STATE OF NEW MEXICO
COUNTY OF LEA
FIFTH JUDICIAL DISTRICT

REPUBLICAN PARTY OF NEW MEXICO, DAVID GALLEGOS, TIMOTHY JENNINGS, DINAH VARGAS, MANUEL GONZALES, JR., BOBBY AND DEANN KIMBRO, and PEARL GARCIA,

Plaintiffs,

v.

Cause No. D-506-CV-2022-00041

MAGGIE TOLOUSE OLIVER as New Mexico Secretary of State, MICHELLE LUJAN GRISHAM as Governor of New Mexico, HOWIE MORALES as New Mexico Lieutenant Governor and President of the New Mexico Senate, MIMI STEWART as President Pro Tempore of the New Mexico Senate, and BRIAN EGOLF as Speaker of the House of Representatives,

Defendants.

LEGISLATIVE DEFENDANTS' MOTION TO DISMISS

Defendants Mimi Stewart, as President Pro Tempore of the New Mexico Senate, and Brian Egolf, as Speaker of the House of Representatives (the "Legislative Defendants") pursuant to Rule 1-012(B)(1) and Rule 1-012(B)(6) NMRA 2021, request that this Court dismiss Plaintiffs' *Verified Complaint for Violation of New Mexico Constitution Article II, Section 18.*[1]

I. Introduction

The Governor signed Senate Judiciary Committee Substitute for Senate Bill 1, 2021 Leg., 2nd Spec. Sess., 55th Leg. (N.M. 2021) on December 17, 2021, implementing a new Congressional

[1] The issues raised in this motion also mandates denial of the Motion for Preliminary Injunction filed by Plaintiffs.

District map for the State of New Mexico (hereinafter "SB-1").[2] As the federal and many state judiciaries recognize, redistricting is an act that is uniquely political[3] and New Mexico commits that act to the Legislature.

Courts determine what the law is, not which party or candidate wins elections. For this Court to entertain Plaintiffs' Verified Complaint would break dangerous new ground by elevating undisputed political questions to legal issues and inserting the judicial branch of government into the legislative arena—upsetting the balance and separation of powers long ago established by the framers of New Mexico's constitution. Not only are the claims made by Plaintiffs not justiciable, even were their claims considered under an equal protection analysis, Plaintiffs fail to state a claim. Plaintiffs' Verified Complaint must be dismissed.

II. Standard of Review

A. Rule 1-012(B)(1) – Lack of Subject Matter Jurisdiction.

Part and parcel of a court's subject matter jurisdiction analysis is consideration of a plaintiff's injury and the court's ability to issue a remedy. Lack of either precludes jurisdiction. The New Mexico Supreme Court has held that "traditional standards of justiciability" set the minimum to establish standing. *State ex rel. Coll v. Johnson*, 1999-NMSC-036, ¶ 24, 128 N.M. 154.

In *Johnson,* the Court reversed a district court's denial of a motion to dismiss, holding that the plaintiffs lacked standing to bring suit on a "nonjusticiable political question." *Id.* ¶¶ 3, 14–27

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[2] The law is compiled at: NMSA 1978, §1-15-15.2

[3] *Easley v. Cromartie*, 532 U.S. 234, 242 (2001); *Miller v. Johnson*, 515 U.S. 900, 915 (1995); *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) ("Politics and political considerations are inseparable from districting" because "[t]he reality is that districting inevitably has and is intended to have substantial political consequences, [and a] "politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results..."); *Getty v. Carroll County Bd. of Elections*, 399 Md. 710, 734, 926 A.2d 216, 231 (Md. Ct. App. 2007); *Terrazas v. Ramirez*, 829 S.W.2d, 712. 720 (Tex. 1991).

(citing *Baker v. Carr*, 369 U.S. 186, 226 (1962)). Nonjusticiability exists when the plaintiffs allegations either (1) "do not set forth a clear legal duty to perform the actions they seek" or (2) "do not provide judicially manageable standards which the Court can utilize in order to determine the lawfulness" of the challenged governmental conduct. *Id.* ¶ 24; *see* Baker, 369 U.S. at 217 (nonjusticiable political question may be found where there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it").

Article III, Section 1 of New Mexico's constitution is clear: The powers of the government of this state are divided. No branch shall exercise any powers properly committed to either of the other branches. The New Mexico Constitution commits redistricting to the Legislature, N.M. Const. art. IV, §3, and provides no "judicially manageable standards" that this Court could employ to decide the matter. *Coll*, 1999-NMSC-036, ¶ 24.

B. Rule 1-012(B)(6) - Failure to State a Claim for Relief.

Dismissal for failure to state a claim for relief under Rule 1-012(B)(6) is properly granted when the plaintiff can neither recover nor obtain relief under the facts alleged. *Estate of Boyd v. United States,* 2015-NMCA-018, ¶ 11; *Delfino v. Griffo*, 2011-NMSC-015, ¶ ¶ 9 &12. On a motion to dismiss for failure to state a claim, the Court must examine the legal sufficiency of plaintiff's claims to determine whether the facts alleged in the pleadings, if proven, demonstrate entitlement to relief. *See Padwa v. Hadley*, 1999-NMCA-067, ¶ 8, 127 N.M. 416; *see also Saylor v. Valles*, 2003-NMCA-037, ¶ 6, 133 N.M. 432

Regarding constitutional challenges to legislation, the Court reviews the constitutionality of challenged legislation de novo. *See Rodriguez v. Scotts Landscaping*, 2008-NMCA-046, 143 N.M. 726, 181 P.3d 718. During this review, the Court will not "question the wisdom, policy, or

justness of legislation enacted by our Legislature," and presumes the legislation constitutional. *See Madrid v. St. Joseph Hosp.*, 1996-NMSC-064, ¶ 10, 122 N.M. 524, 530 928 P.2d 250, 256. Further, "[a] statute will not be declared unconstitutional unless the court is satisfied beyond all reasonable doubt that the legislature went outside the constitution in enacting the challenged legislation." *Benavides v. E. New Mexico Med. Ctr.*, 2014-NMSC-037, ¶43, 338 P.3d 1265, 1276 (quoting *McGeehan v. Bunch*, 1975–NMSC–055, ¶ 7, 88 N.M. 308, 540 P.2d 238).

III. Argument & Authorities

A. The New Mexico Constitution empowers and charges the Legislature—not the Courts—with the duty of Redistricting and Reapportionment. Plaintiffs' claims are not justiciable.

i. Separation of Powers Precludes the Court from Considering Plaintiffs' Complaint.

It is the Legislature, as the democratically elected voice of New Mexico's citizens, that is constitutionally charged with deciding the political and policy questions inherent in redistricting. N.M. Const. art IV, § 3(D) ("Once following publication of the official report of each federal decennial census hereafter conducted, the legislature may by statute reapportion its membership."); *Maestas v. Hall*, 2012-NMSC-006, ¶ 32, 274 P.3d 66, 77 ("[The] Legislature is the voice of the people, and it would be unacceptable for courts to muzzle the voice of the people"); *Connor v. Finch*, 431 U.S. 407, 414–15 (1977) ("[A] state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality.").

"Reapportionment is a legislative function, and the location and shape of districts is within the discretion of the State Legislature so long as the Constitution is complied with. . . . Courts are not designed to perform the task of reapportionment..." *Sanchez v. King*, 550 F. Supp. 13, 14–15 (D.N.M. 1982), *aff'd, King v. Sanchez*, 459 U.S. 801, (1982) (citing *Reynolds v. Sims,* 377 U.S.

533, 586 (1964)); *see also Maestas*, 2012-NMSC-006, ¶ 32, 274 P.3d 66, 77 ("redistricting is primarily the responsibility of the State Legislature").

Thus, when a power is committed to the legislative branch of government, the judiciary is restrained from encroaching or interfering with that power unless expressly directed to do so. Article III, Section 1 of the New Mexico Constitution provides that "The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted." To the extent the executive branch participates in the redistricting process, the Governor acts under her powers enumerated in Article V, Section 4 in approving or vetoing redistricting and reapportionment legislation as expressly permitted under the Constitution.[4]

Where the judiciary inserts itself into the election process, as stated by the New Mexico Supreme Court in *Eturriaga v. Valdez*, 1989-NMSC-080, ¶ 17, 109 N.M. 205, 209, 784 P.2d 24, 28, conflict arises between the legislative and judicial branches, and "[i]t is not the province of this Court to invalidate substantive policy choices made by the legislature." (citing *Southwest Community Health Servs. v. Smith,* 107 N.M. 196, 199, 755 P.2d 40, 43 (1988)). Where policy decisions of great magnitude are implicated and go to "New Mexico's most fundamental political processes," those decisions are "particularly unsuited for judicial resolution as a matter of state constitutional law," and rest within the "particular domain of the legislature, as the voice of the people," *Cockrell v. Bd. of Regents of New Mexico State Univ.*, 2002-NMSC-009, ¶ 13, 132 N.M.

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[4] *State ex rel. Coll v. Johnson,* 1999-NMSC-036, ¶ 24, 128 N.M. 154, 162, 990 P.2d 1277, 1285 ("Similarly, we will not second-guess the Governor's decision to sign or veto bills passed by the Legislature.").

156, 163, 45 P.3d 876, 883. New Mexico's courts are cautioned to "refrain from unduly encroaching on the functions of the legislative branch." *Id.*, ¶ 27.[5]

ii. The Lack of Discernible or Manageable Standards make Partisan Redistricting Claims Non-Justiciable.

It is impossible to articulate judicial solutions to determine redistricting challenges when there are no discernable standards to guide the court's analysis. What would apparently be advocated by Plaintiffs is to replace the representatives of the people with a *cabal* of "experts" and "social scientists" to serve up a proposal more to their liking, the liking of a self-selected small group of litigants. As the Wisconsin Supreme Court noted when confronted with near-identical claims based on partisan fairness, "Whether a map is 'fair' to the two major political parties is quintessentially a political question because: (1) there are no "judicially discoverable and manageable standards" by which to judge partisan fairness; and (2) the Wisconsin Constitution explicitly assigns the task of redistricting to the legislature—a political body." *Johnson v. Wisconsin Elections Comm'n*, 2021 WI 87, ¶ 40, 2021 WL 5578395 (Nov. 30, 2021) (citing *Rucho v. Common Cause,* 139 S. Ct. 2484, 2499–500 (2019)).

In a prescient comment, the supreme court in *Maestas*,2012-NMSC-006, noted its reluctance to insert the judiciary into a "fundamentally political dispute," undertaking to "embroil [itself] in this political thicket" only because the inability of the executive and legislative branches to work together in adopting a map. *Id.*, ¶ 27.[6] No such basis for the involvement of the Courts

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[5] *See also N. Carolina State Conference of Nat'l Ass'n for Advancement of Colored People v. Moore,* 273 N.C. App. 452, 461, 849 S.E.2d 87, 94 (2020) (finding precedent overwhelming for principle that judiciary cannot blanketly deprive legislature of constitutionally delegated power and that instead, where court required to engage in political questions, "there is nothing courts can do about it" because courts "do not cruise in nonjusticiable waters") (quoting *Leonard v. Maxwell*, 216 N.C. 89, 99, 3 S.E.2d 316, 324 (1939)).

[6] *See also Maestas*, 2006-NMSC-005, ¶ 32 (continuing to afford even failed legislative plans deference because "The Legislature is the voice of the people, and it would be unacceptable for courts to muzzle the voice of the people simply because the Legislature was unable, for whatever reason, to have its redistricting plan become law.").

appears under the facts pled in Plaintiffs' Verified Complaint. Here, the Legislature has acted and the Executive branch approved the legislatively-drawn map.[7]

Given the above, no jurisdictional basis exists for Plaintiffs' claims, as well there shouldn't be, having been relegated and expressly delegated to the legislative branch of government.

B. In any event the New Mexico Constitution Does Not Recognize or Provide a Path for Plaintiffs' Claims.

Plaintiffs misapprehend the import of the *Maestas* decision. The *Maestas* decision, as clearly stated in the body of that decision,[8] sets forth standards for New Mexico's courts to follow when its Legislature—in which the power to redistrict is constitutionally lodged—fails to adopt a plan. The 2011 Legislature in *Maestas* having failed to do so, the state's legislative districts were left malapportioned,[9] raising an equal protection issue that had to be addressed judicially.[10] Here. the Plaintiffs ask the Court to apply the same standards followed by courts (when drawing districts

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[7] Compare the facts of Plaintiff's Verified Complaint to those of *Maestas*: The 2010 federal census showed an increase of 13.2% in state population, concentrated in West Albuquerque and Rio Rancho, with substantially slower growth in other areas of the state. *Id.*, ¶ 5. It was undisputed that status quo maps left the legislature constitutionally malapportioned. During the Special Session, over 200 redistricting plans were introduced and discussed, with House Bill 39 passing both House and Senate, but vetoed by the Governor. *Id.*, ¶ 8.

Here, the 2020 federal census showed a 2.8% population growth, SB-1, based in-part on a CRC adopted map, was proposed in the Senate, debated and approved, approved by the House, and signed into law by the Governor. Therefore, no necessity—other than manufactured by Plaintiffs—mandates Court intervention.

[8] *See id.*, ¶ 14 (limiting the Court's review to "whether the **district court** applied the correct legal standards in selecting a redistricting plan")(emphasis added); *see also id.*, ¶ 26 ("In contrast to legislatively-drawn plans, court-drawn plans are held to a higher standard...[and] unlike a legislative body ...a court must enunciate the historically significant state policy or unique features that it relies upon to justify deviations from ideal population equality.").

Finally, the Court's conclusion left no doubt or inference: **"We emphasize that the principles articulated herein apply only to court-drawn maps."** *Id.*, ¶ 46 (emphasis added).

[9] *Id.*, ¶ 5 (results from 2010 Census left House districts with population deviations "ranging from negative 24.3 to a positive 100. 9, for a total deviation range of 125.2 percent.")

[10] *Id.*, ¶ 2 ("Because the lawmaking process failed to create constitutionally-acceptable districts, the burden fell on the judiciary to draw a reapportionment map for the House."); *see also id.*, ¶ 4 ("Before this year this Court had never been asked to decide the legal principles that would govern our courts when they draw reapportionment maps.").

where the legislative process has failed) to set aside the outcome where the legislative process worked.

The doctrine of "one person, one vote"—grounded in the federal Equal Protection Clause— "prohibits the dilution of individual voting power by means of state districting plans that allocate legislative seats to districts of unequal populations." *Maestas*, 2012-NMSC-006, ¶ 14. This doctrine has nothing to do with the argument advanced by Plaintiffs, which appears to be for some sort of proportional partisan representation.[11] Plaintiffs have not made a claim of over- or unequal population in the congressional districts created by SB-1.

The threshold issue that a plaintiff must clear in any equal protection challenge to legislation is "whether the statute itself creates a class of similarly situated individuals who are treated dissimilarly."[12] Based on Plaintiffs' Verified Complaint, Plaintiffs appear to allege that they, either as political incumbents or prior residents of Congressional District 1 or 2, are members of a class of Republican voters both created by SB-1 and, in turn, disadvantaged by SB-1 in their "ability to affiliate with like-minded Republicans and to pursue Republican associational goals."[13] How the drawing of a line on a map physically interferes with the Plaintiffs ability to affiliate or associate, compared with the ability of similarly situated incumbents and individual residents, is not addressed. Nevertheless, this alleged interference—according to Plaintiffs—"unconstitutionally dilut[es] their votes" as registered Republicans. Compl., ¶¶ 78, 89. But the New Mexico Constitution guarantees the right to vote, and of approximately equal voting strength.

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[11] However, as *Maestas* recognized, "partisan asymmetry is not a reliable measure of *unconstitutional* partisanship." *Id.*, ¶ 31 (emphasis in original) (citing *LULAC v. Perry*, 548 U.S. 399, 420 (2006)).

[12] *See Breen v. Carlsbad Mun. Schs.*, 2005–NMSC–028, ¶ 10, 138 N.M. 331, 120 P.3d 413; *Rodriguez v. Brand W. Dairy*, 2015-NMCA-097, ¶ 11, 356 P.3d 546, 551.

[13] Complaint, ¶ ¶ 2-7. The Plaintiffs allege that republican voters in Southeastern New Mexico were "cracked" and that as a consequence their votes were "diluted", concepts applicable to federal voting rights litigation.

to the individual voter, not his or her party affiliation. Therefore, Plaintiffs fall short of alleging a prima facie equal protection claim for dissimilar treatment and warrant dismissal.

In the alternative, should this Court accept Plaintiffs' bald assertions and implied legal conclusions that Plaintiffs are members of a dissimilarly treated class, the Verified Complaint still neglects to state a claim for relief under Article II, Section 18 of the New Mexico Constitution as Plaintiffs fail to demonstrate that SB-1 is unsupported by a rational basis.

Under rational basis review, the challenger must demonstrate that there is not "any reasonably conceivable state of facts that could provide a rational basis for the classification." *Swepi, LP v. Mora County, N.M.*, 81 F. Supp. 3d 1075, 1181 (D.N.M. 2015) (internal quotation omitted). In *Trujillo v. City of Albuquerque*, 1998-NMSC-031, 125 N.M. 721, 965 P.2d 305, the New Mexico Supreme Court adopted a rational basis test slightly different than the federal rational basis review, rejecting a fourth tier of "heightened" analysis and electing to adopt a more "modern articulation" of the rule. *Id.*, ¶ 32. Thus, in New Mexico, the challenging party must "demonstrate that the classification created by the legislation is not supported by a firm legal rationale of evidence in the record." *Wagner v. AGW Consultants*, 2005-NMSC-016, ¶ 24, 137 N.M. 734, 114 P.3d 1050.

Given that Petitioners do not allege facts sufficient to invoke a review under either intermediate scrutiny or strict scrutiny, SB-1 is subject to rational basis review. *See Valdez v. Wal-Mart Stores, Inc.*, 1998-NMCA-030, ¶ 13, 124 N.M. 655, 658, 954 P.2d 87, 90 (holding rational basis test appropriate constitutional standard where legislation "neither creates suspect or sensitive classifications nor infringes fundamental or important rights"). While voting itself is one of the most fundamental rights in our democratic system of government, strict scrutiny only applies when legislation severely restricts the right to vote or the opportunity for equal participation by all

voters—for example, poll taxes. *Harper v. Virginia State Bd. of Elections,* 383 U.S. 663, 670 (1966). Here, Plaintiffs contend that SB-1 interferes only with their ability to "affiliate and associate" and therefore dilutes their collective voting power as registered Republicans in Southeast New Mexico. In other words, Plaintiffs are not prevented from participating in the political process.[14] They are obviously free to associate with members of the Republican Party in the redrawn districts. In no way does SB-1 disenfranchise Plaintiffs. Therefore, rational basis applies.[15]

Plaintiffs must prove that SB-1 lacks a reasonable relationship to a legitimate governmental purpose; that it is "clearly arbitrary and unreasonable." *Marrujo v. New Mexico State Highway Transp. Dept.*, 1994-NMSC-116, ¶ 12, 118 N.M. 753, 758, 887 P.2d 747, 752. Failing that, the Court must also uphold SB-1 if any set of facts could "reasonably sustain the classification." *Id.* The Legislature is constitutionally charged with re-apportioning its membership and drawing congressional districts. *See* N.M. Const., art. IV, § 3(B), 3(C), 3(D); *see also* U.S. Const. art I, § 2. Thus, SB-1 serves not only a legitimate but also a fundamental governmental purpose. SB-1 achieves the exacting population standard required for congressional districts with a total deviation of 0.0%, serving the doctrine of "one person, one vote." SB-1 meets and exceeds the rational basis review.

C. The U.S. Supreme Court's Interpretation under the Fourteenth Amendment's Equal Protection Clause highlights the difficulty in Partisan Gerrymandering Claims.

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[14] *Cf. Montano v. Los Alamos County*, 1996-NMCA-108, ¶¶ 8 & 9, 122 N.M. 454, 457 (evaluating equal protection challenge to statute under rational basis because even though plaintiffs' claim "concerns voting" the Court of Appeals recognized that "not every voting regulation is subject to strict scrutiny," and that strict scrutiny only applies when the right to vote is "subjected to severe restrictions") (citing *Burdick V. Takushi*, 504 U.S. 428, 433 & 443 (1992)).

[15] *Pinnell v. Bd. of County Com'rs of Santa Fe County*, 1999-NMCA-074, ¶ 24, 127 N.M. 452, 458, 982 P.2d 503, 509 (noting the Court of Appeals "has similarly declined to hold previously challenged voting regulations to strict scrutiny" and citing *Montano*, *supra*, and *Lower Valley Water & Sanitation Dist. v. Public Serv. Co.*, 96 N.M. 532, 537, 632 P.2d 1170, 1175 (1981), which applied rational-basis review to alleged equal protection violation that was "a step removed from the actual voting process").

Plaintiffs' partisan gerrymandering argument is predicated on Article II, Section 18, the Equal Protection Clause of the New Mexico Constitution. Plaintiffs are not a class that has suffered intentional discrimination under SB-1 or would be treated differently under SB-1 than similarly situated individuals. Plaintiffs have not demonstrated justiciable viability for their claim of partisan vote dilution under the Equal Protection Clause. Here, because the same path under the federal analog was foreclosed in *Rucho v. Common Cause,* Plaintiffs must prove to the Court that an Equal Protection challenge to SB-1 would be governed by different rationale and limits under the New Mexico Equal Protection Clause.

In considering whether the New Mexico Constitution guarantees a broader umbrella of rights and protection than the U.S. Constitution, New Mexico courts have been consistently circumspect with regard to expanding civil rights outside of those federally guaranteed.[16] The New Mexico Supreme Court spoke to this issue in *Valdez v. Wal-Mart Stores, Inc.*, 1998-NMCA-030, ¶ 6, 124 N.M. 655, 657, 954 P.2d 87, 89, noting "We have interpreted the Equal Protection Clauses of the United States and New Mexico Constitutions as providing the **same** protections." (emphasis added). The State and Federal Equal Protection Clauses are coextensive, sharing the same limits and boundaries.[17] Accordingly, *Rucho*'s reasoning and holding is persuasive and instructive.

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[16] The Honorable Linda M. Vanzi, Andrew G. Schultz & Melanie B. Stambaugh, State Constitutional Litigation in New Mexico: All Shield and No Sword, 48 N.M. L. Rev. 302 (2018); available at: http://digitalrepository.unm.edu/nmlr/vol48/iss2/7 ("[O]ur appellate courts have not shied away from independently evaluating and expanding state constitutional protections for criminal defendants, and that the opposite has been true in civil cases."); *see, e.g., id.* at 305 (discussing *New Mexico Right to Choose/NARAL v. Johnson*, 1999-NMSC-005, in that New Mexico Supreme Court interpreted New Mexico Equal Protection Clause as providing no greater protection than federal analog, instead deciding the case on New Mexico's Equal Rights Amendment), *see also Griego v. Oliver*, 2014-NMSC-003, ¶ 68 (applying federal equal protection clause analysis to New Mexico Constitution).

[17] *E. Spire Communications, Inc. v. Baca,* 269 F. Supp. 2d 1310, 1323 (D.N.M. 2003), *aff'd sub nom. E.SPIRE Communications, Inc. v. New Mexico Pub. Regulation Comm'n,* 392 F.3d 1204 (10th Cir. 2004):

> The equal protection clauses in the United States and New Mexico Constitutions are co-extensive. *See Valdez v. Wal–Mart Stores, Inc.*, 124 N.M. 655, 657, 954 P.2d 87, 89 (N.M.App.1997). Equal protection of the laws "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439(1985). Governmental classifications are subject to strict scrutiny if they target a suspect class

Whereas the Fourteenth Amendment's Equal Protection clause, was held in *Baker v. Carr*, 369 U.S. 186, 217 (1962) to guarantee one person, one vote, and has been routinely applied to population challenges, the federal judiciary has struggled for decades to identify or discern justiciable standards under federal constitutional principles in consideration of partisan challenges to redistricting decisions. The U.S. Supreme Court explicitly addressed and rejected the Court's ability to measure degrees of partisan fairness and answer the question "How much is too much?" or "When has political gerrymandering gone too far?" Unable to articulate a definition of fairness by a clear, manageable, and politically neutral standard,[18] the U.S. Supreme Court has cautioned that without a constitutionally-supplied "objective measure for assessing whether a districting map treats a political party fairly," federal courts simply have no reliable standard by which to adjudicate unconstitutional partisan gerrymandering claims. *Id.* at 2501.

Were this Court to engage Plaintiffs' claims of constitutional violations under SB-1, New Mexico courts would be required to deliver on the same question without additional state statutory or constitutional standards. Although *Rucho* stopped short of foreclosing state law claims for unconstitutional partisan gerrymandering where states had adopted more exacting and specific standards to apply,[19] where a state is without statutory or constitutional standards or guidance by

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or involve a fundamental right. *Save Palisade Fruitlands v. Todd,* 279 F.3d 1204, 1212 (10th Cir. 2002). In the absence of a suspect classification or the denial of a federal fundamental right, the state regulation need only be rationally related to a legitimate government purpose. *Id.*

[18] *Rucho v. Common Cause*, 139 S. Ct. 2484, 2500 (2019) ("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) (citation omitted).

[19] *Id.* at 2507 ("Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply."); *see also id.* at 2507–08, noting the following states' constitutional and statutory prohibitions against partisanship in redistricting:

- Florida's Fair Districts Amendment to the Florida Constitution, Fla. Const., art. III, § 20(a) ("No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent.");
- Mo. Const., art. III, § 3 ("Districts shall be designed in a manner that achieves both partisan fairness and, secondarily, competitiveness. 'Partisan fairness' means that parties shall be able to translate their popular support into legislative representation with approximately equal efficiency.");

which to measure partisan fairness[20]—like New Mexico—the solution under the state Equal Protection Clause remains the same as that reached by federal courts: remedy lies in the hands of the state legislature, as the democratically elected representatives of New Mexico's citizens, to establish such standards. *Id.* at 2508.

D. The Citizen's Redistricting Committee's Adopted District Plans are Advisory and Not Binding Upon the New Mexico Legislature.

Plaintiffs' suggestion that the Legislature's directions to the Citizens Redistricting Committee for drafting advisory plans somehow binds the legislature misapprehends the Redistricting Act. The Act mandates that the Committee, "[b]eginning July 1, 2021, and every August 1 of each year ending in the number zero thereafter...adopt three district plans...for New Mexico's congressional districts." NMSA 1978, §1-3A-5(A)(1)(a). The Act imposes restrictions on the Committee's development and adoption of proposed redistricting plans, and the Committee may only include a post-adoption evaluation of a "measure of partisan fairness", *id.* at §§1-3A-7 and -8. The Act imposes no obligation upon the Legislature other than to "receive the adopted district plans for consideration *in the same manner as for legislation recommended by interim legislative committees.*" *Id.* at §1-3A-9(B) (emphasis added). That is to say, the Legislature is free

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- Iowa Code §42.4(5) (2016) ("No district shall be drawn for the purpose of favoring a political party, incumbent legislator or member of Congress, or other person or group.");
- Del. Code Ann., Tit. xxix, § 804 (2017) (providing that in determining district boundaries for the state legislature. no district shall "be created so as to unduly favor any person or political party").

See also Ohio Const. art. XI, § 6(A) ("No general assembly district plan shall be drawn primarily to favor or disfavor a political party.") and Article XIX, Section 1(C)(3)(a) ("The general assembly shall not pass a plan that unduly favors or disfavors a political party or its incumbents."); *League of Women Voters of Ohio v. Ohio Redistricting Comm'n.* 2022-Ohio-65, 2022 WL 110261 (holding that Arti. XI, §6(A) required state electoral commission to "attempt" nonpartisan plan, even if unsuccessful); *Adams v. DeWine*, 2022-Ohio-89 (finding Art. XIX, §§1 & 2 "bar plans that embody partisan favoritism or disfavoritism in excess of that degree—i.e., favoritism not warranted by legitimate. neutral criteria.").

[20] See *id.* at 2524, n.6 (Kagan. J, dissenting) (commenting that "state courts do not typically have more specific 'standards and guidance' to apply to electoral redistricting," and noting that few states have constitutional provisions like Florida which expressly address political parties).

to adopt, modify, or reject the Committee's proposed plans. Plaintiff's invocation of the Redistricting Act is irrelevant to the issues presented.

IV. CONCLUSION

In conclusion, Plaintiffs' Verified Complaint for partisan gerrymandering as a violation of New Mexico's Equal Protection Clause raises a plethora of preliminary difficulties which preclude their claims from proceeding before this Court: nonjusticiable political questions; separation of powers issues; standing and absence of a concrete, identifiable injury; legislative presumption of constitutionality; lack of specific, constitutional guidance to alter or diverge State interpretation of Article II, Section 18; a state equal protection clause which is coextensive with its federal analog; and the general inability to overcome rational basis review. For these reasons, and in accordance with *Maestas*' guidance, this Court should not entertain Plaintiffs' invitation to enter the political thicket of partisan redistricting claims. Plaintiffs' Verified Complaint should be dismissed.

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CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2022, I caused the foregoing Motion along with this Certificate of Service, to be served and filed electronically through the Tyler Technologies Odyssey File & Serve electronic filing system, which caused all parties or counsel of record to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

HINKLE SHANOR LLP