recognized that partisan gerrymandering violates the state's equal-protection clause. It struck down the challenged districts as violations of the Alaska Constitution, demonstrating that state courts can apply discoverable and manageable standards to resolve partisan-gerrymandering claims based on broad state constitutional guarantees.

First, the opinion is relevant to the justiciability question before this Court. There, as here, the state supreme court was urged to rely on *Rucho v. Common Cause*, 139 S.Ct. 2484 (2019), to find that partisan gerrymandering is nonjusticiable under a state constitution. The Alaska Supreme Court properly rejected that invitation in light of its own independent authority to interpret the Alaska Constitution. Relying on the language of that constitution and Alaska's own history and precedent, the court found that "partisan gerrymandering is unconstitutional under the Alaska Constitution"

and affirmed the trial court's adjudication of the plaintiffs' constitutional partisan-gerrymandering claims. *2021 Redistricting Cases*, slip op. at 91–92; *see also* Pls.' Br. 40–43.

Second, the opinion is relevant to Plaintiffs' claim that partisan gerrymandering violates New Hampshire's equal-protection guarantee. *See* PAI36–38. In their opening brief, Plaintiffs point to persuasive authority from other state courts to support their equal-protection claim. *See* Pls.' Br. 37–38. The Alaska Supreme Court's opinion provides yet another source of authority. Specifically, the court held that "[f]air representation . . . represent[s] a significant constitutional interest" and that "Alaska's equal protection clause requires a more demanding review than its federal analog." *2021 Redistricting Cases*, slip op. at 15 (third alteration in original) (quoting *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1372 (Alaska 1987)); *see also State v. Ball*, 124 N.H. 226, 233 (1983) (New Hampshire courts are not "bound to adopt the federal interpretations" of "parallel provisions" of U.S. Constitution). It ultimately concluded that certain Alaska State Senate districts "constituted an unconstitutional political gerrymander violating equal protection under the Alaska Constitution." *2021 Redistricting Cases*, slip op. at 96.

Third, the opinion is relevant to Plaintiffs' contention that the application of Part I rights to partisan gerrymandering should be understood in light of the State Constitution's history and the intent of its framers. Plaintiffs point to this history and particular statements by its framers to support their argument that the

document was crafted in part to combat district manipulation for partisan gain. *See* Pls.' Br. 33–35. Likewise, in concluding that the Alaska Constitution prohibits partisan gerrymandering, the Alaska Supreme Court looked to both the history of relevant provisions and the stated intent of its framers. *See 2021 Redistricting Cases*, slip op. at 7, 91–92.

Harper v. Hall. On April 28, 2023, the North Carolina Supreme Court issued an opinion in the case of *Harper v. Hall*, No. 413PA21-2, slip op. (N.C. Apr. 28, 2023) (attached as Exhibit 2). In this opinion, the North Carolina Supreme Court reversed its earlier February 2022 decision and concluded that partisan-gerrymandering claims "present nonjusticiable, political questions" under the North Carolina Constitution. *Id.* at 146; *see also Harper v. Hall*, 868 S.E.2d 499 (N.C. 2022). Plaintiffs maintain that the original decision in *Harper*—which they cited in their briefing before the Superior Court and this Court—was correctly decided, and they disagree with the countervailing views of the newly reconstituted North Carolina Supreme Court. But, in any event, the new opinion expressly relied on specific considerations that are not present in this case, limiting the extent to which the North Carolina Supreme Court's change in approach should persuade a similar result here.

First, the *Harper* court's justiciability determination was motivated in large part by the legislature's exclusive redistricting authority as interpreted through the lens of North Carolina's political-question doctrine. *See* slip op. at 52–71; Defs.' Not. 6. Under New Hampshire's political-question doctrine, however,

"concluding that the State Constitution commits to a coordinate branch of government certain exclusive authority does not necessarily end the justiciability inquiry" because "whether the [Legislature] . . . failed to comply with constitutional mandates . . . . *is justiciable*." *Richard v. Speaker of House of Representatives*, 175 N.H. 262, 268 (2022) (emphasis added); *see also, e.g.*, *Hughes v. Speaker of N.H. House of Representatives*, 152 N.H. 276, 283–89 (2005) (contrasting nonjusticiable statutory legislative-process claims with justiciable constitutional claims); Pls.' Reply 8–10 (collecting cases).

Second, *Harper* pointed to prior North Carolina caselaw suggesting that partisan-gerrymandering claims were *not* justiciable under state law. *See* slip op. at 72–74. Here, by contrast, this Court has made clear that constitutional claims would be viable where a districting scheme was "designed to or would 'minimize or cancel out the voting strength of racial *or political* elements of the voting population.'" *Burling v. Chandler*, 148 N.H. 143, 150 (2002) (per curiam) (emphasis added) (quoting *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965)); *see also Op. of Justs.*, 111 N.H. 146, 151 (1971). These are the allegations that Plaintiffs make here. *See* PAI4–45.

Third, both the *Harper* court and Defendants focus on what they view as nonjudicial policy determinations implicating, for example, "how political parties must be or should be proportionally represented at a statewide level" and "what constitutes 'fairness' with respect to proportional representation of political parties at a statewide level." Defs.' Not. 7 (quoting *Harper*, slip op. at 87).

Plaintiffs' claims, however, neither seek proportional representation as a remedy nor require consideration of proportionality for adjudication, *see* Pls.' Reply 15–17, and so the *Harper* court's concerns about proportionality have no bearing here. Nor, for that matter, do New Hampshire courts need to untangle concepts like "fairness" to rule on Plaintiffs' claims. As Plaintiffs alleged, the Senate and Executive Council maps "were enacted with impermissible partisan intent . . . and will achieve their intended effect." PAI7. Accordingly, adjudication of Plaintiffs' claims requires only an examination of the Legislature's intent, which can be assessed using direct and circumstantial evidence, and the maps' effects, which can be measured using the quantitative and qualitative evidence already produced by Plaintiffs' experts. Inquiries into intent and effect, and the weighing of evidence to make those determinations, are familiar to the judiciary. Plaintiffs' claims do *not* require addressing threshold questions of "fairness" or any other nonjudicial policy determinations. *See* Pls.' Reply 13–15.

May 4, 2023

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Plaintiffs-Appellants' Notice of Supplemental Authority shall be served to the following parties of record through the New Hampshire Supreme Court's electronic filing system:

> Matthew G. Conley, Esq., and Myles B. Matteson, Esq., counsel for Defendant-Appellee David Scanlan, New Hampshire Secretary of State.
>
> Samuel R.V. Garland, Esq., and Brendan. A. O'Donnell, Esq., counsel for Defendant-Appellee State of New Hampshire.

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