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THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

Case No. 2022-0184

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Theresa Norelli & *a.*

*Plaintiffs,*

v.

Secretary of State & *a.*

*Defendants.*

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**PLAINTIFFS' MEMORANDUM IN SUPPORT OF PROPOSED  
CONGRESSIONAL DISTRICTING PLAN**

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## INTRODUCTION

In this action, Plaintiffs challenge New Hampshire’s congressional districts, which were enacted in 2012 and were drafted based on data from the 2010 Census. In light of the results of the 2022 Census, those districts are unconstitutionally malapportioned in violation of the New Hampshire and United States Constitutions. Soon after the case was filed, this Court assumed supervisory jurisdiction and ordered briefing and argument on a series of specific questions, including questions relating to the criteria the Court should use if it is required to adopt a congressional districting map.

On May 12, 2022, the Court issued an opinion concluding: (1) the statute currently delineating New Hampshire’s congressional districts, RSA 662:1 (2016), violates Article I, Section 2 of the United States Constitution, and (2) “upon a demonstrated legislative impasse, this court must establish a new district plan” using a “‘least change’ approach.” *Norelli v. Sec’y of State*, No. 2022-0184 (N.H. May 4, 2022), slip. op. at 2. As to the first holding, the Court explained that the State had not demonstrated that the 2.6% overall deviation among the state’s current congressional districts is “necessary to achieve some legitimate state objective” and that the current districts therefore violate the U.S. Constitution. *Id.* at 11 (quoting *Karcher v. Daggett*, 462 U.S. 725, 740 (1983)).

As to the second holding, the Court rejected the State’s argument that “judicial non-intervention in this case is more important than protecting the voters’ fundamental rights under the United States Constitution.” *Id.* at 12. It further explained that it would use a “‘least change’ approach,” which uses the “one-person, one-vote” principle as its primary guide and the “existing congressional districts” as its “benchmark.” *Id.* at 13, 14. In other

words, the Court will adopt a plan that “reflect[s] the least change necessary to remedy the constitutional deficiencies in the existing congressional districts.” *Id.* at 13. To that end, as “contiguous populations are added or subtracted as necessary to correct the population deviations,” the remedial plan should, “to the greatest extent practicable,” “contain roughly the same constituents as the last validly enacted plan” and maintain “the core of the districts.” *Id.* at 14. The Court further recognized that New Hampshire’s historical practice of not “dividing towns, city wards, or unincorporated places unless they have previously requested to be divided by referendum” warrants requiring “any plan we adopt [to] reflect such historic redistricting policies to the greatest extent practicable so long as they are consistent with the ‘least change’ approach to achieving congressional districts with populations as close to perfect equality as possible.” *Id.* Finally, the Court explained that the least-change approach is preferable to any other approach because it best ensures that political considerations do not make their way into its remedial plan. *Id.* at 14–15.

Simultaneously with its opinion, the Court issued an order (“May 12 Order”) appointing Professor Nathaniel Persily as a special master and instructed Dr. Persily to propose a recommended remedial plan to the Court. May 12 Order at 1. In that order, the Court instructed Dr. Persily that his recommended plan “shall modify the existing congressional districts . . . only to the extent required to comply with the following criteria and ‘least change’ standards:

1. Districts shall be as equal in population as practicable, in accordance with Article I, Section 2 of the United States Constitution;
2. The redistricting plan shall comply with the Voting Rights Act of 1965, as amended, 52 U.S.C. § 10101 *et seq.*, and any other applicable federal law;

3. Districts shall be made of contiguous territory;
4. To the greatest extent practicable, each district shall contain roughly the same constituents as it does under the current congressional district statute, such that the core of each district is maintained, with contiguous populations added or subtracted as necessary to correct the population deviations, *see Below v. Secretary of State*, 148 N.H. 1, 13–14, 28 (2002);
5. The plan shall not divide towns, city wards, or unincorporated places, unless they have previously requested by referendum to be divided, or unless the division is necessary to achieve compliance with the population equality required by Article I, Section 2 of the United States Constitution; and
6. The special master shall not consider political data or partisan factors, such as party registration statistics, prior election results, or future election prospects.

*Id.* at 1–2.

The Court noted that the New Hampshire Senate Minority Leader and the New Hampshire House of Representatives Minority Leader (the “Minority Leaders”) had previously submitted a proposed congressional plan they characterized as “least-change.” *Id.* at 2. The Court invited any other interested party, intervenor, or person seeking to participate as *amicus curiae* to submit their own proposed plan, accompanied by appropriate data, documentation, or memoranda.

Pursuant to that invitation, Plaintiffs have submitted a proposed remedial plan that fully satisfies the Court’s criteria for a remedial plan. Attached to this memorandum are maps of Plaintiffs’ proposed plan (Exhibit A), and a list of the towns, cities, and unincorporated places included in each of the plan’s two districts (Exhibit B). As directed by the Court’s supplemental order issued May 13, Plaintiffs have separately emailed the Court a census block equivalency file that correspond to their proposed plan.

## ARGUMENT

Plaintiffs' plan satisfies each of the standards established by the May 12 Order. The plan achieves nearly perfect population equality without splitting any town or ward. It achieves this by moving just four towns from one district to the other: Plaistow and Campton from the First District into the Second, and Bridgewater and Center Harbor from the Second District into the First.

- **Standard 1: Population Equality.** Plaintiffs' plan achieves nearly perfect population equality. According to the 2020 Census, New Hampshire's population is 1,377,529, meaning the ideal population of each congressional district is 688,764.5. Under Plaintiffs' plan, District 1's population is 688,764, and District 2's population is 688,765. Because it is impossible to make the population among the districts more equal, the plan automatically satisfies the requirements of Article I, Section 2 of the U.S. Constitution. *Karcher*, 462 U.S. at 732 ("States must draw congressional districts with populations as close to perfect equality as possible.").

- **Standard 2: Compliance with the Voting Rights Act of 1965.** Plaintiffs' plan complies with the Voting Rights Act ("VRA"). Section 2 of the VRA prohibits any "standard, practice, or procedure" that "results in a denial or abridgement of the right . . . to vote on account of race." 52 U.S.C. § 10301(a). Plaintiffs' plan was not drawn with the purpose of denying or abridging minority voting rights, nor would it have the effect of denying or abridging minority voting rights.

- **Standard 3: Contiguity.** Both of the districts in Plaintiffs’ plan are contiguous because all towns, city wards, and unincorporated places that comprise each district “adjoin[]” another town, ward, or unincorporated place in the same district. *Below*, 148 N.H. at 9.

- **Standard 4: Core retention.** Plaintiffs’ plan achieves nearly perfect population equality while maximizing core retention. Maximizing “core retention” means keeping as many people as possible in their current districts. Put another way, it means minimizing the number of people who are moved to a different congressional district.

Plaintiffs’ plan moves the smallest number of people necessary to achieve near-perfect population equality. Under Plaintiffs’ plan, 99.04% of New Hampshire residents are kept in the same congressional district. This is only slightly lower than the core retention of the Minority Leaders’ plan, which keeps 99.36% of the state’s residents in the same district as last cycle.

In this sense, Plaintiffs’ plan and the Minority Leaders’ plan are compliments of one another, demonstrating the necessary trade-off between maximizing core retention and population equality. While the Minority Leaders’ plan achieves the best possible core retention while minimizing population deviation, it results in a slightly higher population deviation (51 persons) than Plaintiffs’ plan. Meanwhile, to achieve nearly perfect population equality, Plaintiffs’ plan slightly sacrifices core retention, resulting in .32% fewer residents staying in the same congressional district.

Plaintiffs take no position as to whether their plan or the Minority Leaders’ is superior; both plans clearly comply with the Court’s criteria. While the Minority Leaders’

plan has slightly less-than-perfect population equality, that deviation in this instance is arguably justified by a legitimate state policy, *i.e.*, core retention.

- **Standard 5: Maintenance of towns, city wards, and unincorporated places.** Plaintiffs' plan does not divide any town, city ward, or unincorporated place.
- **Standard 6: Prohibition of political considerations.** Plaintiffs' plan was drawn without consideration of political data. Instead, Plaintiffs' plan was drawn to maximize core retention while maintaining perfect population equality. Thus, adoption of this plan would not involve prohibited political considerations.
- **Additional Principle: Compactness.** While the Court did not explicitly state that its proposed plan should contain compact districts, compactness is a widely accepted traditional districting principle. *See, e.g., Bush v. Vera*, 517 U.S. 952, 962 (1996) (noting that the state “neglected traditional districting criteria such as compactness”); *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (defining traditional districting principles to include compactness); *In re Senate Joint Resol. of Legislative Apportionment 1176*, 83 So. 3d 597, 639 (Fla. 2012) (stating that Florida’s compactness criteria required the Legislature “to conform to traditional redistricting principles”). If the Court finds compactness to be relevant in adopting a plan, Plaintiffs note that their proposed plan contains districts that are slightly more compact than the state’s existing congressional districts.

Two of the most commonly used compactness metrics are Reock and Polsby-Popper. The Reock score measures the ratio of the area of the district to the area of the minimum enclosing circle for the district. The measure ranges from zero to one, with one being perfectly compact. The Polsby-Popper score measures the ratio of the district area to

the area of a circle with the same perimeter. Again, the measure ranges from zero to one, with one being maximally compact. The following scores for these metrics show that the districts in Plaintiffs’ proposed plan have Reock scores that are identical to those for the existing districts and Polsby-Popper scores that are slightly higher than those for the existing districts:

<b>District</b>	<b>Reock – Existing Plan</b>	<b>Reock – Plaintiffs’ Plan</b>	<b>Polsby-Popper – Existing Plan</b>	<b>Polsby-Popper – Plaintiffs’ Plan</b>
District 1	0.30	0.30	0.17	0.18
District 2	0.23	0.23	0.15	0.15

### **CONCLUSION**

Plaintiffs respectfully submit that their proposed remedial plan achieves population equality, maximizes core retention, and complies with all of the other criteria set out by this Court.

Dated: May 16, 2022

Respectfully Submitted,

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