IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

MICHELLE LUJAN GRISHAM, et al.,

Petitioners-Defendants,

vs.

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

THE HONORABLE FRED VAN SOELEN,

Respondent,

and

REPUBLICAN PARTY OF NEW MEXICO, et al.,

Plaintiffs–Real Parties in Interest,

and

MAGGIE TOULOUSE OLIVER,

Defendant–Real Party in Interest.

PLAINTIFFS' SUPPLEMENTAL BRIEF

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STATEMENT OF COMPLIANCE

Pursuant to Rule 12-318(G) & (A)(1)(c) NMRA, I certify that this Brief-in-Chief complies with the limitations of Rule 12-318(F)(3), which limits such briefs to 11,000 words (when a proportionally spaced font is used, such as Times New Roman, which is what has been used here) or 35 pages, whichever is longer. The body of this Brief-in-Chief contains 9,959 words as measured by the Word Count function on Microsoft Word 365.

HARRISON, HART & DAVIS, LLC

By: */s/ Carter B. Harrison IV*
Carter B. Harrison IV

This Court has asked certain of the parties to this proceeding to brief the question of whether "the New Mexico Constitution provide[s] greater protection than the United States Constitution against partisan gerrymandering." Order at 3 (filed Jan. 18, 2023). The Court should, based on its established framework for interstitial analysis of state-constitutional provisions, hold that the state Equal Protection Clause is broader than its federal counterpart with regard to protections against partisan gerrymandering.

ARGUMENT

"A state court adopting th[e interstitial] approach [to state-constitutional interpretation] may diverge from federal precedent for three reasons: **[I]** a flawed or undeveloped federal analysis, **[II]** structural differences between state and federal government, or **[III]** distinctive state characteristics." *State v. Gomez*, 1997-NMSC-006, ¶ 19, 122 N.M. 777, 932 P.2d 1. The *Gomez* prongs will be addressed in turn.

I. The U.S. Supreme Court has been clear that partisan gerrymandering violates the federal Equal Protection Clause, but its jurisdictional limitations under Article III have left the substantive scope of the right "undeveloped" under the *Gomez* framework.

"Under the interstitial approach, the court asks first whether the right being asserted is protected under the federal constitution." *Gomez*, 1997-NMSC-006, ¶ 19. As a substantive matter, partisan gerrymandering *does* violate the federal Equal Protection Clause. *See, e.g., Davis v. Bandemer*, 478 U.S. 109 (1986) (White, J.,

joined by Brennan, Marshall & Blackmun, JJ., for the plurality) ("[U]nconstitutional discrimination" occurs "when the electoral system is arranged in a manner that will consistently degrade [a voter's] influence on the political process."); *id.* at 165 (Powell, J., joined by Stevens, J., concurring) ("Unconstitutional gerrymandering" occurs when "the boundaries of the voting districts have been distorted deliberately" to deprive voters of "an equal opportunity to participate in the State's legislative processes."); *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (Scalia, J., joined by Rehnquist, C.J. & O'Connor & Thomas, JJ., for the plurality) ("[A]n *excessive* injection of politics [in districting] is *un*lawful." (emphases in original)); *id.* at 316 (Kennedy, J., concurring) ("I do not understand the plurality to conclude that partisan gerrymandering that disfavors one party is permissible. Indeed, the plurality seems to acknowledge it is not."). But as the U.S. Supreme Court outlined in *Rucho v. Common Cause*, the federal courts' ability to address the Fourteenth Amendment concerns is limited by Article III of the federal constitution. *See* 139 S. Ct. 2484, 2493-94 (2019) (stating that "Article III of the Constitution limits federal courts to deciding 'Cases' and 'Controversies,'" and concluding that partisan-gerrymandering claims "present a 'political question' and [are] nonjusticiable — outside the courts' competence and therefore beyond the courts' jurisdiction").

The New Mexico Constitution has no Case or Controversy Clause, and this Court has never once embraced the political question doctrine, so the binary decision

of whether a justiciable claim exists does not require an interstitial analysis. Where "no federal analogue exists[, this Court's] analysis is initially interpretive," which means that to reject these claims outright, this Court would have to create an unprecedented and extra-textual limitation to its jurisdiction under Article VI, § 3, or adopting some type of reverse-interstitial approach for federally non-justiciable constitutional rights, in which the substance of the state right is interpreted more narrowly than its federal counterpart. *Morris v. Brandenburg*, 2015-NMCA-100, ¶ 23 n.4, 356 P.3d 564.

Under the argot of *Gomez*, the federal case law on equal-protection rights against disenfranchisement by gerrymandering is not so much "flawed" as it is "undeveloped." *Gomez*, 1997-NMSC-006, ¶ 20 (citing *State v. Attaway*, 1994-NMSC-011, 117 N.M. 141, 870 P.2d 103). The U.S. Supreme Court has concluded that Article III and federalism principles curtail its ability to reach the substance of partisan-gerrymandering claims. The Article III analysis was not only the dispositive one in *Rucho*, but has been a central focus across every single one of the Court's gerrymandering cases.[1] This balancing of the protections of the Equal

[1] For almost two-hundred years of the U.S. Supreme Court's existence, until *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) and *Baker v. Carr*, 369 U.S. 186 (1962), *all* redistricting cases, including those based on racial discrimination and malapportionment, were barred by the political-question doctrine. So it should come as no surprise that the Court's analysis of partisan gerrymandering claims focused, from the very beginning, more on the limitations of Article III than on the substantive scope of the Equal Protection Clause.

Protection Clause and the jurisdictional limitations of Article III has resulted in a line of cases in which the former is never actually determined or even opined upon separate from the latter — an omission that is itself dictated by the Case or Controversy Clause, since the Court can decide only the claim it will hear and the standard it will apply, not the meaning of a constitutional provision in a vacuum. *Cf. Luther v. Borden*, 48 U.S. (7 How.) 1 (1849) (holding that the "guarantee to every State in this Union [of] a Republican Form of Government," U.S. Const. art. IV, § 4, cl. 1, is non-justiciable as a political question under Article III, resulting in the clause remaining judicially undefined to this day).[2] The result, however, is that no one can say for sure how the U.S. Supreme Court would define the substantive scope of the federal equal-protection right, except that it exists.

This renders the federal case law in this field more 'inapplicable' than unpersuasive. Where the U.S. Supreme Court's development of partisan-gerrymandering claims is severely limited by Article III, this Court is not so limited. *See, e.g., New Energy Economy, Inc. v. Shoobridge*, 2010-NMSC-049, ¶ 16, 149 N.M. 42 ("[T]he New Mexico Constitution does not expressly impose a 'cases or controversies' limitation on state courts like that imposed upon the federal judiciary by Article III, Section 2 of the United States Constitution."). This Court can and

[2] To be clear, this Court need not develop a jurisprudence around (*e.g.*) the Guarantee Clause, which by its terms imposes an obligation only on the federal government and, more importantly, which has no analogue in the New Mexico Constitution.

should adjudicate claims asserting the full substantive scope of the federal Equal Protection Clause.

But this Court should not stop there, because the second and third *Gomez* prongs prompt the conclusion that Article II, § 18 of the New Mexico Constitution is broader than the federal Equal Protection Clause in the first place. Even Justice Kagan's conceptualization of a partisan-gerrymandering claim is narrower than what is available under the state constitution.

II. Structural differences between state and federal government should push partisan-gerrymandering claims over to state court, not out of existence — as *Rucho* itself recognizes.

In *Rucho*, the U.S. Supreme Court effectively opined that "structural differences between state and federal government," *Gomez*, 1997-NMSC-006, ¶ 19, support increased state-court involvement in partisan-gerrymandering claims. *See, e.g.*, *Rucho*, 139 S. Ct. at 2507 (noting that "[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply," and even a generalized constitutional, statutory, or precedential mandate "that no districting plan 'shall be drawn with the intent to favor or disfavor a political party'" furnishes enough "guidance on the question" to render adjudication workable); *id.* (noting that, unlike what is available to the U.S. Supreme Court to construe a justiciable federal standard, many "States have mandated at least some of the traditional districting criteria for their mapmakers," and suggesting that such criteria could be transformed

into judicially workable standards); *Vieth*, 541 U.S. at 277 n.4 ("The States, of course, have taken their own steps to prevent abusive districting practices. A number have adopted standards for redistricting, and measures designed to insulate the process from politics.").

There are a number of reasons why state courts are the proper venue for partisan-gerrymandering claims.[3] The first is simple comity, *i.e.*, federalism. While this Court has valid horizontal separation-of-powers concerns when reviewing acts of the Legislature, the federal courts have both horizontal *and* vertical separation-of-powers barriers. While it is always true that the federal-court construction of a federal constitutional right has been influenced by the fact that it will be applied against the dignity of separate sovereigns,[4] this concern is heightened in the context of redistricting for because, *e.g.*: **(a)** it is an *exclusively* state function that is never performed at the federal level; and **(b)** for all maps except the congressional one, it goes to the state's determination of its own governmental structure.

[3] This brief interprets the "structural differences between state and federal government" prong to refer to differences between *any* state government and the federal government, *i.e.*, to federalism-type considerations of comity, subsidiarity, and generalized assumptions about localized institutional competence. If the Court disagrees with this categorization, the Plaintiffs respectfully request that the Court consider the New Mexico-specific reasons stated under the third prong in this portion of the analysis.

[4] More accurately, it is *almost* always true, as there are still a few 'unincorporated' rights like the Fifth Amendment grand-jury right and the Seventh Amendment civil-jury right, which do not apply against the states.

A second reason is Article III's Case or Controversy Clause. Although not typically thought of as a federalism provision, it has in effect become one because many states (including New Mexico) do not have any equivalent clause in their constitutions — as a result of which federally non-justiciable questions move over to state court. *See*, *e.g.*, James W. Doggett, Note, *"Trickle Down" Constitutional Interpretation: Should Federal Limits on Legislative Conferral of Standing Be Imported into State Constitutional Law?*, 108 Colum. L. Rev. 839, 875-77 (2008).

A third reason (cynically ascribed to Chief Justice Roberts as a motive for the *Rucho* holding) is the reduction of the federal-court, and specifically U.S. Supreme Court, workload: redistricting cases are one of the vanishingly few cases over which the U.S. Supreme Court still has non-discretionary appellate jurisdiction, and those appeals, in fact, bypass the Circuits and go straight to the Supreme Court. *See* 28 U.S.C. § 1253. This Court does not have the same considerations, as the maximum possible number of cases correspond to the four maps drawn by the Legislature (congressional, state House and Senate, and Public Education Commission), plus potentially the county commission and school-board maps of the 33 counties[5], come only once a decade.

Fourth, simple geographic familiarity creates institutional competence at the state-court level that is absent at the federal level. The Justices of the U.S. Supreme

[5] The incentive to litigate drops off sharply below this.

Court could likely find New Mexico on a map, but what understanding do they have of our cultural, linguistic, demographic, or even just populational distribution; our unique history, contemporary political environment, or the evolution of our legislative and congressional maps over time; or the way in which our legislators discuss politically fraught issues like redistricting and the way in which their statements should be construed when analyzing intent? The Justices can learn about relevant features of a state on a case-by-case basis — in the same way that an intelligent judicial officer can learn up on virology, epidemiology, and public-heath interventions when reviewing a pandemic-mitigation measure imposed by a state health authority, for example — but that does not create "institutional expertise." Such expertise is a meaningful consideration in the both the state and federal judicial systems when allocating decisional responsibility and the stringency of appellate review. It is an uncontroversial propositions that a knowledgeable decisionmaker, all other things being equal, will usually make better decisions than one who is not knowledgeable; this proposition does significant work in both federal and New Mexico jurisprudence.[6]

[6] Both the federal and state systems incorporate enhanced deference to decisionmakers with institutional expertise — which is just a pithy way of saying "having a lot of difficult-to-develop knowledge of facts relevant to the case at hand, obtained in advance because said knowledge is relevant to an entire class of cases" — albeit in different ways (*e.g.*, *Chevron* deference versus the Rule 1-074(R) standards of review).

Consider what this Court already knows implicitly about this case and the ways that knowledge situated the Court to begin, from day one, intelligently and comfortably processing the new information presented by the parties in a way that a far-off court could likely never do: this Court knows that we have long had three congressional districts, two of which have been Democratically controlled and one relatively comfortably Republican; that the power base of the Republican Party is in the southeastern portion of the state, which is rural and economically dominated by the oil-and-gas industry; that the main population center is Albuquerque, which was once fairly politically neutral but has in recent years tilted heavily Democratic, altering the statewide balance of power; that the northwestern portion of the state is the largest Native American reservation in the U.S., populated by a mix of non-Natives and Navajo Nation members; and so on. This knowledge contributes to an institutional competence that the federal courts simply do not have.[7]

Fifth, the flip side of a state court having expertise in its own state is that it does not need to have expertise in anyone else's — and, more substantially, it does

[7] While it is true that a federal district judge, having a geographic jurisdiction coterminous with this Court's, might have similar knowledge, that isn't the relevant comparison, for two reasons: first, the relevant comparison to a federal district judge in the state system is a state district judge, who, owing to the latter's smaller geographic jurisdiction, will have a familiarity superiority to the federal judge's when it comes to (the far more numerous) instances of county, municipal, and school-board redistricting; and second, lone New Mexico-based federal district judges don't actually hear redistricting cases, which go directly to a three-judge panel of district and circuit judges, and then bypass the Tenth Circuit to be instead appealed directly to the U.S. Supreme Court — which is 1,800 miles away physically, and farther than that culturally.

not need to develop a standard that is workable everywhere in the country. No single anti-gerrymandering standard works well for both the two- and three-district states and the 38- and 53-district states — certainly no one 'test' (like the efficiency-gap calculation or minimum isoperimetric quotient) works equally well everywhere, but it has proven impossible to even fashion a workable nationally consistent meta-test that applies different subtests to different states on a non-ad hoc basis — but there is no justification in the federal Equal Protection Clause for applying inconsistent standards. This Court, on the other hand, does not need to fashion or refine over time a standard that accounts for the infinite permutations possible across 50 states. As a three-district state, the important criterion of compactness is easier to obtain (and deviations from it more suspicious) here than in more-populous states. And there are other qualitative differences between states that impair the application of a uniform nationwide standard just as much as the quantitative difference in number of districts: consider that jagged or otherwise irregular state borders or coastlines can dramatically interfere with the application of various tests of compactness like the isoperimetric quotient and district-to-convex-polygon ratio, while New Mexico's shape is simple and, more importantly, will always be the same (*e.g.*, this Court will never be called upon to develop a standard that works for Maryland). Similarly, this Court will never have to grapple with, e.g.: what standard to apply to claims that a national-minority but state-majority Mormon population has gerrymandered non-

Mormon populations (although Utah might); whether the same standards used to evaluate alleged discrimination against Pueblo populations should also be applied to the claims of animus against a rapidly growing and ethnically distinct refugee population in Minnesota or Maine; how the Court's redistricting jurisprudence would apply to West Virginia's unique incorporation of both single- and multi-member legislative districts[8]; or whether and how our state's proud and long constitutional history of protecting the rights of Spanish-speaking citizens applies to Japanese speakers in Hawaii. These are all questions that the U.S. Supreme Court must address, but this Court never will.

III. The distinctive characteristics of New Mexico, including an Equal Protection Clause that this Court has long interpreted far more broadly than its federal analogue, a historical prioritization of representative government — expressed most saliently in §§ 2 and 3 of Article 2 of the Constitution — and a poor track record of passing constitutional redistricting plans though the Legislature, all countenance in favor of broader anti-gerrymandering protections than those found in the federal Equal Protection Clause.

While the first two prongs looked at federal-court interpretative correctness and the general (*i.e.*, nationwide) allocation of judicial authority between the federal and state courts, this prong looks exclusively to New Mexico, its history and culture,

[8] This scheme was discontinued in 2021, but at the time of the *Rucho* decision, would have been something that a federal anti-gerrymandering standard would have had to account for. *See* Hoppy Kercheval, *West Virginia Moves to All Single Member Delegate Districts… Finally*, W.V. Metro. News (Oct. 13, 2021), https://wvmetronews.com/2021/10/13/west-virginia-moves-to-all-single-member-delegate-districts-finally/ (last visited Feb. 4, 2023).

and its own internal positive and precedential law. Two aspects of New Mexico law that have not yet been discussed in depth in the briefing on this case are: **(A)** the historical development of the enacted law, and the way the political branches have understood, implemented, and changed that law over time; and **(B)** this Court's interpretation of the state Equal Protection Clause outside of the redistricting context.

A. The Historical Development of the Positive-Law Redistricting Provisions & Their Use by the Legislature

The relevant enacted law includes **(1)** the state Equal Protection Clause itself; **(2)** sections 2, 3, and 4 of the state Bill of Rights, which this Court should use "as a prism though which [to] view . . . [the applicability of the] equal protection guarantees" to the context of partisan gerrymandering, *Morris v. Brandenburg*, 2016-NMSC-027, 376 P.3d 836; **(3)** the law of redistricting binding on the Legislature itself (*i.e.*, applicable to those statewide bodies that the Legislature is responsible for districting); and **(4)** the law of local redistricting.

1. The State Equal Protection Clause

The state Equal Protection Clause — which provides that "nor shall any person be denied equal protection of the laws" — is not textually unique. It resembles analogous clauses in both the federal and many state constitutions, although its specific origins are obscure. It was formulated by the Committee on

Bill of Rights, one of the twenty-seven committees formed in New Mexico's 1910 constitutional convention to divide up the task of writing what would become New Mexico's constitution upon admission into the Union as a state. *See Proceedings of the Constitutional Convention of the Proposed State of New Mexico* (Oct. 3 to Nov. 21, 1910) ("*Proceedings*").[9] When the Bill of Rights Committee issued its first report to the full 100-delegate body on twenty-eighth day of the convention, it had formulated a completed Bill of Rights except for "two or three sections [still] under advisement" — and the Equal Protection Clause was not one of those. *Proceedings* at 81. Section 18, of which the Clause was and is a part, was presented to the convention in the same form as it ended up in the initial constitution. It was approved without debate or amendment and forwarded to the Committee on Revision and Arrangement, which presented it (along with the rest of the Bill of Rights) to the full

[9] The meetings of the constitutional convention and its constituent committees were famously not transcribed, *see Proceedings* at 37 (describing Resolution No. 14, a motion "to designate a sufficient number of the expert among the stenographers now in employ to take down verbatim the full proceedings of the Convention each day"); *id.* at 42 ("The result [of the vote on a motion to table indefinitely] being in the affirmative, Resolution No. 14 was laid on the table indefinitely."), and it is generally agreed that the *Proceedings* were kept deliberately scant, partly to obfuscate Democratic resistance, *see, e.g.*, Delegate Edward D. Tittman, *New Mexico Constitutional Convention: Recollections*, 27 N.M. Hist. Rev. 177, 178 (1952) ("The official Journal, as published after the convention had adjourned, is by no means a reliable report of what happened on the floor. . . . The membership [of one prominent committee] as shown in the official 'Proceedings' is not correct."). This Court has nonetheless relied upon the *Proceedings* several times, *see*, *e.g.*, *State v. Gutierrez*, 1993-NMSC-062, ¶ 33, 116 N.M. 431, 863 P.2d 1052, in part due to lack of alternatives, as "but few of the original papers and records of the convention proceedings have been preserved," Thomas J. Mabry, *New Mexico's Constitution in the Making – Reminiscences of 1910*, 19 N.M. Hist. Rev. 168, 183 (1944).

body on November 16, at which point it was unanimously confirmed for inclusion in the constitution. *See id.* at 81-85 & 195-98.

The lack of time devoted to discussing the Clause, however, reflects the widespread agreement over its inclusion, not apathy about its content. In his brief and well-publicized remarks at the end of the convention, president of the convention Charles A. Spiess, punctuated his praise for the document by exclaiming:

> The Constitution you have framed will go down in history as one of the grandest documents ever written for a people. You have by its provisions guaranteed the equal protection of the law to every citizen of New Mexico; you have preserved the religious, political, social, and civic rights to every one of our citizens, and placed them beyond the power of assault any source whatsoever.

Proceedings at 288.

The text of the Clause may have been borrowed from any number of sources, or none at all. The delegates to the convention had been furnished with "copies of the 1889 constitution (rejected by the voters), and a number of state constitutions." Dorothy I. Cline, *New Mexico's 1910 Constitution: A 19th Century Product* 43 (1985). The 1889 constitution's Bill of Rights bears strikingly little similarity to the 1910 constitution's, especially when one considers that the same Republican interests that had written the 1889 document dominated the 1910 convention.[10] The

[10] The 1899 constitution was derided as the "Tom-Cat Constitution" for its principal architect, Thomas Catron, *see* Howard Roberts Lamar, *The Far Southwest: 1846-1912*, 191 (1966); Catron remained a key figure of the 1910 constitutional convention, *see* Mabry, *supra*

1899 Bill of Rights had no Equal Protection Clause whatsoever, although buried deep in its Article describing the legislature was a textually dissimilar provision that "[t]he legislature shall not grant to any corporation or corporations, nor to any person or persons, any rights, privileges, immunities or exemptions which shall not upon the same terms belong equally to all persons."[11] N.M. 1889 Constitution art. IV, § 23, at 5. The Equal Protection Clause remains the virtually the same[12] today as it was in 1910, although § 18 was amended by the Equal Rights in 1972 to add the sentence the following sentence after the Clause: "Equality of rights under law shall not be denied on account of the sex of any person." N.M. Leg. Council Serv., *Piecemeal Amendment of the Constitution of New Mexico* 34, 50 & 59 (Dec. 2016),

n.9, at 172 (stating that the 1910 constitution, "as finally written, was largely the handiwork of such able delegates of the majority party as T. B. Catron, thereafter a U.S. Senator"); Cline, *supra* at 31 ("Catron, the oldest [1910] delegate at age 70, had been a powerful, if not *the* most powerful, political figure in territorial affairs for 40 years.").

[11] "State constitutional texts display more diversity in the area of equality than in any other single area of constitutional rights," and equality-based clauses "can be more or less grouped into four categories," the first guaranteeing (like the 1910 New Mexico Constitution) "'equal protection of the laws,'" and the "second recurring type of clause[] phrased in terms of equal privileges or immunities, [which] is the mirror opposite of equal protection clauses." 1 Jennifer Friesen, *State Constitutional Law* § 3.01[2], at 3-6 to -7 (2015 supp.). "Instead of concerning itself with state failures to treat equally an individual or group, it prohibits the award of special rights to a privileged few." *Id.* at 3-7 to -8. Roughly 15 states use the 1889 constitution's formulation, and a prioritization of equal protection can be inferred from the switch to the broader textual form. *See id.*

[12] The word "the" in between "denied" and "equal protection" was removed from the Clause by the Equal Rights Amendment. *See* H.J.R. 2 § 1 (N.M. 1972 Reg. Sess.) (not employing redline/interlineation format to describe the amendment). *Compare Proceedings* at 198, *and Annotated Constitution & Enabling Act of the State of New Mexico* art. II, § 18, at 15, Compiler & Publisher Arthur G. Whittier (1911), *with* N.M. Const. art. II, § 18 (current).

available at https://www.nmlegis.gov/Publications/New_Mexico_State_Government/Piecemeal_Amendment_Dec2016.pdf (last visited Feb. 4, 2023).

2. Other Provisions in the Bill of Rights Recognizing an Individual-Rights Entitlement to Proper Government Structure

The other sections of the 1910 constitution that are potentially relevant here proceeded along the same trajectory as the Equal Protection Clause at the convention — *i.e.*, no counterpart in the 1889 constitution, and no discussion or amendment apparent from the *Proceedings* — including sections 2, 3, and 4 of the Bill of Rights:

> [§ 2:] All political power is vested in and derived from the people: all government of right originates with the people, is founded upon their will and is instituted solely for their good.
>
> [§ 3:] The people of the state have the sole and exclusive right to govern themselves as a free, sovereign and independent state.
>
> [§ 4:] All persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness.

1910 Constitution art. II, §§ 2-4. While the textual provenance of §§ 3 and 4 is, like the state Equal Protection Clause, uncertain, § 2 was very likely taken from the very first section of the Bill of Rights of the Kearny Code, which governed the Territory

of New Mexico from its inception in 1846,[13] and provides: "First. That all political power is vested in and belongs to the people." Bill of Rights as Declared by Brigadier General Stephen W. Kearny, *available in* Prof. Richard N. Ellis, *New Mexico Historic Documents* 8-9 (1975). These three sections remain textually identical today to their 1910 form.

3. The Legislature's Role in Apportionment Since Statehood

The districting and apportionment of legislative seats in the initial constitution was handled by the convention's Apportionment Committee, which was comprised of some of the most powerful Republican delegates[14] and was widely viewed as dead-set on achieving a Republican-favoring map of legislative districts and allocations thereto. Cline, *supra* at 48 & 52 ("The apportionment of . . . districts was so vital to party leaders that progressive Republicans were kept in line during the Convention with threats of gerrymandering their districts . . . ."). There is a rare bipartisan historical unanimity that the initial apportionment of seats was an

[13] The Kearny Code was in turn "taken partly from the laws of Mexico theretofore in effect throughout the territory, partly from the laws of Missouri, and to a lesser extent from the laws of Texas, Coahuila and from the Livingston Code." N.M. State Law Librarian Arie Poldervaart, *The New Mexico Statutes: Observations in Connection with Their Most Recent Compilation*, 18 N.M. Hist. Rev. 52, 52 (1943).

[14] *Compare Proceedings* at 18 (listing the 11 members of the Apportionment Committee), *with* Mabry at 172 (listing the most prominent eight delegates, five of whom were on the Apportionment Committee), *and* Thomas C. Donnelly, *The Making of the New Mexico Constitution, Part II*, 12 N.M. Quarterly 435, 439 (1942) (listing the six "most important leaders of the Republican majority," five of whom were on the committee).

egregious Republican gerrymander accepted by the voters as the price of admission to statehood.[15] *See* Tittman, *supra* n.9, at 179 ("[A]llocations were worked out for the Senatorial Districts, where small counties were attached to large Republican Counties. So, for instance, Socorro County had its own senator but, combined with other counties in other senatorial 'shoe-string' districts, controlled the political color of three other districts."). While the 1889 "Constitution had been badly defeated largely because the Democrats . . . charged that the apportionment plan for the election of 73 delegates put the Republicans in control, despite a majority of Democratic votes in the last three elections," Cline, *supra* at 43 n.28, the 1910 constitution was preceded by a congressional Enabling Act, guaranteeing statehood

[15] Robert W. Larson, *New Mexico's Quest for Statehood: 1846-1912*, 281 (1968) ("A gerrymandering operation was so effectively employed by the Republican majority that although the Democrats elected their governor and their candidate to Congress, plus about half of the state officers, at the first state election, the Republicans achieved a two-thirds majority in both the senate and the house of the state legislature."); Tittman, *supra* at 179 ("I personally filed a suggestion that judicial, legislative, and other districts should be along lines of communication with easy amendment or change by the legislature. In those days, lines of communication were determined by the lines of railroad. . . . [But] instead of making a judicial district joining Bernalillo, Valencia and McKinley counties along the best roads of communication, the Republicans proposed to join McKinley County to San Juan County to Rio Arriba County to Santa Fe County[, which] . . . seemed to assure the election of a Republican in that district."); Mabry, *supra* at 174 ("The 'Gerrymandering' went merrily on notwithstanding all protests and wailing from the minority. The superiority in numbers possessed by the majority party, then well united, was to it proof enough of the justice of its course."); Thomas C. Donnelly, *The Making of the New Mexico Constitution, Part I*, 11 N.M. Quarterly 452, 445 (1941) ("The partisan nature of the convention was again manifested in the closing days in the report of the committee dealing with the apportionment of members of the House and Semite of the legislature. The [Apportionment] committee's report was cleverly drawn for the partisan advantage of the Republicans . . . .").

if a suitable constitution was approved by the voters,[16] *see* Enabling Act for New Mexico, 36 Stat. 557 (June 20, 1910), and making it difficult for even Democrats to oppose ratification, *see* Cline, *supra* at 52 ("Several influential Democrats supported the Constitution as the best they could do under the circumstances and objected to another delay."). Additionally, the territorial legislature had also been gerrymandered in favor of Republicans, so public expectations were likely low. *See* Jack E. Holmes, *Politics in New Mexico* 182 (1967) ("The gerrymander of the territorial period was tempered somewhat by the constitution, but much of its effectiveness remained.").

New Mexico's original apportionment scheme was more than just a simple gerrymander of the garden variety known nationwide today. While it had some standard modern characteristics and even some progressive features, other aspects were decidedly neither modern nor progressive. The constitution did set the size of both the Senate (24) and the House (49), requiring an amendment to change either, *see* N.M. Const. art. IV, § 3 (in eff. 1912-1941), and both senators and representatives were to be elected from districts that, collectively in each chamber, covered the entire state, with no county being split between districts, and each

[16] President Taft did demand that the original 1910 constitution be changed to become more amendable, and the first amendment to the New Mexico Constitution — the 1911 "blue ballot" amendment softening somewhat the amendment process — actually came before (and was a precondition to) statehood. *See* Joint Resolution to Admit the Territories of N.M. & Ariz. as States, 37 Stat. 39 (Aug. 21, 1911); Cline, *supra* at 52.

county's total representation in each chamber being based very loosely on its population, *see id.* § art. IV, § 68. In a more progressive vein, both the drawing of the districts and their allocation of members could (but did not have to) be adjusted by mere legislation once a decade, said adjustments had to be made "upon the basis of population," and all districts had to be contiguous. *See id.* ("[A]fter each United States census[,] the legislature may reapportion the legislative districts of the state upon the basis of population; provided that each county included in each district shall be contiguous to some other county therein.").

However, in order to avoid county-splitting, larger counties were effectively multi-member districts in the House, while in both the House and the Senate the districts *overlapped* each other heavily as a way of increasing the member-electing power of the larger counties without expanding the size the size of the chamber past the § 3 limits. *See* P.M. Baldwin, *The 1940 Census and Legislative Reapportionment in New Mexico*, 11 N.M. Quarterly 37, 38 (1941) ("The distortion of representation in New Mexico is peculiar in that some of the election districts overlap each other. . . . [M]any counties form only part of a legislative district or, in the case of several of the more populous counties, form a part of two or three overlapping districts."). The following list is taken directly from the original § 68, with only those districts covering Bernalillo (a large county), Rio Arriba (a medium-sized county), or Colfax (a small county) included:

Senatorial Districts [24 total]

Fourth. The county of Rio Arriba, one senator.

Fifth. The counties of Bernalillo, San Juan and Sandoval, one senator.

Sixth. The counties of Rio Arriba and Sandoval, one senator.

Seventh. The county of Bernalillo, one senator.

Eighth. The county of Colfax, one senator.

Ninth. The counties of Union and Colfax, one senator, to be a resident of Union County, and to be elected by the qualified electors of Union and Colfax counites.

Representative Districts [30 total]

Third. The county of Bernalillo, three members.[17]

Fifth. The county of Rio Arriba, two members.

Eighth. The county of Colfax, two members.

Twenty-seventh. The counties of Rio Arriba and Sandoval, one member.

1910 Constitution art. IV, § 68. If it were not obvious that "the overlapping shoestring election district[is] a nonsensical device that almost invariably stacks representation in some places while leaving other sections without a local voice in government," Thomas C. Donnelly, *The Government of New Mexico* 98 (1953), Professor Donnelly provides the following example:

[17] These races were conducted in parliamentary-system-style (at-large) unsegmented ballots (*i.e.*, there was no "Bernalillo County Seat 2"), so each of Bernalillo County's three Democratic candidates ran, in effect, against each other as well as against all the nominees of the Republican list, for voters at the general election could choose any combination of the six candidate." Holmes, *supra* at 233.

> Guadalupe County provides a good example of the way the overlapping shoestring district can stack representation which isn't justified by population. Guadalupe has a population of 6,752. On the basis of one representative to every 12,234 persons [*i.e.*, the total population of the state divided by the total number of House members at the time], it should be consolidated with another county of about equal size to form a single legislative district represented by one lawmaker. Instead, it was allotted one representative of its own. Then it was tied into two shoestring districts besides. One includes Santa, Los Alamos, and Torrance counties. The other takes in San Miguel County. While neither shoestring district representative lives in Guadalupe County, either or both might have. Hence, it is possible — under present districting — for as many as three representatives to come from this one small county.

Id. at 99 (noting also that "shoestring district[s] also ha[ve] the disadvantage of combining vast sections that frequently have little in common," doubtless a result of the calculated consolidation described by Delegate Tittman, *supra* at 179). The result was that, in the very first state election, Democrats won the gubernatorial race and a congressional race, while the Republicans won a two-thirds majority in both houses of the Legislature. *See, e.g.*, N.M. Legislature, *Political Composition Since Statehood*, https://www.nmlegis.gov/Publications/Handbook/political_control_23.pdf (last visited Feb. 5, 2023); I Charles F. Coan, *A History of New Mexico* 501 (1925).

This system was left completely untouched — not just 'not constitutionally amended,' or 'left structurally intact,' but literally, the districts and numbers of members given to each were left the exact same — for almost 40 years. *See* F. Chris

Garcia et al., *Governing New Mexico* 86 (4th ed. 2006) ("[The] constitution [] permitted but did not require that both chambers be apportions on the basis of population after every federal decennial census. However, the legislature declined to engage in this task after the 1920, 1930, and 1940 censuses . . . ."). Even when the parties' ideological identities began to change and "[t]he influx of voters from Texas, Oklahoma, and other southern States" combined to allow "the Democrats [to] finally secure[] control of the State[,] they did not find it necessary to change the apportionment which their representatives in the convention had fought so hard" — because they now enjoyed the benefits of the same gerrymandering that had benefitted Republicans at the time of the state's founding. Tittman, *supra* at 180; *see also* Mabry, *supra* at 174 ("[T]he complaint in respect to the Gerrymander has largely subsided since the democrats, many years ago, obtained control of both the senate and the house, and, likewise, came to elect most of the district judges."). While this reversal of fortunes may approximate a sense of rough justice as between the two political parties, it is highly unfortunate for the citizens who had to live most of their lives under a government that went out of its way to waste their votes.

"From statehood until 1949 there had been no substantial change in election districts," resulting in considerable malapportionment. Donnelly, *The Government of New Mexico*, *supra* at 96-97. In the leadup to the 1950 census, rather than prepare to conduct a redistricting and reapportionment under § 68, the Legislature proposed

a constitutional amendment that not only effectuated a one-time reapportionment in the wrong direction — giving each county (except Los Alamos) one and only one senator and increasing the size of the House by six seats while making it more malapportioned — but "abolished the legislature's power to reapportion after each census" going forward, eliminating Article IV, § 68 entirely (and moving all the relevant action to Article IV, § 3, where it remains today). *Id.* The constitutional-amendment process thus became the only route to reapportionment.

A 1955 constitutional amendment again expanded the House, this time to 66 members, but made it less representative in the process by guaranteeing each county at least one unshared representative — this time swapping out the parliamentary-style election, *see* note 17, *supra*, with a system of at-large nominations followed by separate numbered-position elections, *see* Larson, *supra* at 234-35; N.M. Const. art. IV, § 3(b) & (f) (in eff. 1955-1976) ("The senate shall consist of one senator from each county of the state. . . . Once following publication of the official report of each federal decennial census hereafter conducted, the legislature may by statute reapportion among the various counties the number of members of the house of representatives to be elected from each county, provided that each county shall be entitled to elect at least one member of the house of representatives, and that no member of the house of representatives shall represent or be elected by the voters of more than one county.").

"By 1960, 14 percent of the state's population could elect a Senate majority and 27 percent of the state could elect a majority in the House. Bernalillo County had one representative in the House for every 29,133 resident citizens while Harding County had one representative for its 1,874 residents," making New Mexico's upper and lower chambers the fourth and eighth most malapportioned of their kind in the nation, respectively. Garcia, *supra* at 86. The 1960s, of course, was the decade of *Baker v. Carr*, 369 U.S. 186 (1962), and *Reynolds v. Sims*, 377 U.S. 533 (1964), and both legislative maps were struck down, with the House being apportioned by a state district court in 1965 and then the Legislature in 1967, and the Senate being apportioned by a three-judge federal district court. *See Beauchamp v. Campbell*, No. 5778 (D.N.M. 1966); Holmes, *supra* at 234.

A final 1976 constitutional amendment put Article IV, § 3 in the form it is in today, again allowing but not requiring decennial reapportionment by legislative act, while requiring a Senate "composed of not more than forty-two members" and a House of "no more than seventy." N.M. Const. art. IV, § 3 (in eff. 1976-present). From this point on, the Legislature began codifying its redistricting plans in Articles 7*x* (for the House) and 8*x* (for the Senate) of Chapter 2 of the statutes, where *x* is a sequential letter with a new plan, always accompanied by the repeal of the previous letter. These codified plans each contain prefatory findings of fact (including recitations of whether a previous plan was struck down as unconstitutional), and,

since at least 'B' plan (Article 7B and 8B) in 1982, have included an express commitment to be, "insofar as is practicable and possible [] compact and . . . contiguous." NMSA 1978, § 2-7B-3 (in eff. 1982), *available at* https://nmonesource.com/nmos/nmsa-historical/en/item/4270/index.do#!b/2-7B-3 (last visited Feb. 6, 2023).

Lawsuits "filed throughout the 1960s, 1970s, and 1980s . . . [resulted, t]ime and again[in] the courts [finding] in favor of the litigants, sometimes sending plans back to the legislative drawing board, and sometimes choosing to draw lines with a judicial pen." Garcia, *supra* at 86-87. The 1980s redistricting maps were struck down first for the use of a "votes cast" formula for determining equality of population (rather than actual population), *see Sanchez v. King*, 550 F. Supp. 13 (D.N.M.), *aff'd* 459 U.S. 801 (1982), and then later for discrimination against language minorities under the Voting Rights Act, *see Sanchez v. Anaya*, No. 82-0067 (D.N.M. Dec. 17, 1984), earning the state a 10-year preclearance order requiring U.S. Department of Justice approval of all new maps. In the 1990s, after redrawing a six-seat portion of the Senate map at the DOJ's request, a federal three-judge panel lifted the preclearance order. *See* Garcia, *supra* at 87.

In the 2000s and 2010s, of course, Republican Governors Gary Johnson and Susana Martinez prevented the passage of redistricting bills, producing so-called impasse litigation and leading to judicially drawn maps. This produced this Court's

now very familiar decision in *Maestas v. Hall*, 2012-NMSC-006, 274 P.3d 66, in which then-Justice Ed Chavez laid out the standards applicable to (at the very least) court-drawn districting maps in New Mexico. In the 2020 cycle, as the Court is again well aware, the Legislature passed the Redistricting Act, NMSA 1978, §§ 1-3A-1 to -10, creating an independent citizen redistricting committee, having that committee propose three nonbinding proposals for each required districting map to the Legislature, and, perhaps most importantly, codifying historical redistricting principles for the first time in statute, *see id.* § 1-3A-7. Right now, in the 2023 legislative session, bipartisan legislation is pending to propose an amendment to constitution to make the citizen redistricting commission's work final and binding, removing the Legislature from the process altogether. *See* H.J.R. 1 (2023), https://nmlegis.gov/Legislation/Legislation?Chamber=H&LegType=JR&LegNo=1&year=23 (last visited Feb. 6, 2023). The resolution cleared the House Committee on Government, Elections, and Indian Affairs on January 30 by a vote of 5-to-2, with Committee members in the majority party in particular expressing serious misgivings about the basic propriety of Legislature's continued role in the process of the districting its own seats. Video of House Gov't, Elecs. & Indian Affairs Cmte. Mtg. at 9:32:08-11:00:48 (Jan. 30, 2023), https://sg001-harmony.sliq.net/00293/Harmony/en/PowerBrowser/PowerBrowserV2/20230130/-1/70670 (last visited Feb. 6, 2023).

This history can be summed up neatly, if a little uncharitably: the Legislature has *never* been successful as an autonomous redistricting entity, and it frankly has shown remarkably little interest in even trying. The history is one of long stretches of inaction, punctuated by occasional bursts of unapologetic partisanship, apparently indifferent to the representational rights of the people, and underlaid with ongoing efforts to push the task to someone else, be it the voters, the courts, or an independent commission. In light of the Legislature's track record on redistricting, the recent impasse litigation appears fairer, more constitutional, and more publicly accepted than the other mechanisms for apportionment in New Mexico's history.

4. Local Government Redistricting Provisions

New Mexico is rare in that it contains a constitutional provision bearing specifically on local-government redistricting, namely the provision that "[c]ounties, school districts and municipalities may be divided by their governing bodies into districts composed of populations as nearly equal as practicable for the purpose of electing the members of the respective governing bodies." N.M. Const. art. V, § 13; *see* 3 G. Alan Tarr & Robert F. Williams, *State Constitutions for the Twenty-First Century*, 162 (2006) ("[O]nly a handful [of states have] constitutionaliz[ed] requirements for state boards of education, statewide service authority boards, county legislatures, and local charter commissions. Decisions about [when and how to] apportion[] local jurisdictions are often left to the relevant localities, at least when

they possess home rule authority."); *id.* at 164 ("The constitutions of a few states, such as Florida, New Mexico, Tennessee, and Texas, specifically delegate the authority to conduct local apportionment to the relevant local legislature."); *id.* at 166 ("Even fewer state constitutions establish requirements for local government districts. The constitutions of Florida, New Mexico, and Virginia contain an equipopulation requirement for local government districting, and all three require local legislative districts to be contiguous. New Mexico and Virginia also require such districts to be compact.").

The original constitution did not provide for division of local governments at all, with Article V, § 13 merely providing that county/district officials were required to reside in their counties/districts. *Annotated Constitution & Enabling Act of the State of New Mexico* art. V, § 13, at 38, Compiler & Publisher Arthur G. Whittier (1911). The section was amended in 1960 to add the provision that "[t]he legislature is authorized to enact laws permitted division of counties of this state into county commission districts," N.M. Const. art. V, ¶ 13 (in eff. 1960-1985), and, effective 1961 (although the law was actually passed in 1959, indicating anticipation of the amendment), the Legislature by statute provided that "[e]ach county may be divided by the board of county commissioners into three [3] compact districts, as equal in proportion to population as possible." NMSA 1953, § 15-37-3. This represents the first reference to compactness (or any other districting factor aside from contiguity

and population) in the New Mexico Statutes, and also reflects a pre-*Baker*/*Reynolds* commitment to the one-person-one-vote principle.

B. This Court's Broad Construction of the State Equal Protection Clause, Including in a Redistricting Case

Equal-protection rights in New Mexico, while circumscribed somewhat before statehood, grew impressively even at the constitutional convention itself, making it one of the great legacies of our statehood — particularly as it relates to electoral participation. For example, while women were not allowed to vote for the delegates to the convention, despite having the franchise in neighboring states (including Colorado, Utah, Wyoming, and Idaho), by the end of the convention, the constitution granted women were given the right to not only vote, but run for office, in school-board elections. Cline, *supra* at 30 & 47. The 1910 constitution has been uniformly heralded for its protection of the rights of Hispanic and, especially, Spanish-speaking citizens. *See*, *e.g.*, *State ex rel. League of Women Voters of N.M. v. Adv. Cmte. to the N.M. Comp. Cms'n*, 2017-NMSC-025, ¶ 28, 410 P.3d 734 ("The stringent provisions regarding equality for the Spanish-speaking citizen were intended to overcome the fears and apprehensions of the native population that they might be discriminated against by the Anglo majority." (citation and internal quotation marks omitted)). And over the years that followed, it became

> reasonable for [scholars] to conclude that the origin and purpose of the New Mexico Constitution vary greatly from the other forty-nine states'.

> The values held "near and dear" by New Mexicans have fostered a way of life and a political system dominated by a system of inclusive and racially, ethnically, and culturally diverse political representatives. . . . To a great extent the constitutional technology operating in New Mexico protects the "minority interests." One vivid illustration of this is the inclusion of members of the Navajo Nation, who have enjoyed full citizenship since 1948 when a New Mexico district court struck down a provision denying them complete enfranchisement. During the time that many other states, primarily in the South, prevented complete and free access to voting for minority interests via poll taxes and other measures (which became illegal with the passage of the first Voting Rights Act in 1965), New Mexico was actually extending the franchise.

George E. Connor & Christopher W. Hammons, *The Constitutionalism of American States*, 755 (2008). This legacy culminated in the passage of the Equal Rights Amendment in 1972.

In keeping with this tradition, "the Equal Protection Clause of the New Mexico Constitution affords 'rights and protections' independent of the United States Constitution." *Breen v. Carlsbad Mun. Schs.*, 2005-NMSC-028, ¶ 14, 138 N.M. 331, 120 P.3d 413. This Court's equal-protection jurisprudence is meaningfully broader than the federal analogue in several ways, but perhaps most notably in its: **(1)** maintenance of a strong 'fundamental-rights strand' (in contrast to the now-moribund federal doctrine), which contains an intermediate-scrutiny level for "important" but not fundamental rights, *see, e.g.*, *Breen*, 2005-NMSC-028, ¶¶ 14 & 17; and **(2)** application of a significantly (and explicitly) more demanding rational-basis review than the federal-court rubber stamp, *see Morris v.*

Brandenburg, 2016-NMSC-027, ¶ 57, 376 P.3d 836 ("[W]e [have] adopted a rational basis test different than the federal rational basis test. This test requires the challenger to demonstrate that the legislation is not supported by a firm legal rationale or evidence in the record."); *Trujillo v. City of Albuquerque*, 1998-NMSC-031, ¶ 32, 125 N.M. 721, 965 P.2d 305 ("We expressly overrule . . . [cases finding a] fourth tier of review[, "heightened rational basis,"] that has not been utilized in our own cases. However, the rational basis test that we articulate today subsumes that fourth tier and addresses the concerns that caused the Court of Appeals to adopt a fourth tier of review."); *see id.* ¶¶ 29-31 (discussing the rigor of the New Mexico version of ration-basis review).

The top-level division of equal-protection claims is between suspect-classification and fundamental-rights claims. Suspect-classification claims look to the personal characteristic being used as the basis for the government's disparate treatment, and if that characteristic is a "suspect classification" (like race) then strict scrutiny applies, while if it is merely a "sensitive classification" (like mental disability) then intermediate scrutiny applies, and if it is a non-sensitive classification (like being a high-income taxpayer and having a higher marginal tax rate, being a domestic batter and having to go to jail, and most other classifications, with the point of those two examples being that this analysis does not require making any kind of difficult behavior-status distinction, as the more voluntary, etc., the

classification, the more apt the discrimination is to be rationally supported), then the rational-basis test applies. With fundamental-rights claims, even the distinguishing characteristic of the two disparately treated people is a non-sensitive classification, if the disparate treatment itself involves the unequal provision of a fundamental right, strict scrutiny applies, whereas if it involves the unequal provision of an "important" but not fundamental right, intermediate scrutiny applies. *See*, *e.g.*, *Wagner v. AGW Consultants*, 2005-NMSC-016, ¶ 12 n.3, 137 N.M. 734, 114 P.3d 1050 ("We emphasize that th[e intermediate-scrutiny] standard requires *either* an important right *or* a sensitive class, contrary to what we may have suggested in dicta [elsewhere]." (emphases in original)).

Although partisan gerrymandering is a more obvious fit for the fundamental-rights strand, it should be noted that, if the class being discriminated against is defined in a more durably functional way — *e.g.*, "minority-party voters residing in areas that render them vulnerable to deliberate vote-wasting and community-of-interest-splitting by gerrymander," rather than "Republicans"[18] — the classification is not a bad fit for this Court's definition of a "sensitive" class:

> First, . . . the group need not be completely politically powerless, but must be limited in its political power or ability to advocate within the political system. Second, the level of protection needed from the

[18] And this is actually a more reasonable definition, given that defining the victim class here by their political party implies that the analysis would be different if the cracked class was Libertarians, Green Party members, or Democrats (which no one is suggesting is the case).

> majoritarian political process does not have to be as extraordinary as necessary for strict scrutiny because the level of scrutiny is less in intermediate scrutiny. To assist us in determining whether a group of people should be considered a sensitive class, we will look to the analysis used by the United States Supreme Court to afford sensitive class status to certain legislative classifications.

Breen, 2005-NMSC-028, ¶ 18. A member of a party with 40-plus percent voting performance in the state is not "completely politically powerless," even if she has no congressional representation among three seats, and even if she has been cut out from her community and thrown into a district with strangers for the express purpose of ensuring that she will be unable to band together with her neighbors and elect the candidate of her choice. But she is vulnerable, which is why virtually no one *likes* partisan gerrymandering, and why the U.S. Supreme Court, despite being unable to adjudicate the claims under Article III, has recognized that such actions violate the Equal Protection Clause.

On the fundaments-rights side, representational rights, including specifically "voting," have been held to be "fundamental" by this Court. *See Torres v. Village of Capitan*, 1978-NMSC-065, ¶ 23, 92 N.M. 64, 582 P.2d 1277 ("Voting rights have been declared by that court to be one of those 'fundamental interests' that must be subjected to the strictest standard."); *Marrujo v. N.M. State Hwy. Transp. Dep't*, 1994-NMSC-116, ¶ 10, 118 N.M. 753, 887 P.2d 747 ("Strict scrutiny applies when the violated interest is a fundamental personal right or civil liberty — such as first

amendment rights, freedom of association, voting, interstate travel, privacy, and fairness in the deprivation of life, liberty or property — which the Constitution explicitly or implicitly guarantees." (citation omitted)); *State of N.M. ex rel. League of Women Voters v. Herrera*, 2009-NMSC-003, ¶¶ 8-9, 145 N.M. 563, 203 P.3d 94 ("We begin by reiterating the longstanding and fundamental principle that the right to vote is of paramount importance. . . . [I]f a government fails to accurately identify and record a voter's choice, . . . [t]hat would be unacceptable under equal protection principles.").

Of course, just as any suspect classification can be redefined into a non-suspect one by pointing to members of the suspect classification not affected by the discrimination ('it's not discrimination by race; it's a dress code that just happens to overwhelmingly affect members of one race'), so too can any "fundamental right" be redefined into an unimportant one by recasting the government's justification for the restriction or its efforts to tailor the incursion on the right as diminishments of the right being involved in the first place ('this isn't a restriction on voting or fair and equal electoral representation; it's about the nonexistent right to win elections'). Professor Tribe describes the voting right as one of "equal voting opportunity," which must be analyzed under equal protection and not due process, given that normally there is no right, in a vacuum, to be presented with electoral options at all

(*e.g.*, the state can convert an elected position into an appointed one at will). *See* Laurence H. Tribe, *American Constitutional Law* § 16-10, at 1460 (2d ed. 1988).

This brings us to §§ 2, 3, and 4 of the New Mexico Bill of Rights, which have no federal analogue, no judicial gloss, and appear to all be what § 4 has already been held to be — provisions of exceptional importance which, while not supplying standalone enforceable rights, serve "as a prism though which we view due process and equal protection guarantees." *Morris*, 2016-NMSC-027, ¶ 46. The statement that "[a]ll political power is vested in and derived from the people: all government of right originates with the people, is founded upon their will and is instituted solely for their good," when viewed in tandem with our substantively broader-than-federal Equal Protection Clause, and this Court's ability to adjudicate claims unencumbered by the limitations of Article III, clearly counsel in favor of a broadly pro-democracy, anti-gerrymandering approach.

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This Brief Has No Exhibits

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of February 2023, I submitted the foregoing Supplemental Brief electronically via the Court's Odyssey filing system and selected the option for electronic service, which will, on the date that the clerk's office formally accepts the document for filing, cause a certified copy of the document to be served via email upon all counsel of record.

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By: */s/ Carter B. Harrison IV*
Carter B. Harrison IV