IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

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

Plaintiffs-Appellees,

v.

No. _____
District Ct. No. D-506-CV-2022-00041

MICHELLE LUJAN GRISHAM in her official capacity as Governor of New Mexico, HOWIE MORALES in his official capacity as New Mexico Lieutenant Governor and President of the New Mexico Senate, MIMI STEWART, in her official capacity as President Pro Tempore of the New Mexico Senate, and BRIAN EGOLF, in his official capacity as Speaker of the New Mexico House of Representatives,

Defendants-Appellants, and

MAGGIE TOULOUSE OLIVER, in her official capacity as New Mexico Secretary of State,

Defendant.

PETITION FOR WRIT OF ERROR

Directed To: The Fifth Judicial District, County of Lea
Honorable Fred Van Soelen, District Judge

HINKLE SHANOR LLP
Richard E. Olson
Lucas M. Williams
Ann C. Tripp
P.O. Box 10
Roswell, NM 88202-0010
(575) 622-6510

PEIFER, HANSON, MULLINS & BAKER, P.A.
Sara N. Sanchez
Mark T. Baker
20 First Plaza, Suite 725
Albuquerque, NM 87102
(505) 247-4800

Holly Agajanian
Kyle P. Duffy
Maria S. Dudley
490 Old Santa Fe Trl, Suite 400
Santa Fe, NM 87501
(505) 476-2200

Attorneys for Governor Michelle Lujan Grisham and Lieutenant Governor Howie Morales

STELZNER, LLC
Luis G. Stelzner, Esq.
3521 Campbell Ct. NW
Albuquerque NM 87104
(505) 263-2764

Professor Michael B. Browde
751 Adobe Rd., NW
Albuquerque, NM 87107
(505) 266-8042

Attorneys for Mimi Stewart and Brian Egolf

Defendants-Appellants Michelle Lujan Grisham, Governor of New Mexico, Howie Morales, Lieutenant Governor of New Mexico (together the "Executive Defendants"), Mimi Stewart, President Pro-Tempore of the New Mexico Senate, and Brian Egolf, Speaker of the New Mexico House of Representatives (together the "Legislative Defendants"), in accordance with the requirements of Rule 12-503 NMRA 2022 submit the following Petition for Writ of Error to the District Court.[1]

Jurisdiction is conferred on this Court by N.M. Const. art VI, § 29 and Rule 12-503(B).

I. NATURE OF THE CASE, SUMMARY OF PROCEEDINGS, DISPOSITION, AND RELEVANT FACTS

1. On December 17, 2021, the Governor signed Senate Bill 1 (SB 1) into law (codified at NMSA 1978, § 1-15-16 (2021)), establishing new boundaries for New Mexico's three congressional districts which the Legislature had adopted following a special legislative session devoted primarily to redistricting.

2. Plaintiffs-Appellees filed suit on January 21, 2022, challenging the redrawn boundaries of the congressional districts asking the district court to declare that the boundaries of the congressional districts violate the Equal Protection Clause

[1] **Important Notice:** Simultaneously with the filing of the Petition in this Court, Appellants have filed a Petition for a Writ of Superintending Control under Rule 12-504 with the Supreme Court, seeking the same relief. Filing both petitions leaves open the opportunity should the high Court wish to have the views of this Court before its possible final resolution of the significant legal questions presented herein. A copy of that petition is attached as **Exhibit E**.

of the New Mexico Constitution and to impose different boundaries. Plaintiffs' theory was not based upon established federal constitutional and statutory principles. Thus, they do not claim that the districts were comprised of unequal populations or that protected disadvantaged classes were not appropriately protected. Rather Plaintiffs' claim is that as Republicans their equal protection rights under New Mexico's constitution were violated when, by virtue of the new lines drawn for Congressional District 2 (CD-2), they were disadvantaged in their ability to elect one of their own to Congress—i.e., that they have been subjected to political gerrymandering which is allegedly precluded by New Mexico equal protection principles.

3. In addition, Plaintiffs filed a Motion for Preliminary Injunction, seeking the set aside of the newly adopted boundaries and the adoption of an alternative congressional map for the 2022 election year.

4. Defendants-Appellants opposed the Motion for Preliminary Injunction and filed two motions to dismiss asserting that New Mexico does not recognize a cause of action for political, or partisan, gerrymandering.

5. After full briefing by the parties and a hearing on both motions the district court issued separate letter rulings denying each.[2]

[2] The trial court made clear that "[t]o require a change this late in the game would bring a level of chaos to the process that is not in the public's or the candidate's interest." Letter Ruling on Preliminary Injunction, attached hereto as **Exhibit C** at 1-2, further elaborated in the court's

6. The denial of Defendants-Appellant's motions to dismiss, which is the subject of this Petition, is contained in the district court's Letter Ruling of April 19, 2022, attached hereto as **Exhibit A**, as further elaborated in its Order entered on July 11, 2022. *See Order Denying Legislative Defendants' and Executive Defendants' Motion to Dismiss*, attached hereto as **Exhibit B**.

7. The district court recognized that New Mexico's Equal Protection Clause mirrors that of the Fourteenth Amendment of the U.S. Constitution, and that by applying New Mexico's interstitial approach to constitutional interpretation, "the [State's Equal Protection Clause] will only provide broader protections than the [Federal Equal Protection Clause] if the federal approach is unpersuasive because it is flawed or undeveloped." Ex. B, ¶ 2.

8. The court went on to explain that:

> [b]oth sides cite *Rucho v. Common Cause,* 139 S.Ct. 2484 (2019), which decided that political gerrymandering claims are non-justiciable at the federal level, as there was no consensus as to a standard to apply to political gerrymandering and "how much is too much." But *Rucho* also said that this did not foreclose possible court action at the state level where constitutional or statutory grounds may be available to address the issue.

Ex. B, ¶ 4.

Findings of Fact and Conclusions of Law of July 11, 2022, attached hereto as **Exhibit D**. The result is that the 2022 election with respect to the congressional districts will take place under the plan enacted into law. *See* Ex. C at 2.

9. Accepting the facts of Plaintiffs' complaint, the district court viewed it as presenting a well-developed case that SB 1 is an unlawful political gerrymander that dilutes Republican votes on the basis of the traditional districting principles in *Maestas v. Hall*, 2012-NMSC-006, 274 P.3d 66, and the guidelines in the New Mexico Redistricting Act, § 1-3A-1, *et. seq.* NMSA 1978 , giving rise to Plaintiff's equal protection claim Ex. B, ¶ 6.

10. The district court acknowledged Defendants' claim that *Maestas* and the Redistricting Act do not apply to redistricting maps adopted by the Legislature and signed by the Governor, because *Maestas* applies only to court-drawn maps, and the Redistricting Act requirements are not binding on the Legislature, but rather serve only as a recommendation.[3] *Id.*, ¶ 9.

11. With respect to the Defendants' further argument that New Mexico's Equal Protection Clause is the same as its federal analogue, citing *Vasquez v. Wal-Mart Stores, Inc.*, 1998-NMCA-030, 124 N.M. 655, the district court noted that, although *Vasquez* may have said that both federal and state Equal Protection Clauses offer the same level of protection, the court could not say that *Vasquez* definitively answers the questions in this case. Ex. B, ¶ 7. The district court recognized that this

[3] The Redistricting Act directs that "When proposing or adopting district plans, the committee *shall not: use, rely upon or reference partisan data* [other than required by federal law]." § 1-3A-7 (C) (1) (emphasis added).

is an "undeveloped area of political gerrymandering as an equal protection claim," Ex. A at 2,[4] noting that Plaintiffs cited to *Harper v. Hall,* 2022-NCSC-17, 380 N.C. 317, 868 S.E.2d 499 (2022), a North Carolina case which found equal protection violations (among other violations) in a partisan redistricting map. Ex. B, ¶ 7.

II. STATEMENTS CONCERNING THE ORDER SOUGHT TO BE REVIEWED

12. Question Presented was Conclusively Determined: On the basis of the foregoing, the district court concluded that the court has jurisdiction, and the complaint states a claim upon which relief could be granted. *Id.* ¶ 8

13. In denying the Defendants- Appellants', motions to dismiss the district court expressly ruled that the New Mexico Constitution provides a remedy for claims of discriminatory partisan gerrymandering and that partisan gerrymandering is a justiciable issue. *See* Exh. B, ¶ 9.[5]

14. Importance of the Issue Separate from the Merits: Determination of whether there is a claim under New Mexico's Equal Protection Clause for alleged excessive partisan gerrymandering, and if so, what standards are to guide a court in

---

[4] Defendants-Appellants therefore requested that the district court include the specific finding on the need for interlocutory review as provided in NMSA 1978, § 39-3-4. The court's final Order did not include that language, precluding Defendants- Appellants from petitioning this Court for interlocutory appeal.

[5] Even if this Court were to determine the claim justiciable, this Court would be required to determine what standards should be applied in resolving the claim on the merits.

making that determination are of critical importance—and matters which must be finally determined before confronting the merits of the case which remains pending in the district court. The narrow holding of *Rucho,* 139 S. Ct. 2484, governs the jurisdiction of federal courts. Nonetheless, an understanding of its underlying rationale is important and useful to the resolution of this case.

15. As the *Rucho* Court made clear "[t]he "central problem" for the judiciary becomes one of degree: how to reliably differentiate between constitutional political gerrymandering and when a redistricting map's partisan dominance is too far or too much. *Rucho*, 139 S. Ct. at 2497, 2499 (quoting *Vieth v. Jubelirer,* 541 U.S. 267, 296 (2004) and *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 420 (2006)). *Rucho* follows Justice Kennedy's caution in *Vieth* against adopting standards which would not only invite but "commit federal and state courts to unprecedented intervention in the American political process." *Id.* at 2498 (quoting *Vieth*, 541 U.S. at 306).

16. What occurred in *Rucho* also occurred here, where Plaintiffs assert that a districting map is alleged to be unconstitutional because it makes it too difficult for one party to translate statewide support into seats in the legislature (or in this case in Congress). Such a claim is based on a "norm that does not exist" in our electoral system either federal or state. *Id.* at 2499 (quoting Davis v. *Bandemer* 478 U.S. 109, 159 (1986) (opinion of O'Connor, J.). The U.S. Supreme Court has

dismissed this argument and the attendant unmanageable standards directly, whether cloaked as "fairness" or otherwise. *Rucho*, 139 S. Ct. at 2499–2500.

17. Plaintiffs, just as in *Rucho*, ask the court to insert its own political judgment as to the amount of representation a particular political party *deserves*. No guidelines equip this Court to do so, nor do constitutional provisions grant such authority. Because "judicial action must be governed by standard, by rule," and by "principled, rational, and based upon reasoned distinctions" grounded in the law, *Vieth*, 541 U.S. at 278, 279 (plurality opinion), Plaintiffs' request for judicial review of partisan gerrymandering, without enunciating a workable standard, fails. Were this Court to engage in such an unprecedented and novel expansion of judicial power—not only into one of the most intensely partisan aspects of American political life, but also unlimited in scope and duration, repeating with each new census—it would flout the prior wisdom and judicial restraint espoused in *Eturriaga v. Valdez,* 1989-NMSC-080, ¶ 17, 109 N.M. 205, 209 (advising where conflict arises between legislative and judicial branches, "[i]t is not the province of this Court to invalidate substantive policy choices made by the legislature.") and *Maestas*, 2012-NMSC-006, ¶ 27 (cautioning against courts wading into the "political thicket" of redistricting unless the executive and legislative branches fail to agree on a new map).

18. Finally, in following the federal analysis of *Rucho*, specific provisions in state statutes or constitutions *could* provide Plaintiffs' sought-after standards. Indeed, numerous other States have done so through legislative enactment or constitutional referendum.[6] New Mexico has yet to join their ranks. The district court's vague citation to "traditional redistricting principles" employed in court-drawn maps under *Maestas*, 2012-NMSC-006, § 34, or by the independent Citizens Redistricting Committee under the Redistricting Act, NMSA 1978, § 1-3A-7(A), addresses the wrong audience. Ex. B, ¶ 6. The audience is the Legislature, elected

---

[6] *See Rucho,* 139 S. Ct. 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.");
- 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."); *But see* Rucho, 139 S.Ct.. 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).

by the people of this state: Not the courts, as in *Maestas*, and not a Committee unaccountable to the people. Therefore, in the utter absence of specific Constitutional or statutory standards controlling the Legislature or precedent expanding the reach New Mexico's Equal Protection Clause to partisan redistricting, Respondent-Plaintiffs' case must be dismissed as nonjusticiable for lack of jurisdiction and failure to state a claim.

19. Appeal From a Final Judgment Would Be an Inadequate and Grossly Inefficient Remedy: If Defendants-Appellants' succeed in their appellate challenge to the district court order it would obviate the need for a trial on the merits and result in a dismissal of Plaintiffs' case on the merits. If Defendants-Appellants do not obtain dismissal, the appellate court would still be required to direct how the claim on the merits is to be litigated in the first instance. *See generally Maestas*, 2012-NMSC-006 (providing guidance to the district court for court-drawn maps only). Thus, efficiency and concern for judicial economy requires final judicial resolution of the issue presented here *before* not after any possible resolution of the merits.

20. Other Matters Relevant to This Court's Exercise of Its Discretion Including an Appropriate Stay of Proceedings in the District Court: As the district court made clear in its Letter Ruling on the denial of Plaintiffs' Motion for Preliminary Injunction, the current 2022 congressional election will proceed under the law passed during the last session of the Legislature. As a result, the appellate

courts are relieved of the pressure for an immediate result found in many redistricting cases. Here there is sufficient time for careful appellate resolution of the issues which will also allow for a more efficient and expeditious resolution of the case on the merits should such a trial be necessary. If this Petition is granted Defendants-Appellants fully intend, following the directive in Rule 12-503(M), to seek a stay of proceedings below until this matter is resolved in the appellate courts, and will so alert the trial court of that intention at the scheduling hearing currently set by the district court for July 28, 2022.

WHEREFORE, the Defendants-Appellants respectfully request that this Court grant this Petition for a Writ of Error, consider an appropriate stay of proceedings below, and assign the case to its appropriate calendar for resolution, and for such other and further relief as the Court deems just and proper.

HINKLE SHANOR LLP

Richard E. Olson
Lucas M. Williams
Ann C. Tripp
P.O. Box 10
Roswell, NM 88202-0010
575-622-6510 / 575-623-9332 Fax
rolson@hinklelawfirm.com
lwilliams@hinklelawfirm.com
atripp@hinklelawfirm.com

PEIFER, HANSON, MULLINS & BAKER, P.A.
Sara N. Sanchez

Mark T. Baker
20 First Plaza, Suite 725
Albuquerque, NM 87102
505-247-4800
mbaker@peiferlaw.com
ssanchez@peiferlaw.com

STELZNER, LLC
Luis G. Stelzner, Esq.
3521 Campbell Ct. NW
Albuquerque NM 87104
505-263-2764
pstelzner@aol.com

Professor Michael B. Browde
751 Adobe Rd., NW
Albuquerque, NM 87107
505-266-8042
mbrowde@me.com

Attorneys for Mimi Stewart and Brian Egolf

Holly Agajanian
Chief General Counsel to Governor Michelle Lujan Grisham
Kyle P. Duffy
Maria S. Dudley
Deputy General Counsels to Governor Michelle Lujan Grisham
490 Old Santa Fe Trail, Suite 400
Santa Fe, New Mexico 87501
(505) 476-2200
holly.agajanian@state.nm.us
kyle.duffy@state.nm.us
maria.dudley@state.nm.us

Attorneys for Governor Michelle Lujan Grisham and Lieutenant Governor Howie Morales

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2023, I caused the foregoing Verified Petition 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.

Additionally, a copy was emailed to The Honorable Fred Van Soelen at cloddiv3criminalproposedtxt@nmcourts.gov, and mailed via Certified Return Receipt to:

The Honorable Fred Van Soelen
Curry County Courthouse
700 N. Main St., Suite 3
Clovis, NM 88101

HINKLE SHANOR LLP

STATEMENT OF COMPLIANCE RULE 12-503(G)

As required by Rule 12-503(G), Defendants-Appellants certify that the body of this brief complies with Rule 12-503(F) NMRA because:

1. The body of this brief contains a total of 2415 words, excluding the parts of the brief exempted by Rule 12-503(F)(1).

2. This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman.

EXHIBIT A

CHAMBERS OF
HON. FRED T. VAN SOELEN
DISTRICT JUDGE
Division III

CURRY COUNTY COURTHOUSE
700 NORTH MAIN, SUITE 3
CLOVIS, NEW MEXICO 88101
Ph: (575) 742-7510
Fax: (575) 762-7815

STATE OF NEW MEXICO

Ninth Judicial District Court

April 19, 2022

Eric R. Burris
Harold D. Stratton, Jr.
201 Third Street NW, Suite 1800
Albuquerque, New Mexico 87102-4386

Richard E. Olsen
P.O. Box 10
Roswell, New Mexico 88202-0010

Christopher O. Murray
1263 Washington Street
Denver, Colorado 80203

Holly Agajanian
490 Old Santa Fe Trail, Suite 400
Santa Fe, New Mexico 87501

Dylan K. Lange
325 Don Gaspar, Suite 300
Santa Fe, New Mexico 87501

Counsel:

The Court has considered both the Legislative and Executive Defendants' motions to dismiss under Rule 1-012(B)(1) and (6) NMRA, which allege that the Court lacks jurisdiction over the subject matter, and that Plaintiff's complaint fails to state a claim upon which relief can be granted. The question of whether Plaintiffs' claim is justiciable giving the Court jurisdiction to hear the case is intertwined with the second part of the motion as to whether there is a claim for which relief can be granted, so the Court will address both questions at the same time.

Plaintiff's complaint alleges a violation of Article II, Section 18 of the New Mexico Constitution, the equal protection clause. This clause mirrors the Fourteenth Amendment equal protection clause. *See* U.S. Const. amend XIV, § 1. Under the interstitial approach to constitutional interpretation, New Mexico's Constitution will only provide broader protections than the United States Constitution if the federal approach is unpersuasive because it is flawed or undeveloped.

The Plaintiffs allege that Senate Bill 1, the law that was passed creating the new Congressional districts, creates a partisan gerrymander that violates their right to equal protection

under the law. Both sides cite *Rucho v. Common Cause*, 139 S.Ct. 2484 (2019), which decided that political gerrymandering claims are non-justiciable at the federal level, as there was no consensus as to a standard to apply to political gerrymandering and "how much is too much". But *Rucho* also said that this did not foreclose possible court action at the state level, where constitutional or statutory grounds may be available to address the issue.

Plaintiffs allege unconstitutional political gerrymandering. They raise equal protection grounds as the basis for the complaint. Plaintiff's complaint makes a strong, well-developed case that Senate Bill 1 is a partisan gerrymander created in an attempt to dilute Republican votes in Congressional races in New Mexico. They make a strong, well-developed case that Senate Bill 1 does not follow traditional districting principles, including a lack of compactness, lack of preservation of communities of interest, and failure to take into consideration political and geographic boundaries. In considering a motion to dismiss under Rule 1-012, the Court is to accept as true all well pleaded facts.

If the Plaintiffs facts are true, the question is whether this adequately raises an equal protection claim. It is the role of the courts to decide constitutional claims, and this Court has jurisdiction to do so in this case. As the Supreme Court stated, "(i)t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch at 177, even if to later say that "this is not law". *Rucho*, at 2508.

As to the basis of Plaintiffs' claims, they cite to the traditional districting principles cited in *Maestas v. Hall*, 2012-NMSC-006, ¶ 34, and to the statutory guidelines of the Redistricting Act, § 1-3A-7(A), (2021), alleging the violation of these strictures give rise to their equal protections claim. Defendants claim these two sources do not apply to districting maps created by the Legislature and signed by the Governor, because the *Maestas* case applies to court-drawn maps only, and the Redistricting Act requirements are not binding on the Legislature, and serve only as recommendations. They further argue that New Mexico's equal protection protections are the same as federal protections, citing to a Court of Appeals case, *Vasquez v. Wal-Mart Stores, Inc.*, 1998-NMCA-030, which deals with worker compensation claims. While the New Mexico Court of Appeals did say both the federal and state equal protection clauses offered the same level of protection in that area, in this undeveloped area of political gerrymandering as an equal protection claim, this Court can not say that *Vasquez* definitively answers the question in this case. Further, Plaintiffs cite to a North Carolina case, *Harper v. Hall*, 2022-NCSC-17, decided post-*Rucho*, that found equal protection violations (among other violations) in a partisan redistricting map.

Without deciding the full merits of the Plaintiffs' case, in deciding whether this Court has jurisdiction to hear the case, and whether, taking Plaintiff's facts alleged as true, the complaint states a claim upon which this Court could grant relief, the Court finds both to be true, and denies the Defendants' motions to dismiss.

Counsel for Plaintiffs shall prepare an order to this effect, and circulate for signatures, and present the order to the Court within five (5) days of receipt of this letter.

EXHIBIT A

Sincerely,

Fred Van Soelen

Hon. Fred Van Soelen
District Judge

EXHIBIT B

FILED
5th JUDICIAL DISTRICT COURT
Lea County
7/11/2022 3:46 PM
NELDA CUELLAR
CLERK OF THE COURT
Cory Hagedoorn

STATE OF NEW MEXICO
COUNTY OF LEA
FIFTH JUDICIAL DISTRICT COURT

REPUBLICAN PARTY OF NEW MEXICO, et al.,
Plaintiffs
v.

MAGGIE TOULOUSE OLIVER, et al.,
Defendants. No. D-506-CV-2022-00041

ORDER DENYING LEGISLATIVE DEFENDANTS' AND EXECUTIVE DEFENDANTS' MOTIONS TO DISMISS

THIS MATTER is before the Court on Defendants Mimi Stewart and Brian Egolf's ("Legislative Defendants") and Defendants Michelle Lujan Grisham and Howie Morales's ("Executive Defendants") Motions to Dismiss filed February 18, 2022 ("Motions to Dismiss"). The Court having considered the Motions to Dismiss, Plaintiffs' Combined Response to Defendants' Motions to Dismiss, Executive Defendants' Reply in Support, and Legislative Defendants' Reply in Support, and having called the matter for hearing on April 18, 2022, now DENIES the Motions to Dismiss.

1. Plaintiffs' Verified Complaint alleges a violation of the New Mexico Constitution's Equal Protection Clause, Article II, Section 18. Specifically, Plaintiffs allege that Senate Bill 1, the state law creating the new congressional districts in New Mexico, violates the state's Equal Protection Clause because it effects an unlawful political gerrymander.

2. The state's Equal Protection Clause mirrors the Fourteenth Amendment of the U.S. Constitution. Under the interstitial approach to constitutional interpretation, New Mexico's Constitution will only provide broader protections than the U.S. Constitution if the federal approach is unpersuasive because it is flawed or undeveloped. The relevant question here is whether Plaintiffs well-pleaded facts adequately raises an equal protection claim.

EXHIBIT B

3. Legislative Defendants and Executive Defendants moved to dismiss the Verified Complaint under Rule 1-012(B)(1) and (6), NMRA, arguing the Court lacks jurisdiction over the subject matter and that Plaintiffs failed to state a claim upon which relief can be granted. Because the question of whether Plaintiffs' constitutional claim is justiciable giving the Court jurisdiction to hear the case is intertwined with whether Plaintiffs state a claim for which relief can be granted, the Court will address both question at the same time.

4. Both sides cite the U.S. Supreme Court's decision in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), which held that political gerrymandering claims are nonjusticiable in federal court because there was no consensus as to the standard to apply to political gerrymandering claims to determine how much partisanship is "too much." But *Rucho* also said that its conclusion did not foreclose possible court action at the state level where constitutional or statutory grounds may be available to address the issue.

5. Initially, it is the role of the court to decide constitutional claims, and this Court has jurisdiction to do so in this case. As the Supreme Court stated in *Marbury v. Madison*, "[i]t is emphatically the province and duty of the judicial department to say what the law is," 1 Cranch 137, 177 (1803), even if to later say that "this is not law," *Rucho*, 139 S. Ct. at 2508.

6. Next, in considering a motion to dismiss under Rule 1-012, the Court accepts as true all well-pleaded facts. Accepting the well-pleaded facts as true, Plaintiffs' Verified Complaint makes a strong, well-developed case that Senate Bill 1 is an unlawful political gerrymander that dilutes Republican votes in congressional races in New Mexico. As to the basis of Plaintiffs' claims, they cite to the traditional redistricting principles cited in *Maestas v. Hall*, 2012-NMSC-006, ¶ 34, and the standards in the Redistricting Act, § 1-3A-7(A) (2021), alleging the violation of these strictures give rise to their equal protection claim. The Court finds Plaintiffs make a strong, well-developed case that Senate Bill 1 does not follow traditional redistricting principles, including

lack of compactness, failure to preserve communities of interest, and failure to take into consideration political and geographic boundaries.

7. Defendants claim *Maestas* and the Redistricting Act do not apply to redistricting maps adopted by the Legislature and signed by the Governor, because *Maestas* applies to only court-drawn maps, and the Redistrict Act requirement are not binding on the Legislature, but rather serves only as a recommendation. Defendants further argue that New Mexico's Equal Protection Clause is the same as the federal analogue, citing *Vasquez v. Wal-Mart Stores, Inc.*, 1998-NMCA-030, which dealt with workers' compensation claims. While the New Mexico Court of Appeals did say both the federal and state Equal Protection Clauses offer the same level of protection in that area, this Court cannot say that *Vasquez* definitively answers the question in the case. Further, Plaintiffs cite *Harper v. Hall*, 2022-NCSC-17, a North Carolina Supreme Court case decided post-*Rucho*, where the court found equal protection violations (among other violations) in a partisan redistricting map.

8. Without deciding the merits of Plaintiffs' case, the Court finds it has jurisdiction to hear Plaintiffs' constitutional claims and that Plaintiffs have stated a claim upon which relief can be granted. The Court therefore denies the Motions to Dismiss.

IT IS SO ORDERED.

Fred Van Soelen

HON. FRED VAN SOELEN
DISTRICT JUDGE

EXHIBIT B

SUBMITTED BY:

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By */s/ Eric R. Burris*

Eric R. Burris
Harold D. Stratton, Jr.
201 Third Street NW, Suite 1800
Albuquerque, New Mexico 87102-4386
Emails: eburris@bhfs.com; hstratton@bhfs.com
Telephone: (505) 244-0770
Facsimile: (505) 244-9266

Julian R. Ellis, Jr. (*pro hac vice*)
410 Seventeenth Street, Suite 2200
Denver, Colorado 80202-4432
Email: jellis@bhfs.com
Telephone: (303) 223-1100
Facsimile: (303) 223-1111

Christopher O. Murray (*pro hac vice*)
STATECRAFT PLLC
1263 Washington Street
Denver, CO 80203
Email: chris@statecraftlaw.com
Telephone: (602) 362-0034

Carter B. Harrison, IV
HARRISON & HART, LLC
924 Park Avenue SW, Suite E
Albuquerque, New Mexico 87102
Email: carter@harrisonhartlaw.com
Telephone: (505) 312-4245
Facsimile: (505) 341-9340

Attorneys for Plaintiffs

EXHIBIT B

APPROVED AS TO FORM BY:

HINKLE SHANOR LLP

By *s/ Richard E. Olson*
Richard E. Olson
Lucas M. Williams
P.O. Box 10
Roswell, NM 88202-0010
Telephone: (575) 622-6510; Fax: (575) 623-9332
Email: rolson@hinklelawfirm.com; lwilliams@hinklelawfirm.com

PEIFER, HANSON, MULLINS & BAKER, P.A
Sara N. Sanchez
Mark T. Baker
20 First Plaza, Suite 725
Albuquerque, NM 87102
Telephone: (505) 247-4800
Email: mbaker@peiferlaw.com; ssanchez@peiferlaw.com

STELZNER, LLC
Luis G. Stelzner
3521 Campbell Ct. NW
Albuquerque, NM 87104
Telephone: (505) 263-2764
Email: pstelzner@aol.com

PROFESSOR MICHAEL B. BROWDE
751 Adobe Rd., NW
Albuquerque, NM 87107
Telephone: (505) 266-8042
Email: mbrowde@me.com

Counsel for Mimi Stewart and Brian Egolf

GOVERNOR MICHELLE LUJAN GRISHAM AND
LIEUTENANT GOVERNOR HOWIE MORALES

By *s/ Holly Agajanian*
Holly Agajanian
Chief General Counsel to

EXHIBIT B

Governor Michelle Lujan Grisham
490 Old Santa Fe Trial, Suite 400
Santa Fe, New Mexico 87501
Telephone: (505) 476-2210
Email: holly.agajanian@state.nm.us

Kyle P. Duffy
Deputy General Counsel to
Governor Michelle Lujan Grisham
490 Old Santa Fe Trial, Suite 400
Santa Fe, New Mexico 87501
Telephone: (505) 476-2210
Email: kyle.duffy@state.nm.us

Maria S. Dudley
Deputy General Counsel to
Governor Michelle Lujan Grisham
490 Old Santa Fe Trail, Suite 400
Santa Fe, New Mexico 87501
Telephone: (505) 476-2210
Email: maria.dudley@state.nm.us

Counsel for Michelle Lujan Grisham and Howie Morales

SECRETARY OF STATE
MAGGIE TOULOUSE OLIVER

By *s/ Dylan K. Lange*
Dylan K. Lange
General Counsel
325 Don Gaspar, Suite 300
Santa Fe, NM 87501
Telephone: (505) 827-3600
Email: Dylan.lange@state.nm.us

Counsel for the New Mexico Secretary of State

EXHIBIT C

CHAMBERS OF
HON. FRED T. VAN SOELEN
DISTRICT JUDGE
Division III

CURRY COUNTY COURTHOUSE
700 NORTH MAIN, SUITE 3
CLOVIS, NEW MEXICO 88101
Ph: (575) 742-7510
Fax: (575) 762-7815

STATE OF NEW MEXICO

Ninth Judicial District Court

April 19, 2022

Eric R. Burris
Harold D. Stratton, Jr.
201 Third Street NW, Suite 1800
Albuquerque, New Mexico 87102-4386

Richard E. Olsen
P.O. Box 10
Roswell, New Mexico 88202-0010

Christopher O. Murray
1263 Washington Street
Denver, Colorado 80203

Holly Agajanian
490 Old Santa Fe Trail, Suite 400
Santa Fe, New Mexico 87501

Dylan K. Lange
325 Don Gaspar, Suite 300
Santa Fe, New Mexico 87501

Counsel:

The Court requested proposed findings of fact and conclusions of law from the parties by noon after yesterday's hearing, and have received the same from both sides, and I thank you for your prompt response.

The Court also promised its own findings and conclusions by 4:00 p.m.. After receiving the parties' proposals and reading through them, I find that I may have been too optimistic that I could draft a full findings and conclusions in this short period of time. Therefore, I am writing this letter to give you my decision, which will be followed up by the Court's findings of fact and conclusions of law.

On the Plaintiff's Motion for a Preliminary Injunction, the Court will deny the motion, based mainly and importantly on the very small window in which a new map could be implemented, with all the attendant notices, ballot preparations, and mailings necessary by April 23, 2022, which the Court is aware of as the last day all the requirements for the ballot need to be in place for the primary election process to begin. To require a change this late in the game would bring a level of chaos to

the process that is not in the public's or the candidate's interests. It is simply too late to make any changes for this primary election. The Court's other findings related to the Motion for Preliminary Injunction will be included in the findings of facts and conclusion of law to be released.

The Court notes that it has also denied the Defendants' motions to dismiss. The map at issue will be used not just for this election, but potentially for the next five (5) elections, until the next redistricting process in approximately ten (10) years. Therefore, the case will continue, and the Court will hear further argument at a later date on Plaintiff's complaint, that could affect the elections after 2022.

Thank you for your professional and well-argued pleadings.

Sincerely,

Fred Van Soelen

Hon. Fred Van Soelen
District Judge

EXHIBIT D

STATE OF NEW MEXICO
COUNTY OF LEA
FIFTH JUDICIAL DISTRICT COURT

REPUBLICAN PARTY OF NEW MEXICO, ET AL.,
Plaintiffs,
v.

MAGGIE TOULOUSE OLIVER, ET AL.,
Defendants. No. D-506-CV-202200041

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS MATTER came before the Court on the 18th day of April, 2022 on the Plaintiffs' Motion for Preliminary Injunction filed February 3, 2022. The Court has reviewed the briefing, arguments of counsel, and evidence elicited at the hearing, and being sufficiently advised, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. In April 2021, the State Legislature adopted the Redistricting At of 2021 ("Redistricting Act"), NMSA 1978, § 1-3A-1 to -9 (2021), which created the New Mexico Citizen Redistricting Committee ("Committee").
2. The Committee's purpose is to adopt district plans for New Mexico's congressional districts, along with other districts, and submit those plans to the State Legislature. *See* § 1-3A-5.
3. The Committee is designed to be bipartisan , *see* § 1-3A-3, and not have as members anyone who may have a political interest in the outcome of the redistricting process, *see* § 1-3A-4.
4. Section 1-3A-7 requires the Committee to develop redistricting plans in accordance with

several standards.

5. Section 1-3A-7 also prohibits the Committee from relying upon or referencing partisan data, such as voting history or party registration data, with an exception based on compliance with federal law.

6. The redistricting plans adopted by the Committee and submitted to the State Legislature are to be treated in the same manner as legislation recommended by interim legislative committees. *See* § 1-3A-9(B).

7. The Committee submitted its congressional redistricting plans to the State Legislature on November 2, 2021.

8. The Committee submitted three plans:

   A. Concept A: a "status quo map" that largely maintained the existing districts drawn by the courts in 2012;

   B. Concept E: a map that emphasized compactness by creating a single urban district centered on the greater-Albuquerque and maintaining the cores of Congressional Districts 2 and 3. This map is referred to in the pleadings as "Justice Chavez' map"; and

   C. Concept H: a map proposed by a group of community organizations, which split much of southeastern New Mexico with the purported goal of creating a solid Hispanic-majority district in Congressional District 2.

EXHIBIT D

9. The State Legislature met in special session, and approved new congressional districts in Senate Bill 1, 2021 N.M. Laws, 2nd Spec. Sess., (N.M. 2021) ("Senate Bill 1"), which was signed into law by the Governor on December 17, 2021.

10. The State Legislature did not adopt any of the concepts submitted by the Committee, although the plan adopted in Senate Bill 1 was closest to Concept H.

11. Senate Bill 1 significantly redrew all three congressional districts, particularly in southeastern New Mexico, where the named person Plaintiff's live, with Chaves County now divided among all three (3) districts, and the city of Roswell, in Chaves County, split into two (2) districts. The city of Hobbs, in Lea County, is now practically split in half between two (2) districts. In addition to Chaves and Lea Counties, Eddy and Otero Counties are also now split between two (2) districts, where they had been part of one (1) district before.

12. In addition to splitting several political boundaries (counties and cities), the Plaintiff's allege Senate Bill 1 splits communities of interest, and that the redistricting was done with the intent and effect of weakening the elective strength of Republican voters in the affected counties and cities.

13. After adoption of Senate Bill 1, Plaintiffs filed a Verified Complaint for Violation of New Mexico Constitution Article II, Section 18 ("Complaint") on January 21, 2022.

14. Plaintiffs filed a Motion for Preliminary Injunction ("Motion") on February 3, 2022.

15. After a very slow process of multiple recusals and excusals of judges of the Fifth Judicial

District, on March 30, 2022, the Supreme Court of New Mexico issued an Order designating Hon. Fred T. Van Soelen to preside over this case "as all judges in the Fifth Judicial Court have recused themselves or are otherwise unavailable to preside over the case."

16. Testimony at a hearing on April 18, 2022 from Mandy Vigil, State Elections Director in the Office of the New Mexico Secretary of State ("SOS") was that a delay or alteration in the primary election calendar at that stage would cause serious disruptions for state and county election administrators, candidates, and voters, as April 23, 2022 was the last date that ballots could be mailed to Uniform Military and Overseas Voters, as mandated by federal law to be no later than forty-five (45) days before the primary election date of June 7, 2022.

17. Federal congressional candidate filing day occurred on February 1, 2022, and multiple candidates filed their declaration of intent and were qualified as candidates.

18. Federal congressional candidates obtained nominating petition signatures from qualified electors in the districts they seek to represent, which were based on the congressional districts in Senate Bill 1.

19. Ballots had already been designed and proofed, programing the ballots into the voting machines, and conducting logic and accuracy testing to ensure no errors, and the ballot machines were locked.

20. Reprogramming districts, changing ballots, reassigning voters and reprogramming voting machines would take longer than the time left before ballots needed to be mailed to military

and overseas voters pursuant to federal law.

21. Annie Hogland, Curry County Clerk, testified that her office could turn around ballot changes if required under a new congressional district map in "four to five days".

22. Curry County's congressional district in Senate Bill 1 and in Concept E is the same, and would not change if a new districting map was imposed by the Court.

23. Plaintiffs request the Court find that Senate Bill 1 violates New Mexico's Equal Protection Clause, and to block implementation of Senate Bill 1, and instead adopt Concept E approved by the Committee, until a new congressional districting map is passed by the State Legislature.

CONCLUSIONS OF LAW

1. To obtain a preliminary injunction, a movant must show that (1) the plaintiff will suffer irreparable injury unless the injunction is granted, (2) the threatened injury outweighs any damage the injunction might cause the defendant, (3) issuance of the injunction will not be adverse to the public's interest, and (4) there is a substantial likelihood of success on the merits. *LaBalbo v. Hymes*, 1993-NMCA-010, ¶ 11, 115 N.M. 314. "The [second] and [third] factors 'merge' when, like here, the government is the opposing party." *Aposhian v. Barr*, 958 F.3d 969, 978 (10th Cir. 2020).

2. Plaintiffs have shown that if the Court finds Senate Bill 1 to be in violation of New Mexico's Equal Protection Clause, they have suffered the requisite injury. *Elrod v. Burns*, 427 U.S.

347, 374 (1976) (the loss of constitutional rights "unquestionably constitutes irreparable injury").

3. However, Plaintiffs request does not preserve the status quo, which would be an old congressional districting plan that no longer comports with federal legal requirements, but requests one (1) specific new plan from the Committee, even though there are two (2) Committee plans that would generally do what Plaintiff's requests regarding the communities of interest, political boundaries, etc.. It is not clear that the Court has the authority to adopt a new map that has not been passed by the Legislature and signed into law by the Governor, as courts usually don't get into the business of drawing districting maps unless the Legislature and Governor cannot work together as outlined in the New Mexico Constitution. *See Maestas v. Hall*, 2012-NMSC-006, 274 P.3d 66 (discussing litigation following the Legislature's failure to enact new maps over the Governor's veto). It's possible that even if the Court were to find Senate Bill 1 to be in violation of the Equal Protection Clause, the remedy is to return the process to the State Legislature and the Governor, not to adopt a Committee map or otherwise draw its own map.

4. Where the movant also seeks a disfavored preliminary injunction – (1) injunctions that alter the status quo, (2) mandatory injunctions that compel, rather than prohibit, activity on the enjoined party's part, or (3) injunctions that afford the movant all the relief that it could recover at the conclusion of a full trial on the merits – the movant must not only demonstrate

that the four factors "weigh heavily and compelling" in movant's favor but also must make a strong showing that the balance of harms tips in the movant's favor and the preliminary injunction is not adverse to the public interest. *Lujan Grisham v. Romero*, 2021-NMSC-009, ¶ 20.

5. Where an impending election is imminent and a State's election machinery is already in progress, equitable considerations may justify denial of immediately effective relief because a court hearing redistricting or apportionment challenges should consider the proximity, mechanics, and complexities of impending elections. *Reynolds v. Sims*, 377 U.S. 533, 585, 84 S.Ct. 1362, 1393–94 (1964).

6. Judicial intervention late in the electoral process risks practical concerns including disruption, confusion, or other unforeseen deleterious effects. *Purcell v. Gonzalez*, 549 U.S. 1, 4–5, 127 S. Ct. 5, 7 (2006).

7. "State and local election officials need substantial time to plan for elections. 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." *Merrill v. Milligan*, 142 S. Ct. 879, 880 (U.S. Feb. 7, 2022).

8. The effect of an injunction at this late stage of the election process would bring a level of chaos and confusion for the Secretary of State, county clerks across the state, and importantly, for candidates, and for the voters themselves.

EXHIBIT D

9. Plaintiffs have not demonstrated a strong likelihood of success on the merits of their complaint. While well-pleaded, and while making a strong case that the State Legislature and Governor engaged in political gerrymandering in adopting Senate Bill 1, and that the new districts violate traditional redistricting principles found in case law and in the Redistricting Act standards, whether this amounts to a violation of New Mexico's Equal Protection Clause is not clear, and doesn't meet the test of likelihood of success necessary for an injunction needs to be granted.

IT IS THEREFORE ORDERED that the Plaintiffs' Motion for Preliminary Injunction is DENIED.

Fred Van Soelen

HON. FRED VAN SOELEN
DISTRICT JUDGE, DIVISION III

EXHIBIT E

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

MICHELLE LUJAN GRISHAM in her official capacity as Governor of New Mexico; HOWIE MORALES in his official capacity as New Mexico Lieutenant Governor and President of the New Mexico Senate; MIMI STEWART, in her official capacity as President Pro Tempore of the New Mexico Senate; and BRIAN EGOLF, in his official capacity as Speaker of the New Mexico House of Representatives,

Petitioners - Defendants,

v.

HONORABLE FRED VAN SOELEN, Respondent,

and

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

Plaintiffs – Real Parties in Interest;

MAGGIE TOULOUSE OLIVER,

Defendant – Real Party in Interest.

No. _____
District Ct. No. D-506-CV-2022-00041

VERIFIED PETITION FOR WRIT OF SUPERINTENDING CONTROL AND REQUEST FOR STAY

HINKLE SHANOR LLP
Richard E. Olson
Lucas M. Williams
Ann C. Tripp
P.O. Box 10
Roswell, NM 88202-0010
(575) 622-6510

PEIFER, HANSON, MULLINS & BAKER, P.A.
Sara N. Sanchez
Mark T. Baker
20 First Plaza, Suite 725
Albuquerque, NM 87102
(505) 247-4800

Holly Agajanian
Kyle P. Duffy
Maria S. Dudley
490 Old Santa Fe Trl, Suite 400
Santa Fe, NM 87501
(505) 476-2200

Attorneys for Governor Michelle Lujan Grisham and Lieutenant Governor Howie Morales

STELZNER, LLC
Luis G. Stelzner, Esq.
3521 Campbell Ct. NW
Albuquerque NM 87104
(505) 263-2764

Professor Michael B. Browde
751 Adobe Rd., NW
Albuquerque, NM 87107
(505) 266-8042

Attorneys for Mimi Stewart and Brian Egolf

EXHIBIT E

Petitioners Michelle Lujan Grisham, Governor of New Mexico, Howie Morales, Lieutenant Governor of New Mexico (collectively, the Executive Defendants), Mimi Stewart, President Pro-Tempore of the New Mexico Senate, and Brian Egolf, Speaker of the New Mexico House of Representatives (collectively, the Legislative Defendants), pursuant to article VI, § 3 of the New Mexico Constitution and Rule 12-504 NMRA, petition this Court to exercise its power of superintending control to resolve the following controlling legal issues in this case:

(1) Whether Article II, Section 18 of the New Mexico Constitution provides a remedy for a claim of alleged partisan gerrymandering?

(2) Whether the issue of alleged partisan gerrymandering is a justiciable issue; and if such a claim is justiciable under the New Mexico Constitution, what standards should the district court apply in resolving that claim in this case?

Absent this Court's intervention and control, although the 2022 election cycle will proceed under the legislatively adopted plan, the State of New Mexico's redistricting and electoral processes, and those state actors charged with ensuring their execution and integrity, remain at risk of unnecessary confusion, challenge, and delay. For the same reasons, Petitioners also request the Court enter a stay of the trial court litigation until resolution of these issues.

EXHIBIT E

I. JURISDICTION

1. The New Mexico Constitution grants the Supreme Court superintending control over all inferior courts. N.M. Const. art VI, § 3.[1] Under such grant, this Court has original jurisdiction to control the course of this redistricting litigation in the trial court. Given that writs may issue to correct any specie of error, Petitioners have also simultaneously filed a *Petition for Writ of Error*, pursuant to Rule 12-503 NMRA, before the Court of Appeals.[2]

2. Although traditionally and prudentially exercised in extraordinary or exceptional circumstances, *State ex rel. Schwartz v. Kennedy*, 1995-NMSC-069, ¶ 8, 120 N.M. 619, the Court's power of superintending control is "...unlimited, being bounded only by the exigencies which call for its exercise." *State v. Roy,* 1936-NMSC-048, ¶ 94, 40 N.M. 397 (internal quotation marks and citation omitted). Where appeal affords an inadequate remedy, superintending control prevents imposition of hardship, delay, or expense upon the parties and judicial system while

---

[1] N.M. Const. art. VI, § 3 ("The supreme court shall have original jurisdiction...and shall have a superintending control over all inferior courts; it shall also have power to issue ... all other writs necessary or proper for the complete exercise of its jurisdiction and to hear and determine the same.")

[2] **Important Disclosure:** Petitioners have filed a Petition for a Writ of Error under Rule 12-503 with the Court of Appeals seeking the same relief. While the question presented in both Petitions may ultimately require final resolution by this Court, Petitioners acknowledge the opportunity for additional appellate examination before final resolution of the significant legal questions presented herein.

settling questions of great public interest and importance "at the earliest moment." *State ex rel. Townsend v. Court of Appeals,* 1967-NMSC-128, ¶ 10, 78 N.M. 71, 74. In these circumstances, the Court should not hesitate to provide prompt and final resolution through issuance of a writ of superintending control. *Griego v. Oliver*, 2013-NMSC-003, ¶ 12 (quoting *Schwartz*, 1995-NMSC-069, ¶ 9).

3. Additionally, where a case presents a purely legal issue of first impression without clear answers, on which this Court may offer guidance to provide certainty and uniformity in the application of the law, the Court has found it proper to exercise its long-standing power of superintending control. *See, e.g.*, *State ex rel. Torrez v. Whitaker*, 2018-NMSC-005, ¶¶ 30–31.

4. The Court's exercise of its broad power of superintending control in the instant matter is proper because intervention will further the interests of justice, correct manifest error in the lower court, avoid the irreparable injury of burdensome discovery upon the Legislative and Executive Defendants, and provide the plainest, speediest remedy in resolving a matter of substantial public interest. *See In re Extradition of Martinez*, 2001-NMSC-009, ¶ 12, 130 N.M. 144(quoting *Albuquerque Gas & Elec. Co. v. Curtis*, 1939-NMSC-024, ¶¶ 10-15, 43 N.M. 234).

II. REAL PARTIES IN INTEREST

5. Petitioner-Defendants Governor Michelle Lujan Grisham, Lieutenant Governor Howie Morales, Mimi Stewart, President Pro-Tempore of the New Mexico Senate, and Brian Egolf, Speaker of the New Mexico House of Representatives are named in their official capacities and acting in discharge of their official duties.

6. Defendant New Mexico Secretary of State Maggie Toulouse Oliver is also named in her official capacity and acting in discharge of her official duties.

7. Respondents are Plaintiffs Republican Party of New Mexico, David Gallegos, Timothy Jennings, Dinah Vargas, Manuel Gonzales, Jr., Bobby And Dee Ann Kimbro, and Pearl Garcia.

8. Proposed Intervenors Larry Marker and the Board of County Commissioners of Lea County, New Mexico filed Motions to Intervene in the trial court. Both motions were denied by an order of the district court.

III. RECORDINGS REQUESTED

9. Petitioners assert that all available opinions, orders, transcripts, or other papers indicating the parties' position on the matter in question are contained in the record below. Additionally, the District Court's April 19, 2022 Letter Decision is

attached hereto as **Exhibit A**, and the District Court's July 11, 2022 *Order Denying Legislative and Executive Defendants' Motion to Dismiss* is attached as **Exhibit B**.

10. Further, as to comply fully with Rule 12-504(B)(2), Petitioners have attached a preliminary copy of their *Petition for Writ of Error*, to be filed in the Court of Appeals, *see* **Exhibit C**, and a copy of the *Petition for Writ of Certiorari* recently granted by the United States Supreme Court in *Moore v. Harper*, No. 21-1271, *see* **Exhibit D**, raising the issue of the independent state legislature doctrine under the federal Free Election Clause, being both necessary and appropriate to inform the Court of circumstances affecting the Petition herein.

IV. BACKGROUND AND PROCEDURAL HISTORY

11. On December 17, 2021, the Governor signed Senate Bill 1 (SB-1) into law, establishing new boundaries for New Mexico's three congressional districts which the Legislature had adopted following a special legislative session devoted primarily to redistricting.[3] Laws 2021 (2nd S.S.), Ch. 2, § 2.

12. Respondents-Plaintiffs filed suit on January 21, 2022, challenging the redrawn boundaries of the congressional districts,[4] asking the district court to declare

---

[3] This is the first occasion that the political process enacted a congressional redistricting plan since 1991. The legislature and executive were unable to reach a consensus on congressional redistricting after the 2000 and 2010 census, requiring the courts to enact districting plans for New Mexico congressional districts.

[4] No districting plans involving the New Mexico House of Representatives or the New Mexico Senate are challenged.

that the boundaries of the congressional districts violate the Equal Protection Clause of the New Mexico Constitution and for the district court to impose its own, different boundaries. Plaintiffs' theory does not rely upon the established federal constitutional and statutory principles of equal populations ("one person, one vote") or that of protection of disadvantaged classes. Rather, Plaintiffs argue that their equal protection rights as Republicans under New Mexico's Constitution were violated when, by virtue of the new lines drawn for Congressional District 2 (CD-2), Plaintiffs were allegedly disadvantaged in their ability to elect one of their own.

13. Respondents-Plaintiffs also filed a *Motion for Preliminary Injunction*, seeking to set aside SB-1 and adopt an alternative congressional map for the 2022 election cycle.

14. Petitioners-Defendants opposed the injunction and filed on February 18, 2022, two motions to dismiss asserting that the New Mexico Constitution does not recognize a cause of action for political, or partisan, gerrymandering.

15. After full briefing by the parties and a hearing on both motions, the district court issued separate letter rulings denying both injunction and dismissal, as later followed by formal orders.[5] *See, e.g.*, Ex. A & B.

[5] With respect to the denial of Plaintiffs' *Motion for Preliminary Injunction*, the letter ruling made clear that "[t]o require a change this late in the game would bring a level of chaos to the process that is not in the public's or the candidate's interest." *See* Ex A, Letter Ruling on Preliminary Injunction at 1-2. Thus, the 2022 election will take place under the plan enacted into law.

16. In denying dismissal, the district court recognized that New Mexico's Equal Protection Clause mirrors that of the Fourteenth Amendment of the U.S. Constitution, and under the interstitial approach, "New Mexico's Constitution will only provide broader protections than the U.S. Constitution if the federal approach is unpersuasive because it is flawed or undeveloped." Ex. B, ¶ 2.

17. The district court also noted, without deciding whether such constitutional grounds exist in New Mexico or the merits of Plaintiffs' case, that *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), stopped short of foreclosing "possible court action at the state level where constitutional or statutory grounds may be available to address the issue." Ex. B, ¶ 4.

18. Therefore, noting the North Carolina Supreme Court decision in *Harper v. Hall*, 2022-NCSC-17, 380 N.C. 317, 868 S.E.2d 499 (2022), the district court determined that Plaintiffs' claim, that SB-1 is an unconstitutional political gerrymander diluting Republican votes in alleged violation of the traditional redistricting principles noted in *Maestas v. Hall*, 2012-NMSC-006, and the guidelines in the New Mexico Redistricting Act,[6] states a plausible claim for relief. Ex. B, ¶¶ 6 & 8.

---

[6] The district court's Order acknowledged the Petitioners- Defendants' position that *Maestas* and the Redistricting Act do not apply to redistricting maps adopted by the Legislature and signed by the Governor, because *Maestas* applies only to court-

19. Petitioners-Defendants now request this Court exercise control over the issues identified and rejected or avoided in the district court's July 11, 2022 Order denying the Legislative Defendants' and Executive Defendants' Motions to Dismiss.[7]

V. ARGUMENT

A. Writ of Superintending Control is Necessary for Definitive, Constitutional Resolution of Issues of Great Public Importance

The twin issues of jurisdiction and justiciability were fully briefed and squarely rejected by the district court's denial. *See* Ex. B, ¶¶ 3 & 5. In doing so, the district court put off answering the ultimate question of standards to another day, after the parties will have spent their own (and—as state officials—more accurately the public's) resources and the court's own time and resources litigating unprecedented claims that may not be viable. Therefore, in exercising its power of superintending control to decide a question of great public interest at the earliest possible stage in the litigation, this Court should determine (1) whether a claim exists under New Mexico's Equal Protection Clause for partisan gerrymandering, and if

---

drawn maps, and the Redistricting Act requirements are not binding on the Legislature. Ex. B, ¶7.

[7] In the district court's prior Letter Ruling on Petitioners' *Motion to Dismiss*, Ex. A at 2, it characterized the issue as an "undeveloped area of political gerrymandering as an equal protection claim," however Petitioners' request for interlocutory appeal, submitted with Respondent-Plaintiffs via a joint proposed order, was rejected by the district court.

so, (2) what standards are to guide a court in making that determination. Following New Mexico and persuasive federal precedent, Petitioners urge this Court to respect and preserve the fundamental doctrines of separation of powers and justiciability. Here, no clear, discernable standards appear in New Mexico's Constitution to guide the judiciary or remove Plaintiffs' claims from the reach of *Rucho*'s holding.

1. Bedrock Principles of Separation of Powers and the Political Question Doctrine Support Dismissal.

In answering the questions presented, however, this Court does not write upon a blank slate: the Court has taken great pains to caution courts from wading into what is "fundamentally a political dispute," absent a complete failure of the co-equal branches of government:

> [u]nfortunately, because of the inability of our sister branches of government to find a way to work together and address the most significant decennial legislation to affect the voting rights of the adult citizens of our State, the judiciary in New Mexico finds itself embroiled in this political thicket.

Maestas, 2012-NMSC-006, ¶ 27, 274 P.3d 66. Now, and for the first time since 1991, the political branches of government passed and enacted into law a congressional districting plan. Here, there was no failure or deadlock. The Legislature and the Executive accomplished their delegated tasks and have done so in unchallenged compliance with the federal constitutional standards of one-person, one-vote, and the federal statutory standards contained in the Voting Rights Act to protect minority rights from discriminatory treatment. The district court's decision

to intervene in the political redistricting process at this stage, essentially trumping the will of New Mexico's people and their elected representatives,[8] jeopardizes the credibility of the judiciary itself.[9]

2. No Discernable, Justiciable Guidelines Exist to Remove Partisan Redistricting Claims from the Realm of Political Question.

Respondents-Plaintiffs claim partisan vote dilution under New Mexico's Equal Protection Clause because *Rucho* forecloses the federal avenue. Under the interstitial approach cited by the district court, Ex. B at ¶2, the next step for this Court is to ascertain whether divergence from federal precedent is justified because of (1) a flawed federal analysis, (2) structural differences between state and federal government, or (3) distinctive state characteristics. *State v. Gomez,* 1997-NMSC-

[8] *See Maestas*, 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."); *Cockrell v. Bd. of Regents of New Mexico State Univ.,* 2002-NMSC-009, ¶ 13, 132 N.M. 156, 163, 45 P.3d 876, 883 (policy decisions of great public importance and relating to the "most fundamental political processes [are] particularly unsuited for judicial resolution as a matter of state constitutional law") (internal quotations omitted).

[9] *Cf. Montoya v. Ulibarri,* 2007-NMSC-035, ¶ 21, 142 N.M. 89, 96 (in interpreting the New Mexico Constitution, the judiciary is charged with protecting state sovereignty, and "[i]ntrinsic within state sovereignty is an interest protecting the credibility of the state judiciary."); *Eturriaga v. Valdez,* 1989-NMSC-080, ¶ 17, 109 N.M. 205, 784 P.2d 24 ("It is not the province of this Court to invalidate substantive policy choices made by the legislature.").

006, ¶ 19, 122 N.M. 777. Because Respondents-Plaintiffs have not asserted or raised structural differences or distinctive state characteristics, *i.e.* textual differences or the adoption of the Equal Rights Amendment, *see, e.g.*, *New Mexico Right to Choose/NARAL v. Johnson*, 1999-NMSC-005, ¶ 29, 126 N.M. 788, Petitioners focus the Court's attention on the federal analysis of equal protection claims of partisan gerrymandering.[10] A close reading of *Rucho's* rationale demonstrates and supports a similar, coextensive interpretation of New Mexico's Equal Protection Clause and the conclusion that partisan redistricting remains a political question.

(i) Federal Analysis of Partisan Gerrymandering Claims under Rucho *is Sound and Persuasive.*

First, *Rucho* recognizes that '[p]olitics and political considerations are inseparable from districting and apportionment." *Gaffney v. Cummings* 412 U.S. 735, 753 (1973); *see also Maestas*, 2012-NMSC-006, ¶ 27 (characterizing redistricting and apportionment as a "fundamentally political dispute"). Thus, absent the precision of the one-person, one-vote standard or the absolute bar on racial discrimination, the "central problem" for the judiciary becomes one of degree: how to reliably differentiate between constitutional political gerrymandering and when a

[10] *See Morris v. Brandenburg*, 2015-NMCA-100, ¶23, 356 P.3d 564, 573, *aff'd, Morris v. Brandenburg*, 2016-NMSC-027 (where plaintiffs asked court to depart from federal precedent, plaintiffs failed to carry their initial burden in establishing greater protections under Article II, Section 18 of New Mexico Constitution).

redistricting map's partisan dominance is too far or too much. *Rucho*, 139 S. Ct. at 2497, 2499 (quoting *Vieth v. Jubelirer,* 541 U.S. 267, 296 (2004), and *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 420 (2006). *Rucho* follows Justice Kennedy's caution in *Vieth* against adopting standards which would not only invite but "commit federal and state courts to unprecedented intervention in the American political process." *Id.* at 2498 (quoting *Vieth*, 541 U.S. at 306).

Second, *Rucho* addresses Plaintiffs' implicit proportionality argument, wherein challengers declare a validly adopted redistricting map unconstitutional because it is more "difficult for one party to translate statewide support into seats in the legislature." *Id.* at 2499. Proportionality is a "norm that does not exist" in our electoral system, federal or state. *Id.* And the U.S. Supreme Court has dismissed this argument and its attendant unmanageable standards directly,[11] whether cloaked as "fairness" or otherwise. *Rucho*, 139 S. Ct. at 2499–2500.

Third, Plaintiffs, just as in *Rucho*, ask the Court to insert its own political judgment as to the amount of representation a particular political party deserves. No

[11] *See Davis v. Bandemer,* 478 U.S. 109, 159 (1986) (opinion of O'Connor, J.) ("Our cases, however, clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be."). As Justice O'Connor put it, such claims are based on "a conviction that the greater the departure from proportionality, the more suspect an apportionment plan becomes." *Id.*

guidelines equip this Court to do so, nor do constitutional provisions grant such authority. Because "judicial action must be governed by standard, by rule," and by "principled, rational, and based upon reasoned distinctions" grounded in the law, *Vieth*, 541 U.S. at 278, 279 (plurality opinion), Plaintiffs' request for judicial review of partisan gerrymandering, without enunciating a workable standard, fails. Were this Court to engage in such an unprecedented and novel expansion of judicial power—not only into one of the most intensely partisan aspects of American political life, but also unlimited in scope and duration, repeating with each new census—it would flout the prior wisdom and judicial restraint espoused in *Eturriaga,* 1989-NMSC-080, ¶ 17, 109 N.M. 205 (advising where conflict arises between legislative and judicial branches, "[i]t is not the province of this Court to invalidate substantive policy choices made by the legislature.").

(ii) New Mexico has yet to Adopt Clear, Manageable Standards to Adjudicate Partisan Redistricting: Maestas *and the Redistricting Act are Inapposite.*

Finally, in following the federal analysis of *Rucho*, specific provisions in state statutes or constitutions could provide Plaintiffs' sought-after standards. Indeed, numerous other States have done so through legislative enactment or constitutional referendum.[12] But New Mexico has yet to join their ranks. The district court's vague

[12] *See Rucho,* 139 S. Ct. at 2507 ("Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply."); *see also id.* at 2507–

citation to "traditional redistricting principles" employed in court-drawn maps under *Maestas*, 2012-NMSC-006, ¶ 34, or by the independent Citizens Redistricting Committee under the Redistricting Act, NMSA 1978, § 1-3A-7(A), addresses the wrong audience. Ex. B, ¶ 6. The audience is the Legislature, elected by the people of this State; not the courts, as in *Maestas* (when the legislative process of enacting a map has failed), and not an appointed Committee which is not directly accountable to the people, and whose sole function is to make non-binding proposals to the Legislature. Therefore, in the absence of any specific Constitutional or statutory

---

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.");
- 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."); *But see* Rucho, 139 S.Ct. 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).

standards controlling the Legislature or precedent expanding the reach of New Mexico's Equal Protection Clause to partisan redistricting, Respondent-Plaintiffs' case must be dismissed as nonjusticiable for lack of jurisdiction and failure to state a claim.

B. A Stay is Warranted to Avoid Burden, Confusion, and Potential Mootness

For the same reasons that an exercise of superintending control is appropriate, to prevent confusion or conflicting decisions as to the justiciability of Respondents-Plaintiffs' claims prior to this Court providing definitive guidance, Petitioners respectfully ask that the Court order all proceedings stayed in Case No. D-506-CV-2022-00041 during the pendency of this Petition. Rule 12-504(D) NMRA. Petitioners will informally notify Respondents and Real Parties in Interest of this Petition at the time of filing and serve the Petition as soon as possible thereafter. Alternatively, Petitioners also request that the Court stay all litigation in the case below until the matter at issue in *Moore v. Harper* has been heard and decided before the U.S. Supreme Court. A stay is warranted for the following reasons:

(1) No Prejudice to Respondents-Plaintiffs Effectuated by Stay.

As the district court made clear in its Letter Ruling on the denial of Plaintiffs' Motion for Preliminary Injunction, the 2022 congressional election will proceed under the law passed during the last session of the legislature. *See also* Order Denying Preliminary Injunction dated July 11, 2022. As a result, the appellate courts

are relieved of the pressure and need for immediate resolution found in many redistricting cases. Here, there is sufficient time for careful and considered resolution of the issues, allowing for the most efficient and expeditious resolution of the case on the merits.

(2) Stay will Avoid Hardship and Burden Imposed upon Petitioners and Furthers Judicial Economy.

If Petitioners succeed in their challenge to the district court order, dismissal of Plaintiffs' claims obviates the need for a trial on the merits. Thus, the same concerns underlying judicial decisions to delay or forego burdensome discovery under qualified immunity challenges, *see, e.g.*, *Doe v. Leach*, 1999-NMCA-117, ¶¶ 17 & 31, 128 N.M. 28 (granting writ of error and reversing district court decision subjecting immune governmental defendants to discovery), are present here, especially so where legislative immunity, as understood and enforced through the speech and debate clause, N.M. Const. art VI, § 13, renders many areas of inquiry inaccessible and prejudicial.

Second, even if the Respondents-Petitioners' claims are not dismissed, this Court would still be required to direct how the claim is to be litigated and what standards apply in the first instance. Thus, efficiency and concern for judicial economy requires final judicial resolution of the issues presented here *before*—not after —resolution of the merits and the trial discovery attendant to that resolution.

(3) Stay Extending Beyond Decision in *Moore v. Harper* Affords Certainty and Uniformity.

Good cause also exists to extend the Court's stay of the underlying litigation until the U.S. Supreme Court has issued its opinion on the closely related federal Free Election Clause issue, U.S. Const., art I, § 4, determining the powers of the state judiciary in overturning or overriding legislatively enacted congressional redistricting plans. *See* Ex. D. Should the U.S. Supreme Court adopt the independent legislature theory as applied to federal elections, such an outcome would obviate this Court's need to engage in Plaintiffs' express challenge to congressional redistricting maps and render potential, interim-issued opinions moot.

WHEREFORE, Petitioners, the Legislative and Executive Defendants, respectfully request that this Court:

1. Grant their *Petition for Writ of Superintending Control* and order a hearing and supplemental briefing on the issue, as a matter of great public importance;
2. If it believes it necessary for the parties to present additional briefing to the Court, to issue a supplemental brief and oral argument schedule, including directive to any potential amici;
3. Issue a stay of proceedings in the district court pending decisions by this Court on the issues presented;
4. Reverse the district court and find that Plaintiffs have failed to state a claim for relief under New Mexico's equal protection clause for partisan

gerrymandering , or alternatively provide the district court with guidance as to what standards it should apply in resolving such a claim; and

5. For such other and further relief as the Court deems just and proper.

Respectfully submitted,

HINKLE SHANOR LLP

Richard E. Olson
Lucas M. Williams
Ann C. Tripp
P.O. Box 10
Roswell, NM 88202-0010
575-622-6510 / 575-623-9332 Fax
rolson@hinklelawfirm.com
lwilliams@hinklelawfirm.com
atripp@hinklelawfirm.com

PEIFER, HANSON, MULLINS & BAKER, P.A.
Sara N. Sanchez
Mark T. Baker
20 First Plaza, Suite 725
Albuquerque, NM 87102
505-247-4800
mbaker@peiferlaw.com
ssanchez@peiferlaw.com

STELZNER, LLC
Luis G. Stelzner, Esq.
3521 Campbell Ct. NW
Albuquerque NM 87104

505-263-2764
pstelzner@aol.com

Professor Michael B. Browde
751 Adobe Rd., NW
Albuquerque, NM 87107
505-266-8042
mbrowde@me.com

Attorneys for Mimi Stewart and Brian Egolf

Holly Agajanian
Chief General Counsel to Governor Michelle Lujan Grisham
Kyle P. Duffy
Maria S. Dudley
Deputy General Counsels to Governor Michelle Lujan Grisham
490 Old Santa Fe Trail, Suite 400
Santa Fe, New Mexico 87501
(505) 476-2200
holly.agajanian@state.nm.us
kyle.duffy@state.nm.us
maria.dudley@state.nm.us

Attorneys for Governor Michelle Lujan Grisham and Lieutenant Governor Howie Morales

EXHIBIT E

VERIFICATION

I, Mimi Stewart, pursuant to 12-504 NMRA, state, under oath and subject to penalty of perjury under the laws of the State of New Mexico as follows:

1. My name is Mimi Stewart. I am one of the Petitioners in the Petition for Superintending Control to which this Verification is attached.

2. I have read the Petition. The statements contained in the Petition are true and correct to the best of my knowledge, information and belief.

This Verification is made under oath and subject to penalty of perjury under the laws of the State of New Mexico this 22 day of July, 2022.

MIMI STEWART

EXHIBIT E

VERIFICATION

I, Brian Egolf, pursuant to 12-504 NMRA, state, under oath and subject to penalty of perjury under the laws of the State of New Mexico as follows:

1. My name is Brian Egolf. I am one of the Petitioners in the Petition for Superintending Control to which this Verification is attached.

2. I have read the Petition. The statements contained in the Petition are true and correct to the best of my knowledge, information and belief.

This Verification is made under oath and subject to penalty of perjury under the laws of the State of New Mexico this 22 day of July, 2022.

BRIAN EGOLF

EXHIBIT E

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2022 I caused the foregoing Verified Petition 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.

Additionally, a copy was emailed to The Honorable Fred Van Soelen at cloddiv3criminalproposedtxt@nmcourts.gov, and mailed via Certified Return Receipt to:

The Honorable Fred Van Soelen
Curry County Courthouse
700 N. Main St., Suite 3
Clovis, NM 88101

Additionally, pursuant to Rule 12-504(E) a copy was served via Certified Return Receipt to:

The Office of the Attorney General
Litigation Division
Galisteo St.
Santa Fe, NM 87504

HINKLE SHANOR LLP