

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 transmission, 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

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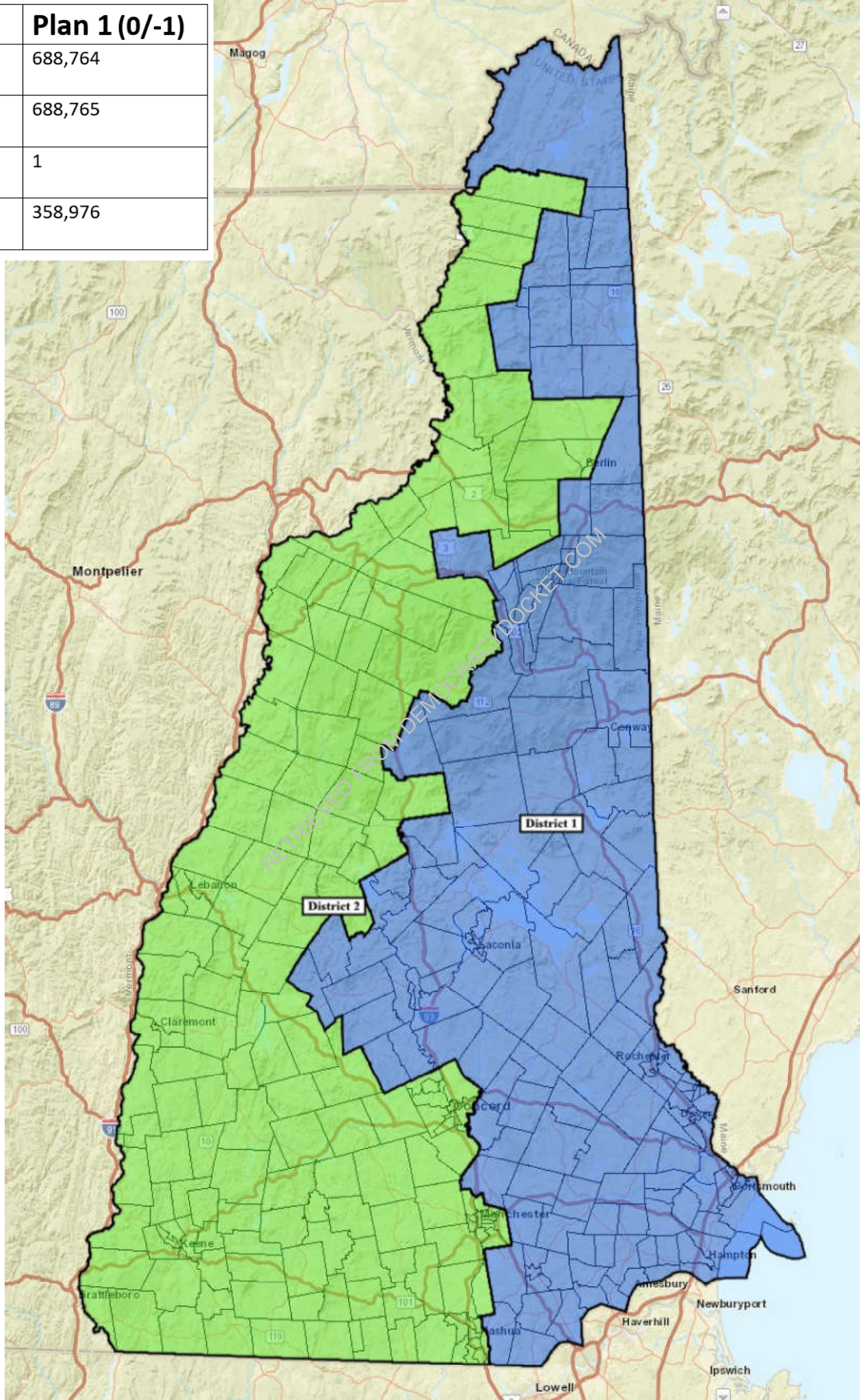
Respectfully submitted,
The Honorable Charles Morse,
President of the N.H. Senate
By his attorney,

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

