THE STATE OF NEW HAMPSHIRE
SUPREME COURT

CASE NO. 2022-0629

Miles Brown & a.,

Plaintiffs-Appellants,

v.

Secretary of State & a.,

Defendants-Appellees.

Rule 7 Appeal from Final Judgment of Hillsborough County
Superior Court, Southern District

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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INTRODUCTION

Defendants do not even address—let alone dispute—many of Plaintiffs' arguments. Defendants do not engage with this Court's precedent regarding the expansive scope of the State Constitution's Part I rights, nor Plaintiffs' historical exploration of the framers' intent to prohibit partisan gerrymandering. Pls.' Br. 30–35. Defendants do not consider the judicially manageable standards derived from other states' analogous precedents. *Id.* at 39–44. And Defendants do not respond to Plaintiffs' *objective* evidence demonstrating that the enacted Senate and Executive Council plans constitute extreme partisan outliers. *Id.* at 15–17.

Instead, Defendants cherry-pick phrases from caselaw and distort them to promote an unprecedented redistricting exception to normal judicial review and, rather than address Plaintiffs' claims, shadowbox against manufactured hypotheticals divorced from the issues actually before the Court. An honest appraisal of the authorities on which Defendants themselves rely confirms that Plaintiffs' challenges to the Senate and Executive Council maps are justiciable.

ARGUMENT

I. The Legislature's redistricting authority does not immunize maps from challenge.

To shoehorn this matter into the narrow nonjusticiability caselaw, Defendants mischaracterize Plaintiffs' claims and this Court's jurisprudence. Finding Plaintiffs' partisan-gerrymandering claims nonjusticiable would represent a dramatic departure from

precedent. The Court should decline Defendants' request to avoid judicial scrutiny and allow Plaintiffs the opportunity to prove their case.

A. Defendants mischaracterize Plaintiffs' claims.

Defendants repeatedly and incorrectly suggest that Plaintiffs' claims invade the proper province of the Legislature.

First, Plaintiffs do not seek to impede legislative "discretion." Defs.' Br. 11–12, 18–19, 21–23. They do not ask the courts to interfere with legislative processes or mandate compliance with statutes or rules. Instead, Plaintiffs bring *constitutional* claims and ask the judiciary to render judgment in accordance with its usual role of safeguarding fundamental rights. *See, e.g.*, *Hughes v. Speaker of N.H. House of Representatives*, 152 N.H. 276, 283–89 (2005) (contrasting nonjusticiable statutory legislative-process claims with justiciable constitutional claims).

Second, Plaintiffs do not claim that the Legislature is precluded from weighing political considerations when redistricting, or that the State Constitution requires only the use of "nonpartisan, traditional redistricting criteria." Defs.' Br. 21 (offering no record cite to support this mischaracterization of Plaintiffs' claims). Instead, Plaintiffs allege that the Legislature "intentionally and systematically subordinated nonpartisan, traditional redistricting criteria to its overarching goal of achieving partisan gain for Republicans." PAI5. Those "nonpartisan, traditional redistricting criteria" are merely indicia of that illicit intent, relevant to Plaintiffs' claim that the Legislature intentionally, systematically, and unlawfully diluted the

voting strength of Democratic voters. While the State Constitution tolerates political considerations in redistricting, it does not allow the Legislature to engage in extreme manipulation of district lines for undemocratic purposes.

Third, Plaintiffs do not ask the courts to "direct the Legislature to pursue certain goals in the redistricting process that the State Constitution does not address." Defs.' Br. 20. Plaintiffs instead seek to vindicate their constitutional rights, challenging maps that were passed with improper intent, have extreme partisan effect, and cannot be justified by any legitimate—much less compelling—state interest. Courts can protect those rights without demanding compliance with any particular redistricting criterion.

For this reason, *City of Manchester v. Secretary of State*, 163 N.H. 689 (2012) (per curiam), does not help Defendants. There, this Court found that, in alleging that the State House plan was unconstitutional because it did not reflect communities of interest, the plaintiffs had failed to state a claim. *Id.* at 708. Here, by contrast, Plaintiffs' claims are not divorced from a constitutional basis; as they explained in their opening brief, their claims are firmly grounded in the protections afforded by Part I. Pls.' Br. 30–39.

B. Defendants mischaracterize political-question caselaw.

Defendants also misapply this Court's narrow political-question doctrine. Indeed, nearly every case Defendants cite *supports* the justiciability of Plaintiffs' claims.

Consider Defendants' heavy reliance on *Richard v. Speaker of House of Representatives*, 175 N.H. 262 (2022). There, this Court reaffirmed the judiciary's obligation to adjudicate claims asserting legislative infringement on constitutional rights. As it explained, "concluding that the State Constitution commits to a coordinate branch of government certain exclusive authority"—such as the obligation to undertake decennial redistricting—"does not necessarily end the justiciability inquiry." *Id.* at 268. Instead, "[w]hen the question presented is whether or not a violation of a mandatory constitutional provision has occurred"—*as Plaintiffs allege here*—"it is not only appropriate to provide judicial intervention, we are mandated to do no less." *Id.* (quoting *Baines v. N.H. Senate President*, 152 N.H. 124, 132 (2005)). Although the *Richard* Court found a claim alleging noncompliance with legislative rules to be nonjusticiable, it concluded that a claim under Part I, Article 32—one of the provisions under which Plaintiffs' claims arise here—*was* justiciable. Ultimately, "whether the legislature . . . violated its own procedural rules is a nonjusticiable political question," but whether it "failed to comply with constitutional mandates . . . . is justiciable." *Id.* at 268, 278.[1]

[1] Just days ago, the Court reaffirmed *Richard*, concluding that a petitioner "s[ought] a ruling on a political, nonjusticiable question" because there were no "controlling 'constitutionally-mandated procedures' applicable to" her claim. *In re Smart*, No. 2022-0198, slip op. at 3–5 (N.H. Mar. 29, 2023). Here, by contrast, Plaintiffs' claims arise under multiple provisions of the State Constitution.

This crucial distinction is drawn in many of the other cases Defendants cite. *See Burt v. Speaker of House of Representatives*, 173 N.H. 522, 528 (2020) (constitutional challenge to internal legislative rules was justiciable because "[t]he legislature may not, even in the exercise of its 'absolute' internal rulemaking authority, violate constitutional limitations") (quoting *Hughes*, 152 N.H. at 284); *Sumner v. N.H. Sec'y of State*, 168 N.H. 667, 668–72 (2016) (challenge to law's enactment process was nonjusticiable but constitutional claims were justiciable); *Baines*, 152 N.H. at 129 (challenge to statutory legislative procedures was nonjusticiable but "[r]eviewing whether the disputed legislation violates [the State Constitution] does not demonstrate lack of respect due the legislative branch of government"); *Hughes*, 152 N.H. at 288 (similar); *In re Jud. Conduct Comm.*, 145 N.H. 108, 111–13 (2000) (per curiam) (Legislature's internal rules for conducting impeachment investigation implicated nonjusticiable political question but courts *would* have "jurisdiction to hear issues concerning matters of constitutional privilege" because State "Constitution does not deprive persons whose rights are violated from seeking judicial redress simply because the violation occurs in the course of an impeachment investigation"). Here, because Plaintiffs assert violations of their fundamental constitutional rights, these precedents command a finding of justiciability.[2]

[2] *State v. LaFrance*, for its part, explains that the political-question doctrine exists to maintain an independent judiciary, "enabl[ing] the

II. Plaintiffs' claims are governed by judicially manageable standards.

Defendants' discussion of judicially discoverable standards hinges almost entirely on *Rucho v. Common Cause*, 139 S.Ct. 2484 (2019). But the comparisons between that case and this one are misleading—and the critical distinctions between them underscore why Plaintiffs' claims are justiciable.

At the outset, Defendants misleadingly assert that Plaintiffs' claims are "functionally identical to the claims the United States Supreme Court concluded were nonjusticiable under the Federal Constitution." Defs.' Br. 25. This contention relies on strategic use of parentheticals: Defendants compare the *Rucho* claims, brought under "the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the *Elections Clause*," and Plaintiffs claims here, brought under "the State Constitution's guarantee of free speech and association, guarantee of equal protection, and *Elections Clause*." *Id.* (emphases added). But these two "Elections Clauses" are nothing alike.

The federal Elections Clause implicates "[t]he Times, Places and Manner of" federal elections, U.S. Const. art. I, § 4, cl. 1, which courts have suggested does *not* "confer a freestanding individual

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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." 124 N.H. 171, 178 (1983) (per curiam). Defendants quote this very language, Defs.' Br. 22, apparently not recognizing that it underscores the need for checks and balances in a tripartite system of government.

right to vote," *Lance v. Dennis*, 444 F.Supp.2d 1149, 1155–56 & n.9 (D. Colo. 2006) (three-judge court), *aff'd in part, vacated in part on other grounds sub nom. Lance v. Coffman*, 549 U.S. 437 (2007) (per curiam). The State Constitution's Free and Equal Elections Clause, by contrast, provides that "[a]ll elections are to be free" and guarantees "an equal right to vote in any election." N.H. Const. pt. I, art. 11. Not only does this clause protect the "fundamental right to vote," *Guare v. State*, 167 N.H. 658, 661 (2015) (per curiam), it "guarantees that each citizen's vote will have equal weight," *Below v. Gardner*, 148 N.H. 1, 5 (2002) (per curiam). The U.S. Constitution has no analogue to the Free and Equal Elections Clause, and on that basis alone *Rucho* is distinguishable.

This Court should not adopt *Rucho*'s reasoning or result. Plaintiffs' opening brief addresses some of the reasons why, including *Rucho*'s explicit call for state courts to police partisan gerrymanders and the imperative to avoid "lockstep" constitutional interpretations. Pls.' Br. 40–41. Moreover, notwithstanding *Rucho*'s assertion that partisan-gerrymandering claims lack "limited and precise standards that are clear, manageable, and politically neutral," 139 S.Ct. at 2500, *state* courts—which are better sources of guidance given their interpretations of analogous constitutional provisions—have adjudicated such claims using judicially manageable standards, Pls.' Br. 41–43. Indeed, Plaintiffs' submissions demonstrated numerous metrics courts can use to assess partisan gerrymandering, just as they have in other states. PAI102–330, PAII89–103. Far from evincing an absence of

manageable standards, the caselaw provides a wealth of analysis to inform adjudication of partisan-gerrymandering claims.[3]

III. Plaintiffs' claims do not require improper political considerations or policy determinations.

Defendants further misconstrue this Court's precedent and Plaintiffs' claims to suggest that nonjudicial political considerations are required to adjudicate this case. Not so.

Defendants' reliance on the impasse cases *Norelli v. Secretary of State*, 175 N.H. 186 (2022) (per curiam), and *Burling v. Chandler*, 148 N.H. 143 (2002) (per curiam), is misguided. Those cases required this Court to perform what is normally a legislative function: drawing new maps in the first instance. Because courts "lack the 'political authoritativeness' of the legislature and must perform redistricting in a restrained manner," *Wattson v. Simon*, 970 N.W.2d 42, 45 (Minn. Special Redistricting Panel 2022) (quoting *Connor v. Finch*, 431 U.S. 407, 415 (1977)), they rightfully avoid the sorts of "[p]olitical considerations" that might otherwise inform redistricting decisions, *Norelli*, 175 N.H. at 203.

Here, however, Plaintiffs do not ask the judiciary to "make the political decisions necessary to formulate a [redistricting] plan." *Gaffney v. Cummings*, 412 U.S. 735, 749 (1973). Instead, Plaintiffs call upon the courts to prevent districting plans from "cancel[ling] out the voting strength of . . . political elements of the voting

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[3] Plaintiffs reiterate that, should this Court have reservations regarding the manageability of these standards, it should remand to the Superior Court for further development of the evidentiary record. Pls.' Br. 44 n.9.

population"—which this Court has recognized as a proper exercise of judicial discretion. *Burling*, 148 N.H. at 150 (quoting *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965)); *see also Op. of Justs.*, 111 N.H. 146, 151 (1971). Defendants' repeated references to *Norelli*'s prohibition on political considerations during the judicial map-drawing process (it appears in their brief no less than four times) is therefore misplaced.[4]

Defendants also suggest that Plaintiffs' claims are nonjusticiable because the State Constitution lacks an explicit partisan-gerrymandering prohibition. Defs.' Br. 28–31. But, as Plaintiffs discussed, this Court regularly interprets and applies expansively worded constitutional provisions—notwithstanding, for instance, that the State Constitution's equal-protection guarantees do not specifically mention trucking regulations and Part I, Article 11 does not explicitly address voter registration. Pls' Br. 30–33.

Adjudicating Plaintiffs' partisan-gerrymandering claims does *not* require first deciding whether "the legislature [can] consider[] partisanship when fulfilling its constitutional duty to reapportion

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[4] Defendants also claim that *Norelli* would prevent courts from "fashioning [a] remedial plan." Defs.' Br. 22. But, as is often the case when maps are invalidated, the Legislature can be "afford[ed] a reasonable opportunity . . . to meet constitutional requirements by adopting a substitute measure." *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (plurality opinion). Moreover, *Norelli* confirmed that the judicial remedial process can avoid undue partisan considerations by, for example, inviting input from various stakeholders and employing the services of a special master. *See* 175 N.H. at 200–03; *see also, e.g.*, *League of Women Voters of Pa. v. Commonwealth*, 181 A.3d 1083, 1084–87 (Pa. 2018) (per curiam).

legislative districts" or any other nonjudicial policy determination. Defs.' Br. 28. Instead, Plaintiffs ask the judiciary to consider objective metrics to determine whether certain votes have been improperly diluted as a result of intentional and systematic partisan manipulation. *That* exercise—weighing expert data to determine whether a constitutional violation has occurred—is squarely within the judicial wheelhouse and does not require predicate policy determinations reserved for nonjudicial discretion.

IV. Plaintiffs do not seek proportional representation.

Rather than engage with the substance of Plaintiffs' claims, Defendants turn to various hypotheticals of their own construction to generate uncertainty where none exists. Puzzling over the precise contours of a constitutional guarantee of proportional representation, they suggest that no "districting plan could possibly guarantee that right." Defs.' Br. 27–28, 31–33. But Plaintiffs seek neither a constitutional requirement of proportionality nor any other rule that would guarantee a predetermined electoral outcome. (In fact, Defendants have it precisely backwards: Plaintiffs assert that the Senate and Executive Council maps are unlawful *because* they were drawn to guarantee predetermined electoral outcomes.) Plaintiffs merely seek to ensure that districting maps in New Hampshire afford "each citizen's vote . . . equal weight"—just as the State Constitution requires. *Below*, 148 N.H. at 3.

Defendants' misguided focus on proportional representation causes them to misconstrue Plaintiffs' claims. They suggest that, "[b]ecause 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.'" Defs.' Br. 32 (quoting *Below*, 148 N.H. at 5). But although "[n]othing about redistricting affects a person's right to *cast* a vote," partisan gerrymandering nonetheless denies "the constitutional rights of the people to vote on equal terms and to substantially equal voting power." *Harper v. Hall*, 868 S.E.2d 499, 510, 525 (2022) (emphasis added) (citations and internal quotation marks omitted). There is a distinction between an equal *opportunity* to cast a ballot and the equal *weight* afforded that ballot; Plaintiffs claim that they have been denied the latter in violation of the State Constitution—including the Free *and Equal* Elections Clause.

Ultimately, Defendants' hypotheticals demonstrate a concern about *remedy*, not an initial liability determination. To say this is the tail wagging the dog would be an understatement; any uncertainty about what a remedy might look like should not foreclose Plaintiffs' ability to even attempt to prove their claims. *See Baker v. Carr*, 369 U.S. 186, 198 (1962) ("Beyond noting that we have no cause at this stage to doubt the District Court will be able to fashion relief if violations of constitutional rights are found, it is improper now to consider what remedy would be most appropriate if appellants prevail at the trial."). And, at any rate, Defendants' concerns are misplaced. In the analogous context of *racial* gerrymandering, the proper remedy is not, say, a certain number of districts with a certain percentage of minority voters. Instead, racial-gerrymandering

violations are remedied by plans that do "not subordinate 'traditional districting principles' to racial considerations," *Personhuballah v. Alcorn*, 155 F.Supp.3d 552, 561 (E.D. Va. 2016) (three-judge court) (quoting *Shaw v. Reno*, 509 U.S. 630, 642 (1993))—in other words, maps that avoid the taint of illicit motivation, which can be assessed based on compliance with objective criteria. Here, similarly, crafting a remedy does not require wading into the murky waters of proportionality. *Any* new Senate and Executive Council maps that do not unlawfully dilute the voting strength of Democratic voters will redress Plaintiffs' constitutional injuries. And Plaintiffs and their experts have identified which criteria can be employed to make that determination.

V. Defendants mischaracterize the holdings of other state courts.

Defendants misleadingly imply that the "vast majority" of states considering similar partisan-gerrymandering claims have found them nonjusticiable, characterizing the decisions of Pennsylvania and North Carolina courts as "outliers." Defs.' Br. 36. But Pennsylvania and North Carolina are, along with Maryland, the only states in which high courts have considered partisan-gerrymandering claims brought under constitutional free-elections clauses like New Hampshire's. And *all three* found those claims justiciable.

Defendants' reliance on *Rivera v. Schwab*, 512 P.3d 168 (Kan. 2022), is similarly misguided. Defendants do not acknowledge that the Kansas Constitution contains no equivalent to the Free and

Equal Elections Clause. *See* Pls.' Br. 35 n.8. They also ignore the Kansas Supreme Court's language distinguishing the doctrinal history in Kansas from that of states like North Carolina, to which New Hampshire is far more similar. *See id*.

Finally, *In re 2022 Legislative Districting* supports Plaintiffs' justiciability argument, as the Maryland Court of Appeals *did* articulate a manageable standard for adjudicating partisan-gerrymandering claims. *See* 282 A.3d 147, 163 (Md. 2022). That the court ultimately found the claims without merit as an evidentiary matter, *see id*. at 211, only underscores that they were justiciable in the first place.

CONCLUSION

"[T]he mere fact that the suit seeks protection of a political right does not mean it presents a political question. Such an objection is little more than a play upon words." *Baker*, 369 U.S. at 209 (citations and internal quotation marks omitted). Defendants have fallen into this trap, painting all superficially "political" issues with the same nonjusticiable brush. But the details matter. When considered in context, the authorities on which Defendants rely confirm that New Hampshire courts can and must adjudicate Plaintiffs' partisan-gerrymandering claims.

April 6, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains 2,989 words, exclusive of the parts that may be excluded, which is less than the maximum number of words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

/s/ Steven J. Dutton
Steven J. Dutton

CERTIFICATE OF SERVICE

I certify that on April 6, 2023, I served the foregoing pleading on all parties or counsel of record in accordance with the rules of the Supreme Court, as follows: I am serving all registered e-filers through the court's electronic filing system; I am serving all other parties by mailing a copy to them.

/s/ Steven J. Dutton
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