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
Docket No. 2022-CV-00181

BRIEF OF *AMICUS CURIAE* CAMPAIGN LEGAL CENTER IN SUPPORT OF APPELLANTS

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**pro hac vice application pending*

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INTRODUCTION

Partisan gerrymandering is "incompatible with democratic principles" and the "core principle of republican government . . . that the voters should choose their representatives, not the other way around." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 824 (2015) (internal citations and quotations omitted). Whether done by Democrats, Republicans, or anyone else, manipulating district lines for partisan gain impedes the proper functioning of the electoral process. The alleged extreme partisan gerrymandering in New Hampshire affronts the State Constitution, which at its core is designed to "protect[] the people from governmental excesses and potential abuses." *State v. Ball*, 124 N.H. 226, 231 (1983). The sweeping constitutional guarantee that "[a]ll elections are to be free," N.H. Const. Part I, Article 11, is undermined when the political process has continuously failed New Hampshire's voters and allowed legislators elected from gerrymandered districts to insulate themselves from the electorate.

Courts are critical to correct this problem—one that is only getting worse. The combination of an increasingly polarized electorate and the sophisticated tools that propel today's mapmaking enables gerrymanderers to dilute the voting strength of a disfavored group of voters with precision, entrench favored incumbents, and often secure preferred electoral outcomes for a decade. The state judiciary, the only institution with both the constitutional authority to stop gerrymandering and the lack of political incentive to allow it, must not leave objections to such partisan manipulation to merely "echo into a void." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019). Instead, because "state constitutions can provide standards and guidance for state courts to apply" against partisan

gerrymandering, *id.*, the Court should hold that the New Hampshire Constitution's Free Elections Clause provides justiciable, substantive limits on extreme gerrymandering.[1]

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

INTEREST OF *AMICUS CURIAE*

Amicus curiae Campaign Legal Center ("CLC") is a nonpartisan, nonprofit organization dedicated to ensuring that the democratic process is free and fair for all voters. CLC has litigated or been involved in approximately 100 voting rights and redistricting cases. CLC represents clients in numerous cases addressing partisan gerrymandering, and served as lead counsel in *Gill v. Whitford*, 138 S. Ct. 1916 (2018), and *Rucho*, 139 S. Ct.

[1] For brevity, this brief does not discuss Appellants' other claims under the New Hampshire Constitution's guarantees of equal protection and speech and association, but A*micus Curiae* supports the arguments asserted by Appellants on those claims.

2484. CLC has expertise in state constitutional partisan gerrymandering cases, serving as lead counsel in cases in Utah and Kansas and filing amicus briefs in cases challenging gerrymandered maps in New York, Maryland, Ohio, and North Carolina. *See League of Women Voters of Utah v. Utah State Legislature*, No. 220901712 (Utah 3d Dist. Ct. 2022); *Rivera v. Schwab*, 512 P.3d 168 (Kan. 2022). CLC respectfully submits this amicus brief in accordance with New Hampshire Supreme Court Rule 30 and has obtained consent of both parties. *See* Consent Attachment at Ex. A.

SUMMARY OF ARGUMENT

Both Democrats and Republicans have engaged in extreme partisan gerrymandering across the country this redistricting cycle and for several decades, seeking to skew the electoral district boundaries in a race to the bottom of partisan gamesmanship. The unfortunate lesson is that politicians when left to their own devices will continue to deploy gerrymandering because it aligns with their political incentives. As Appellants allege, politicians drawing the lines in New Hampshire were no exception this redistricting cycle.

Fortunately, however, state constitutions are fundamentally democracy-protecting charters and are critical to limiting the democracy-eroding practice of partisan gerrymandering. This is particularly true of state constitutions that were devised in the revolutionary era to repudiate the electoral manipulation and faux democracy practices in England. On this score, the New Hampshire Constitution is even "more protective of individual rights than the parallel provisions of the United States Constitution." *Ball*, 124 N.H. at 232.

As explained below, the state judiciary, applying state constitutional protections, can and should adjudicate challenges to partisan gerrymanders. There is firm historical grounding for applying New Hampshire's Free Elections Clause to prohibit excessive partisanship in the redistricting process. And, overall, this Court's intervention to bar partisan gerrymandering is urgently needed to unstop blockages in the democratic process.

ARGUMENT

I. Partisan gerrymandering claims are justiciable.

Partisan gerrymandering claims are justiciable under the New Hampshire Constitution. The judiciary has an obligation to protect the rights of citizens, particularly a subjugated minority, against unconstitutional abuses of power. In accord with this duty, the U.S. Supreme Court has explicitly pointed to state judiciaries as a source of limitation on gerrymandering, and numerous state courts have since ruled that such claims are justiciable. The justiciability of partisan gerrymandering claims here is reinforced in the reality that this Court has historically resolved several different types of redistricting disputes. Absent court intervention to correct the breakdown in the political process here, there may be no alternative avenue to redress the severe harms of partisan gerrymandering.

First, the Court's precedents support that it has jurisdiction over Appellants' claims. To make the New Hampshire Constitution's rights and limitations a reality, "[i]t is [the Court's] constitutional duty . . . to review whether laws passed by the legislature are constitutional," including redistricting legislation. *Baines v. N.H. Senate President*, 152 N.H. 124, 129 (2005). New Hampshire's judicial review provision is clear that "[i]t is essential to the preservation of the rights of every individual . . . that there be an impartial

interpretation of the laws, and administration of justice." N.H. Const. Part I, Article 35. When encountered with cases implicating the separation of powers, this Court has explained that "[w]hile it is appropriate to give due deference to a co-equal branch of government as long as it is functioning within constitutional constraints, it would be a serious dereliction on our part to deliberately ignore a clear constitutional violation." *Burt v. Speaker of the House of Representatives*, 173 N.H. 522, 526 (2020) (quoting *Baines*, 152 N.H. at 129). Thus, despite redistricting being a legislative prerogative in the first instance, the Court maintains a vital constitutional imperative to serve as "the final arbiter of State constitutional disputes." *In re Below*, 151 N.H. 135, 139 (2004).

This obligation is no less true when it comes to partisan gerrymandering. In no uncertain terms, this Court has broadly held that "we have jurisdiction to resolve reapportionment cases," *Monier v. Gallen*, 122 N.H. 474, 476 (1982), and it has exercised that jurisdiction on numerous occasions. *See, e.g.*, *Burling v. Chandler*, 148 N.H. 143, 147 (2002); *Below v. Gardner*, 963 A.2d 785, 792 (N.H. 2002). Given this precedent, redistricting is not within the limited subject areas that are reserved for only one branch to control and thus beyond judicial review. *Cf. Horton v. McLaughlin*, 149 N.H. 141, 143 (2003) (reinforcing that "impeachment is exclusively a legislative prerogative" (quotations omitted)). Indeed, just last year in a one-person-one-vote case, this Court accepted jurisdiction and explicitly "disagree[d]" with the States' categorical stance that "redistricting is an inherently political function that is incompatible with the independent and neutral role of the judiciary." *Norelli v. Sec'y of State*, No. 2022-0184, 2022 WL 1498345, at *2 (N.H. May 12, 2022).

Accordingly, the Court has reinforced in redistricting matters that the State "constitution requires . . . that the State Legislature be apportioned so that each person's vote carries as near equal weight as possible." *Gardner*, 963 A.2d at 790. When political mapmakers devise district lines to give the vote of some New Hampshirites greater effect than others for a partisan gain, the people's votes by definition do not carry equal weight. *See id.* at 792 (describing that gerrymandering "give[s] one political party an unfair advantage by diluting the opposition's voting strength"). Such partisan gerrymandered maps that are "designed as to operate to minimize or cancel out the voting strength of . . . political elements of the voting population" should not be allowed to stand under the New Hampshire Constitution. *See Opinion of the Justices*, 111 N.H. 146, 150-51 (1971) (citation and quotations omitted). The Court should instead apply its precedents in other contexts to recognize the justiciability of partisan gerrymandering claims and uphold New Hampshire's core constitutional guarantees here.

The Court's jurisdiction on this matter in no way depends on federal law. Although the U.S. Supreme Court has long recognized that "partisan gerrymanders . . . are incompatible with democratic principles," *Ariz. State Legis.*, 576 U.S. at 791 (quotation marks omitted), and unanimously deemed them "unlawful," *Vieth v. Jubelirer*, 541 U.S. 267, 293 (2004), it has declined jurisdiction over partisan gerrymandering claims based on its interpretation of Article III's "case or controversy" requirement, *Rucho*, 139 S. Ct. at 2494-95. This says nothing of state courts' justiciability requirements and authority to apply their own doctrines on this question.

Rather, the New Hampshire Constitution departs from the U.S. Constitution on justiciability issues, with the New Hampshire judiciary empowered to adjudicate claims that would be nonjusticiable in federal courts. *See, e.g.*, *Burt*, 173 N.H. at 526. As one court reinforced, "[i]t is clear that 'the constraints of Article III of the Federal Constitution do not apply to state courts, and the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability." *Duncan v. New Hampshire*, No. 219-2012-CV-00121, 2013 WL 12498020, at *9 n.5 (N.H. Super. Ct. June 17, 2013) (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989) (alterations omitted)). This is true "even when [state courts] address issues of federal law," and even more so when they address issues under their own state constitution. *Kadish*, 490 U.S. at 617. Thus, as the U.S. Supreme Court in *Rucho* explicitly recognized, voters' denunciation of gerrymandering will not be left to "echo into a void" because "state constitutions can provide standards and guidance for state courts to apply" to vindicate their rights. 139 S. Ct. at 2507.

Second, the Court should follow the majority of state courts that have accepted the *Rucho* Court's invitation and have applied state constitutional provisions to derive judicially manageable standards for limiting partisan gerrymandering. In some states, often where voters have greater direct authority to amend their state constitution through ballot initiatives, courts have applied new constitutional provisions to limit gerrymandering.[2] In

[2] *See, e.g.*, *Harkenrider v. Hochul*, 197 N.E.3d 437, 453-54 (N.Y. 2022); *LWV of Ohio v. Ohio Redistricting Comm'n*, 167 Ohio St. 3d 255, 288-93 (Ohio 2022); *Adams v. DeWine*, 167 Ohio St. 3d 499, 510-20 (Ohio 2022); *LWV of Fla. v. Detzner*, 172 So. 3d 363 (Fla. 2015); *In re Colo. Indep. Legislative Redistricting Comm'n*, 513 P.3d 352, 355 (Colo. 2021); Final Order Establishing Voting Districts at 1-2, *In Re: Decennial Redistricting* (Va. Dec. 28, 2021), tinyurl.com/2phzpu6s.

other states, often those that lack robust citizen initiative opportunities such as in New Hampshire, courts have barred gerrymandering by engaging in their time-tested role of applying broader constitutional mandates to specific contexts. *See, e.g.*, *Harper v. Hall*, 868 S.E.2d 499, 546 (N.C. 2022); *LWV of Pa. v. Commonwealth*, 178 A.3d 737, 820 (Pa. 2018).[3] As in nearly all other constitutional cases, the courts in these cases have consistently managed to derive standards from broad constitutional protections and apply them to partisan gerrymandering claims, evaluating the pertinent facts and expert evidence to decide where to draw the constitutional line. The Court should do the same here and allow Appellants to at least present their case to better evaluate whether the proposed standards are, in fact, judicially manageable.

Finally, the courts may be the only place where the excesses of partisan gerrymandering can be curtailed. Although "[t]he widespread nature of gerrymandering in modern politics is matched by the almost universal absence of those who will defend its negative effect on our democracy," few political actors are willing to disarm. *Benisek v. Lamone*, 348 F. Supp. 3d 493, 511 (D. Md. 2018).[4] Given that "both Democrats and

[3] Numerous other state courts have similarly applied broad constitutional protections to partisan gerrymandering cases. *See, e.g.*, Order, *In re 2021 Redistricting Cases*, No. S-18419, at 6 (Alaska May 24, 2022), tinyurl.com/y73zyac7 (applying *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1371 (Alaska 1987)); Order Denying Motion to Dismiss at 10-20, *LWV of Utah v. Utah State Legislature*, No. 220901712 (Utah 3d Dist. Ct. Nov. 22, 2022), tinyurl.com/yvd9m9xe; Mem. Op. & Order, *Szeliga v. Lamone*, No. C-02-CV-21-001816, at 93-95 (Anne Arundel Cty. Cir. Ct. Mar. 25, 2022), tinyurl.com/3uhunz9s.

[4] Indeed, Presidents from Ronald Reagan to Joe Biden have condemned the practice, with Reagan describing partisan gerrymandering as an "un-American practice," "anti-democratic," and a "national disaster," and he advocated that "[t]here should be a bipartisan commission appointed ever ten years" to conduct impartial redistricting. *See, e.g.*, Lisa Riley Roche, *Ronald Reagan used to help make case for Better Boundaries ballot proposition*, Deseret News (Oct. 2, 2018), tinyurl.com/f63d85pc.

Republicans have decried [gerrymandering] when wielded by their opponents but nonetheless continue to gerrymander in their own self interest when given the opportunity," this "cancerous" problem that is "undermining the fundamental tenets of our form of democracy" is often not susceptible to political solutions. *See id.* Thus, "because gerrymanders benefit those who control the political branches," and will "[m]ore effectively every day . . . enable[] politicians to entrench themselves in power against the people's will," it is "only the courts [who] can do anything to remedy the problem." *Whitford*, 138 S. Ct. at 1935 (Kagan, J., concurring).

II. Extreme partisan gerrymandering violates the Free Elections Clause.

The New Hampshire Constitution's Free Elections Clause prohibits extreme partisan gerrymanders. The Clause provides 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." N.H. Const. Part I, Article 11.

By its text, this provision curtails politicians' ability to devise electoral boundaries for political gain. An election is not "free" when its results are predetermined by manipulated district lines, and gerrymandering prevents the "equal right to vote" in the election by diminishing the electoral strength of certain disfavored voters and amplifying the influence of other favored voters.

This reading accords with original understandings of the key terms of the Free Elections Clause at the time of its enactment. For example, Samuel Johnson's authoritative dictionary from the founding era defined "Free" as "Invested with franchises; possessing any thing without vassalage; admitted to the privileges of any body" and "Not bound by

fate; not necessitated." Samuel Johnson, A Dictionary Of The English Language (London, J.F. & C. Rivington et al., 10th ed. 1792), tinyurl.com/2k96ypyw. Partisan gerrymandering violates this meaning of free. It amounts to divesting certain voters of a meaningful franchise—subordinating their political power to a state of vassalage to the party in control of the redistricting process. And it leaves electoral results more to a question of designated fate and necessitated outcome than to honoring the will of the people. As such, numerous other state courts have concluded that Free Elections Clause provisions with nearly identical text in their states' constitutions can be applied to curb partisan gerrymandering. *See, e.g.*, *Harper*, 868 S.E.2d at 540-43, 547-49, 559; *LWV of Pa.*, 178 A.3d at 802-18, 825; *LWV of Utah*, *supra* n.3, at 25-38; *Szeliga*, *supra* n.3, 93-95.

Importantly, the history of Free Elections Clauses in general, and New Hampshire in particular, confirms that the provision was designed to prevent the sort of anti-democratic manipulation of the electoral process inherent in partisan gerrymandering. Numerous courts have probed this history and come to the same conclusion. *See, e.g.*, *LWV of Pa.*, 178 A.3d at 804-09; *Harper*, 868 S.E.2d at 540-43.

The Free Elections Clause originated in England and was enacted in response to the manipulation of parliamentary elections through the "rotten boroughs" system, which is a historical cognate to the effects of modern day partisan gerrymandering. In the years prior to the Glorious Revolution, England experienced significant government interference in the democratic process for electing the House of Commons. *See* J. Jones, *The Revolution of 1688 in England* 35-36 (1972). In an effort to skew control of parliament, district boundaries and the composition of such districts (at the time called "boroughs") were

altered or malapportioned to ensure election results favoring the monarch. *See* Bertrall L. Ross II, *Challenging the Crown: Legislative Independence and the Origins of the Free Elections Clause*, 73 Ala. L. Rev. 221, 256 (2021). By using coercion and patronage, dictating who within the borough could vote, and devising boroughs with vastly varying sizes and voter populations, the government rendered elections in many boroughs a mere formality in favor of electing preferred candidates. *Id.* at 269. This became known as the "rotten boroughs" system. *Id.*; *see also Wesberry v. Sanders*, 376 U.S. 1, 14 (1964). The use of rotten boroughs to skew House of Commons election results for partisan gain was "striking proof of the decay in the representative system" at the time. William Carpenter, *The People's Book: Comprising their Chartered Rights and Practical Wrongs* 406 (1831), tinyurl.com/4suj98eu.

The people's opposition to such a manipulated electoral system became a driving force behind the Glorious Revolution in England and passage of the English Bill of Rights in 1688. *See Harper*, 868 S.E.2d at 541-42; *see also Amici Curiae* Brief of Charles Plambeck and Joni Walser, *Moore v. Harper*, No. 21-1271, 2022 WL 16110511, at *15-16 (U.S. Oct. 25, 2022) (hereafter "*Moore* Plambeck Br.") (collecting sources). Thus, the English Bill of Rights provided, in familiar language, "Election of Members of Parliament ought to be free." Bill of Rights, 1688, 1 W. & M., c. 2 (Eng.), tinyurl.com/yckkayw6.[5] The inclusion of this critical provision codifying the right to free elections was "a central

[5] Free Elections Clauses in fact are much older, and likely have their origin in English law dating back to the nearly 750-years-old Statute of Westminster. First Statute of Westminster (1275), 3 Edw. 1 ch. 5 (Eng.); *see also Moore* Plambeck Br., 2022 WL 16110511, at *13 & n.2.

feature of the English Bill of Rights" designed to confront the rotten borough system and ensure "an independent Parliament through free elections." Ross, *supra*, at 221-22, 289. Recognition of the damaging effects of electoral manipulation led "Parliament to reaffirm, and require successor monarchs to acquiesce to, the 1688 Bill of Rights injunction that elections 'ought to be free.'" *Moore* Plambeck Br., 2022 WL 16110511, at *16.

During the American Revolutionary era, the Founders were also keen to reject the electoral manipulation at the center of the rotten boroughs system in England. *See, e.g.*, McKay Cunningham, *Gerrymandering and Conceit: The Supreme Court's Conflict with Itself*, 69 Hastings L.J. 1509, 1537 (2018) ("The Framers were responding to the lack of representation afforded them as colonists, in conjunction with fresh memory of rotten boroughs that corrupted England's representative system."). For example, Alexander Hamilton explicitly decried "the destruction of the right of free election" in England that was the result of parliamentary elections "stigmatized with the appellation of rotten boroughs" as "the true source of the corruption which has so long excited the severe animadversion of zealous politicians and patriots." 2 *Debates in the Several State Conventions on the Adoption of the Federal Constitution*, 264 (J. Elliott ed., 1876), tinyurl.com/2z2fxrr8 (hereafter "Debates").

Adhering to the same sentiments, the earliest American states also recognized the need to safeguard a right to free elections and prevent political manipulation of elections. "In the first American state constitution adopted 87 years after the English Bill of Rights enactment, the New Hampshire Constitution began 'WE, the members of the Congress of New Hampshire, chosen and appointed by the free suffrages of the people of said colony,'

as a clear signal of their independence from Crown influence in their selection" of representatives. Ross, *supra*, at 289. And then following the American Revolution, in New Hampshire's Constitution of 1784, the Framers explicitly "adopted language from the English Bill of Rights declaring '[a]ll elections ought to be free.'" *Id.* New Hampshire was not alone in recognizing the necessity of free elections to prevent the skewing of electoral process to undermine representative democracy. Provisions enshrining protections for "free elections" were "included in every new state constitution written between the Revolution and the U.S. Constitution's ratification," *id.* at 228, and today, New Hampshire is one of twenty-six states with a Free Elections Clause. *See* Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 Vand. L. Rev. 89, 103 & n.86 (2019).

By "transplant[ing]" a Free Elections Clause derived from the English Bill of Rights into the New Hampshire Constitution of 1784, the Framers intended to "bring[] the old soil with it" by retaining the provision's historical meaning. *Stokeling v. United States*, 139 S. Ct. 544, 551 (2019) (citation omitted); *see also Matter of Harman*, 168 N.H. 372, 374 (2015) (evaluating English roots in provision of 1784 Constitution); Ross, *supra*, at 289 (describing historical basis for New Hampshire's constitutional provision). As one scholar summarized, New Hampshire's early constitutions indicate "a suspicious view toward the manipulation of political lines" akin to the rotten boroughs system. Jamal Greene, *Judging Partisan Gerrymanders Under the Elections Clause*, 114 Yale L.J. 1021, 1047 (2005). Accordingly, "as in seventeenth-century England," the meaning of preserving free elections "should be understood as a key constitutional tool for preventing the distortions of the American form of government." Ross, *supra*, at 290.

Overall, the historical context of the original Free Elections Clause "makes clear that the concept of free elections was understood to embrace more than the idea that voters ought not be unduly coerced when voting. It also condemned shaping electoral units for partisan gain." *See Moore* Plambeck Br., 2022 WL 16110511, at *16; *see also* Ross, *supra*, at 222 (collecting sources). And partisan gerrymandering is the modern-day analogue of the electoral manipulation in England's rotten borough system. When mapmakers manipulate district lines by artificially dividing or concentrating voters to achieve a partisan advantage, they skew elections the same way that those devising malapportioned and disenfranchising rotten boroughs did in seventeenth century England. Extreme partisan gerrymandering typifies the partisan contrivance in the electoral process that the right to free elections was established to prevent.

Given the provision's text, sister state precedent, and its historical context, the Court should rule that New Hampshire's Free Elections Clause prohibits the corruption of democracy inherent in extreme partisan gerrymandering.

III. Judicial intervention is necessary to correct the dysfunction in the democratic process due to partisan gerrymandering.

Extreme partisan gerrymandering affronts the basic premise of a republican form of government: that representatives are accountable to, and reflective of, the people. Politicians in control of redistricting politically benefit from partisan gerrymandering and have little incentive to correct its wrongs. The judiciary is urgently needed to prevent such manipulation. Indeed, "unblocking stoppages in the democratic process is what judicial review ought preeminently to be about" and the denial of an effective vote "seems the

quintessential stoppage." John Hart Ely, *Democracy and Distrust* 116-36 (1980). Judicial review here is critical to ensure the proper workings of New Hampshire's democracy. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

The core harms of partisan gerrymandering are threefold: extreme asymmetry between the political parties' ability to translate votes to seats, reduction in competitiveness that increases partisan polarity, and impaired democratic accountability that leads to political dysfunction. And, as described below, the negative consequences of partisan gerrymandering in our society are only becoming worse given the combination of advancements in redistricting technology and increased polarization.

First, partisan gerrymandering enables the line-drawing party to secure far more seats in the legislative body than would be expected based on statewide vote share. The ability for one party to translate fewer votes to more seats creates an asymmetric and exponential benefit that can empower a minority party to silence the majority. Appellants allege that such an extreme asymmetry exists here. Compl. ¶¶ 74-75. This excessive and one-sided disjunction between the votes received and the seats won by the line-drawing party is not itself dispositive but can provide strong evidence of an unconstitutional partisan gerrymander. *See, e.g.*, *Harper*, 868 S.E.2d at 547; *LWV of Pa*, 178 A.3d at 820; *LWV of Ohio*, 167 Ohio St. 3d at 290; *Adams*, 167 Ohio St. 3d at 518.

The negative effects of such an asymmetry are self-compounding because "legislators elected under one partisan gerrymander will enact new gerrymanders after each decennial census, entrenching themselves in power anew decade after decade." *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *125 (N.C. Super. Ct. Sept. 3,

2019). And even by simply maintaining previous gerrymanders through subsequent decades—often by appealing to seemingly neutral principles like taking a "least change" approach to redistricting—partisan mapmakers can continue to lock in the partisan gains of the past without renewed map manipulation. *See, e.g.*, Robert Yablon, *Gerrylaundering*, 97 N.Y.U. L. Rev. 985, 988 (2022) (explaining that so-called "gerrylaundering requires no conspicuous cracking and packing of disfavored voters" because mapmakers can preserve the biased results by "preserving key elements of the existing map").

The extreme asymmetry resulting from partisan gerrymandering goes against the democratic process the Framers envisioned for the American system of representative government. During the founding era, preserving representational equality was seen as an important safeguard against political entrenchment. For example, John Adams argued that to prevent "the unfair, partial, and corrupt elections" that marked the English electoral system, the "equal interest among the people should have equal interest" in the American system of representation. John Adams, *Thoughts on Government* 403 (1776), *reprinted in* 1 *American Political Writing During the Founding Era: 1760-1805* (Charles S. Hyneman & Donald S. Lutz eds., 1983).[6] Equal ability to translate votes to seats is important for the proper functioning of the American system. Allowing politicians to use gerrymandering to artificially lock in supermajorities or minimize minority political representation is counter

[6] Adams also adopted much of his constitutional construction from the 1688 English Bill of Rights, which "suggests the substance and occasionally some of the wording of more than a half dozen of Adams's articles" in the Massachusetts Constitution that Adams principally authored. Robert J. Taylor, *Construction of the Massachusetts Constitution*, 90 Proc. of Am. Antiquarian Soc'y 317, 330-31 (1980). Because "New Hampshire shares its early history with Massachusetts" and the New Hampshire Framers "modeled much of [its] constitution on one adopted by Massachusetts four years earlier," this history is especially pertinent here. *See State v. Mack*, 173 N.H. 793, 802 (2020).

to the Framers' original understandings of American democracy, who cautioned against "measures [that] are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority." The Federalist No. 10, at 77 (James Madison) (Clinton Rossiter ed., 1961).

Second, partisan gerrymandering enables political parties to minimize the number of competitive contests and ensure the election of ideological party patrons. Partisan mapdrawers can focus not only on maximizing their statewide partisan advantage but also on securing as many safe seats as possible. Nicholas O. Stephanopoulos & Eric M. McGhee, *The Measure of a Metric: The Debate over Quantifying Partisan Gerrymandering*, 70 Stan. L. Rev. 1503, 1506 (2018). The current redistricting cycle has been characterized by "a decline of competition . . . [which] is the latest sign of dysfunction in the American political system." Reid J. Epstein and Nick Corasaniti, *'Taking the Voters Out of the Equation': How the Parties Are Killing Competition*, N.Y. Times (Feb. 6, 2022). For example, competition in congressional districts "is on track to dive near – and possibly below – the lowest level in at least three decades." *Id.* This "[l]ack of competition in general elections can widen the ideological gulf between the parties, leading to hardened stalemates on legislation and voters' alienation from the political process." *Id.*

The lack of competitive districts undermines the median voters' ability to translate their votes into effective representation. In general, political parties favor running more ideologically extreme candidates. Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 Harv. L. Rev. 593, 627-28 (2002). But competitive elections temper that instinct by forcing party leadership to recognize that a candidate will have to win the more

moderate, median voters to succeed in the election. *Id.* at 628. The more competitive the district, the more likely the candidate will be to represent the median voter and the political "community as a whole." *Id.* Without competitive districts, the primary becomes determinative of electoral outcomes, often benefitting more extreme candidates who can attract more ideological voters. *See Whitford*, 138 S. Ct. at 1940 (Kagan, J., concurring).

The result is often the election of hyper-partisan candidates who are less likely to broker bipartisan tradeoffs and are more likely to view their constituency as being a base of voters on the far wing of their party.[7] Gerrymandered legislative bodies comprised of ideologically extreme representatives increase partisan gridlock and rancor. Pragmatic solutions on which both parties can agree—and which many voters favor—become politically untenable in a safe seat environment where cooperation is punished rather than rewarded. *See, e.g.*, Brief for Bipartisan Group of Current & Former Members of Congress as *Amici Curiae* in Support of Appellees, *Gill v. Whitford*, No. 16-1161, 2017 WL 4311097, at *10-11 (U.S. Sept. 5, 2017).

These noncompetitive and hyper-polarized conditions are precisely what the Framers feared from a two-party system. The Framers were concerned with the "mischiefs of faction" and the "instability, injustice, and confusion [it] introduced," which are the "mortal diseases under which popular governments have everywhere perished." The Federalist No. 10, at 77 (James Madison). Gerrymandering is the epitome of faction run

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[7] *See, e.g.*, Shane Goldmacher, *'Blood Red': How Lopsided New District Lines Are Deepening America's Divide*, N.Y. Times (Feb. 28, 2022), tinyurl.com/mr354nfd; Richard H. Pildes, *Create More Competitive Districts to Limit Extremism*, RealClearPolitics (Apr. 29, 2021), tinyurl.com/5n8svb7s; Richard H. Pildes, *The Constitution and Political Competition*, 30 Nova L. Rev. 253, 256 (2006), tinyurl.com/2udpx63m.

amok: a classic case of "the public good [being] disregarded" due to hyper-politicized parties that operate in a designed echo chamber of safe seats and anti-competition. *See id.*

Third, partisan gerrymandering reduces popular accountability. It insulates representatives from their voters, allowing incumbents or political parties to strategically consolidate the voters they think will most reflexively reelect their favored candidates and then divide or overconcentrate the remaining voters who would do the opposite. *See* Stephanopoulos, *supra*, at 1506. In an environment where politicians can choose their voters instead of the other way around, partisan gerrymandering "[a]t its most extreme . . . amounts to 'rigging elections.'" *Whitford*, 138 S. Ct. at 1940 (Kagan, J., concurring) (quoting *Vieth*, 541 U.S. at 317 (Kennedy, J., concurring)).

The extreme partisan gerrymandering and resulting lack of accountability that occur under modern redistricting conditions is repugnant to New Hampshire's foundational constitutional tenet that "all government, of right, originates from the people, is founded in consent, and instituted for the general good." N.H. Const. Part I, Article 1. This Court has recognized that unchecked redistricting manipulation compromises core democratic principles, emphasizing that "'[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society,'" and consequently, "[t]his right can neither be denied outright nor diluted by weighting one citizen's right more than another's." *Below*, 151 N.H. at 136 (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)). Where imperfect gerrymanders and the greater compromise incentives of the past may have made some level of political redistricting tolerable in New Hampshire, now mapmakers can and have raised the stakes to use gerrymandering in a way that often skews the electoral process. The

solution is to require that legislators, the same as courts, must be "indifferent to political considerations, such as incumbency or party affiliation," when conducting redistricting. *Burling*, 148 N.H. at 145.

Again, the Framers warned against the antidemocratic results that arise from this lack of accountability in elections. Hamilton explained: "The true principle of a republic is that the people should choose whom they please to govern them." 2 Debates, *supra*, 257. To carry out this principle, the Framers thought "it is essential to liberty that the government in general should have a common interest with the people, so it is particularly essential that" elected representatives "should have an immediate dependence on, and an intimate sympathy with, the people." The Federalist No. 52, at 295 (James Madison); *accord* The Federalist No. 37, at 4 (James Madison) ("The genius of republican liberty seems to demand on one side, not only that all power should be derived from the people, but that those [e]ntrusted with it should be kept in dependence on the people.").

Few forces make representatives less dependent on, and less in sympathy with, their constituents than gerrymandered districts. *See, e.g.*, *Ariz. State Legislature*, 576 U.S. at 815 (discussing the Framers' concern about the "manipulation of electoral rules by politicians and factions in the States to entrench themselves or place their interests over those of the electorate"); *Wesberry*, 376 U.S. at 7-17 (similar). Partisan gerrymandering has, as the Framers feared, increasingly "enable[d] the representatives of the people to substitute their will to that of their constituents." The Federalist No. 78, at 525 (Alexander Hamilton).

Finally, modern technology has made these negative effects of partisan gerrymandering much worse. "Thanks to new technologies, more comprehensive data, and

a deeply polarized electorate, gerrymandering has become more aggressive, precise, and durable than ever before." Yablon, *supra*, at 986 (citation and quotation marks omitted). While mapdrawers in past decades undertook manual processes relying on imperfect and incomplete data, now redistricting uses sophisticated software programs, artificial intelligence and super-computing processing capabilities, widely available and precise data of partisan preferences, and granular information to pinpoint block-level accuracy. *See* Sarah M.L. Bender, *Algorithmic Elections*, 121 Mich. L. Rev. 489, 511-13 (2022) (collecting sources).

Thus, "[w]hile partisan gerrymandering is not a new tool, modern technologies enable mapmakers to achieve extremes of imbalance that, with almost surgical precision, undermine our constitutional system of government." *Harper*, 868 S.E.2d at 509 (footnote and internal quotation marks omitted). As Justice Kagan succinctly put it: "These are not your grandfather's—let alone the Framers'—gerrymanders." *Rucho*, 139 S. Ct. at 2513 (Kagan, J., dissenting). As such, although some level of partisanship may have been tolerated in prior redistricting cycles, *see Burling*, 148 N.H. at 156, the precision with which gerrymandering occurs today facilitates extreme electoral manipulation that subverts democracy. The New Hampshire Constitution does not countenance such results.

CONCLUSION

For the foregoing reasons, the Court should hold that extreme partisan gerrymandering is undemocratic, presents justiciable issues for New Hampshire courts to resolve, and violates the New Hampshire Constitution's Free Elections Clause.

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STATEMENT OF COMPLIANCE

Counsel hereby certifies that pursuant to New Hampshire Supreme Court Rule 26(7), this brief complies with New Hampshire Supreme Court Rule 26(2)-(4). Counsel certifies that the brief contains 5548 words (including footnotes) from the "Questions Presented" to the "Conclusion" of the brief.

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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.

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