# 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.

No. S-1-SC-39481
D-506-CV-2022-00041

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.



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## PLAINTIFFS' RESPONSE TO PETITIONER-DEFENDANTS' VERIFIED PETITION FOR WRIT OF SUPERINTENDING CONTROL AND REQUEST FOR STAY

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## CERTIFICATE OF COMPLIANCE

I certify, according to Rule 12-504(C)(1), (G) NMRA, that this Response complies with the type-volume, size, and word limitations of the New Mexico Rules of Appellate Procedure because it contains no more than 6,000 words of substantive text and was prepared in size 14 Times New Roman font, which is a proportionally-spaced type face, using Microsoft Word as part of Microsoft Office 365.

*/s/ Daniel J. Gallegos*
Daniel J. Gallegos

## INTRODUCTION

Plaintiffs' constitutional claim is straightforward: Senate Bill 1 enacted a discriminatory political gerrymander in violation of the New Mexico Constitution (specifically, Article II, Section 18, the Equal Protection Clause) by severely cracking Republicans in southeastern New Mexico for raw political gain, thereby diluting their votes and causing constitutional injury. Petitioner-Defendants ("Petitioners"), having enacted a congressional map that is both incompatible with democratic principles and discriminatory, now petition this Court to effectively slam the courthouse door shut on Plaintiffs.

Respectfully, Plaintiffs request that this Court refuse to give such a discriminatory partisan gerrymander a pass from judicial review. Indeed, this Court and all our state courts have a responsibility to interpret and apply the protections of the Constitution when litigants allege that the government has unconstitutionally interfered with a right protected by the Bill of Rights.



## FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs in this case include the Republican Party of New Mexico and a bipartisan group of New Mexico voters injured by the New Mexico State Legislature's ("State Legislature") unlawful gerrymander of the state's congressional map. *See* Verified Compl. for Violation of N.M. Constitution Article II, Section 18 ("Verified Compl.") ¶¶ 1-7.

In April 2021, the State Legislature adopted the Redistricting Act of 2021 ("Redistricting Act"), Laws 2021, ch. 79, § 2 (codified at NMSA 1978, § 1-3A-1, *et seq.*). The Redistricting Act created the New Mexico Citizen Redistricting

Committee ("Committee"), which is comprised of seven members appointed by State Senate and State House leadership (four members) and the State Ethics Commission (three members, one whom must be a retired justice of the New Mexico Supreme Court or a retired judge of the New Mexico Court of Appeals). NMSA 1978, § 1-3A-3 (2021).

The Committee must be bipartisan, § 1-3A-3(C) (no more than three of seven members may be of the same political party); persons particularly interested in the redistricting process (*i.e.*, current or former public officials, candidates for public office, lobbyists, or family members of officer holders) are prohibited from serving on the Committee, § 1-3A-4; the Committee must perform its work in an open forum, including holding public meetings and publishing reports and proposed maps, §§ 1-3A-5 and -6; the Committee must adhere to traditional redistricting principles outlined in the Act, § 1-3A-7(A); and the Committee is barred from using, relying on, or referencing "partisan data," § 1-3A-7(C).



The Committee for the 2021 redistricting cycle began its work in July 2021. Verified Compl. ¶ 51. Former New Mexico Supreme Court Justice Edward Chávez served as Chair of the Committee. *Id.* ¶ 50. In all, before issuing its report, the Committee held 16 public meetings, heard testimony from over 350 New Mexicans, and considered volumes of written comments submitted through the Committee's online portal. *See id.* ¶¶ 52-53, 57.

On November 2, 2021, the Committee submitted its report to the State Legislature proposing three congressional map concepts: Concepts A, E, and H. *Id.* ¶ 71. Concept A was mostly a "status quo map" that largely maintained the existing

districts drawn by the courts in 2012. *Id.* ¶ 60. Concept E (known as Justice Chávez's map) emphasized compactness by creating a single urban district centered on the greater-Albuquerque area and maintained the core of CD 2 and CD 3. *Id.* ¶¶ 61-66. All but one Committee member supported Concept E. *Id.* ¶ 64. Concept H, developed by a group of liberal community organizations, split much of southeastern New Mexico purportedly to create a solid Hispanic-majority district in CD 2. *Id.* ¶¶ 66-69.

The State Legislature did not adopt any of the proposed maps developed by the Committee. *Id.* ¶ 72. Instead, the Democratic-controlled State Legislature introduced and adopted Senate Bill 1 in just four legislative days. *Id.* ¶¶ 72-73.

Senate Bill 1 significantly redrew the core of the state's congressional districts. *Id.* ¶¶ 72-73. For instance, **CD 1** (which previously was a relatively compact area encompassing most of Albuquerque and Bernalillo and Torrance Counties) now covers a 10-county area that sprawls south to Roswell and includes all or parts of Lincoln, Otero, Chaves, De Baca, and Guadalupe Counties, *see id.* ¶ 95.a; **CD 2** (which previously included southern New Mexico) cedes nearly all the southeastern part of the state, such as Roswell, half of Hobbs, and all or parts of Eddy, Lea, Chaves, Otero, Roosevelt, De Baca, and Guadalupe Counties, and now includes the southwestern part of the state and the western suburbs of Albuquerque, *see id.* ¶ 95.b; and **CD 3** (which previously included northern New Mexico) now includes the northwest part of the state and stretches eastward to the state's boundary and as far southeast as Hobbs, *see id*.

Researchers agree that Senate Bill 1 will result in a severe partisan swing. The Princeton Gerrymandering Project predicts that, under Senate Bill 1, Democrats will control all three congressional seats and rates none of the districts as "competitive." *New Mexico Redistricting Report Card*, Princeton Gerrymandering Project (Dec. 13, 2021), https://bit.ly/3u4EVKm. This compares to states like Arkansas and Utah, which the Princeton Gerrymandering Project predicts Republicans will control all four congressional seats in each state, none of which are classified as competitive. *See Arkansas Redistricting Report Card*, Princeton Gerrymandering Project (Nov. 6, 2021), https://bit.ly/3AF2QRX; *Utah Redistricting Report Card*, Princeton Gerrymandering Project (Nov. 10, 2021), https://bit.ly/3rgjm89. The Brennan Center, discussing "extreme partisan gerrymandering" in 2021, describes New Mexico as a state where Democrats "are pushing back, drawing maps favorable to their party." Michael C. Li, et al., *Redistricting: A Mid-Cycle Assessment*, at 5, Brennan Center for Justice (Jan. 19, 2022), https://bit.ly/3g5gGnm. And the Cook Political Report has designated New Mexico's congressional map as "one of the most aggressive Democratic gerrymanders yet . . .[,] dilut[ing] GOP votes in the southeastern portion of the state in a brazen bid to oust . . . the only remaining Republican office holder in the state." David Wasserman, *New Map and 2022 Ratings: New Mexico*, The Cook Political Report (Dec. 21, 2021), https://bit.ly/3o4AvQ4.



The Cook Political Report's observation about the political gerrymander of the southeastern corner of the state is supported by voter registration data. As of December 30, 2021, CD 2 (which prior to Senate Bill 1 covered a 17-county area)

had 413,795 registered voters, 155,608 (or 38%) of whom were registered Republicans. N.M. Voter Registration Statistics by Congressional District, N.M. Sec'y of State (Dec. 30, 2021), https://bit.ly/3Kjzf4Z. The four-county area, including Chaves, Eddy, Lea, and Otero Counties, accounted for approximately 45% of the registered Republicans in CD 2 and represented 34% of the total registered voters in the entire district. *Compare id.*, *with* N.M. Voter Registration Statistics by County Precinct, N.M. Sec'y of State (Dec. 30, 2021), https://bit.ly/3GEyjFX. In other words, this four-county area in New Mexico contains a highly concentrated block of registered Republicans — indeed, almost one-half of the registered Republicans in all of CD 2.

Senate Bill 1 cracked this Republican bloc, fracturing cities, counties, and a universally recognized community of interest to do so. While southeastern New Mexico has always been in one congressional district, under Senate Bill 1 it is split between all three districts. *See* Verified Compl. ¶ 91. The cities of Hobbs and Roswell are split between two districts; Chaves, Eddy, Lea, and Otero Counties are split as well, with Chaves split three ways; and the greater-Albuquerque is treated as a hub, with its more-Democratic population disbursed among the three constituent parts of the wheel. *Id.* ¶¶ 92-94.

The result is a politically gerrymandered congressional map. Under the previous congressional map, the community of interest in southeastern New Mexico had a real opportunity to elect a Republican member of Congress — and had done so in all but one term since 2012. *Id.* ¶ 91. Under Senate Bill 1, however, the

registered Republicans in southeastern New Mexico are split between all three congressional districts thereby cracking their votes. *Id.*

Plaintiffs have been, and continue to be, injured by Senate Bill 1's political gerrymander, including the dilution of Plaintiffs' votes by severely cracking a community of interest in southeastern New Mexico based on the State Legislature's political and regional preference. Senate Bill 1 accomplishes this cracking by shifting voters (including Plaintiffs Vargas and Garcia) from the greater-Albuquerque area to outlying districts.

On January 21, 2022, Plaintiffs filed their Verified Complaint to redress these constitutional injuries. Plaintiffs named New Mexico Secretary of State Maggie Toulouse Oliver ("Secretary"); Governor Michelle Lujan Grisham and Lieutenant Governor Howie Morales; and Senator Mimi Stewart and Representative Brian Egolf, all in their official capacities. On February 3, 2022, Plaintiffs filed a motion for preliminary injunction. On February 18, 2022, the Legislative Defendants and Executive Defendants filed a response to the preliminary injunction motion and each moved to dismiss (respectively, "Legislative Defendants Motion" and "Executive Defendants Motion") the Verified Complaint for failure to state a claim and lack of jurisdiction. After full briefing and a hearing, the district court denied the injunction and the motions to dismiss, encapsulated first in letter rulings and later in formal orders filed on July 11, 2022. On July 22, 2022, Petitioners filed their verified petition in this Court for writ of superintending control and a request for stay. On August 17, 2022, this Court requested a response from the real parties in interest, which is timely if filed on or before September 6, 2022.

## ARGUMENT

### I. Plaintiffs do not object to this Court issuing a writ of superintending control to address the questions raised by Petitioners.

At the outset, Plaintiffs have no objection to a writ of superintending control under these circumstances. Given the United States Supreme Court's holding in *Rucho v. Common Cause*, 139 S. Ct. 2484, 2498-2508 (2019) that partisan gerrymandering claims are nonjusticiable political questions in federal courts due to a lack of a clear, manageable, and politically neutral standard for differentiating between permissible partisanship and unconstitutional partisanship in redistricting, it is in the public interest for this Court to settle at the earliest moment the question of whether a justiciable claim for unconstitutional partisan gerrymandering lies under New Mexico's independent equal protection clause, N.M. Const. art. II, § 18, or whether New Mexico courts will likewise abandon the field, effectively shutting the state's courthouse doors to claims of excessive partisan gerrymandering. *See Griego v. Oliver*, 2014-NMSC-003, ¶ 11, 316 P.3d 865 (holding that when it is deemed appropriate, the Supreme Court exercises its power of superintending control to control the course of ordinary litigation in inferior courts even when there is a remedy by appeal, where it is deemed to be in the public interest to settle the question involved at the earliest moment).

## II. Partisan gerrymandering is incompatible with democratic principles and a claim of discriminatory partisan gerrymandering sounds in equal protection.

### A. Partisan gerrymandering is the antithetical perversion of representative government.

In light of the 5-4 nonjusticiability holding in *Rucho* — that "partisan gerrymandering claims present political questions beyond the reach of the federal courts[,]" 139 S. Ct. at 2506-07 — it is important to keep in mind that both the majority and dissenting opinions continued to recognize "the fact that such gerrymandering 'is incompatible with democratic principles.'" *Id*. at 2506 (quoting *Ariz. State Leg. v. Ariz. Indep. Redistricting Com'n*, 576 U.S. 787, 791 (2015)); *Rucho*, 139 S. Ct. at 2509 (Kagan, J., dissenting) ("The partisan gerrymanders in these cases deprived citizens of the most fundamental of their constitutional rights: the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives. In so doing, the partisan gerrymanders here debased and dishonored our democracy, turning upside-down the core American idea that all governmental power derives from the people. . . . They promoted partisanship above respect for the popular will.")



Indeed, even prior to *Rucho*, the United States Supreme Court consistently recognized that partisan gerrymandering jeopardizes "[t]he ordered working of our Republic, and of the democratic process." *Vieth v. Jubelirer*, 541 U.S. 267, 316, (Kennedy, J., concurring). It enables a party that happens to be in power at the right

time to entrench itself there for a decade or more, no matter what the voters would prefer. *Gill v. Whitford*, 138 S. Ct. 1916, 1940 (2018) (Kagan, J., concurring). At its most extreme, the practice amounts to "rigging elections." *Vieth*, 541 U.S. at 317 (internal quotation marks omitted). It thus violates the most fundamental of all democratic principles — that "the voters should choose their representatives, not the other way around." *Ariz. State Leg.*, 576 U.S. at 824 (citation omitted). And according to the Supreme Court of Ohio, "gerrymandering is the antithetical perversion of representative democracy." *Adams v. DeWine*, 2022-Ohio-89, ¶ 2, 2022 WL 129092 (Ohio 2022). Or to put it another way, "[w]hen the dealer stacks the deck in advance, the house usually wins." *Id.* at ¶ 100.



### B. A discriminatory partisan gerrymander is a violation of Federal and State Equal Protection guarantees.

Not only do politically discriminatory gerrymanders such as Senate Bill 1 violate democratic principles and effectively "stack the deck" in favor of the party in power at the right time, they also impose recognized injuries on individuals under the Federal Constitution, particularly as violations of the Fourteenth Amendment's Equal Protection Clause. *See Rucho*, 139 S. Ct. at 2513 (Kagan, J., dissenting) ("Partisan gerrymandering of the kind before us not only subverts democracy (as if that weren't bad enough). It violates individuals' constitutional rights as well. That statement is not the lonesome cry of a dissenting Justice. This Court has recognized

extreme partisan gerrymandering as such a violation for many years."); *see also Davis v. Bandemer*, 478 U.S. 109, 116-117 (1986) (recognizing that gerrymanders based on political discrimination violate the Equal Protection Clause); *cf. Rivera v. Schwab*, 512 P.3d 168, 178 (Kan. 2022) ("Equal protection is at the heart of both partisan and racial gerrymandering or vote dilution claims." (citing *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 413-14 (2006) (federal equal protection challenge to congressional redistricting map as unconstitutional partisan gerrymander)).



Notwithstanding this recognized constitutional injury, the Supreme Court has split time and time again on the standard by which to determine the existence of such a gerrymander and was ultimately never able to settle on a nationwide standard to adjudicate these injuries. As a result, the Supreme Court held in *Rucho* that claims to vindicate the federal constitutional injury caused by a political gerrymander are nonjusticiable in federal court. 139 S. Ct. 2484, 2500. Thus, while politically discriminatory gerrymanders do impose recognized federal constitutional injuries, these injuries can no longer be redressed in a federal courthouse.

But that is not the end of the story. *Rucho* not only took care to explain that the Court's "conclusion does not condone excessive partisan gerrymandering[,] *id*. at 2507, but the majority also expressly contemplated state court review of congressional redistricting schemes for compliance with state law. *See id*. (noting that "provisions in state statutes and state constitutions can provide standards and

guidance for state courts to apply"). In the same vein, the dissenting justices in *Rucho* noted that several state courts had previously struck down congressional redistricting plans as violative of their state constitutions, including the Supreme Court of Pennsylvania just one year before *Rucho* was decided, asking "But what do those courts know that this Court does not?" and "If they can develop and apply neutral and manageable standards to identify unconstitutional gerrymanders, why couldn't we?" *Id*. at 2524 (Kagan, J., dissenting).

Post-*Rucho*, at least two more state high courts have struck down congressional redistricting schemes as violations of state constitutional provisions, including on equal protection grounds. *See Harper v. Hall*, 2022-NCSC-17, ¶ 6, 2022 WL 496215 (N.C. 2022) (Supreme Court of North Carolina recognizing that "[a]lthough the task of redistricting is primarily delegated to the legislature, it must be performed 'in conformity with the State Constitution.' It is thus the solemn duty of this Court to review the legislature's work to ensure such conformity using the available judicially manageable standards. We will not abdicate this duty by "'condemn[ing] complaints about districting to echo into a void.'" (quoting *Rucho*, 139 S. Ct. at 2507)), *cert. granted sub nom Moore v. Harper*, 142 S. Ct. 2901 (2022); *see also Adams*, 2022-Ohio-89, ¶¶ 101-102, 2022 WL 129092 (Supreme Court of Ohio struck down a redistricting plan "infused with undue partisan bias").[1]



[1] On June 21, 2022, the Supreme Court of Kansas reached the opposite conclusion, determining that partisan gerrymandering claims under the Kansas State Constitution are nonjusticiable political questions. *Rivera v. Schwab*, 512 P.3d 168, 183-87 (Kan. 2022). In doing so, the Supreme Court of Kansas stressed that Kansas lacks clear standards in its laws and in its case precedent by which it could evaluate whether an alleged partisan gerrymander is unconstitutional, contrasting its situation with the fact that "[s]ome states have mandated at last some of the traditional districting criteria for their mapmakers" and that other states —

The operative question thus becomes, what will the New Mexico Supreme Court do? Will it condemn Plaintiffs' complaints about Senate Bill 1 to echo into a void? Or will it, like the high courts in Florida, Pennsylvania, North Carolina, and Ohio, fulfill its role to determine whether Senate Bill 1 goes beyond bounds established by the New Mexico State Constitution? *See State ex rel. Clark v. Johnson*, 1995-NMSC-048, ¶ 20, 120 N.M. 562, 904 P.2d 11 ("Although it is not within the province of this Court to evaluate the wisdom of an act of either the legislature of the Governor, it certainly is our role to determine whether that act goes beyond the bounds established by our state Constitution.").

In New Mexico, our State Constitution includes an Equal Protection Clause that mirrors (and is in some ways broader than) the Federal Constitution's Equal Protection Clause. *See* N.M. Const. art. II, § 18 (providing that no person "shall . . . be denied equal protection of the laws"). "Like its federal equivalent, this is essentially a mandate that similarly situated individuals be treated alike, absent a sufficient reason to justify the disparate treatment." *Wagner v. AGW Consultants*, 2005-NMSC-016, ¶ 21, 137 N.M. 734, 114 P.3d 1050. Given that New Mexico's Equal Protection Clause is at least co-extensive with its federal analogue, and that federal courts recognize that political gerrymandering presents an injury under the



lacking a clear constitutional mandate — "have nevertheless discerned clear standards in their case precedent." *Id*. at 186. As will be shown below, New Mexico has clear standards enshrined both in statute and in case law, which makes this case more like *Harper* and *Adams* than like *Rivera*.

federal Equal Protection Clause, political gerrymandering necessarily offends Article II, Section 18 of the New Mexico Constitution.[2] This Court recognized as much in its seminal redistricting case, *Maestas v. Hall*, 2012-NMSC-006, 274 P.3d 66. There, this Court found that "an equal protection challenge will lie" if the drafters of legislative or congressional maps "use[] illegitimate reasons for population disparities and create[] the deviations *solely* to benefit certain regions at the expense of others." *See id*. ¶ 25 (emphasis in original) (quoting *Legislative Redistricting Cases*, 629 A.2d 646, 657 (Md. 1993)).

Yet, even though Plaintiffs allege that Senate Bill 1 violates the New Mexico Equal Protection Clause as a discriminatory partisan gerrymander, Petitioners



[2] The New Mexico Supreme Court is not bound to give the same meaning to the State Constitution as the United States Supreme Court places upon Federal Constitution even in construing provisions having wording that is identical or substantially so unless such interpretations purport to restrict liberties guaranteed entire citizenry under federal charter. *State ex rel. Serna v. Hodges*, 1976-NMSC-033, ¶ 33, 89 N.M. 351, 552 P.2d 787, *overruled on other grounds by State v. Rondeau*, 1976-NMSC-044, 89 N.M. 408, 553 P.2d 688. Here, however, to interpret the Equal Protection Clause of Article II, Section 18 as not supporting a claim based upon discriminatory partisan gerrymandering would be to do exactly that — to restrict the liberties guaranteed under the Federal Constitution, which recognizes such an injury from partisan gerrymandering under the federal Equal Protection Clause.

To the extent that Petitioners argue the necessity for an interstitial analysis — under the guise that Plaintiffs are requesting an expansion of the New Mexico Equal Protection guarantee — they miss the point that Plaintiffs' contention is that Article II, Section 18 protects against the same constitutional Equal Protection violation as repeatedly found under the Federal Constitution. Yet, even if this Court believes that an interstitial analysis is necessary to account for the lack of justiciability under the Federal Constitution, Plaintiffs' argument below regarding clear, manageable, and politically neutral standards under New Mexico law should suffice to illustrate that (1) the federal analysis regarding justiciability is flawed, at least as it relates to whether such a question is justiciable in New Mexico state courts; (2) there are structural differences between state and federal courts; and (3) there are distinctive state characteristics, including the presence of clear, manageable, politically neutral standards in New Mexico statute and case law justifying divergence from federal precedent. *State v. Gomez*, 1997-NMSC-006, ¶ 19, 122 N.M. 777, 932 P.2d 1.

would have this Court sit this one out. In support of their request for judicial abdication, Petitioners raise two primary contentions: (1) whether Senate Bill 1 is an unconstitutional partisan gerrymander under the New Mexico Constitution is a nonjusticiable political question; and (2) general separation of powers concerns should preclude New Mexico courts from reviewing the legislative act of redistricting. Each of these will be addressed in turn.

**1. While a political gerrymandering claim is a nonjusticiable political question for federal courts, the United States Supreme Court recognized that state courts could hear such a claim where, as here, clear, manageable, and politically neutral, standards exist in state law by which to judge the map at issue.**



As stated above, the United States Supreme Court held in a recent 5-4 decision that federal courts must avoid partisan gerrymandering claims from the various states. *Rucho*, 139 S. Ct. at 2499-500. Crucially, *Rucho* was premised on the lack of a standard or rule found in the United States Constitution or federal law. *Id*. at 2507. But the United States Supreme Court's inability to divine a nationwide standard to decide political-gerrymander claims is irrelevant to whether such a standard exists under New Mexico law. Or to put it another way, simply because the Supreme Court has concluded partisan gerrymandering claims are nonjusticiable in federal courts, it does not necessarily follow that they are nonjusticiable in New Mexico courts, as Chief Justice Roberts himself noted in *Rucho*. *See id*. ("Provisions in state statutes and state constitutions can provide standards and guidance for state courts to

apply."). In all practical effect, the Supreme Court held that the remedy for a constitutional injury resulting from a political gerrymander may only be found in state court. Thus, *Rucho* presents no bar to state courts redressing political-gerrymandering claims.

Instead, the relevant question is whether New Mexico has adopted or otherwise developed the sort of statutory or constitutional standards for determining when illegitimate reasons for line drawing results in an unconstitutional political gerrymander. In short, it has.

New Mexico has developed standards that guide judicial review of a redistricting plan in response to the history of partisan redistricting fights in New Mexico and have been deemed constitutionally legitimate by the New Mexico Supreme Court. *Maestas v. Hall* marked the first systematic articulation of the "legal principles that should govern redistricting litigation in New Mexico." 2012-NMSC-006, ¶ 4. These principles were laid out by this Court in concern that "[d]istricts should be drawn to promote fair and effective representation for all, not to undercut electoral competition and protect incumbents." *Id.* ¶ 31. This Court noted that, in New Mexico, "[i]t is preferable to allow the voters to choose their representatives through the election process, as opposed to having their representative chosen for them through the art of drawing redistricting maps." *Id.* Of course, the Court in *Maestas* was not starting from a blank slate: since at least 1991 (the last time the

State Legislature adopted a map without litigation) a set of seven guidelines have been used to safeguard the electorate's right to fair and constitutional district maps. *See id.* ¶ 34. Among these guidelines is the requirement that:

> Districts shall be drawn consistent with traditional districting principles. Districts shall be composed of contiguous precincts, and shall be reasonably compact. To the extent feasible, districts shall be drawn in an attempt to preserve communities of interest and shall take into consideration political and geographic boundaries. In addition, and to the extent feasible, the legislature may seek to preserve the core of existing districts, and may consider the residence of incumbents.

*Id.* This Court incorporated these guidelines into the state's redistricting framework, noting they track similar policies "recognized as legitimate by numerous courts." *Id.* The reason for hewing to traditional districting principles was not lost on this Court: "[these considerations] greatly reduce, although they do not eliminate, the possibilities of gerrymandering," *id.* ¶ 35, and further the interests of representative government because "[m]inimizing fragmentation of political subdivisions, counties, towns, villages, wards, precincts, and neighborhoods allows constituencies to organize effectively [.]" *Id.* ¶ 36.



This Court is not alone among state actors in finding that traditional districting principles protect against political gerrymandering. Less than a year ago, the New Mexico State Legislature adopted the Redistricting Act and made the traditional redistricting principles part of state statute. The Redistricting Act requires the Committee — itself created by the Act — to develop district plans in accordance with ten provisions, including the requirement that they observe the traditional

districting principles approved in *Maestas*. *See* NMSA 1978, § 1-3A-7(A) (2021). The State Legislature went further in protecting against political gerrymanders, forbidding the Committee from using, relying on, or referencing partisan data, such as voting history or party registration data in preparing redistricting plans. § 1-3A-7(C).

Thus, in New Mexico, traditional districting principles provide a framework against which state courts can, when confronted with a claim that a redistricting plan effects a constitutional injury, measure whether the plan is presumptively based upon legitimate considerations or not. And this framework provides a basis for New Mexico state courts to accept the challenge left open to them by the U.S. Supreme Court in *Rucho*: to use state statutes and constitutions to prevent "complaints about districting [from echoing] into a void." 139 S. Ct. at 2507; *cf. id*. at 2521 (Kagan, J., dissenting) ("Using the criteria the State itself has chosen at the relevant time prevents any judicial predilections from affecting the analysis . . . At the same time, using those criteria enables a court to measure just what it should: the extent to which the pursuit of partisan advantage — by these legislators at this moment — has distorted the State's districting decisions.").[3]



Moreover, in addition to the traditional districting principles enshrined in New Mexico law and contained in New Mexico case law, "[j]udicial standards under the

[3] In *Rucho*, the majority concluded that the dissent's proposed test, using "a State's own districting criteria as a neutral baseline" was unmanageable in large part because "it does not make sense to use criteria that will vary from State to State and year to year." *Id*. at 2505. That problem does not exist here, where New Mexico courts would need only apply New Mexico's districting criteria.

Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects no policy, but simply arbitrary and capricious action." *Baker v. Carr*, 369 U.S. 186, 226 (1962). The state judiciary is competent to interpret and apply these standards in this case. Indeed, rather than stepping outside of its role as judicial officers and into the policymaking realm, New Mexico judges would simply be carrying out the most fundamental of their sacred duties: protecting the constitutional rights of the people of New Mexico from overreach by the New Mexico Legislature.



To sum up, "[c]ourts have a critical role to play in curbing partisan gerrymandering" because "a denial of constitutionally protected rights demands judicial protection." *Gill*, 138 S. Ct. at 1941 (2018) (Kagan, J., concurring) (quotation omitted). Indeed, "the need for judicial review is at its most urgent in these cases" because "politicians' incentives conflict with voters' interests, leaving citizens without any political remedy for their constitutional harms." *Id*. (Kagan, J., dissenting). And while the federal courts have abandoned the field, "state law provides more specific neutral criteria against which to evaluate alleged partisan gerrymanders, and those criteria would not require our court system to consider fifty separate sets of criteria, as would federal court involvement." *Harper*, 2022-NCSC-17, ¶ 110, 2022 WL 496215. Or to put it another way, "*Rucho* was substantially

concerned with the role of federal courts in policing partisan gerrymandering, while recognizing the independent capacity of state courts to review such claims under state constitutions as a justification for judicial abnegation at the federal level." *Id*. Indeed, "[t]he role of state courts in our constitutional system differs in important respects from the role of federal courts. *Id*. To conclude otherwise would import into New Mexico a willingness to look the other way in the face of a constitutional violation resembling Justice Kagan's critique of the majority holding in *Rucho*: "In the face of grievous harm to democratic governance and flagrant infringements on individuals' rights — in the face of escalating partisan manipulation whose compatibility with this Nation's values and law no one defends — the majority declines to provide any remedy. For the first time in this Nation's history, the majority declares that it can do nothing about an acknowledged constitutional violation because it has searched high and low and cannot find a workable legal standard to apply." *Rucho*, 139 S. Ct. at 2515 (Kagan, J., dissenting). This is what Petitioners ask of this Court. This Court should refuse to sit this one out.



**2. General separation of powers concerns should not preclude New Mexico courts from deciding whether Senate Bill 1 violates equal protection.**

Petitioners contend that the district court's decision to intervene in the political redistricting process "essentially trump[ed] the will of New Mexico's people and their elected representatives" and "jeopardize[d] the credibility of the

judiciary itself." *Petition* at 10-11. Not only are these contentions overwrought, but they also ignore the fact that this is not a clash between political branches but is instead a case involving individual constitutional rights. And when government is alleged to have threatened any of the rights enjoyed by all New Mexicans, as encapsulated in the New Mexico Bill of Rights — including the right to equal protection of the laws — "it is the responsibility of the courts to interpret and apply the protections of the Constitution." *Griego*, 2014-NMSC-003, ¶ 1. Indeed, "when litigants allege that the government has unconstitutionally interfered with a right protected by the Bill of Rights, or has unconstitutionally discriminated against them, courts must decide the merits of the allegation." *Id*.



To be sure, districting and apportionment are primarily legislative tasks that are subject to judicial review for constitutional compliance. *See Ely v. Klahr*, 403 U.S. 108, 114 (1971) (citing *Reynolds v. Sims*, 377 U.S. 533, 586 (1964)). In other words, although it is not within the province of this Court to evaluate the wisdom of an act of either the legislature or the governor, it is this Court's role to determine whether that act goes beyond bounds established by State Constitution. *Johnson*, 1995-NMSC-048, ¶ 20. "The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority." *Baker*, 369 U.S. at 217. *Cf. Harper*, 2022-NCSC-17, ¶ 4, 2022 WL 496215 ("Accordingly, the only way that partisan gerrymandering can be

addressed is through the courts, the branch which has been tasked with authoritatively interpreting and enforcing the [State] Constitution.").

## III. Plaintiffs do not object to an order staying the proceedings below during the pendency of Petitioners' requested petition, but this Court should not extend the stay until the United States Supreme Court decides *Moore v. Harper*.

Plaintiffs share Petitioners' concerns regarding judicial economy and hardship avoidance, particularly as it relates to conducting discovery and trial while the possibility remains that this Court might ultimately rule that partisan gerrymandering claims are nonjusticiable. *See Petition* at 17. As such, a stay of the proceedings below until this Court has ruled on Petitioners' petition is entirely reasonable.



On the other hand, this Court should not delay in resolving this case and should issue its writ in due course. Certainly, to wait for the United States Supreme Court to rule on *Moore v. Harper* is a bridge too far. In that case, the United States Supreme Court has granted certiorari to consider the so-called independent state legislature doctrine. It is far from a foregone conclusion that the Supreme Court will rule in way that would foreclose this Court from reviewing the congressional redistricting scheme enacted by Petitioners, given a long line of decisions by the Supreme Court confirming the view that state courts may review state laws governing federal elections to determine whether they comply with the state constitution. *See Smiley v. Holm*, 285 U.S. 355, 368 (1932) (holding the Elections

Clause does not "endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided"). That is, the state legislature's enactment of election laws reflects an exercise of the lawmaking power; accordingly, the legislature must comply with all of "the conditions which attach to the making of state laws," *id*. at 365, including "restriction[s] imposed by state Constitutions upon state Legislatures when exercising the lawmaking power," *id*. at 369; *see also Ariz. State Leg.*, 576 U.S. at 817-18 ("Nothing in [the Elections] Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution."); *Growe v. Emison*, 507 U.S. 25, 33-34 (1993) (emphasizing "[t]he power of the judiciary of a State to require valid reapportionment" of congressional districts and rejecting the federal district court's "mistaken view that federal judges need defer only to the Minnesota Legislature and not at all to the State's courts").



## CONCLUSION

This Court should grant Petitioners' petition for a writ of superintending control; determine that Plaintiffs' claim that Senate Bill 1 is an unconstitutionally discriminatory partisan gerrymander is cognizable and justiciable under the New Mexico Constitution's Equal Protection Clause; and instruct the district court to adjudicate the claim on the merits using well-developed and typical equal protection

standards, as well as the traditional districting principles enshrined in state statute and in state court precedent.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that, on September 6, 2022, I electronically filed Plaintiffs' Response to Petitioner-Defendants' Verified Petition for Writ of Superintending Control and Request for Stay with the Tyler/Odyssey New Mexico Court e-file and serve system. All counsel of record are registered as service contacts through that system, and will be served by the Tyler/Odyssey New Mexico Courts system.

*/s/ Daniel J. Gallegos*
Daniel J. Gallegos