STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS SUPERIOR COURT
SOUTHERN DISTRICT

No. 226-2022-CV-00181

MILES BROWN,
ELIZABETH CROOKER,
CHRISTINE FAJARDO,
KENT HACKMANN,
BILL HAY,
PRESCOTT HERZOG,
PALANA HUNT-HAWKINS,
MATT MOOSHIAN,
THERESA NORELLI,
NATALIE QUEVEDO, and
JAMES WARD

v.

DAVID M. SCANLAN,
in his official capacity as the New Hampshire Secretary of State

&

THE STATE OF NEW HAMPSHIRE

DEFENDANTS' JOINT MOTION TO DISMISS

The Defendants, David Scanlan, in his official capacity as New Hampshire Secretary of State, and the State of New Hampshire, submit the following Motion to Dismiss the Plaintiffs' Complaint for Declaratory and Injunctive Relief. For the reasons stated in the Memorandum of Law in Support of this Motion, which is incorporated herein by reference, the Plaintiffs' claims present nonjusticiable political questions.

WHEREFORE, the Defendants respectfully request that this Honorable Court:

A. Dismiss the Plaintiffs' Complaint in its entirety; and

B. Grant such further relief as the Court deems just and equitable.

Respectfully submitted,

DAVID SCANLAN, SECRETARY OF STATE

By his attorneys,

JOHN M. FORMELLA
ATTORNEY GENERAL

Date: June 16, 2022

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THE STATE OF NEW HAMPSHIRE

By its attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on all counsel of record through the Court's electronic-filing system.

/s/ *Samuel Garland*
Samuel Garland

STATE OF NEW HAMPSHIRE

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THE STATE OF NEW HAMPSHIRE

MEMORANDUM OF LAW IN SUPPORT OF THE DEFENDANTS' JOINT MOTION TO DISMISS

The Defendants, David Scanlan, in his official capacity as New Hampshire Secretary of State, and the State of New Hampshire, respectfully submit this Joint Memorandum of Law in support of their Motion to Dismiss the Plaintiffs' Complaint for Declaratory and Injunctive Relief.

Introduction

The Plaintiffs, eleven registered New Hampshire voters, bring this action to challenge duly enacted and constitutionally mandated reapportionments of the State Senate and Executive Council districts following the 2020 federal census. The Plaintiffs challenge the reapportioned

districts based solely on alleged partisan gerrymandering, a theory that the New Hampshire Supreme Court has never recognized under the State Constitution, and one which the United States Supreme Court has held presents a nonjusticiable political question under the Federal Constitution. *See Rucho v. Common Cause*, 139 S.Ct. 2484 (2019).

The Plaintiffs' claims present nonjusticiable political questions under state law as well, and this Court should accordingly dismiss the Plaintiffs' complaint in its entirety. The nonjusticiability of a political question derives from the Constitutional principle of separation of powers. *See* N.H. CONST., Pt. I, Art. 37. Under this principle, courts must decline to adjudicate matters that the Constitution committed to another branch of government, or matters to which the Constitution does not provide judicially discoverable and manageable standards for resolving.

The State Constitution commits reapportionment of the State Senate and Executive Council districts exclusively to the Legislature, subject to a handful of express constitutional requirements. The New Hampshire Supreme Court has consistently refused to intervene in the redistricting process absent "clear, direct, irrefutable constitutional violations" premised on an express constitutional requirement. *City of Manchester v. Secretary of State*, 164 N.H. 689, 697 (2012). Unlike the constitutions of several other states, the State Constitution does not prohibit, restrict, or otherwise provide whether, how, or to what extent the Legislature may consider partisanship when exercising its constitutional authority to redistrict. New Hampshire Supreme Court precedent makes clear that the Legislature, not the Judiciary, has the *exclusive* authority to factor political considerations into its redistricting calculus. *See, e.g.*, *Below v. Gardner*, 148 N.H. 1, 11 (2002) ("*Below I*")

The Plaintiffs' allegations of political gerrymandering would thus require the Court to encroach upon the power and functions of the Legislature—the coordinate branch of government

to which the State Constitution has committed the authority to reapportion State Senate and Executive Council districts—even though the State Constitution does not clearly, directly, and irrefutably prohibit political gerrymandering, and even though the State Constitution does not provide any judicially discoverable and manageable standards for resolving the Plaintiffs' claims. At its heart, the Plaintiffs' complaint seeks to have this Court craft a political solution to the benefit of the Plaintiffs' preferred political party to overturn districts that elected, politically accountable legislators created. The Court cannot do so without wading into "one of the most intensely partisan aspects of American political life," *see Rucho*, 139 S.Ct. at 2507, and without running afoul of the New Hampshire Supreme Court's clear directive that "political considerations have no place in a court-ordered remedial redistricting plan," *Norelli v. Secretary of State*, __ N.H. __, 2022 WL 1498345, at *9 (decided May 12, 2022) (*per curiam*). The Plaintiffs' claims are therefore not susceptible of judicial review, and this Court must resist the Plaintiffs' invitation to impose a judicially-decreed *political* solution to a legislative *political* problem.

For all of these reasons, and those stated below, the Plaintiffs' claims present nonjusticiable political questions. The Court should therefore dismiss their complaint for lack of subject-matte jurisdiction.

Background

I. State Senate and Executive Council districting plans.

The twenty-four State Senate districts were reapportioned following the 2020 federal census through Senate Bill ("SB") 240. *See Bill Docket – SB240*, N.H. Gen. Court, *available at* https://www.gencourt.state.nh.us/bill_status/billinfo.aspx?id=1983&inflect=2. The bill was introduced on January 5, 2022, and passed by the Senate on February 16 and by the House two

months later on April 21. *See id*. The bill was then signed by the Governor on May 6, 2022, with an effective date of the same day. *See id.*

SB 241 reapportioned the five Executive Council districts. *See Bill Docket – SB241*, N.H. Gen. Court, *available at* https://www.gencourt.state.nh.us/bill_status/billinfo.aspx?id=1984&inflect=2. The bill was introduced on January 5, 2022. *See id.* It was passed by the Senate on March 24, 2022, and passed by the House on April 21, 2022. *See id.* The bill was then signed by the Governor on May 6, 2022, with an effective date of the same day. *See id.*

II. Plaintiffs' challenges to the State Senate and Executive Council districts.

The Plaintiffs do not allege that the current State Senate and Executive Council districts violate any of the Constitution's express, mandatory requirements regarding reapportionment set forth in Part II, Articles 25 and 26 (requiring 24, single-member, contiguous State Senate districts that are as nearly equal as may be in population and that don't divide any town, city ward, or unincorporated place) and Part II, Article 65 (requiring five, single-member State Executive Council districts that are as nearly equal as may be in population). Rather, the Plaintiffs challenge the constitutionality of the current State Senate and Executive Council districts on the basis that the districts are not "fair" because they are insufficiently favorable to the Plaintiffs' preferred political party. Specifically, the Plaintiffs argue that the districts constitute a "partisan gerrymander" in violation of: (i) the Elections Clause in Part I, Article 11; (ii) the guarantee of equal protection under Part I, Articles 1, 10, and 12; and (iii) the guarantees of free speech and association under Part I, Articles 22 and 32.[1]

[1] Plaintiffs' Complaint, at 4-5, ¶¶12-14.

Standard of Review

In reviewing a motion to dismiss, the standard of review is whether the allegations in the Plaintiffs' complaint are reasonably susceptible of a construction that would permit recovery. *See McNamara v. Hersh*, 157 N.H. 72, 73 (2008). The Court assumes the Plaintiffs' factual allegations to be true and construes all reasonable inferences in the light most favorable to the Plaintiffs. *See id*. However, the Court does not have to accept allegations that are "merely conclusions of law." *Beane v. Dana S. Beane & Co.*, 160 N.H. 708, 711 (2010). The Court should dismiss the Plaintiffs' complaint if the facts pled do not constitute a basis for legal relief. *Id*.

Argument

The Plaintiffs' claims should be dismissed because they present nonjusticiable political questions. Whether a controversy is nonjusticiable presents a question of law. *Burt v. Speaker of the House of Representatives*, 173 N.H. 522, 525 (2020). The nonjusticiability of a political question derives from the principle of separation of powers, a principle that is set forth in Part I Article 37 of the State Constitution, which provides:

> 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.

N.H. CONST., Pt. I, Art. 37; *see also Burt*, 173 N.H. at 525. "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 (quotation omitted).

"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. . . ." *Id*. (quotation omitted). Where there is such commitment, courts "must decline to adjudicate the matter to avoid encroaching upon the powers and functions of a coordinate political branch." *Id*. (quotation omitted). "A controversy is nonjusticiable—i.e., involves a political question—where there is a textually demonstrable commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." *Id*. (quotation omitted); *see also Baines v. New Hampshire Senate President*, 152 N.H. 124, 129 (2005) (recognizing that a case may also raise a nonjusticiable political question if a court cannot make a "deci[sion] without an initial policy determination of a kind clearly for nonjudicial discretion" (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

I. The Plaintiffs' claims are nonjusticiable because the State Constitution commits reapportionment authority to the State Legislature—not the State Judiciary—and only the Legislature may weigh the political considerations that the Plaintiffs' claims present.

This Court should dismiss the Plaintiffs' claims as nonjusticiable political questions because the text of the State Constitution demonstrably commits the authority to reapportion State Senate and Executive Council districts to the Legislature and the Plaintiffs have not alleged that the Legislature violated any of the mandatory reapportionment requirements set forth in the Constitution.

The State Constitution sets forth the mandatory requirements for reapportionment of the State Senate and Executive Council districts following the decennial federal census. With respect to the State Senate, the Constitution provides:

> And that the state may be equally represented in the senate, the *legislature* shall divide the state into single-member districts, as nearly as 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. The *legislature* shall form the single-member districts at its next session after approval of this article by the voters of the state and thereafter at the regular session following each decennial federal census.

N.H. CONST., Pt. II, Art. 26 (emphasis added). The State Constitution further provides, with respect to the Executive Council, that:

> The *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; And, in case of such division, the manner of choice shall be conformable to the present mode of election in counties.

N.H. CONST., Pt. II, Art. 65 (emphasis added). Both of these provisions expressly contemplate that the legislature has authority to determine the State Senate and Executive Council districts, subject to certain mandatory requirements.

Consistent with this express language, the New Hampshire Supreme Court has recognized that redistricting is inherently a *legislative* function. In *City of Manchester*, the Court observed: "Our State Constitution vests the authority to redistrict with the legislative branch, and for good reason." 264 N.H. at 697 (citation and quotation marks omitted). Likewise, in *Below I*, the Court observed that "[r]eapportionment is primarily a matter of legislature consideration and determination." 148 N.H. at 5 (citation and quotation marks omitted). A court must "tread lightly in this political arena, lest [it] materially impair the legislatures redistricting power." *City of Manchester*, 163 N.H. at 697 (citation and quotation marks omitted). "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." *Id.* (citation and quotation marks omitted).

New Hampshire Supreme Court precedent reflects that, consistent with the plain language of the State Constitution, the Judiciary's role in the redistricting is necessarily

circumscribed. To that end, the New Hampshire Supreme Court has only contemplated judicial intervention when the legislature has failed to meet a mandatory reapportionment requirement. For instance, when the Legislature has failed to meet its express constitutional obligation to reapportion the State Senate and House districts "following [a] decennial federal census," N.H. CONST., Pt. 2, Art. 26 (senate); N.H. CONST., Pt. 2, Art. 11 (house); *see also* N.H. CONST., Pt. 2, Art. 9 (house), the Court has stepped in, *see, e.g.*, *Below I*, 148 N.H. at 2–3; *Burling v. Chandler*, 148 N.H. 143, 144 (2002). Even then, though, the Court provided a judicial remedy only when the State House and Senate districts in question indisputably did not meet the constitutional requirement of equal apportionment, a requirement derived from the express language of the State Constitution itself. *See Below I*, 148 N.H. at 3 ("The State Constitution requires the legislature to redraw each senate seat into a single member district 'as nearly equal as may be in population' every ten years, based upon the federal decennial census." (quoting N.H. CONST., Pt. 2, Arts. 11 & 26)); *Burling*, 148 N.H. at 145 ("The New Hampshire Constitution requires the legislature to redraw each representative district 'as equal as circumstances will admit' every ten years, based upon the decennial census." (quoting N.H. CONST., Pt. 2, Art. 9)). Similarly, the New Hampshire Supreme Court recently intervene to draw congressional districts when new districts were not enacted following the 2020 federal census and the Court was able to determine as a matter of law that the old districts failed to meet the federal constitutional requirement of one person/one vote. *See Norelli v. Secretary of State*, __ A.3d __, 2022 WL 1498345 (N.H. May 12, 2022).

In contrast, the New Hampshire Supreme Court has never invalidated a redistricting plan duly enacted by the Legislature following the then most recent federal decennial census. The Court has emphasized that a duly enacted plan "is entitled to the same presumption of

constitutionality as any other statute." *City of Manchester*, 163 N.H. at 697. "Judicial relief becomes appropriate only when a legislature fails to reapportion according to constitutional requisites in a timely fashion after having had an adequate opportunity to do so." *Id.* (cleaned up). Again, "[b]oth the complexity of 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." *Id.* (citation and quotation marks omitted).

New Hampshire precedent thus makes clear that judicial intervention regarding redistricting is only appropriate in the narrow circumstances where there is a clear, direct, irrefutable violation of a mandatory constitutional requirement. In the cases above, the clarity comes from the specific constitutional obligations imposed on the legislature—for example, (1) single-member districts, (2) as nearly as equal as may be in population, (3) consisting of contiguous towns, city wards and unincorporated places, without dividing any town, city ward or unincorporated place. N.H. CONST., Pt. II, Art. 26. There can be no clarity where the State Constitution provides no obligation.

The State Constitution imposes no mandatory obligation on the Legislature with respect to how it may weigh political considerations when exercising its reapportionment authority. In the absence of such obligation, the New Hampshire Supreme Court has repeatedly recognized "that redistricting is an inherently political process," *City of Manchester*, 163 N.H. at 695 (quoting *In re Below*, 151 N.H. 135, 138 (2004) (*per curiam*) ("*Below II*")), and that the Legislature may factor political considerations—including "partisan advantage"—into its redistricting calculus, *see Burling*, 148 N.H. at 156; *see also id.* (noting that "political considerations are tolerated in legislatively-implemented redistricting plans"); *Below I*, 148 N.H. at 11 (noting that "political considerations"—including "partisan political advantage"—"may be

permissible in legislatively-implemented redistricting plans"). This is because the Legislature is "the institution by far best situated to identify and then reconcile traditional state policies within the constitutional framework of substantial population equality." *Below I*, 148 N.H. at 5. "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.* at 9 (citation and quotation marks omitted). The Legislature thus has a "distinctive mandate to compromise sometimes conflicting state apportionment policies in the people's name." *Id.*

The Judiciary enjoys no similar mandate. Just as nothing in the text of the State Constitution proscribes the Legislature from considering partisan factors when drawing redistricting maps, so too does nothing in the text of the Constitution empower courts to invalidate and redraw maps based on notions of political fairness. To the contrary, "courts engaged in redistricting primarily view the task through the lens of the one person/one vote principle and all other considerations are given less weight." *Id.* A court has "no principled way to choose among [competing redistricting] plans, especially knowing that [it] would be endorsing an unknown but intended political consequence by the choice [it] makes." *Id.* at 13. As the New Hampshire Supreme Court recently recognized, "any change to the existing . . . districts may have political ramifications." *Norelli*, __ A.3d __, 2022 WL 1498345, at *9. "[W]hile these types of political considerations may be permissible in legislatively-implemented redistricting plans, they have no place in a court-ordered remedial plan." *Below I*, 148 N.H. at 11.

Constitutional text and controlling precedent thus make clear that the authority to factor political considerations, including "partisan political advantage," into the reapportionment calculus lies *exclusively* with the Legislature, not the Judiciary. When the State Constitution

places authority over a matter "entirely within legislative control and discretion," it is "not subject to judicial review *unless* the legislative procedure is mandated by the constitution." *Burt*, 173 N.H. at 526 (emphasis in original). Because the State Constitution imposes no mandatory requirement on how the Legislature must weigh political considerations during the reapportionment process, how the Legislature ultimately chooses to do so, if at all, is not subject to judicial review. *Id.*

The New Hampshire Supreme Court's decision in *City of Manchester* illustrates this point. There, the Court rejected an argument that the challenged House plan violated the State Constitution because it failed to adequately preserve "communities of interest." *City of Manchester*, 163 N.H. at 708. The Court made clear that while preserving "communities of interest" is a "traditional . . . districting principle," it is not "constitutionally required." *Id.* (citation and quotation marks omitted). The Court noted that the phrase "communities of interest" "appears nowhere in the state constitutional provisions governing redistricting of the House." *Id.* (citations omitted). The Court observed that, "although preservation of communities of interest may be a legitimate redistricting goal and is oftentimes used to justify the creation of a district that otherwise appears improper, that this is a legitimate goal does not mean that there is an individual constitutional right to have one's particular community of interest contained within one legislative district." *Id.* (cleaned up). As the Court noted: "Had 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. And had the people agreed, those factors would have become the constitutional guideposts. But, they are not." *Id.* (cleaned up). [2]

[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* Affidavit of Steven J. Dutton, Ex. 15, at 2

To the extent the Plaintiffs believe that the State Constitution should be amended to limit the extent to which the Legislature may factor political considerations such as partisan political advantage into its reapportionment calculus, then they are free to pursue such an amendment. More than a third of other States have amended their constitutions in such a manner,[3] including many States that already had provisions like Part I, Article 11 guaranteeing "free" elections.[4] If such an amendment were enacted, the Plaintiffs might have a more colorable argument that partisan-gerrymandering-based claims were justiciable under the State Constitution. *See, e.g.*, *Harkenrider v. Hochul*, __ N.E.3d __, 2022 WL 1236822 (N.Y. May 27, 2022); *Adams v. Dewine*, __ N.3d __, 2022 WL 129092 (Jan. 14, 2022); *League of Women Voters of Fla. v. Detzner*, 172 So.3d 363 (Fla. 2015). At present, though, no such provision exists in the New Hampshire Constitution.

That no such provision exists also distinguishes this case from the redistricting-based causes of action the New Hampshire Supreme Court has recognized. As noted above, the Supreme Court has contemplated judicial intervention in the redistricting process when the

("Plaintiffs' counsel has asked me to examine whether the districts as constituted under Senate Bills 240 and 241 keep communities of interest together.")

[3] In *Rucho*, the United States Supreme Court recognized that Florida, Colorado, Michigan, Missouri, Iowa, and Delaware all approved constitutional amendments or passed legislation that was intended to restrict or prohibit political gerrymandering. 139 S. Ct. at 2507. At least an additional ten states have also changed their laws to prohibit political gerrymandering, including prohibiting favoring a political party, prohibiting considering partisan data, ensuring competitiveness, or adopting independent or bipartisan redistricting commissions. CAL. CONST., Art. XXI, §2(e) (California); HAW. CONST., Art. 4, §6 (Hawaii); Idaho Code Ann., §72-1506(8) (West 2022) (Idaho); Mont. Code Ann., §5-1-115(3) (West 2022) (Montana); 2021 NE L.R. 134 (Nebraska); N.Y. CONST., Art. 3, §4(c)(5) (New York); OHIO CONST., Art. XI, §6 (Ohio); ORS 188.010(2) (Oregon); VA. CONST., Art. II, §6-A (Virginia); WASH. CONST., Art. II, §43(5) (Washington). Others have passed laws creating independent congressional redistricting commissions. *See, e.g.*, *Arizona State Legislature v. Arizona Independent Redistricting Com'n*, 576 U.S. 787, 799 (2015) (upholding a ballot initiative that creating such a commission.)

[4] *See Free and Equal Elections Clauses in State Constitutions*, National Conference of State Legislatures, Nov. 4, 2019, https://www.ncsl.org/research/redistricting/free-equal-election-clauses-in-state-constitutions.aspx (last visited June 16, 2022) (quoting and citing constitutional provisions).

Legislature fails to meet its express, mandatory obligations under the State Constitution's redistricting's provision. *See, e.g.*, *Below I*, 148 N.H. at 2–3; *Burling*, 148 N.H. at 144; *cf. Norelli*, 2022 WL 1498345. Because those cases involved claims that the Legislature had failed to adhere to mandatory constitutional requirements, the Court could resolve them consistent with the political-question doctrine. *See, e.g.*, *Burt*, 173 N.H. at 526 (observing that the Legislature's internal procedures were a matter "entirely within legislative control and discretion, not subject to judicial review *unless the legislative process procedure is mandated by the constitution*" (emphasis added)); *Sumner v. New Hampshire 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);; *In re Judicial Conduct Committee*, 145 N.H. 108 (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).

Here, however, the Plaintiffs ask this Court to resolve claims that necessarily turn on political considerations that under binding authority the Legislature has the *exclusive* province to weigh. "Even if the [Plaintiffs'] criticisms [of the State Senate and Executive Council maps] are accurate," the Supreme Court has emphasized that, "while these types of political considerations may be permissible in legislatively-implemented redistricting plans, they have no place in a court-ordered remedial plan." *Below I*, 148 N.H. at 11. Under the New Hampshire Supreme Court's political-question jurisprudence, those claims are not justiciable.

In sum, the State Constitution expressly commits the redistricting process to the Legislature. N.H. CONST., Pt. II, Art. 26; N.H. CONST., Pt. II, Art. 65. The Plaintiffs do not bring challenges to the State Senate and Executive Council based on any "clear, direct, [and] irrefutable" failure by the Legislature to adhere to the express requirements imposed on the redistricting process by the text of the Constitution itself. *City of Manchester*, 163 N.H. at 697. They instead take issue with how the Legislature fulfilled its "distinctive mandate to compromise sometimes conflicting state apportionment policies in the people's name." *Below I*, 148 N.H. at 5. The Constitution confers that mandate exclusively on the Legislature, not the Judiciary. Accordingly, the Plaintiffs' claims are nonjusticiable and should be dismissed for lack of subject-matter jurisdiction.

II. The Plaintiffs' claims present a nonjusticiable political question because there are no discoverable and manageable standards for judicial intervention.

The Plaintiffs' claims also present nonjusticiable political questions because there are no discoverable and 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 the Legislature considering partisanship when exercising its constitutional authority to redistrict. 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 the Constitution committed to the Legislature.

The United States Supreme Court's decision in *Rucho* is instructive. There, 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."

Rucho, 139 S.Ct. at 2506–07. In reaching this conclusion, 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 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 cautioned that judicial interference in legislative redistricting would represent "an unprecedented expansion of judicial power," that would invade "one of the most intensely partisan aspects of American political life." *Id*. Moreover, exercising judicial authority in this manner "would be unlimited in scope and duration—it would recur over and over again around the country with each new round of districting." *Id*. The Supreme Court reasoned that it would be particularly inappropriate for the courts to assume "such an extraordinary and unprecedented role" because courts are an "unelected and politically unaccountable" branch of the government. *Id*.

The reasoning in *Rucho* applies with equal force to this case. The Plaintiffs bring claims under the State Constitution here that appear to be functionally identical to the claims the Court

in *Rucho* concluded were nonjusticiable under the Federal Constitution. *Compare id.* at 2491 (noting that the Plaintiffs alleged political gerrymandering in violation of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Elections Clause), *with* 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). As discussed above, the State Constitution grants redistricting authority to the Legislature—a body of elected officials who are politically accountable to their voters. The New Hampshire Supreme 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*, 2022 WL 1498345, at *8 ("In the context of state legislative redistricting, we have observed that reapportionment is primarily a matter of legislative consideration and determination." (cleaned up)). Thus, echoing *Rucho*, the New Hampshire Supreme Court has recognized that it has "no principled way to choose among [competing redistricting] plans." *Below I*, 148 N.H. at 13.

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 that would allow the Court to make a determination based on principled, rational, and reasoned distinctions found in those laws. *See Rucho*, 139 S. Ct. at 2507. Indeed, as also discussed above, the New Hampshire Supreme Court has *prohibited* courts basing redistricting remedies on political considerations. *See Norelli*, 2022 WL 1498345, at *9 ("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, the New Hampshire Supreme Court only recently 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 demonstrate that their claims turn on precisely these sorts of considerations.

As it relates to partisan gerrymandering, the State of New Hampshire has no interest or obligation in protecting or favoring any particular political entities, groups, or parties. Any limit on the extent to which the Legislature may factor political considerations into its reapportionment calculates must be resolved by the political branches of government. As such, as has occurred in other States, the voters and elected officials in our State may choose to address political gerrymandering through legislation or constitutional amendments. *See supra* n.3. Unlike in those States, New Hampshire's voters and elected officials have not enacted any laws prohibiting political considerations in redistricting or otherwise setting forth justiciable criteria relating to political considerations in redistricting. Because New Hampshire has not adopted such a law or constitutional amendment, there would be no restraint on judicial intervention, and any judicial action would therefore be "unlimited in scope and duration" and untethered to principled, rational, and reasoned distinctions found in this State's Constitution or laws. *See Rucho*, 139 S.Ct. at 2507.

At bottom, the State Constitution neither prohibits the Legislature from weighing political considerations when exercising its redistricting authority nor provides discoverable and

manageable standards for judicial intervention when those political considerations are challenged. Therefore, such claims present nonjusticiable political questions, and this Court should dismiss the Plaintiffs' claims in their entirety.

Conclusion

For the foregoing reasons, the Plaintiffs' claims present non-justiciable political questions. Their complaint should accordingly be dismissed for lack of subject-matter jurisdiction.

Respectfully submitted,

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By his attorneys,

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Date: June 16, 2022

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on all counsel of record through the Court's electronic-filing system.

/s/ *Samuel Garland*
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