THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Docket No. 2022-0629

Miles Brown, et al.

v.

Secretary of State, et al.

BRIEF FOR THE SECRETARY OF STATE AND THE STATE OF NEW HAMPSHIRE

THE NEW HAMPSHIRE SECRETARY OF STATE AND
THE STATE OF NEW HAMPSHIRE

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(Fifteen-minute oral argument requested)

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Did the superior court correctly dismiss as nonjusticiable the plaintiffs' claims that the State Senate and Executive Council redistricting plans are unconstitutional because they allegedly favor one political party over another?

STATEMENT OF THE CASE AND FACTS

A. State Senate and Executive Council Redistricting Plans 2022

Following the 2020 federal census, the New Hampshire Legislature fulfilled its constitutional duty to reapportion the State Senate and Executive Council districts, and the Governor signed those redistricting plans into law. *See* Laws 2022, ch. 45; Laws 2022, ch. 46.

As required by Part II, Article 25 of the State Constitution, the State Senate redistricting plan (Senate Bill 240) reapportioned the State's twenty-four State Senate districts into single-member districts with nearly equal populations. (New Hampshire Senatorial Districts 2022 (available at 2022-senatorial-district-map.pdf (nh.gov)). In accordance with Part II, Article 26 of the State Constitution, each senate district consists of "contiguous towns, city wards and unincorporated places, without dividing any town, city ward or unincorporated place." *Id.*

As required by Part II, Articles 60 and 65 of the State Constitution, the State Executive Council redistricting plan (Senate Bill 241) reapportioned the State's five Executive Council districts into single-member districts with nearly equal populations. (New Hampshire Executive Councilor Districts 2022 (available at 2022-executive-council-district-map.pdf (nh.gov)). These districts consist of contiguous towns, cities, and unincorporated places, without dividing any town, city, or unincorporated place. *Id.*

B. Superior Court Proceedings

The plaintiffs, eleven registered New Hampshire voters, filed suit in superior court alleging that the State Senate and Executive Council districts

are partisan gerrymanders. (Pls.' Addendum ("Add.") at 2.) The plaintiffs sought: (1) a declaration that these districts "violate Part I, Articles 1, 10, 11, 12, 22, and 32 of the New Hampshire Constitution"; (2) preliminary and permanent injunctive relief enjoining the Secretary of State from "implementing, enforcing, or giving any effect" to those laws; and (3) new court-adopted maps for those districts "that comply with the New Hampshire Constitution." *Id.*

The defendants, the New Hampshire Secretary of State and the State of New Hampshire, moved to dismiss asserting that the plaintiffs' partisan gerrymandering claims present nonjusticiable political questions. The defendants argued that the State Constitution vests redistricting authority exclusively with the legislative branch, expressly details the constitutional requirements such redistricting plans must meet in Part II, Articles 25, 26, 60, and 65, and provides no judicially discoverable or manageable standards for resolving partisan gerrymandering claims. (Pls.' Appendix ("App.") Vol. II at 106-124.)

The superior court (*Colburn*, J.), agreed with the defendants and dismissed plaintiffs' complaint. The superior court determined that the State Constitution clearly commits the authority to draw the boundaries for State Senate and Executive Council districts to the Legislature. (Pls.' Add. at 5.) In doing so, the superior court acknowledged this Court's precedents, which expressly hold that "political considerations are tolerated in legislatively-implemented redistricting plans." *Id.* (quoting *Burling v. Chandler*, 148 N.H. 143, 156 (2002)). The superior court explained that the plaintiffs did not, and could not, claim that either redistricting plan violated the mandatory, express requirements of Part II, Articles 26 and 65, *id.* at 6,

and rejected the argument that a smattering of provisions found in Part I of the State Constitution, all of which are silent as to redistricting, could be used to add a prohibition on redistricting for partisan advantage into the explicit redistricting criteria found in Part II of the State Constitution, *id.* at 6-7. Finally, the superior court concluded that, "'[i]n the absence of a clear, direct, irrefutable' violation of [the State Constitution's] explicit redistricting requirements, 'the complexity of delineating state legislative district boundaries and the political nature of such endeavors necessarily preempt judicial intervention.'" *Id.* at 7 (quoting *City of Manchester v. Secretary of State*, 163 N.H. 689, 697 (2012)).

This appeal followed.

SUMMARY OF THE ARGUMENT

The plaintiffs' claims present nonjusticiable political questions because: (1) the State Constitution vests the Legislature with the exclusive authority to redistrict; (2) no judicially discoverable or manageable standards exist for resolving plaintiffs' claims; and (3) the Judiciary cannot decide the plaintiffs' claims without making an initial policy determination of a kind clearly reserved for nonjudicial discretion. *Richard v. Speaker of the House of Representatives*, 175 N.H. 262, 267-68 (2022).

This Court has held that "[o]ur State Constitution vests the authority to redistrict with the legislative branch, and for good reason.'" *City of Manchester*, 163 N.H. at 697 (quoting *In re Below*, 151 N.H. 135, 150 (2004)). Redistricting is "an inherently political and legislative – not judicial – task." *In re Below*, 151 N.H. at 150. "The framers in their wisdom entrusted this decennial exercise to the legislative branch because the give-and-take of the legislative process, involving as it does representatives elected by the people to make precisely these sorts of political and policy decisions, is preferable to any other." *Id.* (internal quotations omitted). This Court "tread[s] lightly in this political arena, lest [it] materially impair the legislature's redistricting power," *id.*, understanding that "political considerations" play a permissible role in the legislative redistricting process, *Burling*, 148 N.H. at 156.

The State Constitution contains express redistricting requirements for State Senate and Executive Council districts. N.H. Const. Pt. II, Arts. 25, 26, 60, & 65. The State Constitution does not, however, prohibit, restrict, or otherwise provide whether, how, or to what extent the

Legislature may consider partisanship when exercising its constitutional redistricting authority. It instead reserves to the plenary, discretionary authority of the Legislature the business of deciding whether and to what extent politics should be considered in a process that is, by constitutional design, inherently political.

The plaintiffs' partisan gerrymandering claims invite this Court to encroach upon the Legislature's constitutionally reserved authority and impose its own judgments about what kind, mix, or amount of political considerations may be factored into the redistricting process, with no objective operating standards in which to anchor such judgments. No judicially discoverable or manageable standards exist for doing this, and the Judiciary could not begin to referee these issues without making one or more initial policy determinations regarding what kind, mix, or amount of political considerations may be factored into the redistricting process. Such an initial policy determination is of a kind clearly reserved for nonjudicial discretion.

The plaintiffs then ask this Court to craft a political solution for their preferred political party to overturn districts created by elected, politically accountable legislators. This Court has made clear for quite some time now that it cannot do this: "Political considerations 'have no place in a court-ordered remedial [redistricting] plan.'" *Norelli v. Secretary of State*, 175 N.H. 186, 203 (2022) (quoting *Below*, 148 N.H. at 11); *Burling*, 148 N.H. at 156.

The plaintiffs' remedy for their political concerns lies in the political process. Numerous States have amended their state constitutions to prohibit partisanship from being considered in the redistricting process in

particular ways. Other States have passed statutes that prohibit partisanship from being considered during the redistricting process in particular ways. New Hampshire's policymakers and citizens have the tools at their disposal to address partisan gerrymandering through constitutional amendment or specific legislation. It is not the role of the Judiciary to add language to the State Constitution that does not exist. *See N.H. Mun. Trust Workers' Compensation Fund v. Flynn*, 133 N.H. 17, 26 (1990) (declining to "rewrite the constitution" to "creat[e] limitations that are not clearly expressed by the language contained therein").

Accordingly, the superior court correctly dismissed the plaintiffs' claims as presenting nonjusticable political questions and its decision should be affirmed.

ARGUMENT

I. STANDARD OF REVIEW

Whether a controversy is nonjusticiable presents a question of law, which this Court reviews *de novo*. *See Burt v. Speaker of the House of Representatives*, 173 N.H. 522, 525 (2020). "Deciding whether a matter has in any measure been committed by the Constitution to another branch of government is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the State Constitution." *Id*. (cleaned up).

When interpreting a constitutional provision, the Court looks to its purpose and intent and gives the words in question the meaning they must be presumed to have had to the electorate when the vote was cast. *Richard*, 175 N.H. at 269. The Court interprets the meaning of a constitutional provision from the plain language of that provision, as that language was understood and used at the time the constitutional provision was adopted. *Id*.

The challenged redistricting plans are statutes "entitled to the same presumption of constitutionality as any other statute." *City of Manchester*, 163 N.H. at 697. They will therefore not be declared "'invalid except upon inescapable grounds.'" *N.H. Health Care Assoc. v. Governor*, 161 N.H. 378, 385 (2011) (quoting *Baines v. N.H. Senate President*, 152 N.H. 124, 133 (2005)). This means that this Court "'will not hold" the redistricting plans "'to be unconstitutional unless a clear and substantial conflict exists between [them] and the constitution.'" *Id.* (quoting *Baines*, 152 N.H. at 33). "It also means that '[w]hen doubts exist as to the constitutionality of a

statute, those doubts must be resolved in favor of its constitutionality.'" *Id.* (quoting *Bd. Trustees of N.H. Judicial Ret. Plan v. Secretary of State*, 161 N.H. 49, 53 (2010)). The party challenging a statute's constitutionality bears the burden of proof. *Id.*

II. THE PLAINTIFFS' CLAIMS PRESENT NONJUSTICIABLE POLITICAL QUESTIONS.

"Courts lack jurisdiction to decide political questions." *Richard*, 175 N.H. at 267. "'The nonjusticiability of a political question derives from the principle of separation of powers.'" *Burt*, 173 N.H. at 525 (quoting *Hughes v. Speaker, N.H. House of Representatives*, 152 N.H. 276, 283 (2005)). Part I, Article 37 of our State Constitution describes the principle of separation of powers that defines our governmental system:

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

"'The justiciability doctrine prevents judicial violation of the separation of powers by limiting judicial review of certain matters that lie within the province of the other two branches of government.'" *Burt*, 173 N.H. at 525 (quoting *Hughes*, 152 N.H. at 283).

"'Deciding whether a matter has in any measure been committed by the Constitution to another branch of government . . . is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution." *Richard*, 175 N.H. at 268

(quoting *Baker v. Carr*, 369 U.S. 186, 211 (1962)). "'Where there is such commitment, we must decline to adjudicate the matter to avoid encroaching upon the powers and functions of a coordinate political branch.'" *Id.* (quoting *Burt*, 173 N.H. at 525).

> Cases that raise nonjusticiable political questions have the following characteristics: (1) 'a textually demonstrable constitutional commitment of the issue to a coordinate political department'; (2) 'a lack of judicially discoverable and manageable standards for resolving it'; (3) 'the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion'; (4) 'the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government'; (5) 'an unusual need for unquestioning adherence to a political decision already made'; or (6) 'the potentiality of embarrassment from multifarious pronouncements by various departments on one question.'

Id. at 267-68 (quoting *Baines*, 152 N.H. at 129).

A. Plaintiffs' claims are nonjusticiable political questions because the State Constitution commits reapportionment authority to the Legislature.

The State Constitution commits the authority to determine State Senate and Executive Council districts to the Legislature. *See* N.H. CONST., Pt. II, Art. 26; N.H. CONST., Pt. II, Art. 65; *see also City of Manchester*, 164 N.H. at 697 ("Our State Constitution vests the authority to redistrict with the legislative branch, and for good reason" (quotation omitted)). It requires the Senate to consist of twenty-four districts and defines how the Legislature must construct those districts. N.H. Const., Pt. II, Arts. 25, 26, 26-a. Specifically, Part II, Article 26 provides that the "legislature shall

divide the state into single-member districts, as nearly equal as may be in population, each consisting of contiguous towns, city wards and unincorporated places, without dividing any town, city ward or unincorporated place." Part II, Article 26-a further provides that, "[n]otwithstanding Article 26 or any other article, a law providing for an apportionment to form senatorial districts under Article 26 of Part Second may divide a town, ward or unincorporated place into two or more senatorial districts if such town, ward or place by referendum requests such division."

Part II, Article 60 provides that there shall be five Executive Councilors, and Part II, Article 65 further provides that "[t]he legislature may, if the public good shall hereafter require it, divide the state into five districts, as nearly equal as may be, governing themselves by the number of population, each district to elect a councilor . . . ."

This Court has consistently declined to intervene in matters that the Constitution commits to another coordinate branch of government where the Constitution does not expressly mandate that certain actions by that branch of government be taken. For example, in *Burt*, this Court observed that the Legislature's internal procedures were a matter "entirely within legislative control and discretion, not subject to judicial review *unless the legislative procedure is mandated by the constitution*." 173 N.H. at 526 (emphasis added); *see also Sumner v. N.H. Secretary of State*, 168 N.H. 667, 672 (2016) (ruling that alleged violations of the Legislature's procedural rules presented a nonjusticiable political question because the Constitution gives the Legislature "complete control and discretion" over its procedural rules); *Baines*, 152 N.H. at 130 (determining that judicial

review of the Legislature's compliance with "nonconstitutionally mandated statutory legislative procedures" was nonjusticiable political question); *Hughes*, 152 N.H. at 286 (ruling that alleged violations of the right-to-know law by the Legislature was a nonjusticiable political question, in part, because "nothing in Part I, Article 8 requires the legislature to adopt particular internal legislative procedures to protect the public's right of access to public proceedings"); *In re Judicial Conduct Committee*, 145 N.H. 108, 111-12 (2000) (determining that judicial review of an impeachment proceeding presented a nonjusticiable political question because Part II, Article 17 committed the authority to impeach judges to the legislative branch).

This Court further explained in *Richard* that the question of "whether a constitutionally-mandated procedure has been followed is justiciable," but "to the extent the constitution vests the Speaker and the Senate President, on behalf of their legislative bodies, with the *discretion* to take certain actions, we conclude that whether they erred in the manner in which they exercised that discretion is *not* justiciable." 175 N.H. at 268.

Applying this Court's justiciability precedents and reasoning to this case, the Legislature's exercise of its reapportionment authority, which the State Constitution commits to the Legislature in Part II, Articles 26, 26-a, and 65, is a matter entirely within legislative control and discretion except for the reapportionment requirements the Constitution expressly mandates. The State Constitution identifies a finite list of mandatory requirements to which the Legislature must adhere when reapportioning State Senate and Executive Council districts. There must be 24 single-member State Senate districts that are as nearly equal as may be in population and composed of

contiguous, undivided towns, city wards, and unincorporated places. N.H. CONST., Pt. II, Arts. 25-26. And there must be five State Executive Council districts that are as nearly equal in population as may be. N.H. CONST., Pt. II, Art. 60, 65.[1]

The State Constitution does not contain any mandatory requirements or "constitutional guideposts" requiring the Legislature to take, or prohibiting it from taking, political considerations into account during the reapportionment process. *City of Manchester*, 163 N.H. at 708. Thus, whether and to what extent to take politics into account during the redistricting process involves an exercise of legislative discretion that is not justiciable. *Richard*, 175 N.H. at 268.

This Court's precedents support this result. Specifically, this Court has only intervened in reapportionment disputes when challenged districts were alleged to have violated express constitutional provisions requiring districts to be as equal as may be in population, such as those found in Part II, Articles 26 and 65. *See*, *e.g.*, *Norelli*, 175 N.H. at 203 (exercising jurisdiction to judicially reapportion congressional districts because the Legislature had reached an impasse and existing districts violated Article 1, Section 2 of the Federal Constitution because they did not have "populations as close to perfect equality as possible"); *Below*, 148 N.H. at 2-3 (2002) (exercising jurisdiction to judicially reapportion senate districts

[1] These redistricting requirements themselves help prevent partisan gerrymandering. *See Below*, 148 N.H. at 9 (explaining in the context of the State Senate that "the contiguity requirement is intended to prevent partisan gerrymandering"). And it is evident that the Legislature employed a contiguity rule when redistricting the Executive Council, going so far as to ensure that city wards were not split between districts and cities were kept intact. *See id.* ("Contiguity may be a valid consideration in districting a state legislative body.").

because the Legislature had reached an impasse and existing districts violated Part II, Article 26's express requirement that senate districts be "as nearly equal as may be in population"); *Burling*, 148 N.H. at 144-45 (exercising jurisdiction to judicially reapportion house districts because the Legislature had reached an impasse and existing districts violated Part II, Article 9's express requirement that "representation" in house districts "shall be as equal as circumstances will admit").

Conversely, this Court has never intervened in a reapportionment dispute in order to direct the Legislature to pursue certain goals in the redistricting process that the State Constitution does not address. In fact, in *City of Manchester*, this Court declined to address an alleged redistricting violation that was not a violation of one of the State Constitution's mandatory reapportionment requirements. 163 N.H. at 708. One of the petitioners' arguments in that case was that the House redistricting plan was "unconstitutional because it d[id] not reflect 'community of interest' factors." *City of Manchester*, 163 N.H. at 707. In rejecting the argument, this Court observed that preserving communities of interest, while it may be a legitimate legislative goal, is not a constitutionally imposed redistricting requirement. *Id.* at 708. This Court explained that "[h]ad the framers of the State Constitution and its amendments wished, 'they could have proposed such things as defining and preserving communities of interest,' or requiring that legislative districts be compact," but they did not do so. *Id.* And this Court declined to read such a requirement into the State Constitution, noting instead that a decision to divide communities of

interest, "at most, raises a question about the wisdom of the redistricting plan, but does not call its constitutionality into question." *Id.*[2]

The plaintiffs' partisan gerrymandering concerns here fall into the same category as the petitioners' communities of interest concerns in *City of Manchester*. Both concerns are found nowhere in the State Constitution and seek to impose affirmative restrictions on the Legislature's discretion to redistrict. The State Constitution does not, as the plaintiffs assert, require the Legislature to use only "nonpartisan, traditional redistricting criteria." Nor does the State Constitution prohibit the Legislature from considering political criteria when exercising its constitutional authority to reapportion. So long as the Legislature abides by the constitutionally mandated redistricting criteria contained in Part II, Articles 26 and 65, it is free, in the exercise of its discretion, to factor politics into the redistricting process.

Another feature of the State Constitution and this Court's jurisprudence reveals why the plaintiffs' partisan gerrymandering claims are nonjusticiable. Part I, Article 35 of the State Constitution "recognizes the need for an independent judiciary." *State v. LaFrance*, 124 N.H. 171, 177 (1983). It states: "It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit." N.H. Const. Pt. I, Art. 35. "Judicial review, coupled

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[2] Notably, one of the Plaintiffs' experts in this case focuses solely on "communities of interest," despite the Supreme Court's decision in *City of Manchester*. *See* Pls.' App. Vol. I at 263 ("Plaintiffs' counsel has asked me to examine whether the districts as constituted under Senate Bills 240 and 241 keep communities of interest together.").

with the specified constitutional provisions which keep the judicial branch separate and independent of the other branches of government and with those articles of the constitution that protect the impartiality of the judiciary from public and political pressure, enables the courts to ensure that the constitutional rights of each citizen will not be encroached upon by either the legislative or the executive branch of the government." *LaFrance*, 124 N.H. at 178.

Consistent with these constitutional principles, this Court has wisely fenced political considerations in redistricting cases out of the judicial process. *See, e.g.*, *Norelli v. Secretary of State*, 175 N.H. 186, 203 (2022) ("Political considerations 'have no place in a court-ordered remedial [redistricting] plan.'" (quoting *Below*, 148 N.H. at 11); *Burling*, 148 N.H. at 156 ("While political considerations are tolerated in legislatively-implemented redistricting plans, they have no place in a court-ordered plan."). Thus, in *Norelli*, this Court precluded the appointed special master from considering "political data or partisan factors, such as party registration statistics, prior election results, or future election prospects." *Norelli v. Secretary of State*, No. 2022-0184 (May 12, 2022 Order at 4). The plaintiffs' claims in this case, however, are premised entirely on political data and alleged partisan factors that would require the Judiciary not only to consider them, but to rely on them in the adjudication of the case and the fashioning of any remedial plan. Part I, Article 35, and this Court's redistricting precedents, appropriately seek to distance the Judiciary from the political aspects of redistricting, and they highlight why the inherently political process of redistricting is reserved by our State Constitution to the Legislature in the absence of a clear, direct, irrefutable

constitutional violation. *See City of Manchester*, 163 N.H. at 697 ("Both the complexity in delineating state legislative district boundaries and the political nature of such endeavors necessarily preempt judicial intervention in the absence of a clear, direct, irrefutable constitutional violation." (internal quotations omitted)).

Accordingly, the plaintiffs' claims present nonjusticiable political questions. The State Constitution commits reapportionment to the Legislature and does not clearly, directly, and irrefutably prohibit the Legislature from considering politics when redistricting. Whether and to what extent political considerations play a role in the redistricting process are matters of legislative discretion that this Court must decline to review. *Richard*, 175 N.H. at 268.

B. Plaintiffs' claims are nonjusticiable political questions because the State Constitution does not provide discoverable or manageable standards for judicial intervention.

The plaintiffs' claims additionally present a nonjusticiable political question because there are no judicially discoverable or manageable standards for judicial intervention. *See Burt*, 173 N.H. at 525. As described above, the State Constitution does not contain any clear, direct, and irrefutable prohibitions against considering partisanship in the redistricting process. By extension, the fact that the State Constitution is *silent* regarding whether, how, or to what extent the Legislature may consider partisanship when redistricting leaves the Judiciary with no

discoverable, manageable standards for intervening in an area that the State Constitution has committed exclusively to the Legislature.

The United States Supreme Court recently addressed the justiciability of partisan gerrymandering claims under the Federal Constitution. *See Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). The Supreme Court ruled that even if "[e]xcessive partisanship in districting leads to results that reasonably seem unjust," the solution does not lie within the federal judiciary because "partisan gerrymandering claims present political questions beyond the reach of the federal courts." *Id.* at 2506-07. In reaching this ruling, the Supreme Court focused on the fact that the Federal Constitution (which like the State Constitution is silent regarding partisan gerrymandering) contains "no legal standards" to limit or direct judicial decisions regarding partisan gerrymandering, "let alone limited and precise standards that are clear, manageable, and politically neutral." *Id*. at 2500.

The United States Supreme Court reasoned that judges "have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions." *Id*. at 2507. Recognizing that "judicial action must be governed by standard, by rule, and must be principled, rational, and based on reasoned distinctions found in the Constitution or laws," the Supreme Court concluded that "[j]udicial review of partisan gerrymandering does not meet those basic requirements." *Id*. (cleaned up). The Supreme Court further noted that it has "never struck down a partisan gerrymander as unconstitutional—despite various requests over the past 45 years." *Id*.

The Supreme Court's reasoning in *Rucho* applies with equal force to this case. The plaintiffs bring claims under the State Constitution that appear to be functionally identical to the claims the United States Supreme Court concluded were nonjusticiable under the Federal Constitution in *Rucho*. *Compare id.* at 2491 (noting that the plaintiffs there alleged political gerrymandering in violation of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Elections Clause), *with* Pls.' App. Vol. I at 35-40 (Compl. ¶¶ 99–120) (alleging political gerrymandering in violation of the State Constitution's guarantee of free speech and association, guarantee of equal protection, and Elections Clause). The State Constitution grants redistricting authority to the Legislature—a body of elected officials who are politically accountable to their voters. This Court has recognized that the power to redistrict—determinations inseparable from political realities and political balancing—properly belongs to the legislative branch, not the judicial branch. *See Norelli*, 175 N.H. at 200-01 ("In the context of state legislative redistricting, we have observed that reapportionment is primarily a matter of legislative consideration and determination." (cleaned up)).

Furthermore, while *Rucho* held that political partisan gerrymandering claims were beyond the reach of the federal courts and left the issue to state courts, that does not result in the outcome the plaintiffs assert—that state courts are free to prohibit partisan gerrymandering absent explicit constitutional or legislative direction to do so. State constitutional drafters or amendments may explicitly create guidelines or prohibitions relating to political considerations in redistricting. New Hampshire's Constitution has none and is therefore in the same position as the *Rucho*

Court's consideration of the United States Constitution—political considerations in redistricting presents a political question beyond the reach of the state courts.

As was the case in *Rucho*, this Court should not judicially review an allegation of political gerrymandering when there are no state laws or constitutional provisions setting forth one or more standards that would allow the Court to render principled, rational, and reasoned decisions based on those constitutional or statutory standards. *See Rucho*, 139 S. Ct. at 2507. Indeed, this Court has expressly *prohibited* state courts from basing redistricting remedies on political considerations. *See Norelli*, 175 N.H. at 203 ("Political considerations have no place in a court-ordered remedial redistricting plan." (cleaned up) (quoting *Below*, 148 N.H. at 11)); *cf. Burling* 148 N.H. at 145 (recognizing that the New Hampshire Supreme Court's function is not to "decide peculiarly political questions involved in reapportionment," and stating that the Court "reluctantly" engaged in judicial redistricting only because of an impasse in the reapportionment process, but noting that the Court must be "indifferent to political considerations, such as incumbency or party affiliations."). To that end, this Court precluded the special master appointed in *Norelli* from considering "political data or partisan factors, such as party registration statistics, prior election results, or future election prospects." *Norelli v. Secretary of State*, No. 2022-0184 (May 12, 2022 Order at 4). The plaintiffs' filings in this case, including the "expert declarations" attached to their motion for a preliminary injunction, demonstrate that their claims turn on precisely this sort of evidence and these types of considerations,

making it impossible under this Court's precedents for them to obtain the judicial remedy they seek. (*See, e.g.*, Pls.' App. Vol. I at 46-329.)

Despite these precedents, the plaintiffs nonetheless argue that the State Constitution somehow guarantees a political party the "opportunity to aggregate their votes to elect such a governing majority." (Pls.' Brief at 37.) However, the State Constitution does not provide for such a right, and it certainly contains no standards for determining whether a districting plan violates such a right. For example, suppose it were possible to prove that 60% of this State's electorate support political party A, and 40% support political party B. If a redistricting plan contains districts in which each district contains perfect proportional representation of these two parties, 60% of the voters in each district would support political party A, and thus political party A would be projected to elect their preferred representative in every single district state-wide. No standard in our State Constitution appears to prohibit this.

Or is the Legislature somehow required to manipulate districts so that political party B is favored to win 40% of districts state-wide? No standard in our State Constitution appears to require this. Or is the Legislature somehow required to manipulate districts so that political party B is favored to win a certain percentage of districts in a county or geographic region where the party has majority support? No standard in our State Constitution requires this, either. Nor does our State Constitution provide for whether or how a redistricting plan must address third-party voters or voters who are not registered to a major political party. For example, there are currently more undeclared voters in New Hampshire

than there are registered democratic party voters or republican party voters.[3] No part of our State Constitution addresses to what extent undeclared voters have a right to an "opportunity to aggregate their votes" or how a districting plan could possibly guarantee that right. And nothing in our State Constitution addresses how the legislature would balance an ill-defined, court-imposed partisanship requirement with the other clearly constitutionally imposed redistricting requirements.

Accordingly, the plaintiffs' claims present nonjusticiable political questions because no judicially discoverable or manageable standards exist for resolving them. *See Rucho*, 139 S. Ct. at 2508 ("[W]e have no commission to allocate political power and influence in the absence of a constitutional directive or legal standards to guide s in the exercise of such authority.").

C. Plaintiffs' claims are nonjusticiable political questions because this Court cannot decide them without making an initial policy determination of a kind clearly reserved for nonjudicial discretion.

No statute or provision in the State Constitution prohibits the legislature from considering partisanship when fulfilling its constitutional duty to reapportion legislative districts. Creating standards, through constitutional amendment or statutory change, would be the proper process by which the voters and elected officials in our State may choose to address political gerrymandering and is a necessary prerequisite to make political

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[3] *See Party Registration/Names on Checklist History*, New Hampshire Secretary of State, available at Party Registration/Names on Checklist History | New Hampshire Secretary of State (nh.gov) (last visited March 15, 2023).

gerrymandering claims justiciable. That type of initial policy determination is clearly reserved for nonjudicial discretion.

A statute or constitutional amendment regarding political gerrymandering would present an "initial policy determination" regarding whether and to what extent the Legislature may consider partisanship when reapportioning legislative districts. *See Baines*, 152 N.H. at 129 (recognizing that a claim is nonjusticiable if a court cannot make a decision "without an initial policy determination of a kind clearly for nonjudicial discretion" (quotation omitted)). For example, Colorado's constitution expressly states that the "people of the state of Colorado declare that" the "practice of political gerrymandering, whereby legislative districts are purposefully drawn to favor one political party or incumbent politician over another, must end." COLO. CONST., Art. V, §§ 44, 46. *see also* Colo. Const., Art. V, §48.1(4) (providing that no redistricting map may be approved if it "has been drawn for the purpose of protecting … any political party"). New Hampshire's Constitution contains no such provision.

A statute or constitutional amendment regarding political gerrymandering would also provide discoverable and manageable standards for resolving such claims. This is particularly important because States that have changed their laws to address political gerrymandering have done so in markedly different ways. Some States require districting plans to consider partisanship and to have a particular political impact; some states allow redistricting plans to have a political impact up to a certain extent; and some states outright prohibit the consideration of a plan's political impact. *See also Rucho*, 139 S. Ct. at 2489 (explaining that deciding a

"standard for resolving partisan gerrymandering claims," such as the level at which excessive political gerrymandering may become unfair, "poses basic questions that are political, not legal"); *Rivera v. Schwab*, 512 P.3d 168, 185-86 (Kan. 2022) (agreeing with the reasoning in *Rucho* and explaining that making judicial decisions about "metrics of fairness" in political gerrymandering would "inherently involve making an initial policy determination").

Colorado requires that districts "maximize the number of politically competitive districts," which it defines as a "reasonable potential for the party affiliation of the district's representative to change at least once between federal decennial censuses." COLO. CONST., Art. V, §48.1(3)(a)-(d). Thus, in Colorado, the redistricting authority must consider the partisan impact of a plan and must design plans to have a specified political impact on future elections. The Montana Constitution contains similar requirements. *See* MO. CONST., Art. III, §3 (requiring districts to be designed to achieve "partisan fairness" and "competitiveness," meaning that "parties shall be able to translate their popular support into legislative representation with approximately equal efficiency").

Conversely, in Michigan, districts cannot "provide a disproportionate advantage to any political party," as "determined using accepted measures of partisan fairness." MICH. CONST., Art. IV, §6(13)(d). Thus, in Michigan, the redistricting authority may properly consider the partisanship impact of a plan and draw a plan to favor one political party, so long as the plan does not "disproportionately" favor that party.

In Nebraska, the redistricting authority is prohibited from even considering political affiliations, the results of prior elections, or other

demographic information. *See* 2021 NE L.R. 134 ("In drawing district boundaries, no consideration shall be given to the political affiliations of registered voters, demographic information other than population figures, or the results of previous elections, except as may be required by the laws and Constitution of the United States").

Unlike in these States, there is no provision in our State Constitution, or even a state statute, that sets forth what information related to politics must be considered, may be considered, or cannot be considered when redistricting. Nor is there a provision in the State Constitution or in state statute that defines the constitutionally allowable impact that a particular plan may have on political parties. In other words, the State Constitution and state law neither prohibit political considerations in redistricting nor set forth how or under what circumstances political considerations may be tolerated or should be prohibited. These are the types of initial policy decisions that must be made by the electorate of the State or the Legislature in the first instance.

Accordingly, the plaintiffs' claims are also nonjusticiable political questions because this Court cannot decide them without making an initial policy determination of a kind clearly reserved for nonjudicial discretion. *Richard*, 175 N.H. at 268.

D. Part I, Article 11 does not guarantee any political party the right to have statewide representation proportionate to their statewide vote.

The plaintiffs argue that the challenged redistricting plans violate Part I, Article 11 of the State Constitution because they allegedly disfavor the plaintiffs' preferred political party. The plaintiffs do not appear to

dispute that they have the same right to vote as other qualified voters in their respective districts, or that the districts are as nearly equal as may be in population. Rather, the plaintiffs appear to argue that Part I, Article 11's guarantee of an "equal right to vote in any election" somehow means that their preferred political party must be influential in proportion to its number of supporters. The plaintiffs' interpretation is contrary to the plain language of Part I, Article 11.

As relevant here, Part I, Article 11 provides that, "All elections are to be free, and every inhabitant of this state of 18 years of age and upwards shall have an equal right to vote in any election." By its plain terms, Part I, Article 11 requires that qualified voters have an "equal right to vote." The plaintiffs do not argue that they do not have the right to vote for an executive councilor and for a state senator to represent them. Nor do the plaintiffs argue that the Executive Council and State Senate districts are not as nearly equal in population as possible. Because the districts are apportioned as nearly equal in population as possible, and each voter in each district has the same opportunity to vote for a state senator or executive councilor, the present districts do not deprive any plaintiff of an "equal right to vote." *See Below v. Gardner*, 148 N.H. 1, 5 (2002) (explaining that the Constitution's guarantee of an "equal right to vote" ensures that each citizen's vote has equal weight; *i.e.*, "the one person/one vote standard"); *see also Rucho*, 139 S. Ct. at 2501 (reasoning that each vote carries equal weight when "each representative [is] accountable to (approximately) the same number of constituents").

Nevertheless, the plaintiffs appear to argue that this clause gives them some additional right to ensure that the proportion of elected

representatives that associate with their preferred political party matches the proportion of statewide votes for their preferred political party. As other courts have recognized, "the one-person, one-vote principle does not mean that each party must be influential in proportion to its number of supporters." *In re 2022 Legislative Districting of the State*, 481 Md. 507, 526 (2022) (citing *Rucho*, 139 S. Ct. at 2501). In other words, a person's right to have an equal say in the election of representatives does not entitle that person to have their preferred political party "achieve representation in some way commensurate to that party's share of statewide support." *Id*.

E. The plaintiffs rely on just two States whose courts have interpreted their constitutions to prohibit partisan gerrymandering in the absence of an express prohibition.

In *Rucho*, the United States Supreme Court ruled that political gerrymandering claims are nonjusticiable under the Federal Constitution because the Federal Constitution neither grants judicial authority to resolve political gerrymandering claims nor contains judicially discernible and manageable standards for resolving such claims. 139 S. Ct. at 2506-07. However, the Supreme Court noted that "[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply." *Id*. at 2507; *see also Rivera*, 512 P.3d at 187 (deciding, post-*Rucho*, Kansas' constitution, statutes, and case precedent provided no judicially discoverable or manageable standards for addressing and resolving political gerrymandering and concluding that such claims were therefore nonjusticiable).

The plaintiffs appear to erroneously interpret this language to mean that every state court has the authority to adjudicate partisan

gerrymandering claims. But the plaintiffs support this interpretation with decisions from just two states whose highest courts have concluded that their state constitutions prohibit political gerrymandering in the absence of an express prohibition: North Carolina (*Harper v. Hall*, 881 S.E.2d 156 (N.C. 2022)) and Pennsylvania (*League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018).[4] These decisions reflect a minority approach to the issue of political gerrymandering. Moreover, the North Carolina Supreme Court is in the process of rehearing *Harper v. Hall*. *See Harper v. Hall*, 882 S.E.2d 548 (N.C. 2023) (granting the petition for rehearing on February 3, 2023), calling into question the continued validity of that decision. And the plaintiffs relegate to a footnote a recent Kansas Supreme Court decision rejecting political gerrymandering claims when the challenged district plans complied with all other express constitutional requirements. *Rivera*, 512 P.3d at 186-87.

The plaintiffs further fail to grapple with the fact that in all of the other States in which some form of political gerrymandering has been prohibited, the prohibition arose through the political process in the form

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[4] The plaintiffs additionally cite throughout their brief to *Szeliga v. Lamone*, No. C-02-21-001816, 2022 Md. Cir. Ct. LEXIS 9 (Mar. 25, 2022), an unpublished decision from a lower court in Maryland. Although that decision was appealed to the Maryland Court of Appeals, the parties agreed to dismiss the case prior to oral argument. *See Lamone v. Szeliga*, 273 A.3d 889 (Md. 2022). The plaintiffs neglect to mention that the Maryland Court of Appeals subsequently ruled that districting plans only need to comply with the express constitutional requirements that districts consist of adjoining territory, be compact, be of substantially equal populations, and give due regard to natural boundaries and the boundaries of political subdivisions. *See In re 2022 Legislative Districting of the State*, 481 Md. 507, 526, 535-36, 554-55, 615 (2022); MD. CONST., Art. III, §4. Provided a districting plan complies with those express requirements, the plan does not violate the Maryland constitution regardless of partisan gerrymandering and other political concerns. *Id*.

constitutional amendment[5] or statute,[6] not a judicial decree. It was these specific "[p]rovisions in state statutes and state constitutions" that the U.S. Supreme Court as referring to in *Rucho* when leaving open the possibility that partisan gerrymandering claims could be justiciable in state court. *See* 139 S. Ct. at 2507–08 (citing Const., Art. V, §§44, 46; Mich. Const., Art. IV, §6; Mo. Const., Art. III, §3; Iowa Code §42.4(5) (2016); Del. Code Ann., Tit. xxix, §804 (2017)).

The U.S. Supreme Court's decision in *Rucho* cannot reasonably be read to endorse the type of analyses the North Carolina Supreme Court conducted in *Harper* and the Pennsylvania Supreme Court conducted in *League of Women Voters*. Rather, as discussed above, the U.S. Supreme Court expressly rejected arguments that partisan gerrymandering claims were justiciable under provisions in the Federal Constitution that are analogous to those the plaintiffs invoke here. *Compare id.* at 2491 (noting that the plaintiffs there alleged political gerrymandering in violation of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Elections Clause), *with* Pls.' App. Vol. I at 35-40 (Compl. ¶¶ 99–120) (alleging political gerrymandering in violation of the

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[5] ARIZ. CONST., Art. IV, Pt. 2, §1 (Arizona); CAL. CONST., Art. XXI, §2(e) (California); COLO. CONST., Art. V, §§ 44, 46 (Colorado); FLA. CONST., Art. III, §20(a) (Florida); HAW. CONST., Art. 4, §6 (Hawaii); MICH. CONST., Art. IV, §6 (Michigan); MO. CONST., Art. III, §3 (Missouri); N.Y. CONST., Art. 3, §4(c)(5) (New York); OHIO CONST., Art. XI, §6 (Ohio); VA. CONST., Art. II, §6-A (Virginia); WASH. CONST., Art. II, §43(5) (Washington).

[6] Del. Code Ann., Tit. xxix, §804 (Delaware); Iowa Code §42.4(5) (Iowa); Mont. Code Ann., §5-1-115(3) (West 2022) (Montana); 2021 NE L.R. 134 (Nebraska); ORS 188.010(2) (Oregon)

State Constitution's guarantee of free speech and association, guarantee of equal protection, and Elections Clause).

The plaintiffs thus overstate both what the U.S. Supreme Court actually said in *Rucho* and the current state-court jurisprudence on partisan gerrymandering claims. The two cases the plaintiffs rely on are clear outliers. Both the U.S. Supreme Court and the vast majority of States to address this issue have contemplated, like the superior court did here, that the political process is where initial policy determinations around partisan gerrymandering should be made. This view is wholly in keeping with our State Constitution and this Court's established jurisprudence.

Like the United States Supreme Court, the Kansas Supreme Court has also found political gerrymandering claims to present a nonjusticiable political question and its decision is particularly persuasive here. *Rucho*, 139 S. Ct. at 2508; *Rivera*, 315 Kan. at 906. In *Rivera*, the Kansas Supreme Court observed that Kansas had not adopted constitutional or statutory standards for managing and resolving political gerrymandering claims nor did Kansas' case precedent contain such standards. *Rivera*, 512 P.3d at 186. For that reason, the Kansas Supreme Court explained that it could not "follow the decisions of other state supreme courts—such as the North Carolina Supreme Court in *Harper* . . . —that have found their states to be within the *Rucho* exception of states with 'statutes and . . . constitutions' that 'provide standards and guidance for state courts to apply.'" *Id.* (quoting *Rucho*, 139 S. Ct. at 2507).

New Hampshire finds itself in the same situation. No constitutional or statutory standards exist for managing and resolving political gerrymandering claims in New Hampshire. No standards exist in this

Court's case law for addressing, managing, and resolving political gerrymandering claims. In fact, this Court has made clear for decades that, while the legislature may take political considerations into account in the redistricting process, this Court may not take political considerations into account when addressing and remedying redistricting issues. *See, e.g.*, *Norelli*, 175 N.H. at 203 ("Political considerations 'have no place in a court-ordered remedial [redistricting] plan.'" (quoting *Below*, 148 N.H. at 11); *Burling*, 148 N.H. at 156; *see also Norelli v. Secretary of State*, No. 2022-0184 (May 12, 2022 Order at 4) (precluding the special master from considering "political data or partisan factors, such as party registration statistics, prior election results, or future election prospects").

It is also notable that this Court has never confronted a political gerrymandering claim, and that may be for a few reasons. First, New Hampshire is a relatively small state with a compact geography and modest population. Second, the New Hampshire House of Representatives consists of 400 members, such that there are many small individual House districts subject to the one-person/one-vote requirement and various other mandatory constitutional requirements. N.H. Const. Pt. II, Arts. 9, 11, & 11-a. Third, the one-person/one-vote requirement in conjunction with a single-member district and a contiguity requirement constrain the State Senate redistricting task. N.H. Const. Pt. II, Art. 26. Fourth, the Executive Council has only five districts constrained by the one-person/one-vote requirement, N.H. Const. Pt. II, Art. 65, and New Hampshire has only two Congressional representative districts that must be of nearly equal population. These natural features of the State and mandatory constitutional

redistricting requirements place meaningful limits on the extent to which political gerrymandering can occur.

Taken together, the overwhelming majority of States have made it clear that a State's electorate or Legislature should decide in the first instance the significant political question of whether and to what extent to allow or prohibit political considerations from playing a role in the redistricting process. New Hampshire's citizens should not be deprived of that opportunity and may choose to address the issue in a myriad of different ways, including through the imposition of additional mandatory redistricting criteria in the State Constitution or through a statute that provides standards capable of guiding judicial decision-making.

CONCLUSION

The plaintiffs' claims present nonjusticable political questions because: (1) the State Constitution commits redistricting solely to the Legislature; (2) the State Constitution contains no judicially discoverable or manageable standards for deciding whether and to what extent the legislature may take political considerations into account in the redistricting process; and (3) this Court cannot decide the plaintiffs' claims without making one or more initial policy determinations of a kind clearly reserved for nonjudicial discretion.

Accordingly, for all of the above reasons, the superior court's decision below should be affirmed.

The defendants request a fifteen-minute oral argument to be presented by Anthony J. Galdieri.

Respectfully Submitted,

THE STATE OF NEW HAMPSHIRE
AND THE NEW HAMPSHIRE
SECRETARY OF STATE

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CERTIFICATE OF COMPLIANCE

I, Anthony J. Galdieri, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 7481 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

Date: March 17, 2023 /s/ *Anthony J. Galdieri*
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CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief was served on all parties of record through the Court's electronic filing system.

Date: March 17, 2023 /s/ *Anthony J. Galdieri*
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