THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Case No. 2022-0184

Theresa Norelli & a.,

Plaintiffs,

v.

Secretary of State & a.,

Defendants.

PLAINTIFFS' RESPONSE TO THE COURT'S ORDER OF APRIL 11, 2022

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This is an action challenging New Hampshire's current congressional districts, which have been rendered unconstitutionally malapportioned by a decade of population shifts. Plaintiffs asked the Hillsborough County Superior Court South to declare New Hampshire's current congressional districting plan unconstitutional; enjoin Defendant from using the plan in any future elections; and adopt a new congressional districting plan that adheres to the constitutional requirement of one person, one vote in the likely event that the New Hampshire General Court and Governor Chris Sununu did not. On April 11, 2022, this Court issued an order invoking supervisory jurisdiction over this case and requesting responses to a set of preliminary questions. This brief responds to those questions.

Question 1: Would use of the existing congressional districts, *see* RSA 662:1, for the 2022 election be unconstitutional either as a violation of one person/one vote or as otherwise alleged in the complaint?

Response: Yes. Continued use of the existing congressional districts would be unconstitutional.

The current malapportionment of New Hampshire's congressional districts violates the New Hampshire and U.S. Constitutions.

New Hampshire Constitution. Population shifts between 2010 and 2020 have rendered New Hampshire's First Congressional District overpopulated by 8,972 people, and the Second Congressional District underpopulated by 8,973 people, compared to the ideal district population. *See* Compl. ¶ 28. The congressional plan thus has a total population deviation of 2.6%. *Id.* ¶¶ 28–29. Under the New Hampshire Constitution's Free and Equal Elections Clause, a failure to properly "apportion" a districting plan

"violate[s] the equal voting rights of New Hampshire citizens." *Below v. Gardner*, 148 N.H. 1, 3 (2002) (per curiam) (citing N.H. Const. pt. I, art. 11). While *Below* dealt with the New Hampshire State Senate, its logic applies equally where—as here—New Hampshire's congressional districts are malapportioned in a manner that renders the votes of some citizens unequally weighted. *See, e.g.*, *Carter v. Chapman*, 270 A.3d 444, 457 (Pa. 2022) (applying requirement that legislative districts be "as nearly equal in population as practicable" to congressional redistricting pursuant to Pennsylvania's Free and Equal Elections Clause).

Moreover, the New Hampshire Constitution "ensure[s] that State law treats groups of similarly situated citizens in the same manner." *McGraw v. Exeter Region Coop. Sch. Dist.*, 145 N.H. 709, 711 (2001). Indeed, the "principle of equality pervades the entire constitution." *State v. Pennoyer*, 65 N.H. 113, 114 (1889); *see also Rosenblum v. Griffin*, 89 N.H. 314, 321 (1938) (referring to New Hampshire Constitution's "organic principle of equality"). Here, voters in the First Congressional District are similarly situated to voters in the Second Congressional District. Nonetheless, under the existing congressional plan, those in the First Congressional District are denied an equally weighted vote by virtue of where they happen to live.

U.S. Constitution. The U.S. Supreme Court has long made clear that "[s]tates must draw congressional districts with populations as close to perfect equality as possible." *Evenwel v. Abbott*, 578 U.S. 54, 59 (2016); *see also Karcher v. Daggett*, 462 U.S. 725, 730 (1983) (requiring states to "make a good-faith effort to achieve precise mathematical equality" among congressional districts (quoting *Kirkpatrick v. Preisler*,

394 U.S. 526, 530–31 (1969))). Article I, Section 2 of the U.S. Constitution "permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown." *Karcher*, 462 U.S. at 730 (quoting *Kirkpatrick*, 394 U.S. at 531). And when a state's political branches fail to undertake the necessary decennial redistricting process, state courts have both the authority and the obligation to act to ensure compliance with federal law: As the U.S. Supreme Court explained in *Growe v. Emison*, "[t]he power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged." 507 U.S. 25, 33 (1993) (quoting *Scott v. Germano*, 381 U.S. 407, 409 (1965) (per curiam)); *see also, e.g.*, *Carter*, 270 A.3d at 450 (Pa. 2022) ("Because the General Assembly and the Governor failed to agree upon a congressional redistricting plan, this Court was tasked with that 'unwelcome obligation.'" (quoting *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 823 (Pa. 2018))); *Branch v. Smith*, 538 U.S. 254, 275 (2003) (recognizing power of state courts to redraw congressional district lines during legislative impasse).

Here, there is no justification for the 2.6% deviation between the current congressional districts. The current district lines were drawn using decade-old census data. Thus, any justification for the current district lines that might have existed 10 years ago is obsolete. Moreover, no court has ever suggested that a deviation of 2.6% could pass constitutional muster; the largest overall congressional district population deviation upheld by a federal court was 0.79%, when West Virginia proved that such a deviation

was necessary to achieve "valid, neutral state districting policies." *Tennant v. Jefferson Cnty. Comm'n*, 567 U.S. 758, 764 (2012). New Hampshire cannot prove that the 2.6% deviation between the state's current congressional districts is necessary to achieve any legitimate state districting policy. Political deadlock cannot suffice as a justification for the State's failure to achieve absolute equality. Redistricting of the state's congressional districts is therefore required, and because New Hampshire's political branches will not complete that process in time to hold a constitutionally valid congressional election, judicial intervention is needed.

Question 2(A): What is the last date by which the court will have assurance that a congressional reapportionment plan will be validly enacted in time for the 2022 primary election for the purpose of nominating candidates for the United States House of Representatives? See Below I, 148 N.H. at 30 (reproducing court's order dated May 17, 2002); Burling, 148 N.H. at 181 (reproducing court's order dated May 17, 2002).[1]

Response: Unless the candidate filing period is delayed, June 1 is the last date by which the General Court and Governor can enact a new congressional districting plan in time for use in the 2022 primary election.

Currently, the filing period for congressional candidates opens on June 1, 2022, and ends on June 10, 2022. *See* RSA 655:14. Before candidates can file for district-wide office during this period, they must know the boundaries of those districts. As a result, June 1, 2022, would be "the last date by which the court will have assurance that a congressional reapportionment plan will be validly enacted in time for the 2022 primary election for the purpose of nominating candidates for the United States House of Representatives[.]" Order 5.

[1] Question 2(B) was directed at the Secretary of State only. Plaintiffs thus do not offer a response.

While the candidate filing period is established by law, it is not immovable. The General Court, the Secretary of State, and this Court all have authority to delay the candidate filing period. *See* N.H. Const. pt. II, art. 5 (granting the power to the General Court to enact statutes); RSA 655:14-c ("[I]f the elective districts for any office in RSA 662 have not been amended according to the most recently completed federal decennial census before the commencement of the filing period, the secretary of state is hereby authorized to change or extend the filing period as necessary to implement revised elective districts."); *Below*, 148 N.H. at 14, 26 (enjoining and extending filing period until a new Senate plan was established). In the event any of these authorities sees fit to extend the filing deadline, the last date by which the General Court could enact a valid congressional plan would be June 30, the last day of the legislative session. *See* N.H. Const. pt. II, art. 15 (noting that, absent a special session, daily compensation for State House members ends on "the first day of July following the annual assembly of the legislature"); *see also Op. of the Justs.*, 95 N.H. 533, 535 (1949) (stating that the goal of Article 15 was to "limit the length of the [legislative] sessions"). This approach would be consistent with that used in *Below*, in which the lower court concluded that judicial intervention was necessary once the General Court recessed without enacting a valid redistricting plan. 148 N.H. at 4 ("On May 22, 2002, the senate and the house recessed without enacting a valid senate redistricting plan. On May 23, 2002, the [lower] court determined, that since it had no assurance that a redistricting plan would be validly enacted in time for the upcoming election, it must establish a constitutional senate redistricting plan.").

Questions 3(A) and 3(B): If we conclude that use of the existing congressional districts for the 2022 election would be unconstitutional, [s]hould we apply the "least change" approach to congressional redistricting in this case, as we did for state senate redistricting in Below I? If "least change" is the correct approach, what measurement or factors should we use to assess "least change?"[2]

Response: In drawing a remedial plan, this Court should apply the least-change approach, measured by maximizing core retention relative to the existing districts.

As this Court noted, it applied a least-change approach in *Below* when, in the context of a legislative impasse, the judiciary was required to draw a remedial Senate plan. *See* Order 6. The Court evaluated compliance with this principle by referencing how many people were moved out of their existing districts. *See Below*, 148 N.H. at 14 (noting that "the court's plan imposes the least change for New Hampshire citizens in that it changes the senate districts for only 18.82% of the State's population"). The Court should use the same approach here: By maximizing core retention, the Court can ensure that its remedial plan moves as few people as possible. For this reason, the Wisconsin Supreme Court recently evaluated compliance with the least-change approach by maximizing core retention in its congressional map. As that court put it:

> Core retention represents the percentage of people on average that remain in the same district they were in previously. It is thus a spot-on indicator of least change statewide, aggregating the many district-by-district choices a mapmaker has to make. Core retention is, as multiple parties contended from the beginning of this litigation, central to a least change review.

Johnson v. Wis. Elections Comm'n, 971 N.W.2d 402, 408, *stay denied Grothman v. Wisconsin Elections Comm'n*, No. 21A490, 2022 WL 851726, at *1 (U.S. Mar. 23, 2022).

[2] Question 3(C) asks what approach should be taken if "least change" is not the correct approach. Because Plaintiffs assert that least-change is the only proper approach, they offer no response to Question 3(C).

<u>Questions 4(A) and 4(B)</u>: Regarding the appointment of a special master, [d]oes the party, intervenor, or amicus object to the appointment of Professor Nathaniel Persily as special master? If so, what are the specific grounds for the objection? Does the party, intervenor, or amicus propose the appointment of someone else as special master? If so, who (name and contact information) should be appointed instead, and what are that person's qualifications to serve as special master?[3]

<u>Response</u>: Plaintiffs do not object to the appointment of Professor Nathaniel Persily as special master, nor do they propose anyone else.

As evidenced by his curriculum vitae, including his prior special master appointments in redistricting cases, Professor Persily is eminently qualified to serve as special master in this matter. Plaintiffs do not propose the appointment of anyone else as special master.

[3] Question 4(C) is directed at the Secretary of State and any other "interested State body or State official" only. Plaintiffs thus do not offer a response.

Dated: April 25, 2022

Respectfully Submitted,

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By Their Attorneys,

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CERTIFICATE OF SERVICE

I certify that on April 25, 2022, I served the foregoing pleading on all parties or counsel of record in accordance with the rules of the Supreme Court, as follows: I am serving all registered e-filers through the court's electronic filing system; I am serving all other parties by mailing a copy to them.

/s/ Steven J. Dutton
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