THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Docket No. 2022-0184

Theresa Norelli, et al.

v.

Secretary of State

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

THE SECRETARY OF STATE AND THE STATE OF NEW HAMPSHIRE

By their attorneys,

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Oral Argument Requested

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CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES, AND REGULATIONS

NEW HAMPSHIRE CONSTITUTION

Part I, Article 11 [Elections and Elective Franchises.]

All elections are to be free, and every inhabitant of the state of 18 years of age and upwards shall have an equal right to vote in any election. Every person shall be considered an inhabitant for the purposes of voting in the town, ward, or unincorporated place where he has his domicile. No person shall have the right to vote under the constitution of this state who has been convicted of treason, bribery or any willful violation of the election laws of this state or of the United States; but the supreme court may, on notice to the attorney general, restore the privilege to vote to any person who may have forfeited it by conviction of such offenses. The general court shall provide by law for voting by qualified voters who at the time of the biennial or state elections, or of the primary elections therefor, or of city elections, or of town elections by official ballot, are absent from the city or town of which they are inhabitants, or who by reason of physical disability are unable to vote in person, in the choice of any officer or officers to be elected or upon any question submitted at such election. Voting registration and polling places shall be easily accessible to all persons including disabled and elderly persons who are otherwise qualified to vote in the choice of any officer or officers to be elected or upon any question submitted at such election. The right to vote shall not be denied to any person because of the non payment of any tax. Every inhabitant of the state, having the proper qualifications, has equal right to be elected into office.

UNITED STATES CONSTITUTION

Article I, Section 2

The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature….

Article I, Section 4, Clause 1

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

NEW HAMPSHIRE STATUTES, RULES OR REGULATIONS

655:14 Filing: General Provisions. – The name of any person shall not be printed upon the ballot of any party for a primary unless he or she is a registered member of that party, he or she shall have met the age and domicile qualifications for the office he or she seeks at the time of the general election, he or she meets all the other qualifications at the time of filing, and he or she shall file with the appropriate official between the first Wednesday in June and the Friday of the following week a declaration of candidacy as provided in RSA 655:17.

655:14-c Change in Filing Period. – Notwithstanding the provisions of RSA 655:14, if the elective districts for any office in RSA 662 have not been amended according to the most recently completed federal decennial census before the commencement of the filing period, the secretary of state is hereby authorized to change or extend the filing period as necessary to implement revised elective districts.

UNITED STATES STATUTES, RULES OR REGULATIONS

52 U.S. Code § 20302 - State responsibilities

(a) In general, Each State shall—

(1) permit absent uniformed services voters and overseas voters to use absentee registration procedures and to vote by absentee ballot in general, special, primary, and runoff elections for Federal office;
(2) accept and process, with respect to any election for Federal office, any otherwise valid voter registration application and absentee ballot application from an absent uniformed services voter

or overseas voter, if the application is received by the appropriate State election official not less than 30 days before the election;
….

(g) Hardship exemption

(1) In general: If the chief State election official determines that the State is unable to meet the requirement under subsection (a)(8)(A) with respect to an election for Federal office due to an undue hardship described in paragraph (2)(B), the chief State election official shall request that the Presidential designee grant a waiver to the State of the application of such subsection. Such request shall include—

(A) a recognition that the purpose of such subsection is to allow absent uniformed services voters and overseas voters enough time to vote in an election for Federal office;
(B) an explanation of the hardship that indicates why the State is unable to transmit absent uniformed services voters and overseas voters an absentee ballot in accordance with such subsection; …

STATEMENT OF THE CASE AND FACTS

In August 2021, the United States Census Bureau released its population data from the 2020 Census to New Hampshire. That data indicate that the difference between New Hampshire's two congressional districts was 17,945.

Over the course of this legislative session, the General Court conducted "listening sessions," considered legislation, held hearings, and has voted on various bills related to redistricting. The General Court has yet to complete the legislative session in which it is currently engaged.

On March 31, 2022, the Plaintiffs filed suit in the Hillsborough County Superior Court, Southern District, challenging the constitutionality of New Hampshire's congressional districts, seeking to enjoin use of the congressional district maps in the 2022 election cycle, and asking the Superior Court to adopt a new congressional map.

On April 11, 2022, the New Hampshire Supreme Court exercised supervisory jurisdiction over this matter.

SUMMARY OF ARGUMENT

In an equal representation "one person, one vote" analysis, the degree of population deviation from the ideal congressional district size alone is not determinative. Deviation is constitutionally acceptable if supported by legitimate state objectives, including district compactness, preservation of political subdivision boundaries, conservation of prior district lines, the avoidance of contests between incumbents, and a legislature's fulfillment of its reapportionment constitutional obligation.

The U.S. Supreme Court has never definitively addressed what role, if any, a *state* court has to play in the congressional redistricting process under "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, [which] shall be prescribed in each State by the Legislature thereof." U.S. Const., Art I., § 4, cl. 1. Additionally, a well-established U.S. Supreme Court principle also warns against judicial intervention in the present case—courts should not ordinarily enjoin election laws in the days preceding an election.

This case implicates the state legislature's interest in being given every opportunity to complete its federal constitutional obligation to legislate a congressional reapportionment. The legislature is still in the midst of a legislative session and considering redistricting legislation. Judicial preemption of legislative action, given the particular facts and circumstances in *this* case at *this* time, contravenes the constitutional roles of the branches of government.

This Court should take no further action in this case. If, however, the Court chooses to intervene in the redistricting process, the State and the

Secretary of State agree that is should take a "least change" action, essentially only modifying the legislature's past actions to the minimum degree necessary to meet the constitutional obligation of one person, one vote. Put differently, state court action, if permitted in these circumstances at all, is only a temporary involvement to balance a constitutional interest, not a free-ranging exercise in replacing the authority possessed by the legislature.

In sum, the combination of legislative primacy in matters of redistricting and the principle of non-intervention by courts when elections are close at hand delivers a clear directive to this Court—do not intervene to alter New Hampshire's congressional maps. This directive is reinforced by the reality that the legislature is currently fulfilling its constitutional obligations by considering redistricting legislation. This Court should decline to intrude upon the legislature's constitutional activities regarding redistricting, particularly where the deviation at issue is slight as compared to the compelling state interests at play in pursuing legislative constitutional authority and having an election close at hand.

ARGUMENT

I. WOULD USE OF THE EXISTING CONGRESSIONAL DISTRICTS FOR THE 2022 ELECTION BE UNCONSTITUTIONAL EITHER AS A VIOLATION OF ONE PERSON/ONE VOTE OR AS OTHERWISE ALLEGED IN THE COMPLAINT?

The Secretary of State has no role in determining the constitutionality of the existing congressional districts, and therefore takes no position on this question. The position below is solely that of the State.

Apportionment of New Hampshire's two congressional districts appears simple—divide the state population in half. This directive is driven both by the United States Constitution Art. I, § 2 and the New Hampshire State Constitution, Part 1, Article 11. While absolute equality is not constitutionally required, districts must be apportioned such that they fall within the constitutionally acceptable margin of deviation taking into account the strength of state interests and policies.

The United States Supreme Court has articulated the requirements concerning congressional apportionment and the "equal representation" standard of the United States Constitution Art. I, § 2. In *Wesberry v. Sanders*, 376 U.S. 1 (1964), the Court held that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Id*. at 7-8. In *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969), the Court described the process for fulfilling the apportionment obligation. The Court held that (1) congressional districts must be apportioned to achieve population equality as closely as is practicable; (2) plaintiffs challenging the legislated maps bear the burden of proving that population deviations

could have been reduced by good-faith efforts to draw districts with equal populations; and (3) if the plaintiffs meet their burden, the State must show that deviation between districts are necessary to achieve some legitimate goal. *Id.* at 530-31.

Population deviation is the starting point for an equal representation analysis, but it is not the end of the analysis. The *Kirkpatrick* Court invalidated New Jersey's congressional map with a 5.97 percent maximum population deviation. In *Karcher v. Dagett*, 462 U.S. 725 (1983), the Court articulated "absolute population equality" as the standard absent "some legitimate state objective," including district compactness, preservation of political subdivision boundaries, conservation of prior district lines, and the avoidance of contests between incumbents. *Id.* at 730, 740. However, the Court did note that "precise mathematical equality" was not necessary when the State can justify population differences when balancing other State objectives, so long as there is a "good-faith effort to achieve absolute equality." *Id.* at 730. The *Karcher* Court nevertheless found that a 0.6984 percent maximum deviation was unconstitutional based on the articulation of state interests. *Id.* at 744. In contrast, the Court in *Tennant v. Jefferson County Commission*, 567 U.S. 758 (2012), upheld the validity of maintaining boundaries, minimizing population shifts between districts, and avoiding incumbent contests as valid State objectives in finding a West Virginia congressional map with a 0.79 percent average deviation constitutional. *Id.* at 763-64. Importantly, the Court noted that West Virginia's legislature was due appropriate deference relating to its exercise of its political judgment, particularly in that the legislated redistricting plan

had a low population shift as it moved only one county from one district to another, resulting in a population deviation of 4,871. *Id.* at 764.

It is thus clear that the degree of deviation alone is not determinative. In a concurring opinion in *Brown v. Thomas*, Justice O'Connor offered the following summary of the constitutional obligation regarding equal representation as such:

> [T]he "one-person, one-vote" principle is the guiding ideal in evaluating both congressional and legislative redistricting schemes. In both situations, however, ensuring equal representation is not simply a matter of numbers. There must be flexibility in assessing the size of the deviation against the importance, consistency, and neutrality of the state policies alleged to require the population disparities.

Brown v. Thomson, 462 U.S. 835, 848 (1983) (O'Connor, J.).

In this case, the present congressional maps implicate the significant state interests of consistency, compactness, preservation of political subdivision boundaries, conservation of prior district lines, and avoidance of contests between incumbents. Unlike the cases above, however, this case also implicates the state legislature's interest in being given every opportunity to complete its federal and state constitutional obligations to legislate a congressional reapportionment. This interest emanates from the text of the United States Constitution itself, which expressly provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." U.S. Const., Art I., § 4, cl. 1. Here, the legislature is still in the midst of a legislative session and considering redistricting legislation. Judicial preemption of legislative action is in tension with the precedents

cited above and contravenes the constitutional roles of the branches of government.

Failure to reapportion is not itself a constitutional violation if the existing districts fall within the constitutionally acceptable margin of deviation when considering state interests. While the State can identify no precedent holding that a 2.6 percent deviation—the deviation between the two congressional districts based on 2020 Census data—is within that constitutionally acceptable margin for a recently-passed map, there are other state interests that weigh against judicial intervention in this case.

Principal among these interests is the fact that the legislature continues its legislative business concerning congressional apportionment in the lead-up to the election. Because "reapportionment is primarily the duty and responsibility of the State through its legislature or other body," judicial intervention, if authorized at all, cannot be justified "[a]bsent evidence that the[] state branches will fail timely to perform that duty." *Grove v. Emison*, 507 U.S. 25, 34 (1993). Moreover, as the U.S. Supreme Court recognized, litigation can, in fact, be "used to impede" the constitutionally prescribed reapportionment process. *See id.* The State has a significant interest in ensuring that this does not occur.

This is particularly so given the primacy of the legislature—and not the courts—in the redistricting process. As noted, the United States Constitution grants the power of determining the times, places and manner of holding federal elections to *state legislatures*, and to no other entity, including state judiciaries. U.S. Const., Art I., § 4, cl. 1. It is perhaps unsurprising, then, that judicial intervention in redistricting matters did not occur for the first century and a half of our nation's existence. The United

States Supreme Court repeatedly declined to intrude into the redistricting authority of legislatures until *Baker v. Carr*, 369 U.S. 186 (1962). There, the Court held that the Tennessee legislature's failure to reapportion for sixty years, resulting in 19-to-1 disparities in population, gave *federal* courts the jurisdiction to hear equal representation claims. *Id.* at 237. *Baker* was followed by the *Wesberry*, *Kirkpatrick*, and *Karcher* line of cases discussed above, all of which again were limited to federal judicial intervention.

The U.S. Supreme Court has never definitively addressed what role, if any, a *state* court has to play in the congressional redistricting process under the times, places, and manner provision of the United States Constitution. U.S. Const., art I., s. 4, cl. 1. Recently, three Justices suggested that a state court may have no role to play at all. *See Moore v. Harper*, 142 S. Ct. 1089, 1089 –92 (2022) (Alito, J., dissenting from the denial of application for stay). Another has publicly indicated that this is an important issue worthy of resolution. *See id.* at 1089 (Kavanaugh, J., concurring); *see also Democratic Nat'l Comm. v. Wisconsin State Legislature*, 141 S. Ct. 28, 34 n.1 (2020) (Kavanaugh, J., concurring) (observing that "the text of the Constitution requires federal courts to ensure that state courts do not rewrite state election laws"). At least one petition for writ of certiorari is currently pending before the Supreme Court directly presenting this issue. *See Moore v. Harper*, No. 21-1271 (filed Mar. 17, 2022).[1]

[1] The Supreme Court docket is available at https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/21-1271.html.

A second principle also warns against judicial intervention in the present case. In *Purcell v. Gonzalez*, 549 U. S. 1 (2006), the United States Supreme Court held that federal courts should not ordinarily enjoin a state's election laws in the days preceding an election. As articulated by Justice Kavaugh, in *Merrill v. Milligan*, 595 U. S. __, slip op. at 2 (2022), where the timeline was concerning a matter of weeks:

> That principle—known as the *Purcell* principle—reflects a bedrock tenet of election law: When an election is close at hand, the rules of the road must be clear and settled. Late judicial tinkering with election laws can lead to disruption and to unanticipated and unfair consequences for candidates, political parties, and voters, among others.

Id. at 4.

Purcell follows the United States Supreme Court's longstanding concern about late judicial intervention:

> [U]nder certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid. In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles.

Reynolds v. Sims, 377 U.S. 533, 585 (1964).

The timing here is similar to that of *Merrill* nine weeks there and twelve weeks here (from the Court's oral arguments hearing date, not any written order). There the question was not even whether a federal court would be redrawing maps, but whether the court could direct the legislature

to deliver another map in the timeframe of the few weeks before the start of a primary election. *Merrill*, 595 U.S. ___, slip op. at 2. The reasons for avoiding late involvement are clear. Justice Kavanaugh continued: "Running elections state-wide is extraordinarily complicated and difficult. Those elections require enormous advance preparations by state and local officials, and pose significant logistical challenges." *Id.* at 3.

In light of a State's "compelling interest in preserving the integrity of its election process," *Purcell*, 549 U.S. at 4, courts will apply the principle of nonintervention even when there is a question as to the lawfulness of the challenged election regulation. For instance, during the 2020 presidential primaries, the U.S. Supreme Court applied the *Purcell* doctrine to stay an injunction entered after a district court found that certain Wisconsin regulations likely imposed an unconstitutional burden on the right to vote. *See Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam); *Democratic Nat'l Comm. v. Bostelmann*, 451 F. Supp. 3d 952, 976 (W.D. Wis. 2020). This Court has similarly relied on *Purcell* to stay an injunction entered by a trial court on the eve of an election, *Petition of New Hampshire Secretary of State*, No. 2018-0208 (Oct. 26, 2018 Order), of a law that it later invalidated as facially unconstitutional, *see N.H. Democratic Party v. Sec'y of State*, 174 N.H. 312, 262 A.3d 366, 369 (2021). That there may be some question as to whether the current maps remain constitutional does not foreclose the application of *Purcell* in this case.

This is particularly true given the nature of the potential unconstitutionality at issue in this case. Populations did not suddenly shift overnight at the same point in time as the collection of data for the 2020

Census. Nor are populations likely to maintain their current distribution over the coming decade. It is thus plausible, if not likely, that the population deviation of the current map was arguably unconstitutional well before the current election cycle, and that multiple congressional elections occurred using that map. It is similarly plausible, if not likely, that any map this Court adopts, were it in place for a decade, would likewise become arguably unconstitutional before the decade was out. This is a natural consequence of the fact that congressional elections occur every two years, yet redistricting occurs on a decadal cycle. That the system already tolerates elections to occur with maps that are arguably unconstitutional suggests that the disruption caused by this Court intervening in the redistricting process now far outweighs the potential harm of using the current maps for one more election cycle.

In sum, the combination of legislative primacy in matters of redistricting and the principle of non-intervention by courts when elections are close at hand delivers a clear directive to this Court—do not intervene to alter New Hampshire's congressional maps. This directive is reinforced by the reality that the legislature is currently fulfilling its constitutional obligations by considering redistricting legislation. Plaintiffs' predictions or this Court's conclusions as to the likelihood of legislative action before any particular date, and therefore the constitutionality of an electoral map, are at best throws of the dice. This Court should decline to intrude upon the legislature's constitutional activities regarding redistricting, particularly where the deviation at issue is slight as compared to the compelling state interests at play.

II. TO DETERMINE THE TIME FRAME FOR ANY JUDICIAL RELIEF:

A. The Last Date By Which the Court Will Have Assurance That A Congressional Reapportionment Plan Will Be Validly Enacted In Time For The 2022 Primary Election For the Purpose Of Nominating Candidates For the United States House Of Representatives?

The State and Secretary of State can speak generally to the published calendars for the General Court and the presumption of a legislative process without modification of current rules. The calendars as published list:

- Thursday, May 5, 2022, Deadline to ACT on all House/Senate bills.
- Thursday, May 12, 2022, Deadline to FORM Committees of Conference.
- Thursday, May 19, 2022, Deadline to SIGN Committee of Conference Reports.
- Thursday, May 26, 2022, Deadline to ACT on Committee of Conference Reports.

Additionally, the General Court could alter the current deadlines through a rule change. And, absent such a change, the Governor and General Court could also convene a special session to act without regard to the deadlines listed above.

B. What Amount Of Time Does The Secretary Of State Believe Is Required to Prepare, Print, And Distribute Ballots In Advance Of The Primary Election?

The Secretary of State's Response:

Without pursuing extraordinary measures that would have the potential to disrupt or jeopardize the election process and voters' participation, the Secretary of State believes that the most pertinent date for consideration is June 17, 2022, as the end of the congressional filing period. This is one week beyond the current statutory filing deadline of June 10, 2022. Establishing June 17, 2022, as the end of the congressional filing period would allow for a compressed process, but one consistent with the Secretary of State's regular order.

The Secretary of State has limited authority to alter congressional filing periods. The statutory filing period for declarations of congressional candidacy runs from June 1 through June 10, 2022. RSA 655:14. However, the Secretary of State is authorized to change or extend the filing period as necessary to implement revised elective districts where those elective districts have not been amended according to the most recently completed federal decennial census. RSA 655:14-c.

Should a modification of the congressional filing period be necessary, the Secretary of State has several options for trying to minimize disruption to the election process. First, the Secretary of State could use two ballots—one for congressional races and one for all other races. Any delay in a filing period beyond June 17, 2022, would almost certainly necessitate using two ballots. The Secretary strongly recommends against the use of two ballots. This would double the number of ballots to be produced, complicate the ballot handling process, and require both election officials and voters to handle two different ballots throughout the voting process.

Multiple ballots increase the risk of counting and reconciliation errors or confusion and increase the workload on election officials.

Second, with a June 17, 2022, congressional filing deadline, the Secretary of State would likely seek to require congressional candidates to file *in part* on June 10, 2022, and then confirm the district in which they are filing by June 17, 2022. This split-filing requirement would allow the Secretary of State to begin the ballot formatting process in an effort to avoid using two ballots.

Even with a change in the congressional filing period, significant deadlines inform the practicalities of formatting and printing hundreds of ballot versions and the obligations imposed by the Federal MOVE Act, 52 U.S.C.S. § 20302 (a) concerning absent uniformed services voters and overseas voters (UOCAVA voters). A valid request from such a voter requires a ballot to be sent to the voter at least 45 days before an election for Federal office. With the New Hampshire State Primary being on September 13, 2022, 45 days prior to that date is July 30, 2022. Any further delay would require a Presidential Designee to grant a hardship exemption from the deadline if the state "has suffered a delay in generating ballots due to a legal contest." 52 U.S.C.S. § 20302(g)(1)(B). However, the granting of a hardship exemption still risks the timely receipt and return of UOCAVA voters' ballots.

The most important dates to maintain the Secretary of State's regular order are as follows:

- June 10, 2022: Statutory filing deadline.
- June 15, 2022: Party vacancy deadline.
- June 17, 2022: Amended congressional filing deadline.

- June 24, 2022: Ballot print layout and proofing documents submitted to printers.
- July 8, 2022: Printing begins.
- July 29, 2022: Ballots shipped.
- July 30, 2022: UOCAVA ballots must be transmitted to clerks for distribution to UOCAVA voters.

The State of New Hampshire's Additional Response:

The State of New Hampshire does not dispute any of the representations made by the Secretary of State in the preceding subsection and joins in those representations. The State would further emphasize that these representations demonstrate that preparations for the 2022 election cycle are well underway such that this Court should decline to intervene consistent with the *Purcell* principle. The mere fact that this Court is contemplating selecting its own maps has the potential to forestall the legislature's ability to meet its constitutionally prescribed duty. *See Grove*, 507 U.S. at 34. Any additional action only exacerbates this potential. At a minimum, the Court's proposed schedule will leave the congressional maps in limbo beyond the end of the current legislative session, assuming a new map is not enacted before the session ends. Potential candidates may not know which district they will run in, meaning voters may not know for whom they can vote. Indeed, many voters may not even know which district they reside in while this Court deliberates. The Secretary of State's office will be limited in what guidance it can provide, and what preparations it can undertake.

Moreover, if this Court *does* impose a new map, then there is a real possibility that litigation will continue on an emergency basis to the U.S. Supreme Court. The Supreme Court has repeatedly demonstrated its willingness to entertain emergency applications in relation to court decisions affecting election protocols, and many of its recent decisions in this area have been closely divided. *See, e.g.*, *Moore*, 142 S. Ct. at 1089; *Democratic Nat'l Comm.*, 141 S. Ct. at 28; *Scarnati v. Boockvar*, 141 S. Ct. 644, 644 (2020); *Wise v. Circosta*, 141 S. Ct. 658, 658 (2020); *Moore v. Circosta*, 141 S. Ct. 46, 46–48 (2020); *Democratic Nat'l Comm.*, 141 S. Ct. at 28–46; *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. at 1205–11. This, at a minimum, has the potential to leave this Court's decision in flux for additional days or weeks. And given the views expressed by a number of Justices, the Supreme Court may well entertain a stay of any decision this Court renders, adding a further layer of complication to the equation. *See Moore*, 142 S. Ct. at 1089 (Kavanaugh, J., concurring); *id.* at 1089–92 (Alito, J., dissenting); *Democratic Nat'l Comm.*, 141 S. Ct. at 34 n.1 (Kavanaugh, J., concurring).

All of these considerations highlight why, consistent with *Purcell*, this Court should not enter the fray. Again, any harm caused by the current map is far outweighed by the disruption to the election process that would come if this Court chooses to intervene. This is particularly true given that it is an open question whether this Court has the authority under the Federal Constitutional to act at all. At bottom, the best way to ensure "the integrity of [the state] election process," *Purcell*, 549 U.S. at 4, is to allow that process to play out as constitutionally prescribed in the legislative process.

III. IF USE OF THE EXISTING CONGRESSIONAL DISTRICTS FOR THE 2022 ELECTION WOULD BE UNCONSTITUTIONAL:

A. Should We Apply The "Least Change" Approach To Congressional Redistricting In This Case?

For all of the reasons stated above, this Court should take no further action in this case. If, however, the Court chooses to intervene in the redistricting process, the State and the Secretary of State agree that it should take a "least change" action, essentially only modifying the legislature's past actions to the minimum degree necessary to meet the constitutional obligation of one person, one vote. Stated differently, state court action, if permitted in redistricting at all, is only a temporary involvement to balance a constitutional interest, not a free-ranging exercise in replacing the authority possessed by the legislature.

This Court must therefore, at a minimum, limit any modification of the existing maps to the smallest necessary congressional district modification from the existing districts to achieve the primary constitutional obligation: apportionment. If this Court finds it has the authority to order a modification to the congressional map, the Court should depart from the existing congressional map only to the degree that is necessary to rectify a population deviation to within the constitutional margin of variation while balancing the state interests inherent in the current districts. Any additional modification beyond that minimum threshold to reach a constitutionally acceptable margin of deviation would create downstream consequences, including altering the practical and

political calculus of the General Court in pursuing its constitutional mission to reapportion.

This Court has a line of cases regarding redistricting. In *Levitt v. Maynard*, 105 N.H. 447 (1964), this Court denied injunctive relief where one of New Hampshire's congressional districts contained 9.34 percent more of the state's total population than the other district. The Court wrote:

> Reapportionment is primarily a matter for legislative consideration and determination and judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so.

Id. at 451 (internal citations omitted). The Court also cited *Reynolds* in support of its reluctance to push forward with judicial intervention on the eve of an election. *Reynolds*, at 449. While courts have pointed to improved technologies as a means of achieving more accurate and faster apportionments, *Levitt,* at the very least provides precedent for this Court to decline to intervene in congressional redistricting with an election imminent *even where the deviation was more than three times greater than the current congressional map*.

Opinion of the Justices, 111 N.H. 146 (1971), likewise highlights that the margins discussed in the redistricting realm are artificially precise. The pertinent section of *Opinion* concerns the question posed by the legislature regarding the ability to adjust census data to account for non-residents temporarily residing in New Hampshire. *Id.* at 149. The Court answered that "in no decision has it suggested that the States are required to include aliens, transients, short-term or temporary residents or persons denied the vote for conviction of crime in the apportionment base. This

determination however must be made by a reliable and systematic method." *Id.* at 149. The takeaway is clear: as long as the method is systematic, the legislature may effectively utilize various sets of baseline population numbers from the decadal Census for the purposes of redistricting. The practical effect of this reality is that a concentration on population deviations to the tenths or hundreds of a percent obscures the imprecision inherent in baseline population assumptions. Some may argue that they can divine the constitutionality of a map with the precision of a watchmaker; reality more likely reflects a level of inexactitude measured on a scale of population shifts commensurate with the swings brought on by a fresh snow in the mountains or a sunny day at the beach.

In *Monier v. Gallen*, 122 N.H. 474 (1982), this Court held that it had jurisdiction to resolve apportionment cases, and that it would do so only if no duly-enacted redistricting map was in place in the final few days before the start of the statutory filing period. Notably, this decision concerned state senate districts, not congressional districts. For the reasons stated above, it is inappropriate for this Court to extend *Monier* to the last-minute invalidation or change to congressional districts.

Below v. Gardner, 148 N.H. 1 (2002), represents this Court's most extensive assessment of the handling of redistricting, albeit state legislative maps rather than congressional maps. There, the question again concerned senatorial districts where the legislature had failed to enact a new district plan following the 2000 Census. Importantly, while both chambers of the legislature had passed redistricting legislation, the governor vetoed the legislation, then the General Court recessed without further action. *Id.* at 786-87. The Court determined that as the constitutional apportionment

obligations in the New Hampshire Constitution, Part II, Article 26, had not been completed, the Court had jurisdiction to intervene given the overall range of deviation from the ideal population, which for Senate districts totaled 31.27 percent. *Id.* at 787. The Court held that the phrase "as nearly equal as may be in population" in Part II, Article 26 was at least as protective as that of the federal constitution. *Id.* at 790. Even so, the Court acknowledged that judicial intervention demands higher precision than a legislatively-enacted map: "State legislatures have more leeway than courts to devise redistricting plans that vary from absolute population equality." *Id.* at 791.

The *Below* Court understood that "precision" is still a general, rather than specific, obligation:

> [N]either courts nor legislatures are furnished any specialized calipers that enable them to extract from the general language of the constitution the mathematical formula that establishes what range of percentage deviations is permissible, and what is not.

Id. at 791 (internal citations omitted). The Court then stated that, in drawing maps it must abide by the federal standard of exactness, rather than the more generous deference granted to state legislatures in crafting their own districts. *Id.* at 790-91.

The Court rejected the maps proposed by the parties first because they used non-federal population data, and secondly because none had the "virtue of political legitimacy" of being duly-enacted law. *Id.* at 794. This distinguishes the current congressional map from the maps proposed in *Below*. The existing map was passed by the General Court and signed into law by the Governor. While that occurred a decade ago, that reality is still a

compelling factor in rejecting the need for judicial intervention to address a small deviation at this time. Indeed, the *Below* Court looked to the 1992 Senate map as the reference point for understanding state redistricting policy in order to try to follow it where proper. *Id.* at 794.

In putting in place its own map, the Court wrote: "we have determined that to remedy the population deviations in existing districts, it is preferable that the core of those districts be maintained, while contiguous populations are added or subtracted as necessary to correct the population deviations." *Id.* at 795. That is the "least change" approach. And that "least change" approach also resulted in senatorial districts with an overall population deviation of 4.96 percent, which "satisfies the one person/one vote standard." *Id.* at 795.

If the *Below* Court adopted the strict federal equal representation one person/one vote standard (not the more lenient state legislature standard), had no basis for the consideration of factors other than population, and used the existing district "cores" as a baseline, the 4.96 percent deviation threshold is informative. If 4.96 percent was constitutionally protective for a Court plan in 2002—specifically seeking an absolute equality standard, even for senatorial districts—how could a deviation barely more than half that amount be unconstitutional in 2022 based on this Court's precedent and where the current maps are legislatively enacted and the legislature continues its own redistricting efforts? The *Below* Court's deviation tolerance should be instructive for the case at hand.

A final note on *Below*: the Court confirmed that its pursuit of "least change" meant that only 18.82 percent of the state's population shifted into a different senate district, and "the court's plan does not divide any town,

city ward or unincorporated place throughout the entire State." *Id.* at 795. As will be discussed below, the focus primarily on population is the most appropriate measurement factor for "least change" if this Court determines it has the jurisdiction and justification to intervene in the present case.

Burling v. Chandler, 148 N.H. 143 (2002), followed close on the heels of *Below*. A month after *Below,* the Court again rejected the parties' proposed maps—this time concerning the state House of Representatives—and adopted a court-designed redistricting plan. *Id.* at 144. Applying substantially the same analysis as in *Below*, the Court arrived at a plan with a deviation range of 9.26 percent. *Id.* at 157. The court justified this level of state legislative district deviation: "Given the small population of this State, the unusually large size of its house of representatives, and our State Constitution and traditional redistricting policies, we hold that a deviation range of approximately 9% achieves substantial equality." *Id.* at 157.

In re Below, 151 N.H. 135 (2004) ("*Below II*"), concerned the question of whether the legislature may follow a court's redistricting with its own reapportionment, and could do so in legislative sessions subsequent to the first following the court action. *Id.* at 136. This case confirmed that the legislature remains constitutionally empowered to reapportion regardless of judicial intervention. *Id.* at 151. The Court further held that, while the constitutional instruction is to reapportion (once) closely following the federal decadal census, the legislature is not obligated to pass new maps in the legislative session immediately following the issuance of census data. Finally, the Court rejected extraterritorial precedent holding that a court redistricting would foreclose a legislature's ability to reapportion:

> Separation of the three co-equal branches of government is essential to protect against a seizure of control by one branch that would threaten the ability of our citizens to remain a free and sovereign people. Thus, the separation of powers doctrine prohibits each branch from encroaching upon the powers and functions of the other branches. Our State Constitution vests the authority to redistrict with the legislative branch, and for good reason.

Id. at 150 (internal citations omitted).[2]

In *City of Manchester v. Secretary of State*, 163 N.H. 689 (2012), largely concerning floterial and single-member districts, this Court affirmed the principle that the legislature is afforded wide latitude in managing redistricting considerations for state legislative districts once the equal representation obligation is satisfied by bringing population deviation within a constitutionally acceptable margin. *Id.* at 701 The petitioners did not allege an equal representation violation, and the Court relied on its line of decisions discussed above in holding that the legislature's map with a deviation of 9.9 percent embodied a rational legislative policy sufficient to override other imperatives, such as the pursuit of single-member districts. *Id.* at 702. The Court repeatedly rejected invitations to conduct its own redistricting, stating: "Our only role in this process is to ascertain whether a particular redistricting plan passes constitutional muster, not whether a better plan could be crafted." *Id.* at 705 (internal citations omitted).

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[2] The *In re Below* Court also cited to a Wisconsin Supreme Court opinion at length: "Redistricting remains an inherently political and legislative—not judicial—task. Courts called upon to perform redistricting are, of course, judicially legislating, that is, writing the law rather than interpreting it, which is not their usual—and usually not their proper—role. Redistricting determines the political landscape for the ensuing decade and thus public policy for years beyond. 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 150.

It is clear from the cases above that this Court, in the redistricting context, has consistently applied a "least change" approach. Although the State does not concede that these interventions permit judicial intervention in the present case, a "least change" approach has been adopted in other jurisdictions as well. Another state Supreme Court recently utilized the "least change" approach in redistricting, and, in doing so, referenced this Court's decision in *Below v. Gardner*. In *Johnson v. Wisconsin Elections Commission*, 399 Wis.2d 623, 667 (2021), while the maps at issue were for the congressional districts and state legislature, the Supreme Court of Wisconsin did not distinguish between the two:

> By utilizing the least-change approach, we do not endorse the policy choices of the political branches; rather, we simply remedy the malapportionment claims. Attempting to redress the criticisms of the current maps advanced by multiple intervenors would amount to a judicial replacement of the law enacted by the people's elected representatives with the policy preferences of unelected interest groups, an act totally inconsistent with our republican form of democracy.

Id. at 670. Additionally, the Court utilized the existing maps as a baseline and then implemented "only those remedies necessary to resolve constitutional or statutory deficiencies confines [its] role to its proper adjudicative function, ensuring [the Court] fulfill [its] role as apolitical and neutral arbiters of the law." *Id.* at 665.

To the extent this Court decides to intervene in the ongoing redistricting process, its approach should be consistent with *Tennant*. That is, in all likelihood moving only one jurisdiction between districts to achieve a constitutionally acceptable margin of deviation. Any change that

falls under that deviation appears to be the most proper exercise of any authority the Court might arguably have to resolve a constitutional apportionment issue, particularly where the ideal district population is based on a fixed point in time—the 2020 Census data—and its accuracy is likely to fluctuate or decay as population shifts continue. This Court's involvement, if any, should be limited to the "minimum effective dose" to temporarily rebalance the congressional districts for the upcoming election cycle.

B. If "Least Change" Is The Correct Approach, What Measurement Or Factors Should We Use To Assess "Least Change"?

The measurement or factors for a "least change" approach should be population and the number of political subdivisions only, starting from the existing congressional district map. If this Court is determined to act, any additional factors risk clouding the judicial mission of a minimally invasive action necessary to bring the congressional districts within a constitutionally acceptable margin of deviation.

The starting point for "least change" must be the current congressional districts. This preserves a historically recognized interest in protecting districts' cores, as well as minimizing the practical and political impacts that can occur through judicial intervention. At the same time, the State recognizes that this Court has previously indicated that it could not be part of a political process by adopting maps proposed by legislators and parties drawn with partisan considerations, and therefore introduced its own maps for state legislative districts. *See Burling v. Chandler*, 148 N.H. 143

(2002). However, even in those circumstances the Court held that it was "indifferent to political considerations, such as incumbency or party affiliation." *Id.* at 145. Rejecting the existing maps as a baseline would likely have profound political consequences and would depart from the essence and mission of "least change." This Court would be acting as a legislative body enacting policy rather than a judicial one examining the law and addressing civil rights and liberties.

If this Court acts, population is the necessary and most natural primary measurement or factor as it is *the* metric directly pertaining to the equal representation obligation. The next question has to be *which people* are subject to being moved between districts. Without identifying a singular solution to this question, the State holds that any movement of population must preserve jurisdictional boundaries and move only the most minimal number of jurisdictions as to achieve a constitutionally acceptable margin of deviation. If that means one town with a population that brings the districts within that margin, then that is the Court's most appropriate exercise and is likely to be the most minimally invasive action.

Dividing a town or political subdivision could have serious consequences. For example, election officials and voters risk confusion and complicated voting processes if parts of the subdivision voting in different congressional districts share a polling place. This is also antithetical to the preference for maintaining boundaries, such as county boundaries, as discussed in *Burling*. 148 N.H. at 152. The practical realities militate heavily toward avoiding any division of municipalities.

No additional measurement or factors are needed, even if in public discourse there is a frequent call in redistricting processes for "fair maps."

While fairness may be a concept for discussion among the body politic and in legislative debate, it is an unworkable standard in the context of judicial consideration of redistricting maps. In analyzing variations of fairness—competitiveness, desire for party proportional representation, communities of interest, protecting incumbents—the United States Supreme Court has stated clearly that it has no role in determining fairness in the context of redistricting and political gerrymandering:

> Deciding among just these different visions of fairness (you can imagine many others) poses basic questions that are political, not legal. There are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral. Any judicial decision on what is "fair" in this context would be an "unmoored determination" of the sort characteristic of a political question beyond the competence of the federal courts.

Rucho v. Common Cause, 139 S.Ct. 2484, 2500 (2019). As noted above, this Court has similarly observed that it is "indifferent to political considerations, such as incumbency or party affiliation." *Burling* 148 N.H. at 145.

This discussion of fairness applies to the question of factors to consider in pursuing a "least change" approach. Minimizing the population shift to within the constitutionally acceptable margin of deviation is the most appropriate means, followed only where necessary, by the inclusion of additional political subdivisions in order to reach that acceptable margin. The Court need not achieve the ideal population of 688,764.5 individuals per district—an unachievable goal in any event, given that the total population under the 2020 Census was an odd number. Instead, if it acts, it

must determine the minimum effective intrusion—the population shift by political subdivision—that brings the two districts to within a constitutionally acceptable margin. This has been a 0.79 percent deviation or less in other cases (and 0.79 percent equates to 4,185 people in this case), as governed by the state interests at play. However, a higher deviation reasonably appears to be justifiable where the legislature is still engaged in redistricting activity, activity in fulfillment of its constitutional role as the body responsible for apportionment—the most compelling state interests in any equal representation context.

C. If "Least Change" Is Not The Correct Approach, What Approach Should We Take For Congressional Redistricting In This Case, And What Measurement Or Factors Should We Take For Congressional Redistricting In This Case, And What Measurement Or Factors Should We Use To Assess That Approach?

To the extent that the Court has any role in redistricting, the State and Secretary of State believe that the "least change" approach is not only correct but constitutionally mandated for any court action relative to redistricting.

IV. REGARDING THE APPOINTMENT OF A SPECIAL MASTER:

A. Does The Secretary Of State or State Object To The Appointment Of Professor Nathaniel Persily As A Special Master?

A special master is not necessary for at least two reasons. First, this Court should take no further action in this case, as discussed at length above. Second, any action this Court might take should occur using the "least change" approach, which would likely require that only a small number of political subdivisions—and perhaps only one—be moved from one congressional district to another. Given these circumstances, there is no need to appoint a special master in this case.

B. Does The Secretary Of State or State Propose The Appointment Of Someone Else As Special Master?

The Secretary of State and the State believes a special master is unnecessary for the reasons stated in the previous subsection. If, however, the Court chooses to appoint a special master, the Secretary of State and the State do not propose that a different person be appointed.

C. Is There A Maptitude License To Make Available For The Special Master?

The Secretary of State's Office is in possession of "Maptitude for the Web" Version 4.7 software. This license is significantly outdated, no Secretary of State personnel are conversant with the operation of the

software, and the Secretary of State does not believe that it is of use in this context.

CONCLUSION

For the reasons set forth above, the Secretary of State and State of New Hampshire respectfully request that this honorable Court:

1. Decline to intervene in such a way that denies the Secretary of State the ability to execute his obligations with ample time and minimal duplication of effort;

2. Recognize that the Court should not act at this late hour, even if it finds it has the authority to do so;

3. Decline to invalidate New Hampshire's existing, legislatively-enacted congressional maps;

4. Utilize the "least change" approach, should the Court determine it has authority to intervene; and

5. Dismiss this action.

STATEMENT REGARDING ORAL ARGUMENT

The Secretary of State requests oral argument to be presented by Myles B. Matteson.

The State of New Hampshire requests oral argument to be presented by Samuel R.V. Garland.

Respectfully submitted,

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April 25, 2022

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CERTIFICATE OF SERVICE

I, Myles B. Matteson, hereby certify that a copy of the State's Brief shall be served on all parties of record, through the New Hampshire Supreme Court's electronic filing system.

April 25, 2022

/s /Myles B. Matteson
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CERTIFICATE OF COMPLIANCE

I hereby certify that the within document complies with the word limit for briefs as established in the Court's April 11, 2022, order, and contains less than 14,000 words.

April 25, 2022

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