THE STATE OF NEW HAMPSHIRE

SUPREME COURT

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CASE NO. 2022-0184

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Theresa Norelli *& a.* v. Secretary of State *& a.*

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# REPORT AND PLAN OF THE SPECIAL MASTER

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May 27, 2022

Nathaniel Persily
559 Nathan Abbott Way
Stanford, CA 94305

**REPORT AND PLAN OF**

**THE SPECIAL MASTER**

By order dated May 12, 2022, this Court appointed me as Special Master in the above captioned matter. *See* App. A at A2.[1] In the order, this Court directed me to prepare and issue to the Court "a report and a recommended congressional redistricting plan for New Hampshire." The Court instructed me to modify existing congressional district lines "only to the extent required to comply with the [Court's] criteria and 'least change' standards." *Id.*

Contained herein is my report and proposed congressional redistricting plan for the State of New Hampshire. Exhibit 1 presents a statewide map showing the two congressional districts comprising the Special Master's Plan. Exhibit 2 highlights the Plan's proposed changes in the boundaries from the existing congressional districts. Exhibit 3 presents a table of racial demographic data for each district in the Special Master's Plan. Exhibit 4 presents a list of towns in each proposed congressional district in the Special Master's Plan. Exhibit 5 presents statewide maps of the different proposals submitted in this case. Exhibit 6 presents a table comparing the Special Master's Plan to the submitted proposals on the criteria specified in the Court's order. Exhibit 7 presents, for comparison, maps of the existing congressional districts. For ease of reference, relevant orders, submissions, and transcripts are attached as appendices. Appendix A includes the order appointing me as Special Master. Appendix B includes the submission from the

[1] All page references to the Appendix refer to the repagination of the combined materials as indicated in the bottom right corner of each page in the Appendix.

Plaintiffs. Appendix C includes the submission from the President of the New Hampshire Senate and Speaker of the New Hampshire House. Appendix D includes the submission from the Minority Leaders of the Senate and House. Appendix E includes the Plaintiffs' reply brief. Appendix F includes a transcript of the hearing held before me on May 19, 2022, for which the full video is available at https://livestream.com/nhjb/events/10045798/videos/231209113. In addition to this Report and Plan, the Clerk of the Court has been provided a census block equivalency file of the Special Master's Plan for public distribution.

## I. Introduction

The Court's May 12th order directed me to fashion a congressional redistricting plan for the state to be submitted to the Court no earlier than May 27, 2022. App. A at A2. Through its order, the Court notified the public of an in-person hearing that would be held at the Court on May 19, 2022, at 1:00 p.m. *Id.* at A3. Parties, intervenors, and amici curiae were directed to submit by 5:00 p.m. on May 16, 2022, any proposed redistricting plans, accompanied by supporting documentation, data, and memoranda. *Id.* Responses to any proposed redistricting plan were to be submitted by 1:00 p.m. on May 18, 2022. *Id.*

The Court's order instructed me to consider certain factors, while ignoring others, in drawing the plan for New Hampshire's congressional districts. In particular, the Court instructed:

> In developing a recommended congressional redistricting plan, the special master shall use 2020 federal census data, P.L. 94-171, and shall modify the existing congressional districts, as established by RSA 662:1 (2016), only to the extent required to comply with the following criteria and "least change" standards:
>
> 1. Districts shall be as equal in population as practicable, in accordance with Article I, Section 2 of the United States Constitution;
> 2. The redistricting plan shall comply with the Voting Rights Act of 1965, as amended, 52 U.S.C. § 10101 et seq., and any other applicable federal law;
> 3. Districts shall be made of contiguous territory;
> 4. To the greatest extent practicable, each district shall contain roughly the same constituents as it does under the current congressional district statute, such that the core of each district is maintained, with contiguous populations added or subtracted as necessary to correct the population deviations, see Below v. Secretary of State, 148 N.H. 1, 13-14, 28 (2002);
> 5. The plan shall not divide towns, city wards, or unincorporated places, unless they have previously requested by referendum to be divided, or unless the division is necessary to achieve compliance with the population equality required by Article I, Section 2 of the United States Constitution; and
> 6. The special master shall not consider political data or partisan factors, such as party registration statistics, prior election results, or future election prospects.

*Id.* at A2-3.

The Court made clear in its order, however, that its involvement and the Special Master's plan were only necessary because of the failure of the political branches to agree on a congressional redistricting plan. Moreover, the court-directed process could and would shut down in the event a legal plan passed the Legislature was not vetoed by the Governor. "The special master's appointment," the order stated, "does not preclude the legislature from enacting a congressional redistricting plan on or before May 26, 2022 – the date

identified to us as the last date for legislative action in this session on a congressional redistricting plan." *Id.* at A2. "[T]he court will terminate this proceeding if a congressional redistricting plan is validly enacted by the legislature at any time prior to the close of this case." *Id.* at A3. Because a congressional district plan for New Hampshire has yet to be validly enacted, the development and submission of the Special Master's Plan for the Court's consideration has become necessary.

## II. Submissions from the Parties

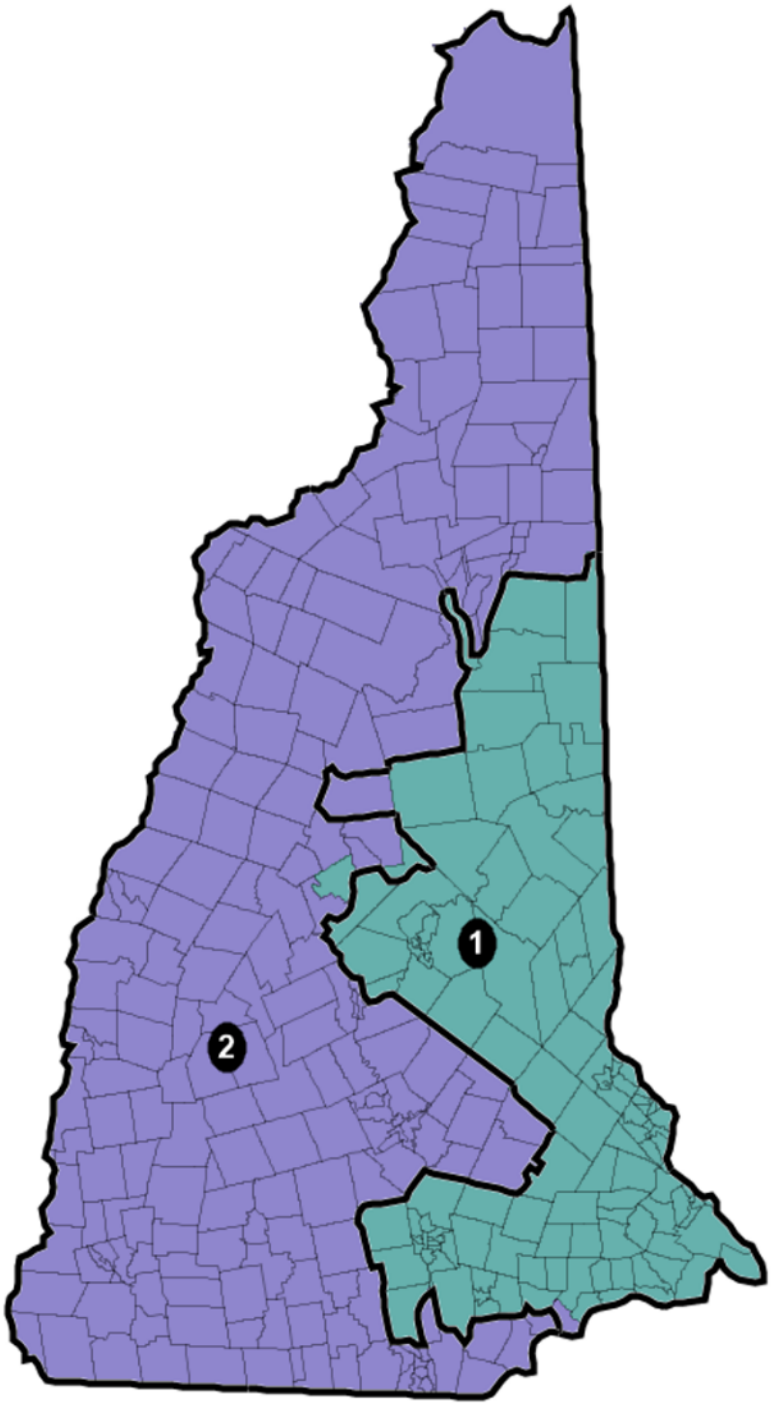
Prior to the May 19th hearing, I received submissions from the parties and amici offering four maps for consideration. I received one proposed map from the Plaintiffs, two from the President of the Senate and Speaker of the House (Majority Plan 1 and Majority Plan 2), and one (submitted earlier to the Supreme Court) from the Minority leaders of the House and Senate ("Minority Plan"). Their submissions are attached as Appendix B-D. I also received only one response brief, from the Plaintiffs, presented as Appendix E.

### A. Plaintiffs' Submission

The Plaintiffs' proposal would move four towns and a total of 13,373 people between districts. It would move Plaistow and Campton from District 1 to District 2, and it would move Bridgewater and Center Harbor from District 2 to District 1. It has an overall deviation of only one person, with proposed District 1 containing 688,764 people and proposed District 2 containing 688,765 people. It does not substantially alter the shape or

compactness of the existing districts. *See* App. B at A10-13. The map submitted by the Plaintiffs is depicted below, with the proposed districts in green and purple and the existing districts depicted with black borders.

Figure 1. Plaintiffs' Plan



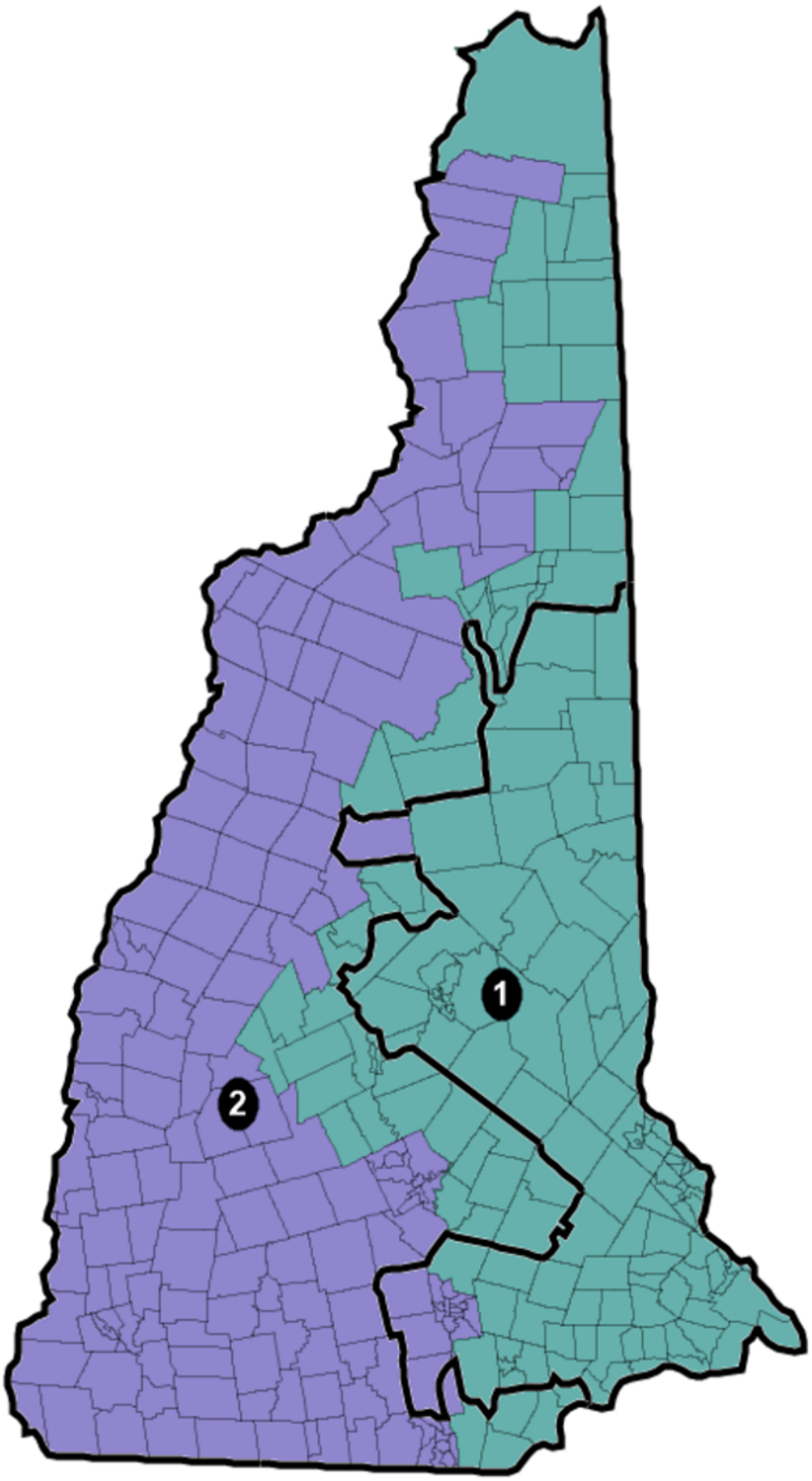
B. Submissions from State Senate President and Speaker of the House

The State Senate President and Speaker of the House submitted two plans: Majority Plan 1 and Majority Plan 2. The plans are very different from one another. Majority Plan 1 reconfigures both districts by moving the greatest number of people of any submitted plan, whereas Majority Plan 2 moves the fewest number of people of all submitted plans.

1. Majority Plan 1

Majority Plan 1 moves 75 towns and 358,976 people – roughly one quarter of the population of the state – between districts. It significantly alters the shape of districts by pushing District 1 up along the eastern boundary with Maine all the way to the northernmost point of the state bordering Canada. To compensate, it moves Manchester into the same District (District 2) as Nashua, among many other changes in the southern half of the state. Although Majority Plan 1 significantly reconfigures both districts, it achieves the lowest population deviation possible (just one person): District 1 would have 688,764 people, and District 2 would have 688,765 people. *See* App. C at A19.

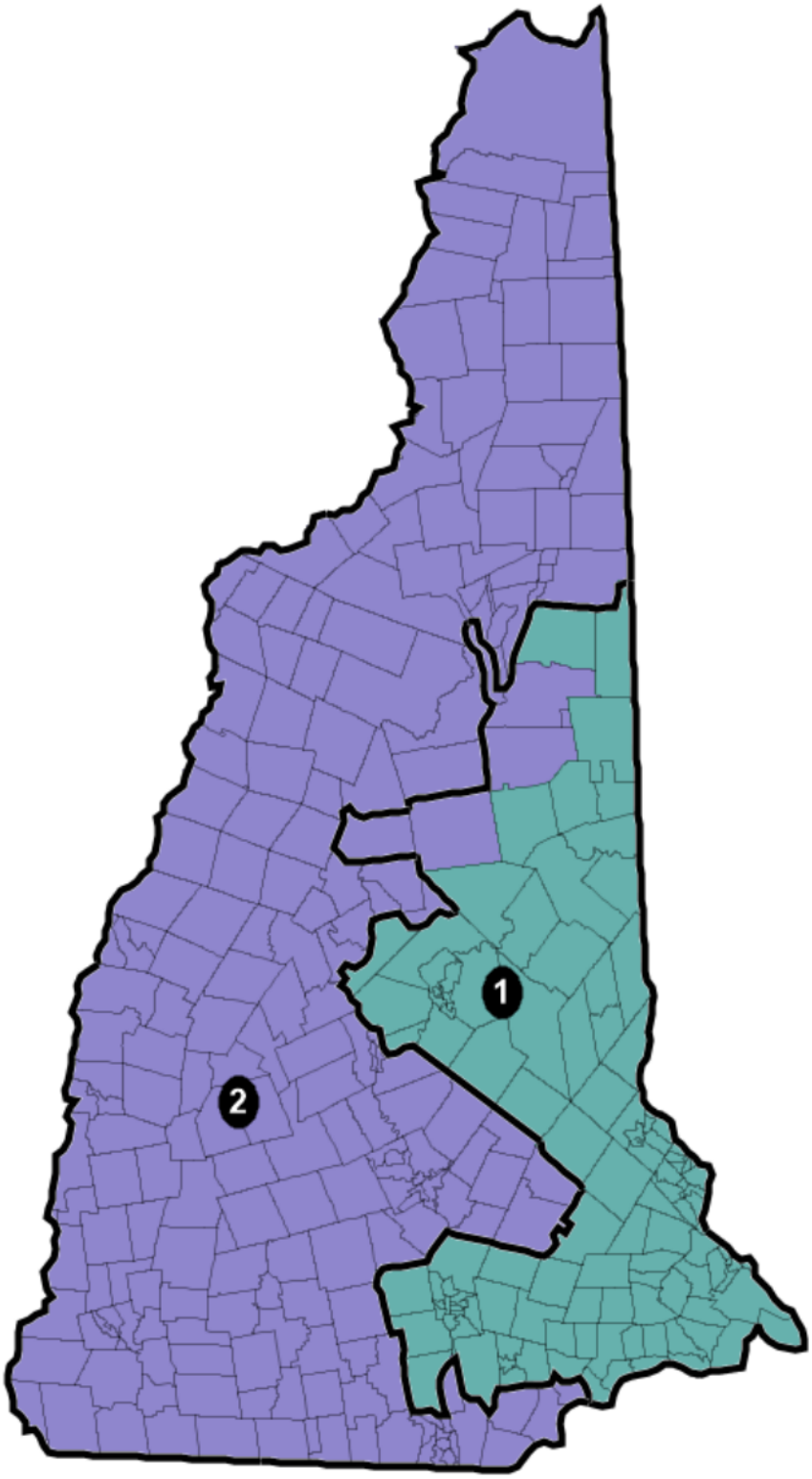
Figure 2. Majority Plan 1



2. Majority Plan 2

In contrast, Majority Plan 2 moves the fewest people between districts of all the submitted plans. It moves 8,968 people from District 1 to District 2. It does so by moving six whole towns – Albany, Bartlett, Campton, Hale's, Hart's Location, Sandwich – from District 1 to District 2, without requiring any compensating moves back from District 2 to District 1. It achieves a deviation of just 9 people: Proposed District 1 has 688,769 people; Proposed District 2 has 688,760 people. *See* App. C at A19.

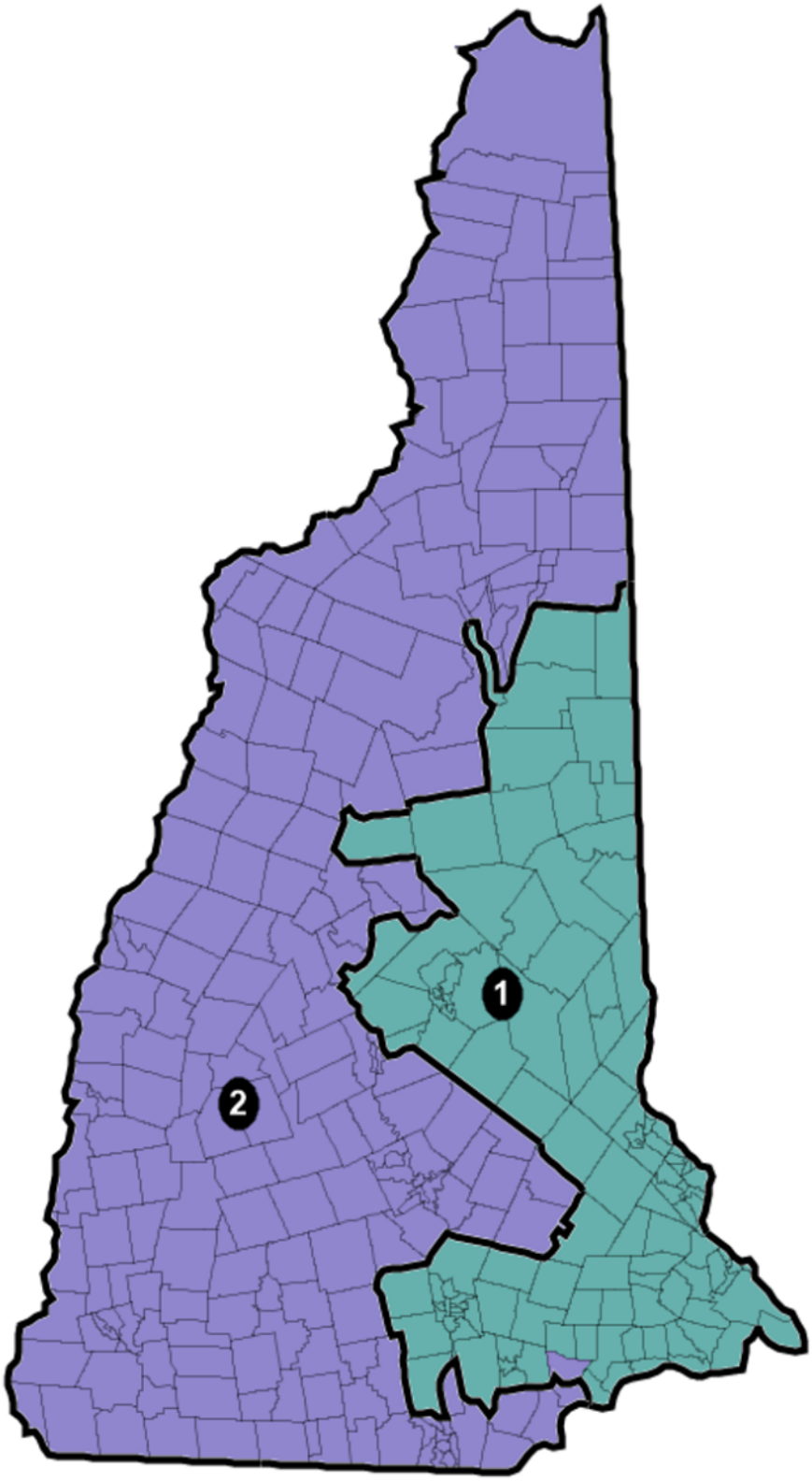
Figure 3. Majority Plan 2



3. Minority Plan

The Minority Plan was submitted on April 25, 2022, to the Court in an earlier round of briefing. *See* App. D. That plan is the simplest to describe. It would move a single town – the town of Hampstead (all 8,998 people) – from District 1 to District 2. District 1 would then have 688,739 people (26 below ideal population equality) and District 2 would have 688,790 people (25 people over ideal population equality), creating an overall deviation of 51 people. *Id.* at A34. The change in the southern part of the state, depicted below, is barely visible to the naked eye. In that sense and from the standpoint of the number of towns moved, it proposes the "least change" as compared to all other submissions. As discussed in the presentation of the Special Master's Plan, the Minority Plan may move slightly more people than necessary, but it has the great advantage of maintaining the district configurations as close as possible. Were the Court to reformulate the least change principle in its order to focus on maintaining the same geography between plans, as opposed to minimizing the number of people moved, the Special Master would endorse the adoption of the Minority Plan, which should be considered as an alternative to the Special Master's Recommended Plan.

Figure 4. Minority Leaders' Plan



B. The May 19th Hearing

Pursuant to the Court's May 12th Order, I presided over an in-person hearing at 1 p.m. on May 19th in the chamber of the New Hampshire Supreme Court. Oral arguments were presented by counsel for the Plaintiffs and counsel for the Senate President. Counsel for the Secretary of State also appeared to answer questions or respond to arguments. The hearing, which was live streamed on the Supreme Court's website and remains available at https://livestream.com/nhjb/events/10045798/videos/231209113, lasted under an hour. A transcript of the hearing is attached as Appendix F.

The Plaintiffs made clear in their oral argument that all submitted plans, except for Majority Plan 1, complied with the Court's Order. *Id.* at A76. Reiterating the arguments in their Reply Brief, App. E at A66-69, the Plaintiffs argued that Majority Plan 1 moved many more people than necessary to achieve population equality. As such, it violated the "least change" directive in the Court's order. As the Reply Brief puts it, Majority Plan 1 "defies the Court's intent to devise a remedial plan by, using the current plan as the 'benchmark,' 'add[ing] or subtract[ing]' 'contiguous populations' as 'necessary to correct the population deviations' while keeping each districts' constituents 'the same' 'to the greatest extent practicable.'" *Id.* at A67 (quoting App. A). Instead of moving the fewest residents possible, Plaintiffs argue, Majority Plan 1 would reallocate 75 towns, comprising 358,976 people. Moreover, in Plaintiffs' view, it "would also dramatically alter the historical nature of the state's congressional districts," *Id.* at A69, by dividing the North Country and placing Nashua and Manchester in the same district. Plaintiffs suggested that the significant reconfiguration of the districts in Majority Plan 1 was motivated by political

reasons, or at least that opening up the door to changes on this scale would lead to an "inevitable risk of political manipulation." *See* App. F at A80.

Counsel for the Senate President advocated for his proposed plans, but also made several separation-of-powers arguments. In his view, "the best plan is one that's not before the Court right now." *Id.* at A81. Rather, it was one that had been favorably recommended out of the legislative committees and would receive a floor vote within a week. "[It] is the best plan that anybody's considering right now, in part, because it's being considered by the branch that's appropriate to consider it in the first instance." *Id.* at A82. The release of a court plan before the Governor has acted on a newly enacted plan coming from the Legislature, Senate Counsel argued, would upset checks and balances by effectively giving the Governor a choice between the Legislature's plan and one proposed by the Court (which would go into effect were the Governor to veto the Legislature's plan). Counsel urged the Court and the Special Master to delay the release of the Court plan in hopes that the Legislature and Governor could agree on a plan. *Id.* at A83.

In the alternative, Counsel for the Senate President proposed a brand-new map (designated here as Majority Plan 3) that had not been previously submitted to the Court, the Special Master, or opposing counsel.[2] In the words of the Counsel to the Senate President, "having seen the submissions and going through the process a little bit, [we] went back to the drawing board and came up with a . . . one-person deviation map with

[2] In rebuttal, Plaintiffs objected to consideration of this plan since it had not been submitted by the Court's deadline. Indeed, to this date, the plan has not been formally submitted to the Special Master or to the Court. The sole description of the plan (and my understanding of it) comes from the above listing, at oral argument, of towns moved from one district to the other.

. . . lower than 13,373 persons moved." *Id.* at A84-85. A plan could achieve population equality, he suggested, by moving the following towns from District 1 to District 2: Campton, Sandwich, Tamworth, Bartlett, Hale's and Hart's Location. To balance out those moves, the following towns would be moved from District 2 to District 1: Center Harbor, Bean's Purchase, Shelburne, Cambridge, Dummer, Errol, Wentworth, Odell, and Martin's Location. Only 13,069 people would be moved under such a proposal, which Senate Counsel emphasized was 304 fewer people moved than under the Plaintiffs' proposed one-person deviation map. If the Court order were interpreted as directing the Special Master to achieve zero deviation through the movement of the fewest people possible, Senate Counsel argued, then "that's the best one [map] I've heard about." *Id.* at A87. The map was only described at oral argument through a listing of towns, but was never formally submitted to the Special Master.

## III. The Special Master's Recommended Plan

I have considered each of the redistricting plans submitted by the parties and *amici*. I agree with the Plaintiffs that each of the proposed plans, except Majority Plan 1, complies with the Court's order. Majority Plan 1 moves too many people to be considered a least-change plan in compliance with the Court's order. The remaining plans each move many fewer people (between 8,968 and 13,373 people) to achieve deviations between one and fifty-one persons. All of the submitted plans are comprised of whole towns, meaning that no town is split between districts, as required by the Court's order. Were I to choose

among the submitted plans, I would need to decide how to trade off and balance population equality with the "least change directive" of the Court's order. Some plans move fewer people but achieve greater deviations, and others achieve lower deviations but move more people than necessary.

Contrary to suggestions made by the parties, however, a perfect population plan can be achieved by moving whole towns containing the exact number of people necessary to achieve a one-person deviation between the two districts. An ideal population plan can be achieved by moving only five towns, which together contain exactly 8,973 people. Those towns are Albany, Campton, Jackson, New Hampton, and Sandwich. By moving those towns from District 1 to District 2, District 1 would have a population of 688,764 people and District 2 would have a population of 688,765 people – a total deviation of one person, which is mathematically the lowest deviation possible. The Special Master's Recommended Plan is depicted below, preceded by a table comparing the Recommended Plan to all others submitted.

Table 1. Comparison of Special Master's Recommended Plan to Party Submissions

| District | Existing | Special Master | Minority Leaders | Plaintiffs | Majority Leaders 1 | Majority Leaders 2 | Majority Leaders 3 |
|---|---|---|---|---|---|---|---|
| **1** | 8972 | -1 | -26 | -1 | -1 | 4 | -1 |
| **2** | -8973 | 0 | 25 | 0 | 0 | -5 | 0 |
| **Total Deviation** | 17945 | 1 | 51 | 1 | 1 | 9 | 1 |
| **Number of Towns Moved** | -- | 5 | 1 | 4 | 75 | 6 | 15 |
| **Number of People Moved** | -- | 8973 | 8998 | 13373 | 358976 | 8968 | 13069 |

Figure 5. Special Master's Recommended Plan

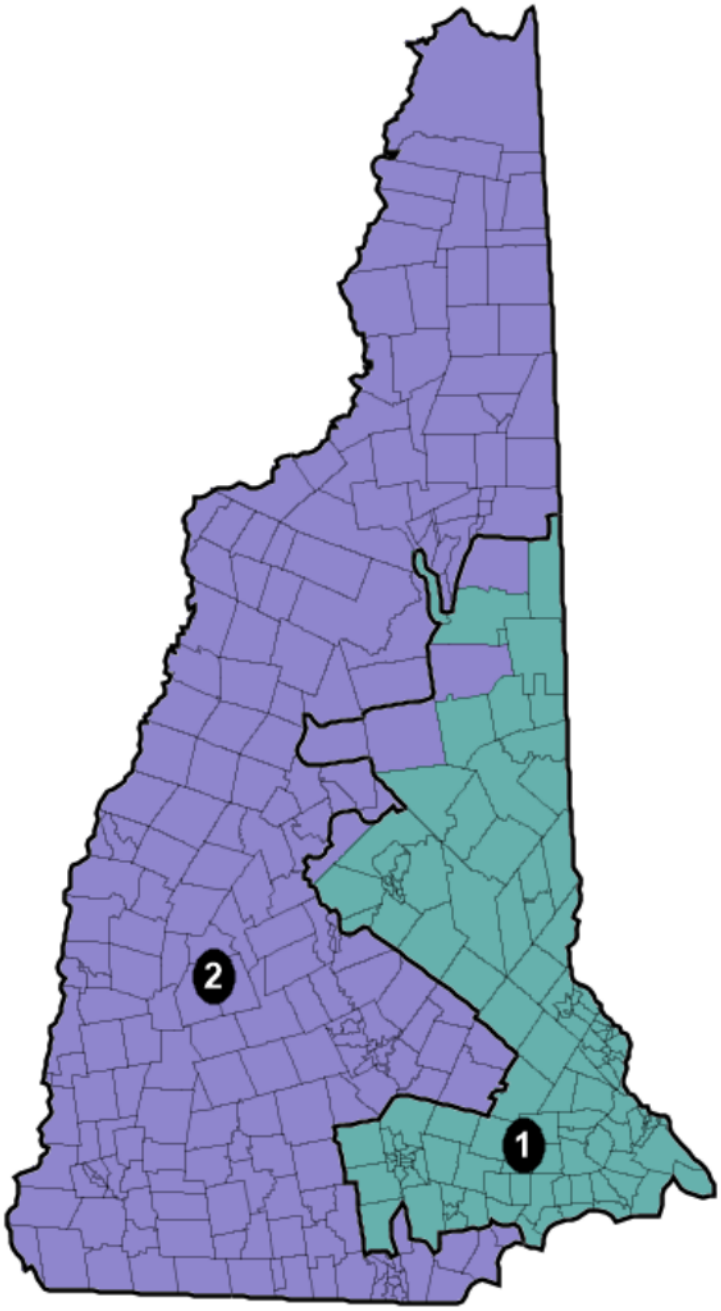
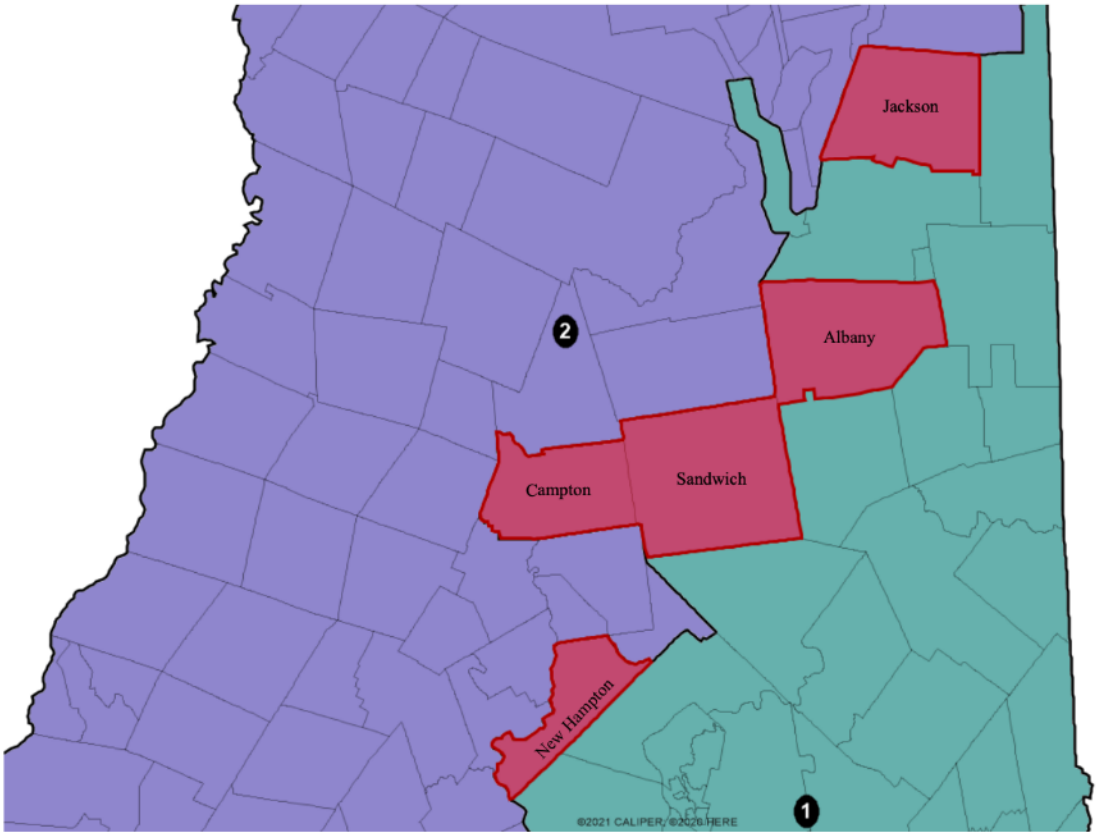


Figure 6. Special Master's Recommended Plan Inset With Moved Towns Highlighted




A. Compliance with One-Person, One-Vote

The 2020 Census revealed a population for New Hampshire of 1,377,529 people. Perfect population equality would require one district to have 688,764 people and one district to have 688,765 people. The existing districts are malapportioned, with a total deviation of 17,945, with District 1 overpopulated by 8,972 people and District 2 underpopulated by 8,973 people. To achieve perfect population equality 8,972.5 people must be moved from District 1 to District 2.

The Special Master's Recommended Plan complies with the constitutional requirement of one-person, one-vote, and the Court's directive to draw districts "as equal

in population as practicable." *See* App. A at A2. The Special Master's Plan achieves the lowest deviation possible: a single person. In this regard, it is "tied" with the Plaintiffs' plan, Majority Plan 1, and Majority Plan 3. It is superior to the Minority Plan, which has a deviation of 51 people, and Majority Plan 2, which has a deviation of nine people.

To be fair, there is no functional difference between a one-person-deviation plan and one that has a deviation of nine or 51 people. Even leaving aside the number of people who moved between districts since April 1, 2020, when the Census was taken, the 2020 Census data themselves are not accurate with respect to deviations that small. Indeed, the Census has suggested that, for New Hampshire, the number of erroneous enumerations – due to duplications or other reasons – might be as high as two percent of the enumerated population and omissions might be as high as 4.5 percent; together, these figures suggest differences of tens of thousands of people from the final enumeration. *See* Courtney Hill, Krista Heim, Jinhee Hong, & Nam Phan, *Census Coverage Estimates for People in the United States by State and Census Operations: 2020 Post-Enumeration Survey Estimation Report* (May 2022) at 17, available at https://www2.census.gov/programs-surveys/decennial/coverage-measurement/pes/census-coverage-estimates-for-people-in-the-united-states-by-state-and-census-operations.pdf.

When it comes to court-imposed plans, however, the strict population equality requirement serves other purposes besides political equality of potential voters. The Supreme Court has made clear that congressional districts must be "as equal as is practicable," *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964), meaning that the "the State make a good-faith effort to achieve precise mathematical equality." *Kirkpatrick v. Preisler*,

394 U.S. 526, 530-531 (1969). For congressional plans, population deviations under one percent have been rejected by the U.S. Supreme Court as violating the one-person, one-vote rule. *See Karcher v. Daggett*, 462 U.S. 725, 730-31 (1983). To the extent courts might allow for some deviations from strict equality among legislatively drawn plans based on a consistently applied state policy, *see Tennant v. Jefferson County,* 567 U.S. 758 (2012), the U.S. Supreme Court has warned that court-drawn plans must be held to an even higher standard of equality. *See Chapman v. Meier*, 420 U.S. 1, 26 (1975) ("A court-ordered plan, however, must be held to higher standards than a State's own plan. With a court plan, any deviation from approximate population equality must be supported by the enunciation of historically significant state policy or unique features."). The equal population requirement is stricter for court-drawn plans because courts are not in the best position to subordinate population equality, which can be easily measured and objectively defined, to other legitimate policy objectives, which the legislature might deem sufficiently weighty to justify population deviations. *See* Nathaniel Persily, *When Judges Carve Democracies*, 73 Geo.Wash. L. Rev. 1131, 1140 (2005) (citing cases).

These considerations guide the development of the Special Master's Plan. The Supreme Court's order limits the permissible considerations for the Special Master's Plan to those that are legally required (such as compliance with federal law or the state requirement as to avoiding town splits) and the principle of "least change." Choosing between the submitted plans, which attempt to strike the balance between "least change" and population equality in different ways, runs the risk of accusations of favoring one party's proposal over another. Were one of the submitted plans clearly superior to all

others on *all* court-prescribed dimensions, accepting it as the Special Master's Plan could be justified on that clearly nonpolitical basis. But there is no clear formula for how to trade off small population variances against small differences between plans as to the number of people moved between districts.

Fortunately, the Special Master's Plan does not need to justify the prioritization of one principle over another because both can be optimally satisfied. The move of five towns from District 1 to District 2 in the Special Master's Plan achieves population equality by moving only the exact number of people necessary to do so. These mathematically governed changes inoculate the plan against charges that anything other than those two principles guided the creation of the districts in the Special Master's plan.

B. The Principle of "Least Change"

The Court's Order imposed a "least change" principle on the Special Master's Plan. As the Court directed, "the special master . . . shall modify the existing congressional districts . . . only to the extent required top comply with the following criteria and 'least change' standards." App A at 2. The requirement of "least change" was further operationalized in the fourth criterion for the Special Master's plan: "To the greatest extent practicable, each district shall contain roughly the same constituents as it does under the current congressional district statute, such that the core of each district is maintained, with contiguous populations added or subtracted as necessary to correct the population deviations, see Below v. Secretary of State, 148 N.H. 1, 13-14, 28 (2002)." App. A at A3.

In other words, population should only be moved if necessary to correct the underlying malapportionment in the plan.

The Special Master's Plan moves the fewest number of people possible to bring the existing districts to population equality. Other submitted plans achieve population equality, but they do so by moving more people than necessary. Majority Plan 1 moves the greatest number of people – 358,976 – of the submitted plans. As described above, the plan is, therefore, inconsistent with the Court's order. In contrast, the Plaintiffs' plan moves 13,373 people, and the Majority Plan 3 (described at oral argument, but never submitted) moves 13,069 people. Both plans have deviations of only one person. The Minority Plan moves fewer people – 8,998 – but, as a result, it has a deviation of 51 people. Majority Plan 2 moves the fewest people of any of the submitted plans – only 8,968 people. It achieves a very low, if not perfect, population deviation of nine people, with District 1 being four people over population equality and District 2 being five people under population equality. (To reiterate the point made above, these small differences are not significant statistically or from the standpoint of political fairness, but they provide a nonpolitical criterion for comparing plans.) That being said, the Special Master's Plan moves only 8,973 people – no more nor less than is required to achieve population equality, in which no district in the plan has more than one person than the other.

C. Other criteria mentioned in Court's order

The Special Master's Plan complies with the other requirements of the Court's Order as well. The districts are made of contiguous territory, and they do not divide towns, city wards, or unincorporated places. No political data or partisan factors were considered

in the creation of the plan; indeed, the mathematics behind population equality and "least change" demonstrate that those were the only principles that guided the plan. Finally, the plan complies with the Voting Rights Act of 1965, 52 U.S.C. § 10101 et seq. No congressional districts, in which racial minorities could constitute a majority of the voting age population, can be created in New Hampshire. Liability under Section 2 of the VRA requires that such districts could be drawn in order for a court to impose them. *See Bartlett v. Strickland*, 556 U.S. 1 (2009). The racial breakdown of the voting age population in existing districts and those in the Special Master's Plan is presented below.

Table 2. Racial Breakdown of New Hampshire's Voting Population Under Existing And Special Master's Proposed Districts

| Existing Districts | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| District | VAP | % NHWVAP | % HVAP | % BVAP | % AVAP | % IVAP | % PVAP | % OVAP |
| 1 | 568352 | 89.10% | 3.49% | 2.04% | 2.94% | 1.63% | 0.11% | 3.77% |
| 2 | 552328 | 88.60% | 3.61% | 1.85% | 3.10% | 1.82% | 0.11% | 4.08% |
| **Special Master Plan** | | | | | | | | |
| District | VAP | % NHWVAP | % HVAP | % BVAP | % AVAP | % IVAP | % PVAP | % OVAP |
| 1 | 560816 | 89.04% | 3.52% | 2.06% | 2.96% | 1.63% | 0.11% | 3.78% |
| 2 | 559864 | 88.67% | 3.58% | 1.83% | 3.07% | 1.82% | 0.11% | 4.06% |

VAP = Voting Age Population
NHWVAP = Non-Hispanic White Voting Age Population
HVAP = Hispanic Voting Age Population
BVAP = Black Voting Age Population
AVAP = Asian Voting Age Population
IVAP = Amerian Indian or Alaska Native Voting Age Population
PVAP = Native Hawaiian or other Pacific Islander Voting Age Population
OVAP = Some Other Race Voting Age Population

## IV. Conclusion

New Hampshire is the last state in the union to enact its congressional districts. With only two districts, relatively little population shift over the past decade, and a limited number of legal constraints as compared to other states, one might be puzzled as to why this process is "going down to the wire," requiring court involvement. Although court

involvement may be an "unwelcome obligation," *Connor v. Finch*, 431 U.S. 407, 415 (1977), it remains an *obligation* nonetheless if one-person, one-vote is to be respected and the state fails to remedy the malapportionment in the existing map.

As this Report and Plan attempt to demonstrate, even a two-district plan, highly constrained by neutral, court-ordered principles, requires the exercise of discretion. The challenge posed in this case is to explain that exercise of discretion with transparency and with appeal to neutral principles, lest observers suspect some other motivation is driving the process. Rarely can the creator of a redistricting plan say that the math determined the outcome. Such is the case here, however. The court-ordered principles fully determined the drawing of the districts. The five towns and 8,973 people moved from one district to the other represent the absolute minimum necessary to comply with the principles contained in the Court's order. The Special Master's plan complies with the Court's order and all other requirements of state and federal law. All submitted proposals were considered, but none better complies with the principles contained in the Court's order. I therefore submit to the Court for its adoption the Special Master's Recommended Plan for congressional districts for the State of New Hampshire.

## Exhibits to Special Master's Plan and Report


1. Special Master's Plan, Statewide Map p. 28

2. Special Master's Plan, Statewide Map with Proposed Changes from Existing Districts. p. 30

3. Racial Breakdown of Existing Districts and Proposed Districts in Special Master's Plan. p. 33

4. List of Towns by Congressional District. p. 35

5. Comparison Images of Special Master's Plan to Party Submissions. p. 40

6. Comparison Table of Special Master's Plan to Party Submissions. p. 42

7. Maps of Existing Congressional Districts. p. 44


## Appendix


A. Order Appointing Special Master p. A1

B. Plaintiff Submission p. A5

C. President of the New Hampshire Senate and Speaker of the New Hampshire House Submission p. A15

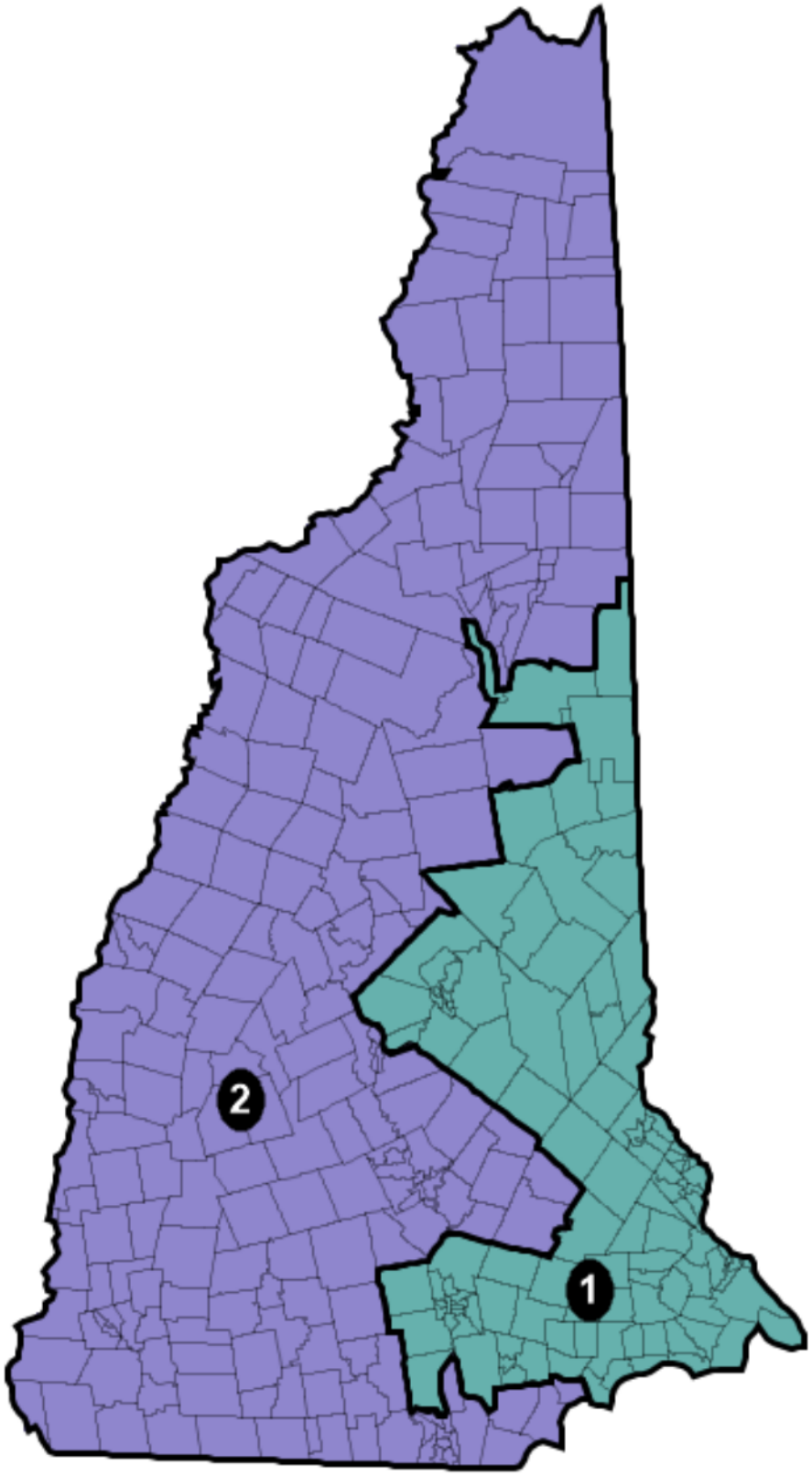
D. Minority Leaders of the Senate and House Submission p. A25

E. Plaintiffs' Reply Brief p. A63

F. Transcript of Special Master Hearing p. A71

**Exhibit 1.**

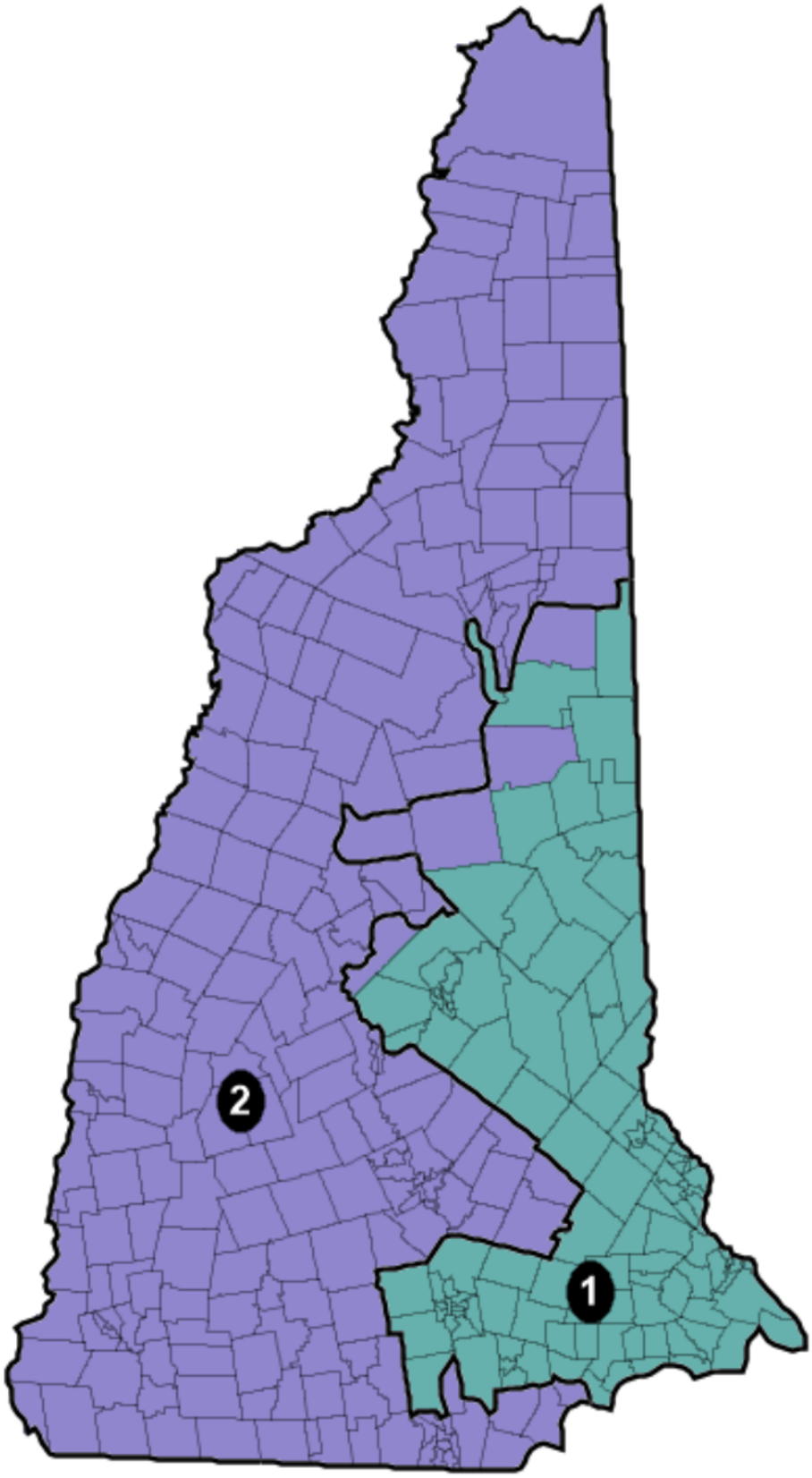
**Special Master's Plan, Statewide Map.**




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**Exhibit 2.**

**Special Master's Plan, Statewide Map with Proposed Changes from Existing Districts.**




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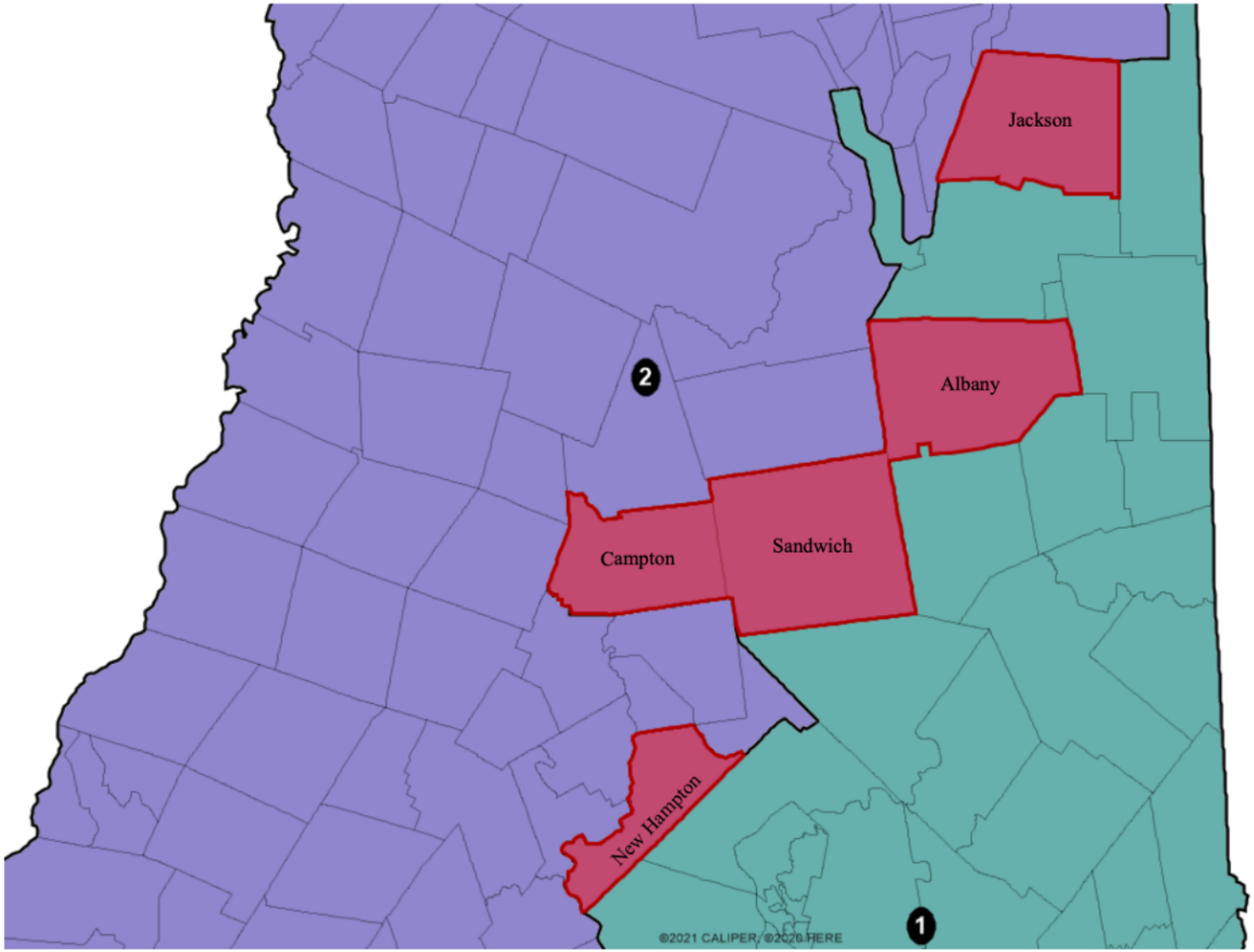

Jackson
Albany
Sandwich
Campton
New Hampton
2
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**Exhibit 3.**

**Racial Breakdown of Existing Districts and Proposed Districts in Special Master's Plan.**

Existing Districts

| District | VAP | % NHWVAP | % HVAP | % BVAP | % AVAP | % IVAP | % PVAP | % OVAP |
|---|---|---|---|---|---|---|---|---|
| 1 | 568352 | 89.10% | 3.49% | 2.04% | 2.94% | 1.63% | 0.11% | 3.77% |
| 2 | 552328 | 88.60% | 3.61% | 1.85% | 3.10% | 1.82% | 0.11% | 4.08% |

Special Master Plan

| District | VAP | % NHWVAP | % HVAP | % BVAP | % AVAP | % IVAP | % PVAP | % OVAP |
|---|---|---|---|---|---|---|---|---|
| 1 | 560816 | 89.04% | 3.52% | 2.06% | 2.96% | 1.63% | 0.11% | 3.78% |
| 2 | 559864 | 88.67% | 3.58% | 1.83% | 3.07% | 1.82% | 0.11% | 4.06% |

VAP = Voting Age Population
NHWVAP = Non-Hispanic White Voting Age Population
HVAP = Hispanic Voting Age Population
BVAP = Black Voting Age Population
AVAP = Asian Voting Age Population
IVAP = Amerian Indian or Alaska Native Voting Age Population
PVAP = Native Hawaiian or other Pacific Islander Voting Age Population
OVAP = Some Other Race Voting Age Population

**Exhibit 4.**

**List of Towns By Congressional District.**

User:
Plan Name: NH Plan 1
Plan Type: Congress

# Town List By District

Thursday, May 26, 2022 8:27 PM

**Whole County Subdivision : 245**
**County Subdivision Splits: 0**
**Zero Population County Subdivision Splits: 15**

| District | County Subdivision | Population | % Pop |
|---|---|---|---|
| 1 | Meredith NH | 6,662 | 100.00% |
| 1 | Laconia NH | 16,871 | 100.00% |
| 1 | Gilford NH | 7,699 | 100.00% |
| 1 | Moultonborough NH | 4,918 | 100.00% |
| 1 | Hart's Location NH | 68 | 100.00% |
| 1 | Merrimack NH | 26,632 | 100.00% |
| 1 | Bedford NH | 23,322 | 100.00% |
| 1 | Manchester NH | 115,644 | 100.00% |
| 1 | Londonderry NH | 25,826 | 100.00% |
| 1 | Auburn NH | 5,946 | 100.00% |
| 1 | Ossipee NH | 4,372 | 100.00% |
| 1 | Effingham NH | 1,691 | 100.00% |
| 1 | Tamworth | 2,812 | 100.00% |
| 1 | Madison NH | 2,565 | 100.00% |
| 1 | Freedom NH | 1,689 | 100.00% |
| 1 | Eaton NH | 405 | 100.00% |
| 1 | Hale's NH | 132 | 100.00% |
| 1 | Conway NH | 9,822 | 100.00% |
| 1 | Wakefield NH | 5,201 | 100.00% |
| 1 | Rye NH | 5,543 | 100.00% |
| 1 | New Castle NH | 1,000 | 100.00% |
| 1 | Bartlett NH | 3,200 | 100.00% |
| 1 | Chatham NH | 341 | 100.00% |
| 1 | Tilton NH | 3,962 | 100.00% |
| 1 | Hooksett NH | 14,871 | 100.00% |
| 1 | Candia NH | 4,013 | 100.00% |
| 1 | Belmont NH | 7,314 | 100.00% |
| 1 | Gilmanton NH | 3,945 | 100.00% |
| 1 | Sanbornton NH | 3,026 | 100.00% |
| 1 | Derry NH | 34,317 | 100.00% |
| 1 | Chester NH | 5,232 | 100.00% |
| 1 | Sandown NH | 6,548 | 100.00% |
| 1 | Plaistow NH | 7,830 | 100.00% |
| 1 | Hampstead NH | 8,998 | 100.00% |
| 1 | Danville NH | 4,408 | 100.00% |
| 1 | Fremont NH | 4,739 | 100.00% |
| 1 | Newton NH | 4,820 | 100.00% |
| 1 | Kingston NH | 6,202 | 100.00% |
| 1 | Brentwood NH | 4,490 | 100.00% |
| 1 | East Kingston NH | 2,441 | 100.00% |
| 1 | South Hampton NH | 894 | 100.00% |
| 1 | Kensington NH | 2,095 | 100.00% |
| 1 | Exeter NH | 16,049 | 100.00% |
| 1 | Seabrook NH | 8,401 | 100.00% |
| 1 | Hampton Falls NH | 2,403 | 100.00% |
| 1 | Hampton NH | 16,214 | 100.00% |
| 1 | North Hampton NH | 4,538 | 100.00% |
| 1 | Raymond NH | 10,684 | 100.00% |
| 1 | Epping NH | 7,125 | 100.00% |
| 1 | Nottingham NH | 5,229 | 100.00% |
| 1 | Barrington NH | 9,326 | 100.00% |
| 1 | Barnstead NH | 4,915 | 100.00% |
| 1 | Alton NH | 5,894 | 100.00% |
| 1 | Strafford NH | 4,230 | 100.00% |
| 1 | Farmington NH | 6,722 | 100.00% |
| 1 | New Durham NH | 2,693 | 100.00% |
| 1 | Middleton NH | 1,823 | 100.00% |
| 1 | Lee NH | 4,520 | 100.00% |
| 1 | Newfields NH | 1,769 | 100.00% |
| 1 | Newmarket NH | 9,430 | 100.00% |
| 1 | Durham NH | 15,490 | 100.00% |
| 1 | Madbury NH | 1,918 | 100.00% |
| 1 | Stratham NH | 7,669 | 100.00% |

# Town List By District



| District | County Subdivision | Population | % Pop |
|---|---|---|---|
| 1 | Greenland NH | 4,067 | 100.00% |
| 1 | Newington NH | 811 | 100.00% |
| 1 | Portsmouth NH | 21,956 | 100.00% |
| 1 | Dover NH | 32,741 | 100.00% |
| 1 | Somersworth NH | 11,855 | 100.00% |
| 1 | Rollinsford NH | 2,597 | 100.00% |
| 1 | Rochester NH | 32,492 | 100.00% |
| 1 | Milton NH | 4,482 | 100.00% |
| 1 | Tuftonboro NH | 2,467 | 100.00% |
| 1 | Wolfeboro NH | 6,416 | 100.00% |
| 1 | Brookfield NH | 755 | 100.00% |
| 1 | Goffstown NH | 18,577 | 100.00% |
| 2 | Thornton NH | 2,708 | 100.00% |
| 2 | Center Harbor NH | 1,040 | 100.00% |
| 2 | Sandwich NH | 1,466 | 100.00% |
| 2 | Waterville Valley NH | 508 | 100.00% |
| 2 | Haverhill NH | 4,585 | 100.00% |
| 2 | Bath NH | 1,077 | 100.00% |
| 2 | Monroe NH | 864 | 100.00% |
| 2 | Benton NH | 374 | 100.00% |
| 2 | Landaff NH | 446 | 100.00% |
| 2 | Lyman NH | 585 | 100.00% |
| 2 | Lisbon NH | 1,621 | 100.00% |
| 2 | Easton NH | 292 | 100.00% |
| 2 | Sugar Hill NH | 647 | 100.00% |
| 2 | Lincoln NH | 1,631 | 100.00% |
| 2 | Franconia NH | 1,083 | 100.00% |
| 2 | Bethlehem NH | 2,484 | 100.00% |
| 2 | Littleton NH | 6,005 | 100.00% |
| 2 | Dalton NH | 933 | 100.00% |
| 2 | Whitefield NH | 2,490 | 100.00% |
| 2 | Livermore NH | 2 | 100.00% |
| 2 | Carroll NH | 820 | 100.00% |
| 2 | Hadleys NH | 0 | 0.00% |
| 2 | Beans NH | 0 | 0.00% |
| 2 | Crawfords NH | 0 | 0.00% |
| 2 | Cutts NH | 0 | 0.00% |
| 2 | Chandlers NH | 0 | 0.00% |
| 2 | Jefferson NH | 1,043 | 100.00% |
| 2 | New Boston NH | 6,108 | 100.00% |
| 2 | Amherst NH | 11,753 | 100.00% |
| 2 | Nashua NH | 91,322 | 100.00% |
| 2 | Litchfield NH | 8,478 | 100.00% |
| 2 | Hudson NH | 25,394 | 100.00% |
| 2 | Pelham NH | 14,222 | 100.00% |
| 2 | Surry NH | 820 | 100.00% |
| 2 | Alstead NH | 1,864 | 100.00% |
| 2 | Gilsum NH | 752 | 100.00% |
| 2 | Acworth NH | 853 | 100.00% |
| 2 | Sullivan NH | 658 | 100.00% |
| 2 | Nelson NH | 629 | 100.00% |
| 2 | Stoddard NH | 1,374 | 100.00% |
| 2 | Marlow NH | 749 | 100.00% |
| 2 | Lempster NH | 1,118 | 100.00% |
| 2 | Claremont NH | 12,949 | 100.00% |
| 2 | Unity NH | 1,518 | 100.00% |
| 2 | Cornish NH | 1,616 | 100.00% |
| 2 | Newport NH | 6,299 | 100.00% |
| 2 | Goshen NH | 796 | 100.00% |
| 2 | Croydon NH | 801 | 100.00% |
| 2 | Sunapee NH | 3,342 | 100.00% |
| 2 | Antrim NH | 2,651 | 100.00% |
| 2 | Windsor NH | 262 | 100.00% |
| 2 | Washington NH | 1,192 | 100.00% |
| 2 | Bradford NH | 1,662 | 100.00% |
| 2 | Bennington NH | 1,501 | 100.00% |
| 2 | Albany NH | 759 | 100.00% |
| 2 | Sargents NH | 0 | 0.00% |
| 2 | Thompson and Meserves NH | 1 | 100.00% |
| 2 | Pinkhams NH | 0 | 0.00% |
| 2 | Jackson NH | 1,028 | 100.00% |
| 2 | Greens NH | 0 | 0.00% |
| 2 | Beans NH | 0 | 0.00% |
| 2 | Martins NH | 2 | 100.00% |
| 2 | Gorham NH | 2,698 | 100.00% |
| 2 | Berlin NH | 9,425 | 100.00% |
| 2 | Shelburne NH | 353 | 100.00% |
| 2 | Success NH | 4 | 100.00% |
| 2 | Dummer NH | 306 | 100.00% |
| 2 | Milan NH | 1,358 | 100.00% |
| 2 | Millsfield NH | 25 | 100.00% |
| 2 | Cambridge NH | 16 | 100.00% |
| 2 | Errol NH | 298 | 100.00% |

# Town List By District



| District | County Subdivision | Population | % Pop |
|---|---|---|---|
| 2 | Dixville NH | 4 | 100.00% |
| 2 | Dixs NH | 0 | 0.00% |
| 2 | Webster NH | 1,913 | 100.00% |
| 2 | Andover NH | 2,406 | 100.00% |
| 2 | Boscawen NH | 3,998 | 100.00% |
| 2 | Franklin NH | 8,741 | 100.00% |
| 2 | Northfield NH | 4,872 | 100.00% |
| 2 | Bow NH | 8,229 | 100.00% |
| 2 | Concord NH | 43,976 | 100.00% |
| 2 | Pembroke NH | 7,207 | 100.00% |
| 2 | Allenstown NH | 4,707 | 100.00% |
| 2 | Epsom NH | 4,834 | 100.00% |
| 2 | Canterbury NH | 2,389 | 100.00% |
| 2 | Loudon NH | 5,576 | 100.00% |
| 2 | Chichester NH | 2,665 | 100.00% |
| 2 | Pittsfield NH | 4,075 | 100.00% |
| 2 | Hill NH | 1,017 | 100.00% |
| 2 | Bristol NH | 3,244 | 100.00% |
| 2 | Hebron NH | 632 | 100.00% |
| 2 | Plymouth NH | 6,682 | 100.00% |
| 2 | New Hampton NH | 2,377 | 100.00% |
| 2 | Bridgewater NH | 1,160 | 100.00% |
| 2 | Ashland NH | 1,938 | 100.00% |
| 2 | Holderness NH | 2,004 | 100.00% |
| 2 | Rumney NH | 1,498 | 100.00% |
| 2 | Ellsworth NH | 93 | 100.00% |
| 2 | Woodstock NH | 1,434 | 100.00% |
| 2 | Campton NH | 3,343 | 100.00% |
| 2 | Wentworth NH | 28 | 100.00% |
| 2 | Second College NH | 1 | 100.00% |
| 2 | Atkinson and Gilmanton Academy NH | 0 | 0.00% |
| 2 | Pittsburg NH | 800 | 100.00% |
| 2 | Lancaster NH | 3,218 | 100.00% |
| 2 | Low and Burbanks NH | 0 | 0.00% |
| 2 | Randolph NH | 328 | 100.00% |
| 2 | Kilkenny NH | 0 | 0.00% |
| 2 | Northumberland NH | 2,126 | 100.00% |
| 2 | Stratford NH | 662 | 100.00% |
| 2 | Columbia NH | 659 | 100.00% |
| 2 | Stark NH | 478 | 100.00% |
| 2 | Odell NH | 1 | 100.00% |
| 2 | Ervings NH | 0 | 0.00% |
| 2 | Colebrook NH | 2,084 | 100.00% |
| 2 | Stewartstown NH | 813 | 100.00% |
| 2 | Clarksville NH | 294 | 100.00% |
| 2 | Windham NH | 15,817 | 100.00% |
| 2 | Salem NH | 30,089 | 100.00% |
| 2 | Atkinson NH | 7,087 | 100.00% |
| 2 | Deerfield NH | 4,855 | 100.00% |
| 2 | Northwood NH | 4,641 | 100.00% |
| 2 | Hinsdale NH | 3,948 | 100.00% |
| 2 | Winchester NH | 4,150 | 100.00% |
| 2 | Chesterfield NH | 3,552 | 100.00% |
| 2 | Westmoreland NH | 1,706 | 100.00% |
| 2 | Walpole NH | 3,633 | 100.00% |
| 2 | Langdon NH | 651 | 100.00% |
| 2 | Charlestown NH | 4,806 | 100.00% |
| 2 | Richmond NH | 1,197 | 100.00% |
| 2 | Swanzey NH | 7,270 | 100.00% |
| 2 | Keene NH | 23,047 | 100.00% |
| 2 | Troy NH | 2,130 | 100.00% |
| 2 | Fitzwilliam NH | 2,351 | 100.00% |
| 2 | Marlborough NH | 2,096 | 100.00% |
| 2 | Roxbury NH | 220 | 100.00% |
| 2 | Harrisville NH | 984 | 100.00% |
| 2 | Jaffrey NH | 5,320 | 100.00% |
| 2 | Rindge NH | 6,476 | 100.00% |
| 2 | Dublin NH | 1,532 | 100.00% |
| 2 | Hancock NH | 1,731 | 100.00% |
| 2 | Sharon NH | 359 | 100.00% |
| 2 | New Ipswich NH | 5,204 | 100.00% |
| 2 | Temple NH | 1,382 | 100.00% |
| 2 | Peterborough NH | 6,418 | 100.00% |
| 2 | Greenfield NH | 1,716 | 100.00% |
| 2 | Greenville NH | 1,974 | 100.00% |
| 2 | Wilton NH | 3,896 | 100.00% |
| 2 | Mason NH | 1,448 | 100.00% |

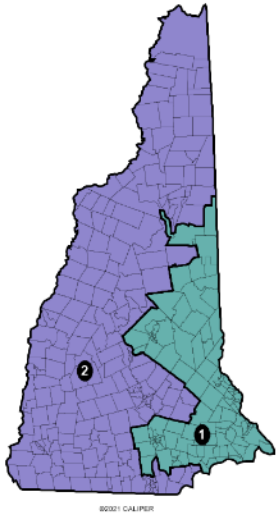
# Town List By District



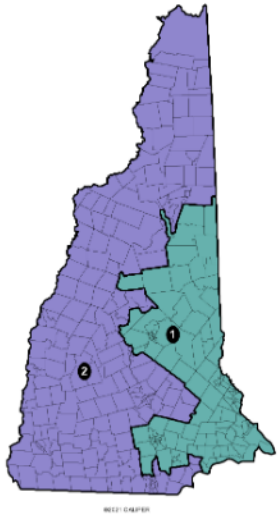
| District | County Subdivision | Population | % Pop | District | County Subdivision | Population | % Pop |
|---|---|---|---|---|---|---|---|
| 2 | Lyndeborough NH | 1,702 | 100.00% | | | | |
| 2 | Brookline NH | 5,639 | 100.00% | | | | |
| 2 | Milford NH | 16,131 | 100.00% | | | | |
| 2 | Hollis NH | 8,342 | 100.00% | | | | |
| 2 | Mont Vernon NH | 2,584 | 100.00% | | | | |
| 2 | Deering NH | 1,904 | 100.00% | | | | |
| 2 | Hillsborough NH | 5,939 | 100.00% | | | | |
| 2 | Newbury NH | 2,172 | 100.00% | | | | |
| 2 | Springfield NH | 1,259 | 100.00% | | | | |
| 2 | New London NH | 4,400 | 100.00% | | | | |
| 2 | Sutton NH | 1,978 | 100.00% | | | | |
| 2 | Warner NH | 2,937 | 100.00% | | | | |
| 2 | Wilmot NH | 1,407 | 100.00% | | | | |
| 2 | Plainfield NH | 2,459 | 100.00% | | | | |
| 2 | Lebanon NH | 14,282 | 100.00% | | | | |
| 2 | Grantham NH | 3,404 | 100.00% | | | | |
| 2 | Enfield NH | 4,465 | 100.00% | | | | |
| 2 | Hanover NH | 11,870 | 100.00% | | | | |
| 2 | Lyme NH | 1,745 | 100.00% | | | | |
| 2 | Grafton NH | 1,385 | 100.00% | | | | |
| 2 | Canaan NH | 3,794 | 100.00% | | | | |
| 2 | Dorchester NH | 339 | 100.00% | | | | |
| 2 | Danbury NH | 1,250 | 100.00% | | | | |
| 2 | Alexandria NH | 1,776 | 100.00% | | | | |
| 2 | Orange NH | 277 | 100.00% | | | | |
| 2 | Groton NH | 569 | 100.00% | | | | |
| 2 | Orford NH | 1,237 | 100.00% | | | | |
| 2 | Piermont NH | 769 | 100.00% | | | | |
| 2 | Wentworth NH | 845 | 100.00% | | | | |
| 2 | Warren NH | 825 | 100.00% | | | | |
| 2 | Francestown NH | 1,610 | 100.00% | | | | |
| 2 | Weare NH | 9,092 | 100.00% | | | | |
| 2 | Henniker NH | 6,185 | 100.00% | | | | |
| 2 | Hopkinton NH | 5,914 | 100.00% | | | | |
| 2 | Dunbarton NH | 3,005 | 100.00% | | | | |
| 2 | Salisbury NH | 1,422 | 100.00% | | | | |

**Exhibit 5.**

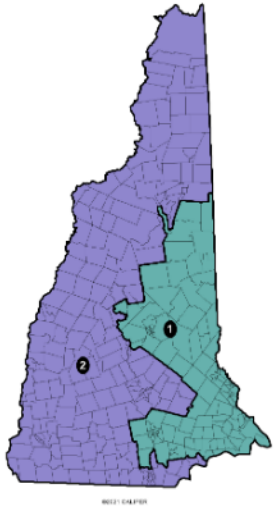
**Comparison Images of Special Master's Plan to Party Submissions**



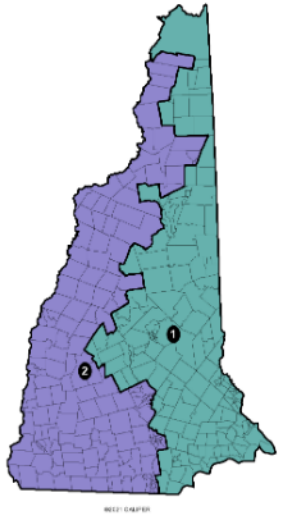

Special Master Plan



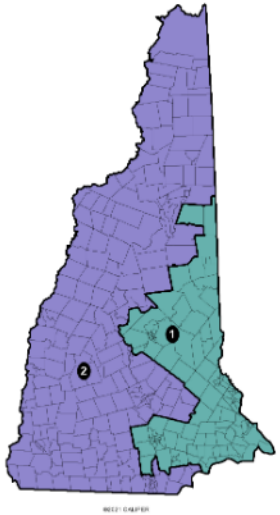

Minority Leaders Plan



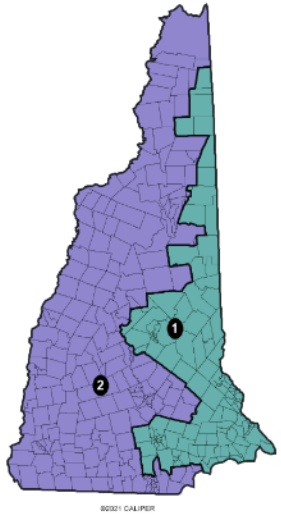

Plaintiffs Plan




Majority Leaders Plan 1




Majority Leaders Plan 2




Majority Leaders Plan 3

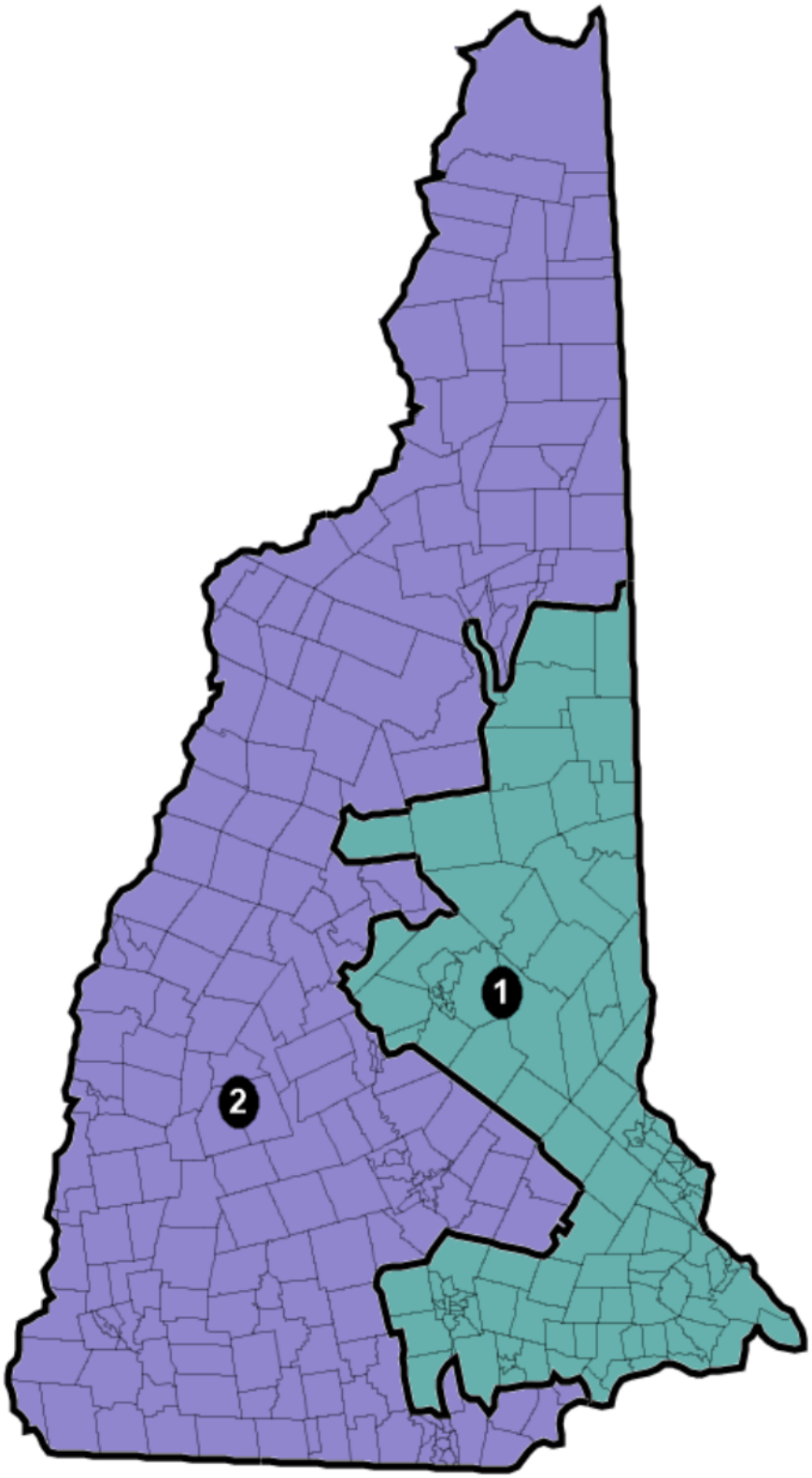
**Exhibit 6.**

**Comparison Table of Special Master's Plan to Party Submissions**

| District | Existing | Special Master | Minority Leaders | Plaintiffs | Majority Leaders 1 | Majority Leaders 2 | Majority Leaders 3 |
|---|---|---|---|---|---|---|---|
| **1** | 8972 | -1 | -26 | -1 | -1 | 4 | -1 |
| **2** | -8973 | 0 | 25 | 0 | 0 | -5 | 0 |
| **Total Deviation** | 17945 | 1 | 51 | 1 | 1 | 9 | 1 |
| **Number of Towns Moved** | -- | 5 | 1 | 4 | 75 | 6 | 15 |
| **Number of People Moved** | -- | 8973 | 8998 | 13373 | 358976 | 8968 | 13069 |

**Exhibit 7.**

**Maps of Existing Congressional Districts**




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**Appendix A**

**Order Appointing Special Master**

**THE STATE OF NEW HAMPSHIRE**

**SUPREME COURT**

**In Case No. 2022-0184, Theresa Norelli & a. v. Secretary of State & a., the court on May 12, 2022, issued the following order:**

In furtherance of our opinion issued today, the court hereby appoints Professor Nathaniel Persily to serve as special master in this case. See RSA 490:8 (2010). A special master is a judicial officer with the attendant obligation of impartiality. See Tuftonboro v. Willard, 89 N.H. 253, 260-61 (1938) (stating that the impartiality obligation of Part I, Article 35 of the New Hampshire Constitution applies to court-appointed masters, referees, and auditors); see also N.H. Sup. Ct. R. 38 (definition of "judge" in the Code of Judicial Conduct includes "a referee or other master"). Accordingly, ex parte communications with the special master are prohibited. See N.H. Sup. Ct. R. 38 (Rule 2.9 of the Code); N.H. R. Prof. Cond. 3.5. As a judicial officer, neither the special master nor staff members acting at his direction may be subjected to cross-examination, and all confidential computer and other confidential files prepared by or for the special master in connection with this case are entitled to the same level of protection from production or disclosure as are the confidential materials of the court itself.

The special master shall prepare and issue to the court, no earlier than May 27, 2022, a report and a recommended congressional redistricting plan for New Hampshire pursuant to the criteria set forth in our opinion and this order. The special master's appointment, although effective immediately, does not preclude the legislature from enacting a congressional redistricting plan on or before May 26, 2022 — the date identified to us as the last date for legislative action in this session on a congressional redistricting plan, unless the legislature were to suspend its rules or to meet in special session.

In developing a recommended congressional redistricting plan, the special master shall use 2020 federal census data, P.L. 94-171, and shall modify the existing congressional districts, as established by RSA 662:1 (2016), only to the extent required to comply with the following criteria and "least change" standards:

1. Districts shall be as equal in population as practicable, in accordance with Article I, Section 2 of the United States Constitution;

2. The redistricting plan shall comply with the Voting Rights Act of 1965, as amended, 52 U.S.C. § 10101 et seq., and any other applicable federal law;

3. Districts shall be made of contiguous territory;

4. To the greatest extent practicable, each district shall contain roughly the same constituents as it does under the current congressional district statute, such that the core of each district is maintained, with contiguous populations added or subtracted as necessary to correct the population deviations, see Below v. Secretary of State, 148 N.H. 1, 13-14, 28 (2002);

5. The plan shall not divide towns, city wards, or unincorporated places, unless they have previously requested by referendum to be divided, or unless the division is necessary to achieve compliance with the population equality required by Article I, Section 2 of the United States Constitution; and

6. The special master shall not consider political data or partisan factors, such as party registration statistics, prior election results, or future election prospects.

The New Hampshire Senate Minority Leader and the New Hampshire House of Representatives Minority Leader (the legislative amici curiae) previously submitted, with their memorandum of law on the preliminary questions, a proposed congressional redistricting plan that they contend is a "least change" plan. By 5:00 p.m. on May 16, 2022, interested parties, intervenors, and any other person participating or seeking to participate as an amicus curiae may submit, through the court's electronic filing (e-filing) system, their proposed redistricting plan, accompanied by such supporting data, documentation, or memoranda that they deem helpful to the special master's evaluation of their proposed plan's compliance with our opinion and this order.

By 1:00 p.m. on May 18, 2022, interested parties, intervenors, and any person participating or seeking to participate as an amicus curiae may submit, through the court's e-filing system, a response to any proposed redistricting plan, including the proposed plan previously submitted by the legislative amici curiae.

An in-person hearing before the special master will be held at the court on May 19, 2022, at 1:00 p.m., to provide an opportunity for plan proponents to present arguments in favor of their plans and for opponents of particular plans to respond. Following the hearing, the special master shall select a proposed redistricting plan — or shall formulate one on his own — that he recommends for adoption by the court. The special master's report and recommended

congressional redistricting plan shall be issued to the court no earlier than May 27, 2022, and then promptly distributed by the clerk's office to persons who have appeared in this case.

If necessary, oral argument on the special master's report and recommendation will be held before the justices of the supreme court on May 31, 2022, at 9:00 a.m.

As stated in our orders of April 11 and May 5, 2022, the court will terminate this proceeding if a congressional redistricting plan is validly enacted by the legislature at any time prior to the close of this case.

MacDonald, C.J., and Hicks, Bassett, Hantz Marconi, and Donovan, JJ., concurred.

**Timothy A. Gudas,**
**Clerk**

Distribution:
Steven J. Dutton, Esq.
Paul J. Twomey, Esq.
Jonathan Hawley, Esq.
John M. Devaney, Esq.
Abha Khanna, Esq.
Aaron Mukerjee, Esq.
Anthony J. Galdieri, Esq.
Myles B. Matteson, Esq.
Anne M. Edwards, Esq.
Matthew G. Conley, Esq.
Samuel R.V. Garland, Esq.
Attorney General
Sean R. List, Esq.
Richard J. Lehmann, Esq.
Gilles R. Bissonnette, Esq.
Henry R. Klementowicz, Esq.
James J. Armillay, Jr., Esq.
Suzanne Amy Spencer, Esq.
Olivia Bensinger, Esq.
File

**Appendix B**

**Plaintiff Submission**

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Case No. 2022-0184

Theresa Norelli *& a.*

*Plaintiffs*,

v.

Secretary of State *& a.*

*Defendants*.

# PLAINTIFFS' MEMORANDUM IN SUPPORT OF PROPOSED CONGRESSIONAL DISTRICTING PLAN


Steven J. Dutton, NH Bar No. 17101
McLANE MIDDLETON, P.A.
900 Elm Street
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## INTRODUCTION

In this action, Plaintiffs challenge New Hampshire's congressional districts, which were enacted in 2012 and were drafted based on data from the 2010 Census. In light of the results of the 2022 Census, those districts are unconstitutionally malapportioned in violation of the New Hampshire and United States Constitutions. Soon after the case was filed, this Court assumed supervisory jurisdiction and ordered briefing and argument on a series of specific questions, including questions relating to the criteria the Court should use if it is required to adopt a congressional districting map.

On May 12, 2022, the Court issued an opinion concluding: (1) the statute currently delineating New Hampshire's congressional districts, RSA 662:1 (2016), violates Article I, Section 2 of the United States Constitution, and (2) "upon a demonstrated legislative impasse, this court must establish a new district plan" using a "'least change' approach." *Norelli v. Sec'y of State*, No. 2022-0184 (N.H. May 4, 2022), slip. op. at 2. As to the first holding, the Court explained that the State had not demonstrated that the 2.6% overall deviation among the state's current congressional districts is "necessary to achieve some legitimate state objective" and that the current districts therefore violate the U.S. Constitution. *Id.* at 11 (quoting *Karcher v. Daggett*, 462 U.S. 725, 740 (1983)).

As to the second holding, the Court rejected the State's argument that "judicial non-intervention in this case is more important than protecting the voters' fundamental rights under the United States Constitution." *Id.* at 12. It further explained that it would use a "'least change' approach," which uses the "one-person, one-vote" principle as its primary guide and the "existing congressional districts" as its "benchmark." *Id.* at 13, 14. In other

words, the Court will adopt a plan that "reflect[s] the least change necessary to remedy the constitutional deficiencies in the existing congressional districts." *Id.* at 13. To that end, as "contiguous populations are added or subtracted as necessary to correct the population deviations," the remedial plan should, "to the greatest extent practicable," "contain roughly the same constituents as the last validly enacted plan" and maintain "the core of the districts." *Id.* at 14. The Court further recognized that New Hampshire's historical practice of not "dividing towns, city wards, or unincorporated places unless they have previously requested to be divided by referendum" warrants requiring "any plan we adopt [to] reflect such historic redistricting policies to the greatest extent practicable so long as they are consistent with the 'least change' approach to achieving congressional districts with populations as close to perfect equality as possible." *Id.* Finally, the Court explained that the least-change approach is preferable to any other approach because it best ensures that political considerations do not make their way into its remedial plan. *Id.* at 14–15.

Simultaneously with its opinion, the Court issued an order ("May 12 Order") appointing Professor Nathaniel Persily as a special master and instructed Dr. Persily to propose a recommended remedial plan to the Court. May 12 Order at 1. In that order, the Court instructed Dr. Persily that his recommended plan "shall modify the existing congressional districts . . . only to the extent required to comply with the following criteria and 'least change' standards:

1. Districts shall be as equal in population as practicable, in accordance with Article I, Section 2 of the United States Constitution;

2. The redistricting plan shall comply with the Voting Rights Act of 1965, as amended, 52 U.S.C. § 10101 *et seq.*, and any other applicable federal law;

3. Districts shall be made of contiguous territory;

4. To the greatest extent practicable, each district shall contain roughly the same constituents as it does under the current congressional district statute, such that the core of each district is maintained, with contiguous populations added or subtracted as necessary to correct the population deviations, *see Below v. Secretary of State*, 148 N.H. 1, 13–14, 28 (2002);

5. The plan shall not divide towns, city wards, or unincorporated places, unless they have previously requested by referendum to be divided, or unless the division is necessary to achieve compliance with the population equality required by Article I, Section 2 of the United States Constitution; and

6. The special master shall not consider political data or partisan factors, such as party registration statistics, prior election results, or future election prospects.

*Id.* at 1–2.

The Court noted that the New Hampshire Senate Minority Leader and the New Hampshire House of Representatives Minority Leader (the "Minority Leaders") had previously submitted a proposed congressional plan they characterized as "least-change." *Id.* at 2. The Court invited any other interested party, intervenor, or person seeking to participate as *amicus curiae* to submit their own proposed plan, accompanied by appropriate data, documentation, or memoranda.

Pursuant to that invitation, Plaintiffs have submitted a proposed remedial plan that fully satisfies the Court's criteria for a remedial plan. Attached to this memorandum are maps of Plaintiffs' proposed plan (Exhibit A), and a list of the towns, cities, and unincorporated places included in each of the plan's two districts (Exhibit B). As directed by the Court's supplemental order issued May 13, Plaintiffs have separately emailed the Court a census block equivalency file that correspond to their proposed plan.

## ARGUMENT

Plaintiffs' plan satisfies each of the standards established by the May 12 Order. The plan achieves nearly perfect population equality without splitting any town or ward. It achieves this by moving just four towns from one district to the other: Plaistow and Campton from the First District into the Second, and Bridgewater and Center Harbor from the Second District into the First.

- **Standard 1: Population Equality.** Plaintiffs' plan achieves nearly perfect population equality. According to the 2020 Census, New Hampshire's population is 1,377,529, meaning the ideal population of each congressional district is 688,764.5. Under Plaintiffs' plan, District 1's population is 688,764, and District 2's population is 688,765. Because it is impossible to make the population among the districts more equal, the plan automatically satisfies the requirements of Article I, Section 2 of the U.S. Constitution. *Karcher*, 462 U.S. at 732 ("States must draw congressional districts with populations as close to perfect equality as possible.").

- **Standard 2: Compliance with the Voting Rights Act of 1965.** Plaintiffs' plan complies with the Voting Rights Act ("VRA"). Section 2 of the VRA prohibits any "standard, practice, or procedure" that "results in a denial or abridgement of the right . . . to vote on account of race." 52 U.S.C. § 10301(a). Plaintiffs' plan was not drawn with the purpose of denying or abridging minority voting rights, nor would it have the effect of denying or abridging minority voting rights.

- **Standard 3: Contiguity.** Both of the districts in Plaintiffs' plan are contiguous because all towns, city wards, and unincorporated places that comprise each district "adjoin[]" another town, ward, or unincorporated place in the same district. *Below*, 148 N.H. at 9.

- **Standard 4: Core retention.** Plaintiffs' plan achieves nearly perfect population equality while maximizing core retention. Maximizing "core retention" means keeping as many people as possible in their current districts. Put another way, it means minimizing the number of people who are moved to a different congressional district.

Plaintiffs' plan moves the smallest number of people necessary to achieve near-perfect population equality. Under Plaintiffs' plan, 99.04% of New Hampshire residents are kept in the same congressional district. This is only slightly lower than the core retention of the Minority Leaders' plan, which keeps 99.36% of the state's residents in the same district as last cycle.

In this sense, Plaintiffs' plan and the Minority Leaders' plan are compliments of one another, demonstrating the necessary trade-off between maximizing core retention and population equality. While the Minority Leaders' plan achieves the best possible core retention while minimizing population deviation, it results in a slightly higher population deviation (51 persons) than Plaintiffs' plan. Meanwhile, to achieve nearly perfect population equality, Plaintiffs' plan slightly sacrifices core retention, resulting in .32% fewer residents staying in the same congressional district.

Plaintiffs take no position as to whether their plan or the Minority Leaders' is superior; both plans clearly comply with the Court's criteria. While the Minority Leaders'

plan has slightly less-than-perfect population equality, that deviation in this instance is arguably justified by a legitimate state policy, *i.e.*, core retention.

- **Standard 5: Maintenance of towns, city wards, and unincorporated places.** Plaintiffs' plan does not divide any town, city ward, or unincorporated place.

- **Standard 6: Prohibition of political considerations.** Plaintiffs' plan was drawn without consideration of political data. Instead, Plaintiffs' plan was drawn to maximize core retention while maintaining perfect population equality. Thus, adoption of this plan would not involve prohibited political considerations.

- **Additional Principle: Compactness.** While the Court did not explicitly state that its proposed plan should contain compact districts, compactness is a widely accepted traditional districting principle. *See, e.g.*, *Bush v. Vera*, 517 U.S. 952, 962 (1996) (noting that the state "neglected traditional districting criteria such as compactness"); *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (defining traditional districting principles to include compactness); *In re Senate Joint Resol. of Legislative Apportionment 1176*, 83 So. 3d 597, 639 (Fla. 2012) (stating that Florida's compactness criteria required the Legislature "to conform to traditional redistricting principles"). If the Court finds compactness to be relevant in adopting a plan, Plaintiffs note that their proposed plan contains districts that are slightly more compact than the state's existing congressional districts.

Two of the most commonly used compactness metrics are Reock and Polsby-Popper. The Reock score measures the ratio of the area of the district to the area of the minimum enclosing circle for the district. The measure ranges from zero to one, with one being perfectly compact. The Polsby-Popper score measures the ratio of the district area to

the area of a circle with the same perimeter. Again, the measure ranges from zero to one, with one being maximally compact. The following scores for these metrics show that the districts in Plaintiffs' proposed plan have Reock scores that are identical to those for the existing districts and Polsby-Popper scores that are slightly higher than those for the existing districts:

| District | Reock – Existing Plan | Reock – Plaintiffs' Plan | Polsby-Popper – Existing Plan | Polsby-Popper – Plaintiffs' Plan |
|---|---|---|---|---|
| District 1 | 0.30 | 0.30 | 0.17 | 0.18 |
| District 2 | 0.23 | 0.23 | 0.15 | 0.15 |

## CONCLUSION

Plaintiffs respectfully submit that their proposed remedial plan achieves population equality, maximizes core retention, and complies with all of the other criteria set out by this Court.

Dated: May 16, 2022

Respectfully Submitted,

THERESA NORELLI, CHRISTINE FAJARDO, MATT GERDING, and PALANA HUNT-HAWKINS

By Their Attorneys,

By /s/ Steven J. Dutton

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## Appendix C

## President of the New Hampshire Senate and Speaker of the New Hampshire House Submission

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Theresa Norelli & a.

v.

Secretary of State & a.

Case No. 2022-0184

**SUBMISSION OF SPEAKER OF THE HOUSE AND SENATE PRESIDENT PURSUANT TO ORDER OF MAY 12, 2022**

By Order dated May 12, 2022, this Court invited interested parties, intervenors, and *amici curiae* to submit proposed redistricting plans, accompanied by such supporting data, documentation, or memoranda that they deem helpful to the special master's evaluation of their proposed plan's compliance with the criteria set forth in the Court's Order and Opinion. The Court's Opinion indicated that the Court will decide this case "…solely under the Federal Constitution…" *Opinion*, p. 8, May 12, 2022.

The Court's May 12, 2022, Opinion further detailed that Article I, §2 of the U.S. Constitution requires that congressional districts be apportioned so that "'as nearly as is practicable, one [person's] vote in a congressional election is to be worth as much as another's.' *Id.* (citing *Wesberry v. Sanders*, 376 U.S. 1, 7-8, 17-18 (1964)). "Article I, Section 2 establishes a 'high standard of justice and common sense' for the apportionment of congressional districts: 'equal representation for equal numbers of people.'" *Id.* "The 'as nearly as practicable' standard requires that the State make a good-faith effort to achieve

precise mathematical equality." *Opinion*, p. 8 (citing *Karcher v. Daggett*, 462 U.S. 725, 732 (1983). (quotation and brackets omitted).

"Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, **no matter how small**." *Opinion*, p. 8 (citing *Karcher*, 462 U.S. at 732) (Emphasis added). Absolute population equality is the paramount objective, so "[s]tates must draw congressional districts with populations as close to perfect equality as possible." *Opinion*, p. 8 (*citing Evenwel v. Abbott*, 578 U.S. 54, 59 (2016); *Karcher*, 462 U.S. at 725).

In its May 12 Order, the Court tasked the appointed special master with modifying the existing congressional districts "only to the extent required to comply with the following criteria and "least change" standards:

1. Districts shall be as equal in population as practicable, in accordance with Article I, Section 2 of the United States Constitution;

2. The redistricting plan shall comply with the Voting Rights Act of 1965, as amended, 52 U.S.C. § 10101 et seq., and any other applicable federal law;

3. Districts shall be made of contiguous territory;

4. To the greatest extent practicable, each district shall contain roughly the same constituents as it does under the current congressional district statute, such that the core of each district is maintained, with contiguous populations added or subtracted as necessary to correct the population deviations, see *Below v. Secretary of State*, 148 N.H. 1, 13-14, 28 (2002);

5. The plan shall not divide towns, city wards, or unincorporated places, unless they have previously requested by referendum to be divided, or unless the division is necessary to achieve compliance with the population equality required by Article I, Section 2 of the United States Constitution; and

6. The special master shall not consider political data or partisan factors, such as party registration statistics, prior election results, or future election prospects.

Of the six criteria listed in the Order, three are absolute and not subject to any balancing considerations: (2) requiring compliance with the Voting Rights Act of 1965 and other federal laws; (3) requiring contiguity; and (6) requiring the master to ignore political data or partisan factors. Criterion number five states that the plan shall not divide towns, city wards, or unincorporated places unless required by Article 1, Section 2 of the U.S. Constitution. One of the plans submitted by the Speaker and President contains the lowest mathematically possible deviation. Since the U.S. Constitution cannot require greater equality than is mathematically possible, there is no need for the master of the Court to consider whether dividing a town, city ward, or unincorporated place is required.

The word "practicable" must be considered alongside another word that the Court did not use in the Orders: "possible." A criterion that contained a requirement that the master choose a redistricting plan with the lowest deviation "possible" would remove the possibility of the exercise of judgment that is inherent in the meaning of the word "practicable." The Speaker and President do not take issue with the Court's use of that word, nor is this submission a criticism of the Court's reservation of the need to exercise some level of judgment. To the contrary, the Speaker and President continue to maintain that any action, whether by the General Court or this Court, necessarily involves the exercise of discretion and the balancing of interests. The use of the word "practicable" and the competing interests in population equality and "least change" reflect the inherent tension involved in making redistricting decisions.

It is unclear from the Court's Order whether the master and Court intend to mechanically compare the population equality of all the plans, and if any plan achieves perfect equality, break the tie by determining which plan moves fewer people, or whether the master and Court intend to balance substantial population equality against the desire to effectuate a "least change" map.

The Speaker and President propose two plans for evaluation by the master. Depending on how the master, and ultimately the Court, weigh the competing interests detailed in the Orders, either of these two plans may best meet the Court's balancing tests, as depicted in the data below.

| | **Plan 1** (0/-1) | **Plan 2** (4/-5) |
|---|---|---|
| District 1 Population | 688,764 | 688,769 |
| District 2 Population | 688,765 | 688,760 |
| Absolute Deviation | 1 | 9 |
| "Change" Population | 358,976 | 8968 |

As the above chart reflects, if the Court is going to place population equality above all other factors, then the Speaker and President Plan 1 is the superior of these two plans. However, if the Court is going to balance population equality with "least change," then the Court should at least consider Plan 2. This raises the obvious question: Is Plan 1's moving of roughly 350,000 people to different districts worth the cost in terms of "least change" in order to accomplish a decrease in population inequality equal to 8 persons? Or perhaps it is possible to achieve a perfect deviation while moving fewer people? Assuming that this

possibility turns out to be true, where is the line drawn to demarcate the point at which it is worth creating *x* units of "change" for each single unit of population equality? There simply is no answer to this question that does not require the master and the Court to weigh the importance of population inequality against the importance of the "least change" to the last enacted legislative plan.

On the other hand, perhaps the Court will decide to apply its criteria mechanically, by taking all possible "zero deviation" plans and simply seeing which one of them is the "least change," without weighing the state objective question posed by part two of the *Karcher* analysis. This is not without its own risks, however. Any choice made by the Court will cause political consequences, as is the inherent nature of the task.

As the master will quickly discover, and as submitted plans may very well demonstrate, the easiest way to achieve very low population equality is to divide up northern Coos County, because the small sizes of the political subdivisions in the northernmost part of our state contain the low population numbers that are necessary to make the precise population adjustments required to achieve perfect equality. Achieving perfect population equality means that neighboring towns in the north country that clearly share important communities of interest are divided up into different congressional districts. Although the criteria put forward by the Court do not address these issues, the Speaker and President believe they are worthy of note. While the Speaker and President recognize the Court's interest in adhering to its stated criteria, doing so is not without cost.

At the time of this submission, the Speaker and President cannot know what changes may be proposed by other parties, intervenors, or *amici curiae.* In their previous filing, the

legislative Minority Leaders proposed to move the Town of Hampstead from District 1 to District 2. The Minority Leaders' plan leaves a total deviation of 51 people. Compared to the Speaker and President's perfect population equality plan, Plan 1, it is obviously inferior according to the paramount objective of population equality as explained by *Karcher*. 462 U.S. at 725; *see also Evenwel*, 578 U.S. at 59.

| | **Plan 2 (4/-5)** | **Minority Leaders' (-26/25)** |
|---|---|---|
| District 1 Population | 688,769 | 688,739 |
| District 2 Population | 688,760 | 688,790 |
| Absolute Deviation | 9 | 51 |
| "Change" Population | 8968 | 8998 |

The Minority Leaders' plan is likewise inferior to the Speaker and President's Plan 2 under both the population equality and least change criteria. As the above chart reflects, the Speaker and President's "Plan 2" adheres more closely with the stated criteria because it: (1) results in a population deviation that is closer to the ideal number than the Minority Leaders' plan; and (2) moves thirty fewer people between the Districts. By either objective standard, Plan 2 submitted by the Speaker and President is superior to the Minority Leaders' plan.

## CERTIFICATION

I, Sean R. List, hereby certify that on May 16, 2022, copies of the foregoing were forwarded to all counsel of record through the electronic filing system. Further, I certify that on May 16, 2022, the census block equivalency files for the proposed plans were

transmitted to the Clerk's Office by electronic mail, with all counsel of record copied on said transmition, in the manner indicated by the Court's May 13, 2022 Order.

Respectfully submitted,
The Honorable Sherman Packard,
Speaker of the N.H. House of Representatives
By his attorney,

Date: May 16, 2022 By: /s/ Sean R. List

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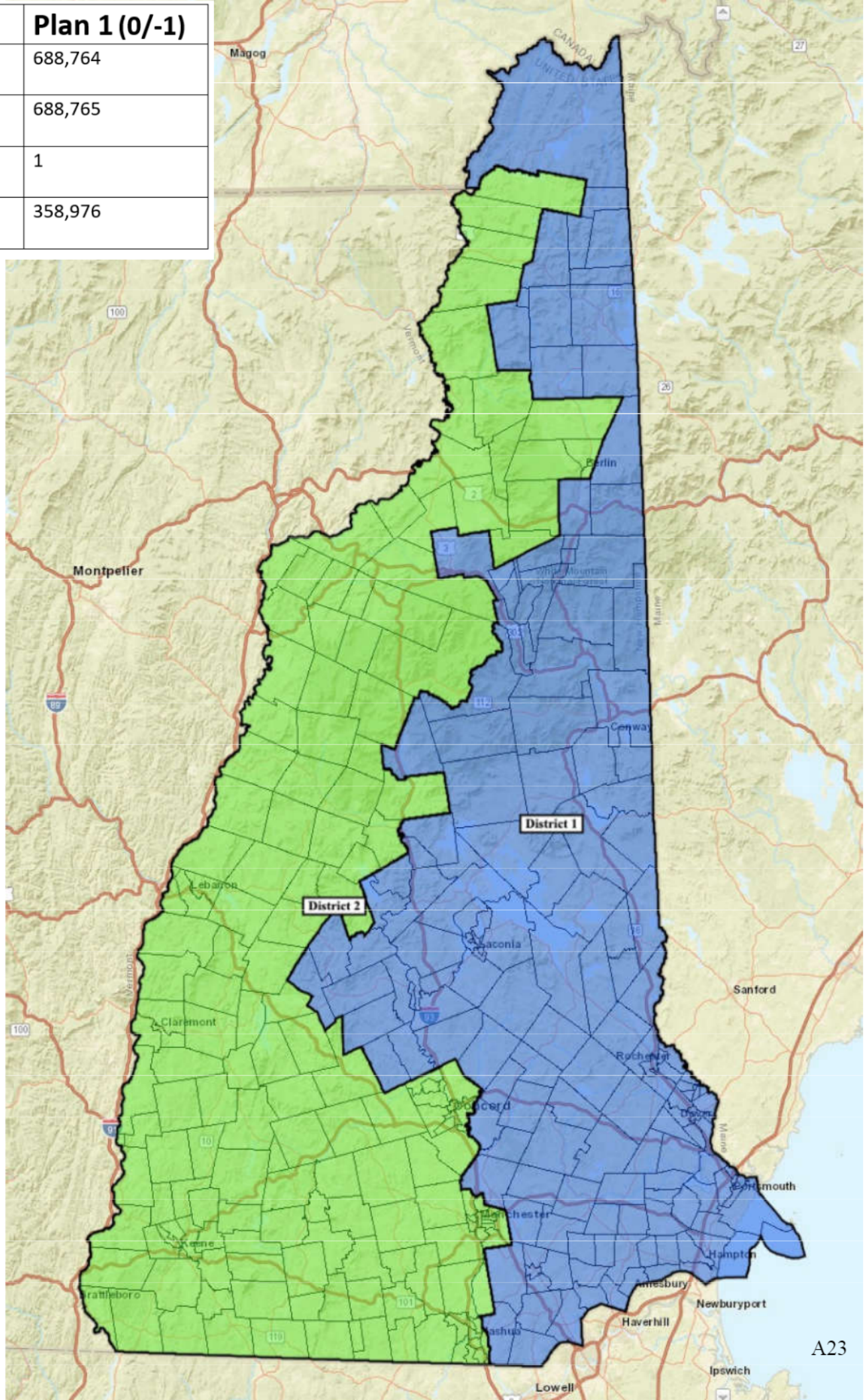
&

Respectfully submitted,
The Honorable Charles Morse,
President of the N.H. Senate
By his attorney,

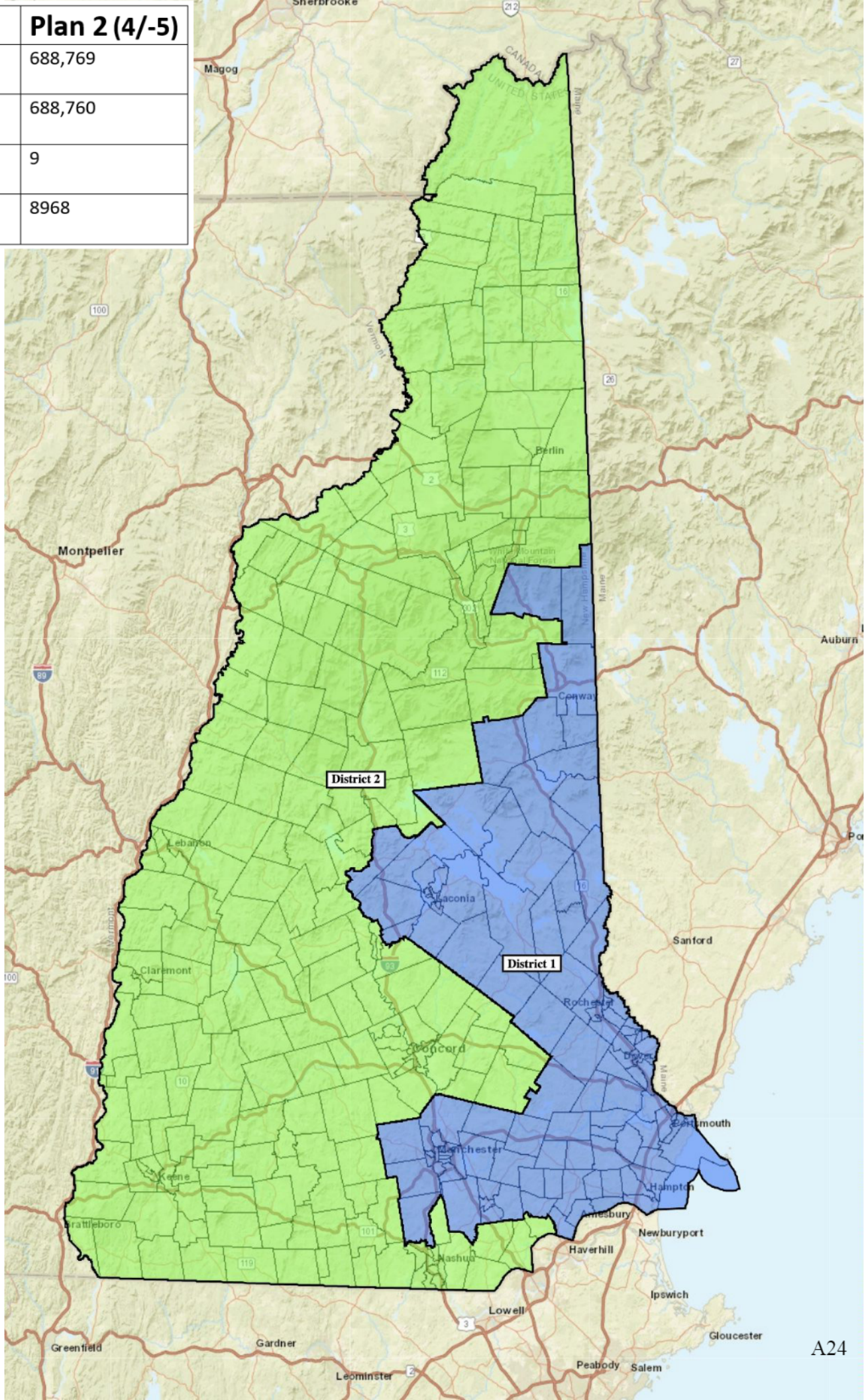
Date: May 16, 2022 By: /s/ Richard J. Lehmann

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| | Plan 1 (0/-1) |
|---|---|
| District 1 Population | 688,764 |
| District 2 Population | 688,765 |
| Absolute Deviation | 1 |
| "Change" Population | 358,976 |



| | Plan 2 (4/-5) |
|---|---|
| District 1 Population | 688,769 |
| District 2 Population | 688,760 |
| Absolute Deviation | 9 |
| "Change" Population | 8968 |



## Appendix D

## Minority Leaders of the Senate and House Submission

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

CASE NO. 2022-0184

Theresa Norelli, et. al v. Secretary of State

**MEMORANDUM OF LAW OF AMICI CURIAE STATE SENATE MINORITY LEADER SENATOR DONNA SOUCY AND HOUSE MINORITY LEADER REPRESENTATIVE DAVID COTE IN SUPPORT OF PLAINTIFF THERESA NORELLI, ET AL**

Pursuant to Supreme Court Rule 30, amici curiae State Senate Minority Leader Senator Donna Soucy and House Minority Leader Representative David Cote submit the following memorandum of law in support of the Plaintiffs Theresa Norelli, et al. (hereinafter, "Plaintiffs"):

## INTRODUCTION

This matter comes before the court to determine the constitutionality of the New Hampshire congressional district maps. In the below brief, we address the applicable questions presented by the Court's April 11, 2022 Order.

New Hampshire's two congressional districts have remained virtually the same for the last 140 years. The longstanding map has remained compact, competitive, and reflective of communities of interest, only making the changes necessary to represent the state's population shifts. We must update our congressional districts to adjust for the slight population change evident in the 2020 census data. We have suggested a map that would do just that. By shifting one town, Hampstead, from the First Congressional District into the Second Congressional District, our proposed map (hereafter, the "minority map") corrects the constitutional deficiency while preserving the core of the longstanding prior district.[1] This plan would only change the congressional district of 8,998 Granite Staters.

[1] The minority map was introduced on March 16, 22 as Amendment 2022-1136s to House Bill 52. The bill and the corresponding map are attached as Exhibits C and D in the addendum to this memorandum. Also available at

In contrast, the Republicans seek to use their control of the legislature to, in the words of New Hampshire Republican State Committee Chair Stephen Stepanek "guarantee…send[ing] a conservative Republican to Washington, D.C. as a Congress person in 2022. *See* John DiStaso, *NH Primary Source: Stepanek guarantees at least one NH Republican will be elected to US House in '22*, WMUR (Jan. 28, 2021), https://www.wmur.com/article/nh-primary-source-stepanek-guarantees-at-least-one-nh-republican-will-be-elected-to-us-house-in-22/35341751#. To accomplish this goal, the map proposed by House Republicans, House Bill 52, shifts the congressional district of more than 250,000 Granite Staters.

Both parties know Granite Staters oppose this partisan approach. Over the past seven months, members of the New Hampshire legislature - both Republicans and Democrats - engaged in a statewide listening tour to hear the concerns of Granite Staters in advance of redistricting. Specifically, the Special Committee on Redistricting held in-person, public hearings in all ten New Hampshire counties. These public hearings revealed Granite Staters preference for fair congressional maps - and opposition to explicitly partisan gerrymanders.[2] Through these meetings and written testimony submitted to the Special Committee on Redistricting, hundreds of Granite Staters expressed their desire to avoid dramatic changes that served the interest of either political party.[3] The

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http://gencourt.state.nh.us/house/committees/committee_websites/Redistricting_2021/plans/Congressional%20Maps.pdf?mc_cid=52c4b5d600&mc_eid=UNIQID.

[2] "People are sick and tired of unfair maps and gerrymandering," stated William Maddocks of Amherst; Kevin Fleming of Exeter "asked that the committee be attentive to be strong and fair and avoid accusations of gerrymandering"; Debra Altschiller of Stratham said the committee "must try hard to avoid gerrymandering and draw fair maps"; Steven Borne of Rye said the committee should "avoid the suspicion of gerrymandering and confirm a transparent process, which is what the citizens of NH want." *Senate Special Committee on Redistricting*, NH General Court (last accessed Apr. 25, 2021), http://gencourt.state.nh.us/Senate/committees/Redistricting/.

[3] A good "litmus test to determine whether the process was fair will be what they do with the two Congressional Districts. [...]. The population has not changed enough for any big changes to the Congressional Districts." Chris Muns, Hampton, Rockingham County Input Session, October 5, 2021. David Andrews of Chichester testified "that they try to keep the [congressional] districts as they are." Merrimack County Community Input Session, September 14, 2021; Olivia Zink, of Franklin "added that the Congressional districts have pretty equal population and she would suggest keeping the existing maps." *Id.*

listening tour also demonstrated that the legislature should adopt a congressional map that makes the least change possible.

Further, over seventy municipalities have passed fair redistricting warrant articles in 2020 and 2021, which specifically demand districts that ensure fair and effective representation and that are not gerrymandered to favor a political party.[4] While these warrant articles are non-binding, they reflect the will of the people.

It is clear that New Hampshire residents want fair, equitable, non-partisan congressional maps. It is unfortunate that Republicans in the New Hampshire Legislature refused to listen to their constituents and instead put forth a gerrymandered map that Democrats - and Governor Sununu - could not support. Amici support Plaintiffs' attempt to resolve the impasse through the appointment of a special master to ensure Granite Staters receive the representation to which they are constitutionally entitled. Amici believe that the Court should adopt the minority map, which employs the "least change" methodology to keep our districts compact, competitive, and reflective of the communities they represent. This plan should be adopted prior to the June 1, 2022 commencement of the candidate filing period.

As Governor Sununu stated in his April 21, 2022 letter to the Members of the House Special Committee on Redistricting, "NH citizens have made it clear that they want a redistricting map that keeps our districts competitive and holds our incumbents accountable so that no one elected official is immune from challengers or constituent services." We agree.

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[4] *See, e.g.* Alstead 2021 Art. 20; Amherst 2021 Art. 34; Andover 2020 Art. 13; Atkinson 2021 Art. 21; Barrington 2020 Art. 22; Belmont 2021Art. 26; Bethlehem 2021 Art. 25; Brookline 2021 Art. 21; Canterbury 2020 Art. 18; Chester 2021 Art. 29; Conway 2020 Art. 42; Cornish 2021 Art. 15; Deerfield 2021 Art. 7; Dunbarton 2020 Art. 21; Durham 2021 Resolution 21-01; Easton 2021 Art. 17; Effingham 2020 Art. 27; Epsom 2021 Art. 16; Exeter 2020 Art. 28; Franklin 2021 Resolution 15-21; Gilford 2021 Art. 30; Gilmanton 2021 Art. 18. Goffstown 2020 Art. 14; Grafton 2021 Art. 23; Hanover 2020 Art. 27; Hancock 2021 Art. 13; Henniker 2020 Art. 37; Hillsborough 2020 Art. 14; Hollis 2021 Art. 19; Hopkinton 2020 Art. 17; Littleton 2021 Art. 43; Loudon 2020 Art. 21; Lyman 2021 Art. 12; Madison 2021 Art. 23; Marlborough 2021 Art. 14; New Boston 2021 Art 21; Nottingham 2020 Art. 18; Pembroke 2020 Art. 13; Rollinsford 2020 Art. 9; Roxbury 2021 Art. 20; Sanbornton 2021 Art. 11; Stratham 2020 Art. 20; Sugar Hill 2021 Art. 16; Tilton 2021 Art. 16; Weare 2021 Art. 25; Webster 2021 Art. 7; Windham 2021 Art. 19; Wolfeboro 2021 Art. 36 . *See also*, Adam Drapcho, *Voters send clear message to Concord: No redistricting shenanigans*, Laconia Daily Sun (May 4, 2021), https://www.laconiadailysun.com/news/local/voters-send-clear-message-to-concord-no-redistricting-shenanigans/article_5fa3cd94-ad19-11eb-8a74-0b2d596c5b1d.html.

## QUESTIONS PRESENTED

The Supreme Court of New Hampshire requested that interested parties file briefs answering the following questions:

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?**

2. **To determine the time frame for any judicial relief,**

   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).

   B. And, from the Secretary of State, what amount of time does he believe is required to prepare, print, and distribute ballots in advance of the primary election?

3. **If we conclude that use of the existing congressional districts for the 2022 election would be unconstitutional,**

   A. Should we apply the "least change" approach to congressional redistricting in this case, as we did for state senate redistricting in *Below I*?

   B. If "least change" is the correct approach, what measurement or factors should we use to assess "least change?" C. If "least change" is not the correct approach, what approach should we take for congressional redistricting in this case, and what measurement or factors should we use to assess that approach?

4. **Regarding the appointment of a special master,**

A. Does 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?

B. 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?

C. And, from the Secretary of State and any other interested party that is a State body or State official, is there a New Hampshire Maptitude license to make available for the special master to use for his or her work on this case, or, instead, might it be necessary for the special master to purchase a New Hampshire Maptitude license for this case if the special master does not already have one?

## INTEREST OF THE AMICI CURIAE

Senator Donna Soucy is the Minority Leader of the New Hampshire Senate. Senator Soucy has served the residents of the 18th District since 2012. She is a former state representative, who has also served on the Manchester Board of Alderman and on the Manchester School Board

Representative David Cote is the Minority Leader of the New Hampshire House of Representatives. He has served the residents of Hillsborough County District 31 in the House of Representatives since 1982.

## SUMMARY OF THE ARGUMENT

This brief addresses the relevant questions posed by the Court's April 11, 2022 Order. *First*, we argue that the existing congressional map is unconstitutional due to population shifts in the newly released decennial Census data. *Second*, we argue the Court should adopt a new congressional map no later than June 1, 2022, which commences the filing period for candidates to participate in the state primary election. *Third*, we advocate that the Court should

adopt a map based on the "least change" approach, which was used by the Minority in drafting its proposed map. *Fourth*, we support the appointment of Professor Nathaniel Persily as Special Master.

## ARGUMENT

### A. The Existing Congressional Map Unconstitutionally Violates the Fundamental Principle of "One Person, One Vote."

New Hampshire's existing congressional map is unconstitutional in violation of Part I, Articles 1, 10, 11, and 12 of the New Hampshire Constitution and Article I, Section 2 of the U.S. Constitution following the release of the 2020 Census data. "Existing apportionment schemes become instantly unconstitutional upon the release of new decennial Census data." S*ee Arrington v. Elections Bd*., 173 F. Supp. 2d 856, 860 (E.D. Wis. 2001) (three-judge court). On August 12, 2021, the United States Census Bureau delivered 2020 Census data to New Hampshire allowing the state to commence its redistricting process, and in doing so, rendered the existing congressional map unconstitutional. Press Release, *2020 Census Statistics Highlight Local Population Changes and Nation's Racial and Ethnic Diversity*, U.S. Census Bureau (Aug. 12, 2021), available at https://www.census.gov/newsroom/press-releases/2021/population-changes-nations-diversity.html.

The Census data confirmed that significant population shifts had occurred in New Hampshire since the last census in 2010. Under the latest Census estimates, the population of the First Congressional District is now 17,945 persons greater than the Second Congressional District. Given this, the current congressional maps violate the fundamental principle of "one person, one vote." "The Equal Protection Clauses of the New Hampshire and Federal Constitutions demand no less than substantially equal state legislative representation for all citizens." *Petition of Below I*, No. 2004-361 (N.H. 2004). Further, unlike with state legislative districts, with congressional redistricting, "absolute population equality [is] the paramount objective." *Karcher v. Daggett,* 462 U.S. 725, 732-33, 103 S.Ct. 2653, 77 L.Ed.2d 133 (1983).

## B. The Court Must Adopt a New Congressional Map Prior to June 1, 2022.

This court should move expeditiously to adopt a new congressional map to provide clarity to Granite Staters and potential candidates. Specifically, the Court should ensure a new congressional map has been adopted in advance of the commencement of the candidate filing for the state primary elections. This year, the filing period opens on June 1, 2022 and concludes on June 10, 2022. *See* RSA 655:14 ("...he or she shall file with the appropriate official between the first Wednesday in June and the Friday of the following week.")

There is no realistic possibility that the legislature will validly enact a congressional redistricting plan in time for declarations of candidacy to be filed in accordance with RSA 655:14. After Governor Sununu promised to veto the Republican map proposed in HB 52, he proposed his own map. In a letter to Senate President Chuck Morse and House Speaker Sherman Packard, he proposed a map that he stated that he would be willing to sign into law because it "keeps our districts competitive, passes the smell test, and holds our incumbents accountable so that no one elected official is immune from challengers or constituent services." This letter is attached as Exhibit A in the addendum to this memorandum. In a subsequent letter dated April 21, 2022, Governor Sununu conceded that his proposed map does not have the necessary support to advance through the committee. This letter is attached as Exhibit B in the addendum to this memorandum. No alternative maps remain on the table.

This Court should resolve this matter as soon as feasible. As of filing, New Hampshire is one of only two states (together with Missouri) which have thus far failed to adopt new congressional maps. *See What Redistricting Looks Like in Every State*, FiveThirtyEight (last updated April 21, 2022), available at https://projects.fivethirtyeight.com/redistricting-2022-maps/. Each day the Court delays in adopting a new map risks reducing the number of days a candidate has to decide to file for public office. While the Secretary of State maintains authority to change the filing period if a new map is not in place, this any such change risks

causing unnecessary confusion and burdens for candidates, voters, city and town clerks, moderators, volunteers, and other local election officials. *See* RSA 655:14-c.

### C. The Court Should Apply the "Least Change" Approach to Congressional Redistricting.

The Special Master should adopt a congressional map in accordance with the "least change" methodology, which directs the map drawer to keep as many Granite Staters in their current district as possible. Adopting such a methodology in this matter would align with the approach adopted by this Court in previous redistricting cycles. Most notably, the Court used the "least change" methodology in resolving a dispute over the state house and senate maps after the 2000 Census. *Senator Below v. Gardner*, 148 N.H. 1, 4 (2002) (*Below I*).

In *Below I*, after the New Hampshire Senate and House of Representatives failed to pass new state legislative redistricting plans, Senate Democrats filed a similar petition for original jurisdiction in this Court, which was accepted. *Id.* at 4. There, the Court accepted the "unwelcome obligation" of drawing the legislative maps. We agree with this Court's recognition in *Below I* that "[r]eapportionment is primarily a matter of legislative consideration and determination." *Id.* at 5 (citing *Monier v. Gallen*, 122 N.H. 474, 476 (1982)). Yet, because the legislature has failed to adopt a congressional map, we believe the Court's intervention here, as there, is necessary. *Id.*

In *Below I*, the "[C]ourt…devised a redistricting plan consistent with neutral State and federal constitutional principles." *Below I*, 148 N.H. at 13. The Court "determined that to remedy the population deviations in existing districts, it is preferable that the *core* of those districts be maintained, while contiguous populations are added or subtracted as necessary to correct the population deviations." *Id.* In effect, the Court's plan "imposed the least change for New Hampshire citizens." *Id.* at 14.

The plan put forth by Democrats during the legislative session, introduced on March 16, 2022 as Amendment 2022-1136s, observed the "least change" principle. A copy of the amendment is attached as Exhibit C in the addendum to

this memorandum. A draft of the proposed map and a list of the towns and cities in each district are attached as Exhibit D in the addendum to this memorandum.

The map, which leaves existing political units intact, accomplishes population equality by moving only one town. By moving Hampstead from the First Congressional District into the Second Congressional District, Democrats were able to devise a map which only changes the district of 8,998 New Hampshire residents, or 0.65% of all Granite Staters. This small change would ensure New Hampshire's two congressional districts are as equal as practicable - 688,739 residents in District 1 and 688,790 residents in District 2, a deviation of +/- 0.0037%.

This methodology stands in stark contrast to the methodology adopted by Republicans in HB 52, which is rooted in cementing "calculated partisan political outcomes" that this Court expressed its distaste for in *Below I*. The map put forth by Democrats demonstrated that New Hampshire can achieve the fair, equitable, and non-partisan maps sought by residents, while providing minimal disruption for voters. The Court should adopt the "least change" methodology.

### D. There is No Reasonable Alternative Methodology to the "Least Change" Methodology.

Amici believe that the only reasonable methodology to be used is "least change." We take no position on an alternative methodology.

### E. Amici Do Not Oppose the Appointment of Professor Nathaniel Persily as Special Master.

Professor Nathaniel Persily is a well-respected expert on redistricting. He has decades of experience working on redistricting issues on both state legislative and federal congressional maps and has advised on other related issues including independent commissions. He is the author of "When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans," an essay which presents guidelines for courts that undertake to draw their own redistricting plans.

Persily has worked as a special master or court-appointed expert in at least six (6) states (Connecticut, Georgia, Maryland, New York, North Carolina, Pennsylvania). Specifically, Persily served as special master on congressional redistricting plans in Connecticut and New York. He is eminently qualified to serve as the special master in this matter and amici believe he will deliver fair congressional maps for the people of New Hampshire.

## CONCLUSION

For these reasons, the court should 1) declare the existing congressional map unconstitutional; 2) grant the Special Master until June 1, 2022 to draw a new congressional map; 3) apply the "least change" approach to draft a new congressional map in this case as it did for senate redistricting in *Below I*; and 4) appoint Professor Nathaniel Persily as Special Master.

Dated: April 25, 2022

Respectfully submitted,

Senator Donna Soucy
Representative David Cote
By and through their attorney(s):

/s/ James J. Armillay, Jr.
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S. Amy Spencer, Esq. #266617
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saspencer@shaheengordon.com
obensinger@shaheengordon.com

## CERTIFICATE OF COMPLIANCE

I hereby certify that this memorandum of law complies with New Hampshire Supreme Court Rule 16(11) and Rule 22(2). It contains 3,044 words, therefore complying with the 4,000-word limit for memorandum of law.

/s/ *James J. Armillay, Jr.*_____
James J. Armillay, Jr. #271651

## CERTIFICATE OF SERVICE

I hereby certify that a copy of forgoing was served this 25th day of April, 2022 through the electronic-filing system on all counsel of record.

/s/ James J. Armillay, Jr.
James J. Armillay, Jr. #271651

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

CASE NO. 2022-0184

Theresa Norelli, et. al v. Secretary of State

**MOTION FOR LEAVE TO FILE AN AMICUS BRIEF ON BEHALF OF STATE SENATE MINORITY LEADER SENATOR DONNA SOUCY AND STATE HOUSE MINORITY LEADER REPRESENTATIVE DAVID COTE**

Pursuant to Supreme Court Rule 30(1), State Senate Minority Leader Senator Donna Soucy and State House Minority Leader Representative David Cote move to file an amicus brief. Our brief is attached and filed contemporaneously with this motion. The Plaintiffs and Defendants [assent to/take no position on] the filing of this amicus brief.

**WHEREFORE,** Amici respectfully request this Honorable Court:

(a) Accept the brief of undersigned Amici Curiae; and

(b) Grant any other relief deemed just and proper.

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of forgoing was served this 25th day of April, 2022 through the electronic-filing system on all counsel of record.

/s/ James Armillay

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# ADDENDUM

# EXHIBIT A

# STATE OF NEW HAMPSHIRE
## OFFICE OF THE GOVERNOR

CHRISTOPHER T. SUNUNU
Governor

March 22, 2022

The Honorable Chuck Morse
President
New Hampshire Senate
State House, Room 302
107 North Main Street
Concord, NH 03301

The Honorable Sherman Packard
Speaker
New Hampshire House of Representatives
State House, Room 311
107 North Main Street
Concord, NH 03301

Dear President Morse and Speaker Packard,

I appreciate your willingness to meet this morning, where we discussed the ongoing redistricting process.

Attached to this letter you will find a draft Congressional redistricting map that I would sign should it reach my desk. This is certainly not the only solution, but hopefully will be helpful. It keeps our districts competitive, passes the smell test, and holds our incumbents accountable so that no one elected official is immune from challengers or constituent services.

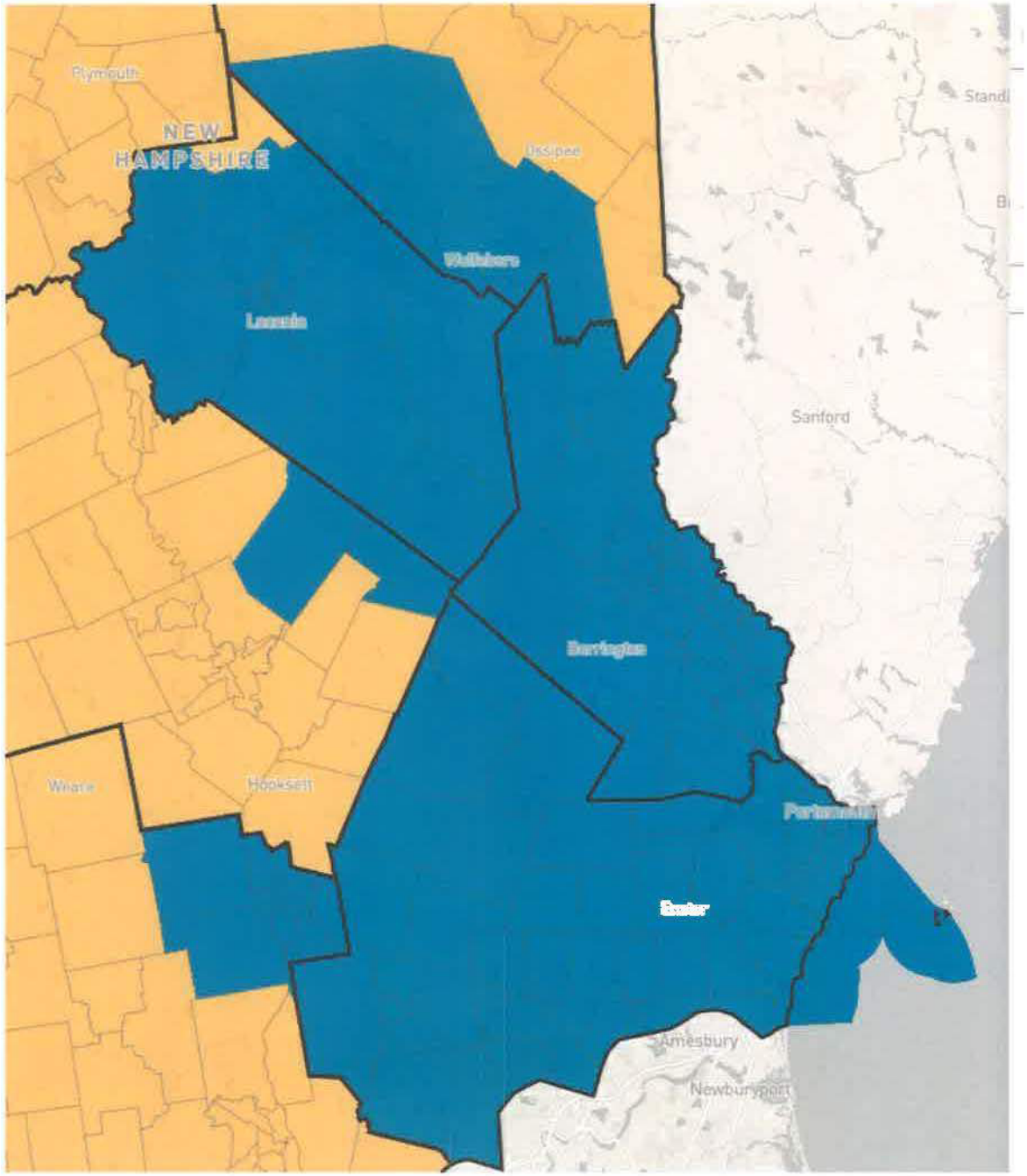
There is still enough time in this process to deliver a map for our citizens that gets the job done, and I hope you will continue to work to get something done through the legislative process that meets the expectations of our citizens. They are counting on us to get this right.

Sincerely,

Christopher T. Sununu
Governor

107 North Main Street, State House - Rm 208, Concord, New Hampshire 03301
Telephone (603) 271-2121 • FAX (603) 271-7640
Website: http://www.governor.nh.gov/ • Email: governorsununu@nh.gov
TDD Access: Relay NH 1-800-735-2964

# Governor Proposal



# EXHIBIT B

April 21, 2022

Dear Members of the House Special Committee on Redistricting,

I would like to thank the members of the committee for their time and dedication to the redistricting process and for holding a committee hearing on amendment #2022-1523h to Senate Bill 200.

My office has been in communication with members of the committee to gather their thoughts on the proposed amendment. Based on those conversations, it is clear this amendment "as is" does not have the support of the majority of the committee members. One of the common concerns raised during these conversations was the deviation in population between the two districts proposed in the amendment. I appreciate the concerns that have been raised and believe this could be easily addressed by moving one or two towns.

The amendment is one of many potential solutions, and I am supportive of amendments that would look to further reduce population deviations to address the concerns of committee members. There are many avenues this committee can consider, and I look forward to seeing what other opportunities this committee brings to the table that can pass. NH citizens have made it clear that they want a redistricting map that keeps our districts competitive and holds our incumbents accountable so that no one elected official is immune from challengers or constituent services.

Sincerely,

Christopher T. Sununu

Christopher T. Sununu

# EXHIBIT C

Sen. Soucy, Dist 18
Sen. Perkins Kwoka, Dist 21
March 16, 2022
2022-1136s
10/05

Floor Amendment to HB 52

Amend RSA 662:1 as inserted by section 1 of the bill by replacing it with the following:

662:1 U.S. Representative Districts. The state is divided into 2 districts for the choosing of representatives in the congress of the United States. Each district may elect one representative. The districts shall be constituted as follows:

I. The first district is constituted of:

(a) The counties of*:*

(1) Carroll, and

(2) Strafford; and

(b) In the county of Belknap, the towns and city of*:*

(1) Alton,

(2) Barnstead,

(3) Belmont,

(4) Gilford,

(5) Gilmanton,

(6) Laconia,

(7) Meredith,

(8) New Hampton,

(9) Sanbornton, and

(10) Tilton; and

(c) In the county of Grafton, the town of*:*

(1) Campton; and

(d) In the county of Hillsborough, the towns and city of*:*

(1) Bedford,

(2) Goffstown,

(3) Manchester, and

(4) Merrimack; and

(e) In the county of Merrimack, the town of*:*

(1) Hooksett; and

(f) In the county of Rockingham, the towns and city of*:*

(1) Auburn,

(2) Brentwood,
(3) Candia,
(4) Chester,
(5) Danville,
(6) Derry,
(7) East Kingston,
(8) Epping,
(9) Exeter,
(10) Fremont,
(11) Greenland,
(12) Hampton,
(13) Hampton Falls,
(14) Kensington,
(15) Kingston,
(16) Londonderry,
(17) New Castle,
(18) Newfields,
(19) Newington,
(20) Newmarket,
(21) Newton,
(22) North Hampton,
(23) Nottingham,
(24) Plaistow,
(25) Portsmouth,
(26) Raymond,
(27) Rye,
(28) Sandown,
(29) Seabrook,
(30) South Hampton, and
(31) Stratham.

II. The second district is constituted of*:*

(a) The counties of*:*

(1) Cheshire,
(2) Coos, and
(3) Sullivan; and

(b) In the county of Belknap, the town of*:*

(1) Center Harbor; and

(c) In the county of Grafton, the towns, city, and unincorporated place of*:*

(1) Alexandria,

(2) Ashland,

(3) Bath,

(4) Benton,

(5) Bethlehem,

(6) Bridgewater,

(7) Bristol,

(8) Canaan,

(9) Dorchester,

(10) Easton,

(11) Ellsworth,

(12) Enfield,

(13) Franconia,

(14) Grafton,

(15) Groton,

(16) Hanover,

(17) Haverhill,

(18) Hebron,

(19) Holderness,

(20) Landaff,

(21) Lebanon,

(22) Lincoln,

(23) Lisbon,

(24) Littleton,

(25) Livermore,

(26) Lyman,

(27) Lyme,

(28) Monroe,

(29) Orange,

(30) Orford,

(31) Piermont,

(32) Plymouth,

(33) Rumney,

(34) Sugar Hill,

(35) Thornton,

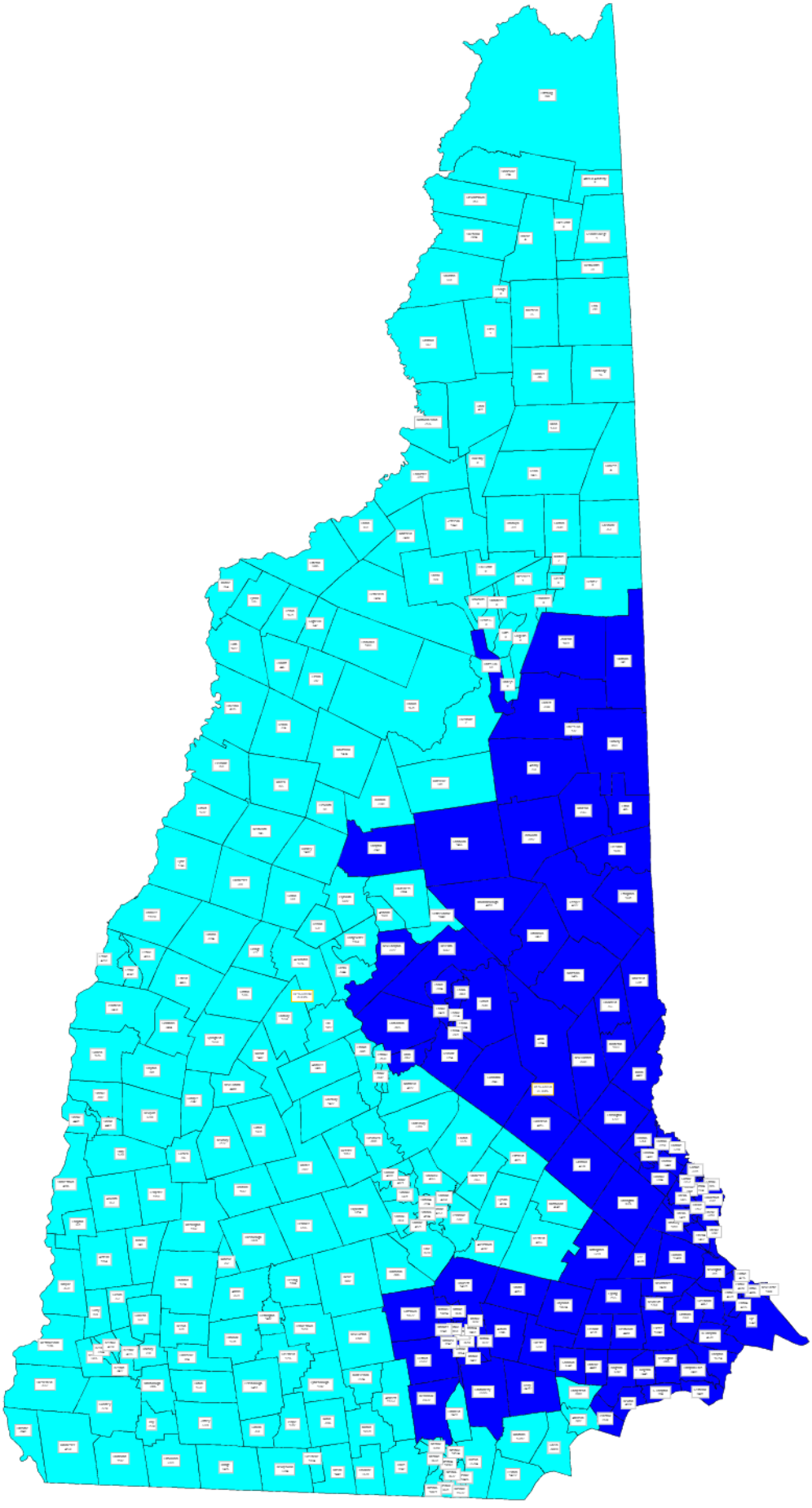
(36) Warren,

(37) Waterville Valley,
(38) Wentworth, and
(39) Woodstock; and
(d) In the county of Hillsborough, the towns and city of*:*
(1) Amherst,
(2) Antrim,
(3) Bennington,
(4) Brookline,
(5) Deering,
(6) Francestown,
(7) Greenfield,
(8) Greenville,
(9) Hancock,
(10) Hillsborough,
(11) Hollis,
(12) Hudson,
(13) Litchfield,
(14) Lyndeborough,
(15) Mason,
(16) Milford,
(17) Mont Vernon,
(18) Nashua,
(19) New Boston,
(20) New Ipswich,
(21) Pelham,
(22) Peterborough,
(23) Sharon,
(24) Temple,
(25) Weare,
(26) Wilton, and
(27) Windsor; and
(e) In the county of Merrimack, the towns and cities of*:*
(1) Allenstown,
(2) Andover,
(3) Boscawen,
(4) Bow,
(5) Bradford,

(6) Canterbury,
(7) Chichester,
(8) Concord,
(9) Danbury,
(10) Dunbarton,
(11) Epsom,
(12) Franklin,
(13) Henniker,
(14) Hill,
(15) Hopkinton,
(16) Loudon,
(17) Newbury,
(18) New London,
(19) Northfield,
(20) Pembroke,
(21) Pittsfield,
(22) Salisbury,
(23) Sutton,
(24) Warner,
(25) Webster, and
(26) Wilmot; and

(f) In the county of Rockingham, the towns of*:*
(1) Atkinson,
(2) Deerfield,
(3) Hampstead,
(4) Northwood,
(5) Salem; and
(6) Windham.

# EXHIBIT D



Whole state

Minority

Congressional Redistricting

WHOLE_STATE

| Towns | Dist# | Seats | Deviation |
|---|---|---|---|
| Albany | | | |
| Alton | | | |
| Auburn | | | |
| Barnstead | | | |
| Barrington | | | |
| Bartlett | | | |
| Bedford | | | |
| Belmont | | | |
| Brentwood | | | |
| Brookfield | | | |
| Campton | | | |
| Candia | | | |
| Chatham | | | |
| Chester | | | |
| Conway | | | |
| Danville | | | |
| Derry | | | |
| DovW1 | | | |
| DovW2 | | | |
| DovW3 | | | |
| DovW4 | | | |
| DovW5 | | | |
| DovW6 | | | |
| Durham | | | |
| E. Kingston | | | |
| Eaton | | | |
| Effingham | | | |
| Epping | | | |
| Exeter | | | |
| Farmington | | | |
| Freedom | | | |
| Fremont | | | |
| Gilford | | | |
| Gilmanton | | | |

Goffstown
Greenland
Hale's Loc
Hampton
Hampton Falls
Hart's Loc
Hooksett
Jackson
Kensington
Kingston
LacW1
LacW2
LacW3
LacW4
LacW5
LacW6
Lee
Londonderry
Madbury
Madison
ManW1
ManW2
ManW3
ManW4
ManW5
ManW6
ManW7
ManW8
ManW9
ManW10
ManW11
ManW12
Meredith
Merrimack
Middleton
Milton
Moultonborough
New Castle
New Durham
New Hampton

| | | | |
|---|---|---|---|
| Newfields | | | |
| Newington | | | |
| Newmarket | | | |
| Newton | | | |
| N. Hampton | | | |
| Nottingham | | | |
| Ossipee | | | |
| Plaistow | | | |
| PortW1 | | | |
| PortW2 | | | |
| PortW3 | | | |
| PortW4 | | | |
| PortW5 | | | |
| Raymond | | | |
| RochW1 | | | |
| RochW2 | | | |
| RochW3 | | | |
| RochW4 | | | |
| RochW5 | | | |
| RochW6 | | | |
| Rollinsford | | | |
| Rye | | | |
| Sanbornton | | | |
| Sandown | | | |
| Sandwich | | | |
| Seabrook | | | |
| SomW1 | | | |
| SomW2 | | | |
| SomW3 | | | |
| SomW4 | | | |
| SomW5 | | | |
| S. Hampton | | | |
| Strafford | | | |
| Stratham | | | |
| Tamworth | | | |
| Tilton | | | |
| Tuftonboro | | | |
| Wakefield | | | |
| Wolfeboro | 1 | 1 | -0.0% |

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Acworth
Alexandria
Allenstown
Alstead
Amherst
Andover
Antrim
Ashland
Atkinson
Atk&Gil Academy
Bath
Beans G.
Beans P.
Bennington
Benton
Berlin
Bethlehem
Boscawen
Bow
Bradford
Bridgewater
Bristol
Brookline
Cambridge
Canaan
Canterbury
Carroll
Center Harbor
Chandler's
Charlestown
Chesterfield
Chichester
ClarW1
ClarW2
ClarW3
Clarksville
Colebrook
Columbia
ConcW1
ConcW2

ConcW3
ConcW4
ConcW5
ConcW6
ConcW7
ConcW8
ConcW9
ConcW10
Cornish
Crawfords
Croydon
Cutts
Dalton
Danbury
Deerfield
Deering
Dixs Grant
Dixville
Dorchester
Dublin
Dummer
Dunbarton
Easton
Ellsworth
Enfield
Epsom
Errol
Ervings
Fitzwilliam
Francestown
Franconia
FranW1
FranW2
FranW3
Gilsum
Gorham
Goshen
Grafton
Grantham
Greenfield

Greens
Greenville
Groton
Hadleys
Hampstead
Hancock
Hanover
Harrisville
Haverhill
Hebron
Henniker
Hill
Hillsborough
Hinsdale
Holderness
Hollis
Hopkinton
Hudson
Jaffrey
Jefferson
KeenW1
KeenW2
KeenW3
KeenW4
KeenW5
Kilkenny
Lancaster
Landaff
Langdon
LebW1
LebW2
LebW3
Lempster
Lincoln
Lisbon
Litchfield
Littleton
Livermore
Loudon
L&B Grant

Lyman
Lyme
Lyndeborough
Marlborough
Marlow
Martins
Mason
Milan
Milford
Millsfield
Monroe
Mont Vernon
NashW1
NashW2
NashW3
NashW4
NashW5
NashW6
NashW7
NashW8
NashW9
Nelson
New Boston
New  Ipswich
New London
Newbury
Newport
Northfield
Northumberland
Northwood
Odell
Orange
Orford
Pelham
Pembroke
Peterborough
Piermont
Pinkhams
Pittsburg
Pittsfield

Plainfield
Plymouth
Randolph
Richmond
Rindge
Roxbury
Rumney
Salem
Salisbury
Sargents
Second College
Sharon
Shelburne
Springfield
Stark
Stewartstown
Stoddard
Stratford
Success
Sugar Hill
Sullivan
Sunapee
Surry
Sutton
Swanzey
Temple
Thornton
Meserves
Troy
Unity
Walpole
Warner
Warren
Washington
Waterville
Weare
Webster
Wentworth
Wentworths
Westmoreland

Whitefield
Wilmot
Wilton
Winchester
Windham
Windsor
Woodstock 2 1 0.0%

---

Total seats = 2

Deviation Range is -0.0% to 0.0%
or 0.0% overall

State Total Seats = 2
State Deviation Range is -0.0% to 0.0% or 0.0% overall

**Appendix E**

**Plaintiffs' Reply Brief**

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Case No. 2022-0184

Theresa Norelli *& a.*

*Plaintiffs*,

v.

Secretary of State *& a.*

*Defendants*.

# PLAINTIFFS' RESPONSE TO OTHER PARTIES' PROPOSED CONGRESSIONAL DISTRICTING PLANS


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Washington, DC 20002

## INTRODUCTION

On May 12, 2022, this Court issued an opinion holding: (1) the statute currently delineating New Hampshire's congressional districts, RSA 662:1 (2016), violates Article I, Section 2 of the United States Constitution, and (2) "upon a demonstrated legislative impasse, this court must establish a new district plan" using a "'least change' approach." *Norelli v. Sec'y of State*, No. 2022-0184 (N.H. May 4, 2022), slip. op. ("May 12 Op.") at 2. With that opinion, the Court issued an order (the "May 12 Order") appointing a special master and setting forth six criteria he should use to develop a proposed remedial plan: (1) population equality as required by Article I, Section 2 of the United States Constitution; (2) compliance with the Voting Rights Act ("VRA") and other federal law; (3) contiguity; (4) core retention; (5) preservation of town, ward, and unincorporated-place lines; and (6) avoidance of political considerations. May 12 Order at 1–2.

The Court's order noted that the New Hampshire Senate Minority Leader and the New Hampshire House of Representatives (the "Minority Leaders") had submitted a proposed plan in their merits briefing, and it invited other interested parties to do the same. *Id.* at 2. The Court has since received three additional proposed plans: one from the Plaintiffs, and two from the Speaker of the New Hampshire House of Representatives and President of the New Hampshire Senate (the "Majority Leaders").

Thus, the Court currently has four proposed plans before it: the Minority Leaders' Plan, the Plaintiffs' Plan, the Majority Leaders' Plan 1, and the Majority Leaders' Plan 2.

## ARGUMENT

Of the four submitted plans, three satisfy the criteria set forth in the Court's May 12 Order (the Minority Leaders' Plan, the Plaintiffs' Plan, and Majority Leaders' Plan 2), while one (the Majority Leaders' Plan 1) does not. Plaintiffs therefore urge the Court not to adopt the Majority Leaders' Plan 1 as its remedial plan in this case.

As an initial matter, all four of the proposed plans sufficiently comply with the Court's criteria relating to population equality; compliance with federal law (including the VRA); contiguity; and preservation of town, ward, and unincorporated-place lines. However, with respect to core retention—the most important indicator of compliance with the court's least-change approach—the Majority Leaders' Plan 1 stands out as a clear, unacceptable outlier.

| Plan | Total Population Deviation | Persons Moved | Core Retention | Towns, Wards, and Unincorporated Places Moved |
|---|---|---|---|---|
| **Minority Leaders' Plan** | 51 | 8,998 | 99.35% | 1 |
| **Plaintiffs' Plan** | 1 | 13,373 | 99.03% | 4 |
| **Majority Leaders' Plan 1** | 1 | 366,063 | 73.43% | 75 |
| **Majority Leaders' Plan 2** | 9 | 8,968 | 99.35% | 6 |

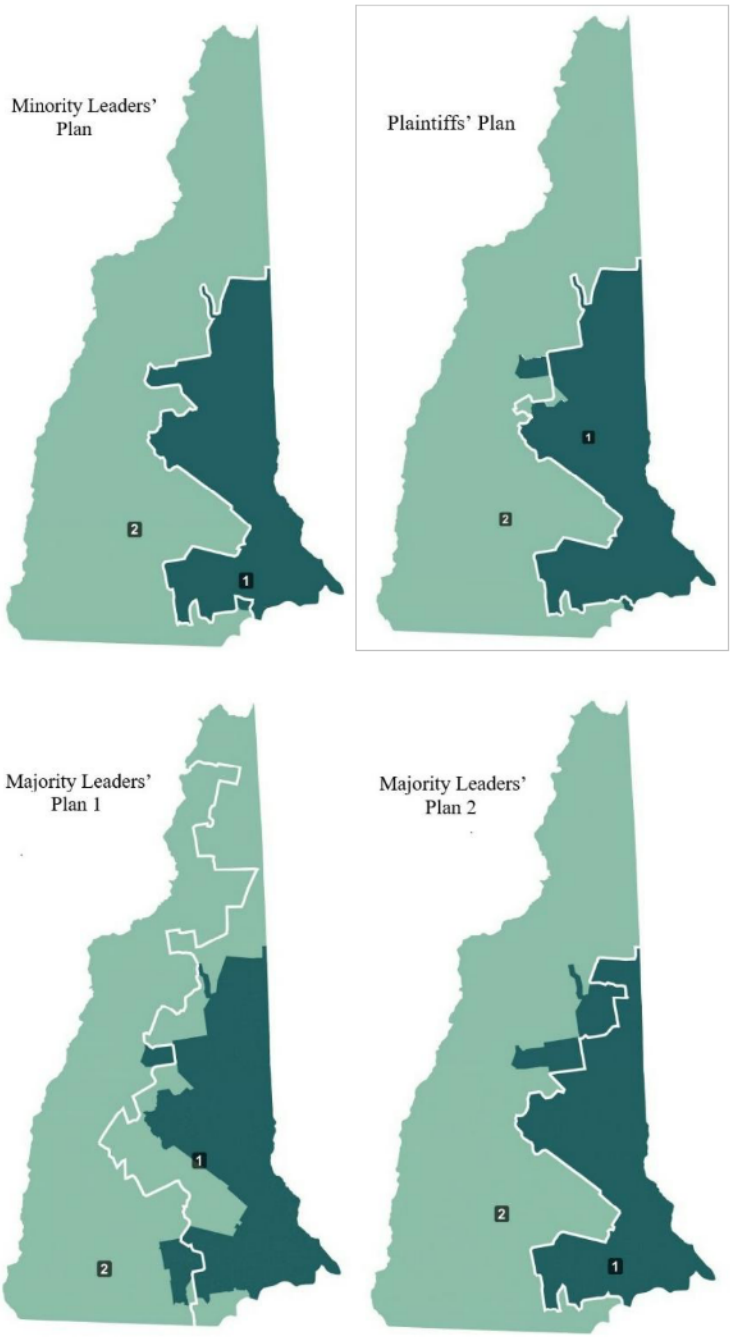
In no sense can the Majority Leaders' Plan 1 be described as a "least-change"

approach to remedying the malapportionment between the state's current congressional districts. The current districts differ in population by 17,945 persons. May 12 Op. at 4. As a result, District Two needs to gain just 8,972 people to equalize the districts' populations. Nonetheless, the Majority Leaders' Plan 1 proposes to move 366,063 people—a quarter of the state's population and more than *27 times* the number of people that Plaintiffs' plan (which also achieves one-person deviation) moves. This proposal defies the Court's intent to devise a remedial plan by, using the current plan as the "benchmark," "add[ing] or subtract[ing]" "contiguous populations" as "necessary to correct the population deviations" while keeping each districts' constituents "the same" "to the greatest extent practicable." May 12 Op. at 14.

As the other three proposed plans make clear, there are several ways to reduce the deviation between the current districts while keeping far more people in the same district than the Majority Leaders' Plan 1 does. Contrary to the Majority Leaders' assertion that "the easiest way to achieve very low population equality is to divide up northern Coös County," Submission of Speaker of the House and Senate President Pursuant to Order of May 12, 2022, at 5, Plaintiffs have demonstrated it is possible to achieve one-person deviation by moving less than one percent of the population and just four towns. Plaintiffs' plan does so without dividing the North Country at all, a result that the Majority Leaders themselves argue is worth pursuing. *Id.*

Also, unlike the other three proposed plans, the Majority Leaders' Plan 1 would dramatically alter the basic shapes of the state's congressional districts, resulting in a map that no New Hampshire voter would recognize. As the table above indicates, the Majority

Leaders' Plan 1 proposes to move *75* political subdivisions, while the other three proposed plans move at most six. The figures below, which overlay the proposed plans (represented by white lines) on top of the current districts, demonstrate how drastic this change would be.



The unwarranted changes proposed by the Majority Leaders' Plan 1 would also dramatically alter the historical nature of the state's congressional districts. For decades, New Hampshire's districts have each covered largely the same area. The First District has long contained Manchester, the Seacoast, and Belknap, Carroll, and Strafford Counties, while the Second District has long contained the North Country, the western half of the state, and Nashua. Despite claiming to follow a "least-change" approach, the Majority Leaders' Plan 1 would upend these historical lines by dividing the North Country and putting Manchester and Nashua in the same district.

The Majority Leaders' Plan 1 exemplifies how proper application of the least-change approach minimizes the risk that political considerations make their way into the adoption of the remedial plan. The more people the Court moves from one district to another, the more options there are as to who goes where. By choosing the Majority Leaders' Plan 1, the Court would be inviting political considerations that "have no place in a court-ordered remedial [redistricting] plan." May 12 Op. at 14 (quoting *Below v. Sec'y of State*, 148 N.H. 1, 11 (2002)). The Court need not do so here because the other three proposed plans show that it is possible to achieve population equality while moving far fewer people.

## CONCLUSION

The Majority Leaders' Plan 1 is inconsistent with the Court's chosen criteria for modifying the existing congressional plan. As a result, it should not be adopted. By contrast, the other three proposed plans demonstrate slightly different ways the Court could properly balance its criteria and would each be an appropriate remedial plan in this case.

Dated: May 18, 2022

Respectfully Submitted,

THERESA NORELLI, CHRISTINE FAJARDO, MATT GERDING, and PALANA HUNT-HAWKINS

By Their Attorneys,

By /s/ Steven J. Dutton

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**Appendix F**

**Transcript of Special Master Hearing**

STATE OF NEW HAMPSHIRE

SUPREME COURT

| | |
|---|---|
| THERESA NORELLI & a., Plaintiffs, | ) Supreme Court Case No. 2022-0184 |
| vs. | ) Superior Court Case No. 226-2022-CV-0126 |
| SECRETARY OF STATE & a., Defendants. | ) Concord, New Hampshire ) May 19, 2022 ) 1:01 p.m. |

SPECIAL MASTER HEARING
BEFORE THE HONORABLE NATHANIEL PERSILY
SPECIAL MASTER

APPEARANCES:

| | |
|---|---|
| For the Plaintiffs: | John M. Devaney, Esq.<br>PERKINS COIE<br>700 13th Street, NW<br>Suite 800<br>Washington, DC 20005-3960 |
| For the Defendants: | Myles B. Matteson, Esq.<br>NEW HAMPSHIRE DEPARTMENT OF JUSTICE<br>33 Capitol Street<br>Concord, NH 03301 |
| Also Present: | Sean R. List, Esq.<br>LEHMANN MAJOR LIST, PLLC<br>Richard J. Lehmann, Esq.<br>LEHMANN MAJOR LIST, PLLC |
| Audio Operator: | Electronically Recorded by Claire Mackinaw |



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(Proceedings commence at 1:01 p.m.)

THE BAILIFF: Please rise for Special Master Nathaniel Persily.

SPECIAL MASTER: Good afternoon.

MR. DEVANEY: Good afternoon.

MR. LEHMANN: Good afternoon.

MS. NORELLI: Good afternoon.

THE CLERK: This is case, Theresa Norelli, et al v. Secretary of State, et al.

SPECIAL MASTER: Welcome everybody. I'm Nate Persily. I'm a law professor at Stanford, but I appear here in my individual capacity. I was appointed, pursuant to the Order of the Supreme Court on May 12th to serve as Special Master in this case, which concerns the redistricting of New Hampshire's Congressional Districts.

The order from the Supreme Court on May 12th has ordered me to conduct this hearing today, as well as to draw or decide upon a Redistricting Plan, according to the following criteria; specifically, to read from the Order, it says that "The Special Master shall use the 2020 Federal Census Data and shall modify the existing Congressional Districts, only to the extent required to comply with the following criteria and least changed standards.

"Districts shall be as equal in population as practical, in accordance with the Constitution. The



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Redistricting Plan shall comply with the Voting Rights Act of 1965, and any other applicable Federal law. Districts shall be made of contiguous territory. To the greatest extent practical, each district shall contain, roughly, the same constituents as it does under the current Congressional District statute, such that the core of each district is maintained with contiguous populations added or subtracted as necessary to correct the population deviations.

"The Plan shall not divide towns, city, wards, or unincorporated places, unless they have previously requested by referendum to be divided, or unless the division is necessary to achieve compliance with the population equality required by the U.S. Constitution. And the Special Master shall not consider political data or partisan factors such as party registrations, statistics, prior election results, or future election prospects."

We've received three submissions, totaling four Plans in this case, as I understand it. One from the Plaintiffs, one from the Minority Leaders in the Legislature, and two from the Senate President and House Speaker. I understand that the advocates have either had a coin flip or agreed on the sequence of speakers today, and each will have 15 minutes, and then 5 minutes for rebuttal.

And so I understand, I think, here we have John Devaney for the Plaintiffs and Richard Lehmann for the Senate



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President. Do we have representatives from the Secretary of State and the State of New Hampshire here as well, or?

MR. MATTESON: Yes, Myles Matteson.

SPECIAL MASTER: Okay. And Myles Matteson from the Secretary of State's Office. So why don't we start with Mr. Devaney, and then followed by Mr. Lehmann. I may ask you questions or I may just hear what you have to say here.

MR. DEVANEY: Good afternoon, Professor. John Devaney for the Plaintiffs. I was going to walk through the criteria you just articulated, so I will skip through that and just go straight to the Plans. As you indicated, we have four Plans before us. A Plan from the Minority Leaders, the Plaintiffs' Plan, which we are sponsoring, and the Majority Leaders, two Plans, Plans I and Plan II. The good news, Professor, is that of these four Plans, three meet the Court's criteria that you articulated a few minutes ago, and adoption of any of those three would result in a Constitutional Voting Plan that would protect the voting power of New Hampshire citizens.

One of the maps, which is Majority Leaders Plan I, clearly violates the Court's order for reasons I'll expand upon, and the criteria the Court set forth. It would be unlawful and would compromise the voting power of New Hampshire citizens.

Turning, first then to the three lawful maps, and



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just giving some highlights on those maps. I'll start, not surprising, with our map, the Plaintiffs' (audio interference) map. And it's lawful, complies with all the criteria that the Court has established. First, it has almost perfect population equality with only a one person, unavoidable, deviation because that's how the math works. It has a core retention score of 99.03 percent, and moves only a little more than 13,000 people. It moves only four towns and it was prepared without any consideration of the political performance of the districts.

Would it be better if I put this back on? There we go. Maybe that will stop the echo.

And in addition, our Plan divides no towns, wards, municipalities, or unincorporated places, and it does well in compactness as well. It's essentially identical to the existing Plan with a slightly better Pulse v. Popper (phonetic) score in District 1 than in the existing Plan. So now, as far as we endorse our Plan, we crafted it to ensure compliance with the Court's criteria and we think it does, in fact, complies strictly with the criteria. It truly follows the least change approach that's been commanded.

Turning then to the Minority Leaders' Plan. It moves fewer people in towns than our map, but has higher population deviation. The population deviation is plus 51 in New Hampshire District 2. It has a good core retention score



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of 99.35 percent, moves just under 9,000 people, and moves only one town, Hampstead. It goes from District 1 to District 2 and it has no divisions of political boundaries. So again, it's also a very acceptable, lawful, constitutional map that complies with the Court's criteria. The only important difference, potentially, is the population deviation is different from ours.

And then of course, the Majority Leaders' Plan II, we were happy to see, is another from Majority that also is acceptable. It's a lawful, constitutional map. It moves fewer people than the Plaintiffs' and the Minority Leaders' Plans. It moves more towns than the Minority Leaders' Plan, but is has higher population deviation than, at least, our Plan with a deviation point, I think, it's plus nine in New Hampshire District 1. It moves just under 9,000 people. A good core retention score of 99.35 percent. And it moves six towns in New Hampshire District 2. It also has no divisions of local subdivisions.

Which takes me to the map that causes us significant concern, and that is Majority Leader Plan II. It's a clear outlier, with respect to comparison to the other three, and particularly with respect to core retention, which is the most important criteria when one thinks about a least change approach. Core retention, case law across the country and courts across the country applying least change have really



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focused on that factor, as I'm sure you are aware.

The current districts differ in population by just under 18,000 people, which means that New Hampshire District 2 needs to gain 8,972 people to equalize the district's populations. But nonetheless, puzzlingly, the Majority Leaders Plan I proposes to move about 366,000 people, which is a quarter of the state's population, and more than 27 times the number of people that our plan moves. Clearly, this proposal conflicts with the Court's intent to devise our veto Plan, by using the current Plan as the benchmark and keep each district's constituents the same "to the greatest extent practical".

We have provided, in the brief we submitted, visuals that just show how different the outlines and boundaries of this Plan II are from the current map. And just that visual alone, I think, establishes that it doesn't comply with the least change mandate from the Court.

And the other problem with the low core retention and moving 360,000 people or so is, it allows political factors and political performance to come into play because, obviously, when you're moving that many people around, you can effect political performance of the districts, which is, again, something that the Court proscribed. And as shown in the other maps, there are multiple ways to reduce the deviation between the districts while keeping far more people



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in the same district, and not violating the Court's mandate that constituents remain the same as much as possible in crafting the new map in accounting for this population deviation that needs to be addressed.

All three maps that I've described show there's no need to divide the north country at all, which Plan II of the Majority does. I'm sorry. I said Plan II, I meant Plan I. And the Plan I, also, just dramatically changes the shapes of the districts. So it would move 75 political subdivisions, while the other Plans move 6 at most. And it would also dramatically change the historical nature of the State's Congressional Districts.

For example, as I said, it would divide the north country, it would put Manchester and Nashua in the same district. Something that, to my knowledge, has not been done before. And last, as I said before, moving so many people deviating so much from the least change approach just brings in inevitable risk of political manipulation, which this Court has said is not proper.

So in conclusion, Professor, any of the three maps I described at the start of my presentation are acceptable to us. We think all would be lawful. All would protect the voting power of citizens throughout New Hampshire. And for the reasons I have described, Plan I is an outlier, and would plainly be unconstitutional and inconsistent with the Court's



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order. Thank you.

SPECIAL MASTER: Mr. Lehmann.

MR. LEHMANN: Thank you. Good afternoon, Professor. My name's Richard Lehmann. I am a lawyer at Lehmann Major List, right here in Concord, and I also am the legal counsel to the State Senate here representing Senate President today.

From the Senate President's perspective, the best Plan is one that's not before the Court right now, and I'm happy to tell you where it is. It's a bill called SB 200. It's been through the committee of conference process, so I can report that all members of the House and Senate committees of conference have signed off on it. It'll be voted on by the full bodies a week from today.

After that, the process followed here in New Hampshire is that the bill has to be enrolled, signed by the presiding officers, the President and the Speaker. It's then sent to the Secretary of State's Office and Secretary of State presents it to the Governor. The Governor, upon presentation -- which doesn't necessarily have to happen the 26th or the 27th; there's no mandated time line for that to happen --constitutionally, in part to Article 44, the Governor has five days to act on it, Saturdays and Sundays excluded, from the date of presentation.

I can report to you, the deviation of SB 200 is 53 people. I can't report to you whether the bodies are going to



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pass it. That's for them to decide a week from today. But it is the Senate President's very strong view that that is the best Plan that anybody's considering right now, in part, because it's being considered by the branch that's appropriate to consider it in the first instance.

I also, on his behalf, would like to express a concern about the way it appears this process could play out. In our very carefully thought-out constitutional balance of powers, the Legislature passes bills, and then the Governor either vetoes what the Legislature has provided, lets it become law without a signature, or signs it in for law. We don't have line-item veto or any of those sort of halfway in between procedures in this state.

If the Court -- upon your recommendation -- or if they don't approve your recommendation -- whatever they do, releases an order stating what the Court's map would be, before the Governor's time to act on a legislative Plan expires, it'll upset the balance of powers between the three branches, because the Governor will then be sitting looking at something that passed the Legislature, or something that will become law, if he chooses to veto it, effectively, giving the Governor a choice of two Plans, instead of the choice of the legislative Plan or an unknown resolution by the Court.

So from the President's perspective, maintaining the legislative process as the primary manner in which



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redistricting occurs is the singularly, first, most important thing about this whole exercise. So I just --

SPECIAL MASTER: Can I just ask on that? Because that I was going to ask you later on, what in this process can I do to expedite that process, the constitutional process? It doesn't sound like there's really anything in my power to do that. I mean, there have been times when I've been Special Master where we try to get the parties together, try to mediate -- that's obviously a different situation than what we're working with -- but there's a very specific order to me about the dates when I have to have this Plan done by, or accepted. And so I don't know, is there anything on my end of the process that can facilitate this?

MR. LEHMANN: I don't think there's anything that you can do to facilitate the legislative process from happening, except, potentially, recommend to the Court that it hold back on issuing an order to the public until the legislative process has played itself out. The Secretary of State in our state has the authority to push back the legislation period --

SPECIAL MASTER: Filing deadlines, yeah.

MR. LEHMANN: -- and filing date, so hopefully -- I don't know if it will come to that, but on Thursday we'll know if there's a Plan going to the Governor's desk; Thursday the 26th, a week from today.



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SPECIAL MASTER: Okay.

MR. LEHMANN: Concerning the Plans that have been submitted for your consideration, Professor, I would agree with some of what my colleague has indicated. I would say that I don't believe that there is a constitutional core retention standard. I know that the Court issued an order stating that that is a criteria. Interestingly, the least change language is not contained in the -- it's not clear to what degree your recommendation is supposed to balance population equality with maintaining the least change value.

And we submit that underscores the reason that the legislative Plan is the most important Plan in this proceeding. It's simply that the Legislature can make that balance without it coming in the way of its doing its proper constitutional duties. Because it's an inherently political decision and it involves balancing competing interests, which is what Legislatures do best.

That said, there is an additional Plan. When we made our submissions, we had no idea what the other side's submissions were going to look like, of course. And having seen the submissions and going through the process a little bit, went back to the drawing board and came up with a -- and I would point out, you, of course, have the authority to create your own map based on whatever you think is best, based on what you learn or what you bring to the table yourself.



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It's possible to have a one-person deviation map with a lower than 13,373 persons moved score. And the way you would do it is to move out of District 1 and into District 2, the following towns: Campton, Sandwich, Tamworth, Bartlett, Hales Location and Hart's Location. And out of 2 and into 1, Center Harbor, Bean's Purchase, Shelburne, Cambridge, Dummer, Errol, Wentworth, Odell, and Martin's Location. The deviation is one, and by my calculation, the number of people moved is 13,069.

Now, as I stated in the pleadings we filed together, the way you do that is to go up to the north country where we have these various small towns. Some of which, one town has one person, and another has two people. That's how you get down to the low numbers, consistently. And whether or not achieving population equality by driving contiguity up through those small towns is, absolutely, a policy call, but it's a policy call that underscores the tension between the least change and the population equality values that are at play here.

So I'm not suggesting one Plan or another, of the ones we've submitted, whether it's better to have a deviation of nine or whether it's better to have a deviation of one, or whether it's worth adding those other towns and subtracting towns. I would submit, probably, our Plan II balances those the best, but again, that is a call, and from where we sit



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simply underscores the fact that it really is best to leave it to the Legislature, if at all possible. And for that reason, we ask you to -- again, going back to my very first argument -- continue to hold off and give the Legislature every chance to put something in front of the Governor, and give the Governor his authority to act on it within his appropriate sphere as well.

The last comment I have, really, is to say I agree with my friends at the ACLU, that the raw number of people moved from one district to another is the way to measure least change. It didn't sound like our friends on the other side were disagreeing with that, but they do make some arguments that, I think, really ask you to engage in the kind of balancing that I think our Supreme Court is trying to avoid in its order to you to make this decision.

So they talk about the basic shape of the district or whether the New Hampshire voter would recognize the map as it's drawn or the historical nature of the State's Congressional Districts. Those factors aren't part of your charge here. The Court didn't say to consider those and our suggestion is that those are things you really shouldn't be thinking about. The Court asked you to do it by criteria that were sort of binary. Either the Plan violated the Voting Rights Act or it didn't. The Plan is contiguous or it isn't.

Neither of us have a complaint about each other's



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Plans, in those regards, and then from where I sit, it comes to a simple factor of least change balanced against population equality. And we would suggest that our Plan II, with the nine deviation, is probably the best, but if you really want to do the fully objective measure, the thing I just described to you that could be your idea, would have a deviation of one and the least people moved overall, and if it's really a purely objective test, then that's the best one that I've heard about. There may be others; I don't know what's possible to hook that's better, but you never know what you don't know. And I think that's all I have to say.

SPECIAL MASTER: The Plan that you're articulating, that's a one-person deviation is different than the one you submitted though?

MR. LEHMANN: It is. It does a couple different things. It starts with the Plan II, and it does a couple of different things to drive the deviation from nine down to one, and it results in moving about 3,000 more people -- a little over 4,000 more people to drive a deviation from nine to one.

SPECIAL MASTER: Right. Right. And it moves fewer people than the Plaintiffs' submission?

MR. LEHMANN: It moves fewer Plaintiffs (sic) than the Plaintiffs' Plan that goes to deviation of one by about 300.

SPECIAL MASTER: Okay. All right. I just want to



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make sure. I mean, I haven't seen the Plan, so it's a little hard to evaluate it.

MR. LEHMANN: Well, I mean, I can submit it to you as an after-hearing memo, or show it recorded and it's easy enough to draw it up --

SPECIAL MASTER: Okay.

MR. LEHMANN: -- from the existing Plan. It's not a lot moving either way. It must be, frankly, from your perspective, sort of an interesting exercise to look at this situation where you're literally drawing one line instead of --

SPECIAL MASTER: Yeah.

MR. LEHMANN: -- all over the map they way these things usually go.

SPECIAL MASTER: Indeed.

Mr. Devaney.

MR. DEVANEY: Thank you. A few comments in response. First, on the last point about a map that we haven't seen. The Court established a procedure for submitting maps. There is a deadline. I can't remember off the top of my head what the deadline was, but it has past, and to hear for the first time, now, that there is a new map out there that we've never seen, and just to have an oral description of it is not consistent with due process. It's not consistent with the Court's procedures and that should not



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be considered.

With respect to the suggestion that, somehow, the view, I guess, should give the Legislature deference, and allow the process to play out. There are a few points I'd like to make in response to that. First of all, Missouri, yesterday, I think, passed its congressional map, which means New Hampshire is the only state left in the country that does not have a congressional map. So here we are.

And the Court, in its order, this Court, was very careful to respect the Legislature's role in redistricting. It allowed the Legislature time to pass a map and appropriately -- particularly given that New Hampshire is the last state in country to have a map -- set a deadline. If the Governor doesn't have a map by the end of this month, then we're going to have a map that's ready to go to protect the people of New Hampshire, and that's the Court's obligation under the Growe decision from the U.S. Supreme Court and that whole line of authority.

And so this argument that somehow the separation of powers is being violated just doesn't hold any water, and the Supreme Court has already addressed that. And as I said, has given appropriate deference to the Legislature by allowing them time to get a map together, get it passed, if they can, and if they can't, for the Court to step in, for you to step in, and play the role that has been established by the U.S.



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Supreme Court in Growe and to protect the voting power of New Hampshire citizens.

With respect to the Plan that my colleague noted, SB 200, which is, I guess, in before the Legislature now. We don't have a full understanding of that Plan, but we do know a few things about it that suggests it's quite similar to Plan I that is before you. For example, I know it puts Manchester and Nashua together, in the same district, which means that it's moving people, significantly, and therefore, it cannot have a good core retention score. It also cannot do a good job of keeping constituents with their current Congress people in their current districts.

Our understanding is, it creates, from a political perspective, one safe Democratic seat and one safe Republican seat, and in doing so violates the criteria of this Court as established, which is do not take into consideration the political performance of a district. So to the extent that the Legislature is asking for consideration of that map in this proceeding -- and they haven't submitted it, so I guess in fairness, it's not before you -- but I think it's appropriate to respond that there's some serious concerns with that map's compliance or noncompliance with the criteria that this Court has established.

Let's see, I had one or two other points. Counsel said that we made the argument about the shape of the



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districts and that that's not part of the criteria that should be considered. Obviously, the reason we're pointing out the shape is indicative, strongly, of noncompliance of Plan I with the least change approach. When the boundaries of the district have changed so dramatically, one, obviously, can infer from that that people have been moved, and that towns and cities have been put into new districts. And that's our only point with that graphic, is to show, this is for the demonstration of the fact that this map does not follow least change approach. And that's the only reason we put in that graphic, so that you could see it visually. And that visual look is supported by the data and including the low core retention score, and the fact that so many people are moved under Plan I. So that's why we put that in there.

In conclusion, I was happy to hear my colleague say that Plan II, in their perspective, does the best job of balancing the various factors that are before you. Perhaps we have some agreement, or close to something of an agreement, and as I said in my opening, either Plan II, our Plan, or the Minority Plan are acceptable, and I think that we've got a pretty clear path forward here. So thank you.

MR. LEHMANN: Yes. Couple things. First, in terms of New Hampshire being the last state to have a Congressional Redistricting Plan done, I would say we are also the state with the latest primary in the country, as I understand it.



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So I don't actually think we're that far behind most of our sister states, simply because if you measure from the date of the primary backwards, we're right in the ballpark where, I think, everybody was.

I guess, and I would point out in the Below case, the 2002 Senate redistricting case from 20 years ago, in that case, the Court didn't exercise jurisdiction until the -- or final jurisdiction, anyway, until the Legislature had adjourned without having adopted a Plan. We're far from that right now. We've still got a Plan in the hopper. It's still in the process.

What that Plan looks like or what it does, I would respectfully submit, is none of the business of the Court at this time, other than the fact that it exists. It's primary. It exists and it's in the proper venue. That's it's primary benefit, and it's the most important benefit. To the extent that something that is under legislative consideration right now doesn't line up with the criteria that the Court set for a Court-Drawn Plan, I think, is -- well, it's irrelevant, they're two different things.

Criteria for a Court-Drawn Plan are one thing. I don't take anything that the Court said about the criteria it would use to draw congressional districts to in any way control, or purport to control, or attempt to influence in any way what the Legislature's going to choose to do. And if it



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comes before the Court to review something passed by the Legislature and signed by the Governor, we will address the criteria by which that gets done at another time. I would submit that nothing that the Court has had to say about criteria in this matter, in the Norelli case, as it now stands, has anything to do with the review of the legislatively inactive Plan.

So other than that, I don't believe I have anything else to add.

SPECIAL MASTER: Let me ask you one other question, which is, just on this -- as I understand the argument from the separation of powers standpoint, you're saying that the court shouldn't release anything because then somehow it interrupts the bargain, so then it distorts the balance between the Legislature and the Governor; is that --

MR. LEHMANN: Correct.

SPECIAL MASTER: -- the basic argument?

MR. LEHMANN: Yes.

SPECIAL MASTER: Because another option; if the Governor is eventually going to veto it, right, part of what sometimes happens in these cases is that you have the Court Plan is the default, so that then the parties can, essentially, negotiate around it, so that it can actually facilitate -- so it can remove some of the uncertainty as to what would be the eventual Plan that would go into effect,



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absent agreement between the Governor and the Legislature.

MR. LEHMANN: That won't work in this case because the Legislature will be done. The last day for the Legislature to act, pursuant to its own rules without suspending those rules by 2/3, two from majority vote, is next Thursday, the 26th. So the Court Plan won't be released until after the Legislature's gone home.

SPECIAL MASTER: Right.

MR. LEHMANN: So it won't be a situation where there's legislative ability to engage in that kind of negotiation.

SPECIAL MASTER: So is it your argument that, then, the Court wait until the Governor vetoes this Plan? If the Governor were to veto it?

MR. LEHMANN: Wait until the Governor takes action on it, yes.

SPECIAL MASTER: Okay. Thank you. Is there anything else?

MR. DEVANEY: The only point I would make is that, obviously, you're under a directive from this Court to issue a map, I think, by May 27th. And so while I hear my colleague's arguments about timing and allowing the process to play out, before us today is, we all have to deal with the fact that we have a court order that requires issuance of a map on May 27th.



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SPECIAL MASTER: Yeah.

MR. DEVANEY: So I just want to state the obvious.

SPECIAL MASTER: And I will follow the Court's order to issue -- and interestingly, the Court phrased it as not before, nor after, May 27th, which is an interesting way to phrase. So I've got my directions on it. Yeah.

MR. LIST: Sean List on behalf of the Speaker of the House. I'm not presenting oral argument, just in terms of the time line. So the Court's order from May 12th states that the Special Master shall prepare and issue to the Court no earlier than May 27th. As far as how it works in New Hampshire, constitutionally, if the bill passes the Legislature, when it's presented to the Governor, the Governor has five days to act. So when we're talking about holding off until the Governor takes action, assuming the bill can be enrolled and presented in an expedited fashion, we're talking about holding off for less than a week. Thank you.

SPECIAL MASTER: Great.

MR. DEVANEY: I'm sorry.

SPECIAL MASTER: Sure.

MR. DEVANEY: Playing ping pong here.

SPECIAL MASTER: Well, literally, I am under a court order.

MR. DEVANEY: Yeah.

SPECIAL MASTER: So I'm going to release a Plan on



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May 27th, since that's what you've brought me here to do. Then there are arguments that can be made to the Court as to what it should do with it, and whether it should have -- as sometimes happens with courts -- they may decide to give an extension for -- give another bite of the apple to the Legislature or to the Governor, but I will follow the Court's order, both as to procedure and to the substance of the map.

Yes.

MR. MATTESON: Myles Matteson for the Secretary of State.

UNIDENTIFIED SPEAKER: Can you move closer?

SPECIAL MASTER: Yeah. Go to the microphone. I do feel like I'm running one of my law-school seminars at this point, but yeah.

MR. MATTESON: Just referring to this Court's orders. You had mentioned a not after --

SPECIAL MASTER: Right.

MR. MATTESON: -- May 27th. I don't believe that that's the language in the orders, as issued. It appears, looking at the May 5th order, and then the May 12th, that the Congressional Redistricting Plan from the Special Master, on or before -- or congressional action would be on or before May 26th, and then the report shall not be issued earlier than May 27th, but leaves open the possibility of issuing a report later than that.



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SPECIAL MASTER: I'm pretty sure that I've seen an order that tells me that, but I'll review that and make sure that's correct.

All right. Well, thank you very much. I will, as I said, abide by the Court order. Thank you for your excellent arguments today and for all of your submissions. I will, obviously, analyze all of them. I've looked at all of the maps that have presented thus far, and so I have not made a decision as to which map I will choose or whether I'll draw my own, but you'll have an answer within a week.

(Proceedings concluded at 1:36 p.m.)



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May 20, 2022