IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

REPUBLICAN PARTY OF NEW MEXICO, DAVID GALLEGOS, TIMOTHY JENNINGS, DINAH VARGAS, MANUEL GONZALES, JR., BOBBY KIMBRO, DEANN KIMBRO, and PEARL GARCIA, Plaintiffs-Appellants, v. MAGGIE TOULOUSE OLIVER in her official capacity as New Mexico Secretary of State, 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 JAVIER MARTINEZ in his official capacity as Speaker of the New Mexico House of Representatives, Defendants-Appellees.	No. S-1-SC-40146

DEMOCRATIC PARTY OF NEW MEXICO'S EXPEDITED MOTION FOR LEAVE TO PARTICIPATE AS *AMICUS CURIAE*

The Democratic Party of New Mexico ("DPNM") respectfully moves for leave to file an *amicus* brief in support of Defendants and conditionally file the brief with this Motion as Exhibit A under Rule 12-320(A) NMRA. DPNM is filing this motion on an expedited basis prior to the oral argument scheduled for November 20, 2023.[1]

INTEREST OF *AMICUS*

DPNM has a substantial interest in this high-profile dispute over New Mexico election law. When DPNM sought to intervene in district court, Plaintiffs did not dispute that DPNM's interest in this litigation is substantial enough for intervention—which imposes a far higher bar than that for *amicus* participation. *See, e.g.*, *Thriftway Mktg. Corp. v. State*, 1990-NMCA-115, ¶ 3, 111 N.M. 763, 810 P.2d 349, 351 (noting differences between bases for intervention and *amicus* participation). Nor did any party dispute below that New Mexico courts routinely include the state's political parties in major election litigation. *See State ex rel. Riddle v. Oliver*, 2021-NMSC-018, ¶ 2, 487 P.3d 815, 818 (granting

[1] Counsel for DPNM conferred with counsel for Plaintiffs and Defendants regarding their position on this motion as required by Rule 12-309(C) NMRA. Plaintiffs object, the Secretary of State does not object, and Legislative Defendants take no position.

intervention of Republican Party of New Mexico in election dispute and "request[ing] responses" from other major parties); *see also Crum v. Duran*, 2017-NMSC-013, ¶ 3, 390 P.3d 971 (ordering that "the Democratic Party of New Mexico (DPNM) and the Republican Party of New Mexico (RPNM), New Mexico's two major political parties, should be joined as party defendants" in challenge to primary election eligibility rules); *Johnson v. Vigil-Giron*, 2006-NMSC-051, 140 N.M. 667, 146 P.3d 312 (DPNM intervening as defendant in challenge to 2006 general election ballot).

DPNM has four distinct interests at stake in this litigation. First, a victory for Plaintiffs in this case would harm the electoral prospects of DPNM's candidates. *See Mecinas v. Hobbs*, 30 F.4th 890, 897-99 (9th Cir. 2022) (finding this interest sufficient for Article III standing). Second, a decision in Plaintiffs' favor would require DPNM to expend critical resources redesigning its electoral strategy for 2024 based on a newly-configured congressional map issued, at best, just months before the upcoming June 2024 primary. *See Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007), *aff'd*, 553 U.S. 181, 189 n.7 (2008) (finding Article III standing due to diversion of resources). Third, a

decision in Plaintiffs' favor would deprive DPNM of a congressional map which it has supported before and since its enactment in December 2021. *See WildEarth Guardians v. Nat'l Park Serv.*, 604 F.3d 1192, 1200 (10th Cir. 2010) (finding organization that had supported enacted policy and stood to lose from its elimination had interest sufficient for intervention as of right). Fourth, Plaintiffs' lawsuit threatens to dilute the voting power of DPNM's voters and constituents. *See Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 573-74 (6th Cir. 2004) (holding that risk of member disenfranchisement conferred Article III standing).

All of these interests support DPNM's participation as *amicus* in this case.

ARGUMENT

I. DPNM's Proposed *Amicus* Brief brings an unrepresented perspective and fills a gap in the existing expert reports.

DPNM's Proposed *Amicus* Brief would assist the Court by providing a perspective otherwise missing from this litigation. Plaintiffs include the Republican Party of New Mexico, DPNM's partisan opposition, and DPNM can provide a balancing point of view that the government defendants, by virtue of their status as state actors, cannot provide "while

acting in good faith." *La Union del Pueblo Entero v. Abbott*, 29 F.4th 299, 309 (5th Cir. 2022) (holding that government defendants could not represent interests of political party); *see also Utah Ass'n of Cntys. v. Clinton,* 255 F.3d 1246, 1250-51 (10th Cir. 2001) (recognizing that government defendants necessarily represent different interests than private parties). This Court's evaluation of the partisan fairness of New Mexico's congressional map can only benefit from hearing the perspective of *both* of New Mexico's major political parties.

In addition, in its decision in *Grisham*, decided just a few months ago, this Court held that partisan gerrymandering claims must be evaluated using the test articulated by Justice Kagan in her dissent in *Rucho v. Common Cause*, 139 S. Ct. 2484, 2509 (2019) (Kagan, J., dissenting)). DPNM's proposed amicus brief offers this Court the insights of a recognized partisan gerrymandering expert using statistical partisan fairness analyses not replicated in the existing record, which demonstrate that Plaintiffs cannot succeed under the applicable test. Dr. Christopher Warshaw is a Professor of Political Science at George Washington University who regularly participates in redistricting cases and publishes about partisan gerrymandering. As his proposed report

itself explains, "[t]his analysis speaks to the second prong of Justice Kagan's test in her dissenting opinion in *Rucho v. Common Cause*, which asks whether a plan leads to 'substantial' partisan vote dilution, as well as this Court's 'egregious effect' standard." Ex. A-1 at 3. In addition, both the brief and the report's treatment of competitiveness provide a "legitimate, non-partisan justification" for the enacted map under the third prong of Justice Kagan's test. *Rucho*, 139 S. Ct. at 2517 (Kagan, J. dissenting).

Dr. Warshaw's analysis of partisan fairness metrics is not duplicated in any of the existing expert reports. Plaintiffs' expert, Sean P. Trende, by his own admission "does not rely upon various 'partisan fairness' metrics." **[5 RP 1100]** Neither do the Legislative Defendants' experts. Dr. Jowei Chen relies primarily on simulated district maps, and although both the reports of Kimball Brace and Brian Sanderoff touch on the competitiveness of New Mexico's enacted map, neither utilizes partisan fairness metrics like those in Dr. Warshaw's report. Therefore, Dr. Warshaw's analysis—which addresses partisan fairness head-on as instructed by Justice Kagan's *Rucho* dissent—can only assist this Court

in adjudicating whether the enacted map constitutes an "egregious" partisan gerrymander.

II. DPNM's Proposed *Amicus* Brief will not prejudice the parties.

DPNM was not served with this Court's order accepting certification from the Court of Appeals but reached out to all counsel regarding its intent to seek *amicus* participation as soon as it learned of the court-ordered deadlines. Although DPNM was not able to provide 14 days' notice to the parties as required by Rule 12-320(D)(1) NMRA, the parties are not prejudiced by the late notice, particularly where the submission of the present motion and Proposed *Amicus* Brief is timely. *See* Rule 12-320(D)(2)(a) NMRA ("a prospective amicus curiae shall file its motion and brief within seven (7) days after the due date of the principal brief of the party whose position it supports"); Scheduling Order (Oct. 13, 2023) ("the answer brief shall be timely if filed on or before Sunday, November 12, 2023").

The parties have had notice as of July 2023 that DPNM sought to intervene in district court. **[3 RP 713-45]** And as of September 2023, the parties have had notice that DPNM sought to participate as an *amicus curiae* in district court. **[18 RP 4870]** The parties have also had ample

notice of the existence and contents of Dr. Warshaw's report. DPNM first disclosed Dr. Warshaw as an expert witness in its Proposed Witness List, filed on August 10. **[5 RP 1040]** DPNM then filed Dr. Warshaw's complete report alongside its Proposed Expert Disclosure on August 28. **[9 RP 2111]** And DPNM moved in the district court to submit a similar amicus brief, again attaching Dr. Warshaw's report. **[18 RP 4870, 4877, 4892]** All of these filings gave the parties an opportunity to respond to the report and DPNM's argument and analysis if they so chose.

DPNM does not seek to participate in oral argument. DPNM is filing this motion for leave prior to the deadline according to Rule 12-320(D)(2)(a) NMRA and this Court's scheduling order entered on October 13, 2023, and prior to oral argument in this case. DPNM, like the existing parties, has a strong interest in the expeditious resolution of this matter.

DPNM understands that under Rules 12-320(D)(3) and 12-318(F)(4) NMRA, documents may not be attached to a brief. DPNM hereby seeks leave to file the report of Dr. Warshaw as Exhibit A-1 to its conditionally filed *amicus* brief.

CONCLUSION

DPNM respectfully requests that the Court grant its motion for leave to participate as *amicus*, file on the record DPNM's attached *Amicus* Brief and attachment, and take these filings into consideration when deciding the merits.

Dated: November 17, 2023

Respectfully submitted,

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REPUBLICAN PARTY OF NEW MEXICO, et al.,

Plaintiffs–Appellants,

v. No. S-1-SC-40146

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

Defendants–Appellees,

Appeal from the Fifth Judicial District Court
Lea County
The Honorable Fred T. Van Soelen, Presiding

BRIEF OF (PROPOSED) *AMICUS CURIAE* THE DEMOCRATIC PARTY OF NEW MEXICO

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INTRODUCTION[1]

In December 2021, following a deliberative process that invited and incorporated comments and contributions from community leaders, members of the public, and elected officials—Democratic and Republican alike—the New Mexico Legislature enacted a new congressional map (the "Enacted Map") that readily satisfies the requirements of the New Mexico Constitution. *See* Senate Bill 1 ("SB 1"), 2021 N.M. Laws, 2d Spec. Sess., ch. 2, §§ 1-5. The Enacted Map is the product of a carefully considered legislative process, and it ensures that the voices of all New Mexicans will be heard in the state's congressional elections. In fact, the Enacted Map is actually *less* partisan and *more* competitive than the alternatives considered by the Legislature—including the State's prior congressional map as well as the maps submitted by the Citizen Redistricting Committee ("CRC").

Nevertheless, Plaintiffs challenged the Enacted Map as an impermissible partisan gerrymander under the New Mexico

[1] No counsel for a party authored any part of this *amicus* brief. Counsel for DPNM authored this *amicus* brief in whole. Neither counsel for any party nor a party to this litigation made a monetary contribution intended to fund the preparation or submission of the brief. *See* Rule 12-320(C) NMRA.

Constitution. Plaintiffs' claims fail in multiple respects. But for purposes of this appeal, it suffices that substantial evidence supports the district court's finding that the new congressional map is not egregiously gerrymandered to entrench any political party. That decision—based on two days of trial and a broad base of evidence including hundreds of pages of expert reports—should be upheld. *See generally* **23 RP 5968-81**.

DPNM files this amicus brief pursuant to Rule 12-320 NMRA. DPNM did not receive notice of the briefing schedule in this case until November 13. DPNM immediately notified the parties of its intent to file this brief upon learning of the schedule on November 13. Plaintiffs alone object to DPNM's filing this amicus brief; the Secretary of State does not object, and Legislative Defendants take no position.[2]

[2] Because DPNM did not receive notice of the briefing schedule until November 13, it was not able to provide notice of its intent to file this brief to all parties within the 14-day timeframe set forth in Rule 12-320(C)(1). There is, however, no prejudice to Plaintiffs. All parties have long been aware of DPNM's interest in this case, and are familiar with the content of the proposed amicus brief, based on DPNM's motion to intervene, which it filed in July 2023, **[3 RP 713-45]**, and similar motion for leave to participate as amicus in the district court proceedings, which it filed in September 2023. **[18 RP 4870-4917]**.

SUMMARY OF ARGUMENT

DPNM presents this *amicus* brief to emphasize the high bar to which the Plaintiffs must be held under this Court's precedent. That test allows a court to invalidate a legislatively-enacted map only if it reflects a partisan bias that is "egregious" in both intent *and* effect. *Grisham v. Van Soelen*, No. S-1-SC-39481, 2023 WL 6209573, ¶ 52 (N.M. Sept. 22, 2023). These are questions of degree, ultimately left to the factfinder.

Plaintiffs cannot meet this high bar. The Enacted Map is—as noted—less partisan and more competitive than the alternatives presented to the Legislature, including by the CRC. In fact, *none* of the multiple outside studies from academics and data journalists have concluded that the enacted map is uniformly biased in favor of one party on the metrics political scientists use to determine whether a map is an extreme or egregious gerrymander.

In addition to these independent outside sources, DPNM draws the Court's attention to the expert report of Dr. Christopher Warshaw (attached as Exhibit A-1), a professor of political science and partisan gerrymandering expert who analyzed the Enacted Map. Similar to the multitude of other studies and analyses that have come to the same

conclusion, Dr. Warshaw's report concludes that "a comprehensive analysis of the relevant metrics indicates that the enacted plan does not lead to substantial vote dilution or create an egregious partisan effect." Ex. A-1 at 21.

Dr. Warshaw's analysis confirms that the Enacted Map is not an unconstitutional partisan gerrymander. Indeed, if anything, Dr. Warshaw concludes that, using several recognized measures of partisan bias, the Enacted Map shows a slight bias in favor of *Republican* candidates, and is certainly not an egregious Democratic gerrymander. *Id.*

Finally, competitiveness is itself a permissible non-partisan interest in redistricting proceedings. So even if Plaintiffs' watered-down version of this Court's standard for partisan gerrymandering were the law, the competitiveness of the Enacted Map would preclude its invalidation.

Because Plaintiffs cannot establish that the Enacted Map "entrenched" any political party in power, their claims fail under this Court's appropriately demanding test. The Court should affirm the district court's decision.

ARGUMENT

I. Only "egregious" gerrymanders that "entrench" the party in power violate the New Mexico Constitution.

This Court has held that while "some degree of partisan gerrymandering is permissible, *egregious* partisan gerrymandering can effect vote dilution to a degree that [1] denies individuals their 'inalienable right to full and effective participation in the political process,' and [2] 'enables politicians to entrench themselves in office as against voters' preferences." *Grisham*, 2023 WL 6209573, ¶ 30 (quoting *Reynolds v. Sims*, 377 U.S. 533, 565 (1964), and *Rucho v. Common Cause*, 139 S. Ct. 2484, 2509 (2019) (Kagan, J., dissenting)). The test articulated by Justice Kagan in her dissent in *Rucho*, which this Court has adopted, requires that three factors be reviewed when considering the degree of a partisan gerrymander:

- First, the plaintiffs challenging a districting plan must prove that state officials' "predominant purpose" in drawing a district's lines was to "entrench [their party] in power" by diluting the votes of citizens favoring its rival.
- Second, the plaintiffs must establish that the lines drawn in fact have the "intended effect"—that is, entrenchment—by "substantially" diluting their votes.
- And third, if the plaintiffs make those showings, the State must come up with a legitimate, non-partisan justification to save its map.

Rucho, 139 S. Ct. at 2516 (Kagan, J., dissenting) (citations omitted).

The district court rested its conclusion in favor of the Enacted Map on the second prong—the "effect" of the alleged gerrymander.[3] As this Court explained, "the touchstone of an egregious partisan gerrymander under Article II, Section 18 is political entrenchment *through* intentional dilution of individuals' votes." *Grisham*, 2023 WL 6209573, ¶ 51 (emphasis added). That is, only those gerrymanders that have the effect of "entrenching" a party in power are "egregious" enough to warrant judicial invalidation. "Entrenchment" occurs only where "ensuing elections are effectively predetermined, essentially removing the remedy of the franchise from a class of individuals whose votes have been diluted." *Id.* ¶ 30.

This Court should reject Plaintiffs' attempt to water down this standard announced just months ago in *Grisham*. It is not enough, as Plaintiffs argue, for the district court to find that the effect of the challenged map was to "substantially dilute" Plaintiffs' votes. **[BIC 47-53]** Instead, "the touchstone of an egregious partisan gerrymander under

[3] For purposes of this appeal, DPNM, like the district court, focuses on the "entrenchment" requirement of the "effects" test.

Article II, Section 18 is *political entrenchment* through intentional dilution of individuals' votes." *Grisham*, 2023 WL 6209573, ¶ 51 (emphasis added). That is, to use Justice Kagan's language, "the plaintiffs must establish that the lines drawn *in fact have the intended effect*"—i.e., to "entrench" one party in power—"*by* substantially diluting their votes." *Id.* ¶ 50 (quoting *Rucho*, 139 S. Ct. at 2516 (Kagan, J., dissenting)) (emphasis added). The district court's finding of substantial vote dilution, standing alone, therefore does not satisfy the effects prong of the *Grisham* test. Plaintiffs needed to show that the challenged map "entrenched" the Democratic Party—meaning that "ensuing elections are effectively predetermined." *Id.* ¶ 30. They failed to do so because, as the district court found, the outcome of future elections in CD-2 is effectively a tossup. **[23 RP 5975, FOF 33; *id.* 5977, FOF 40]**

Plaintiffs complain that this standard sets the bar too high because, in their view, it is currently impossible to draw three districts in New Mexico that will produce "predetermined" outcomes. **[BIC 51-52]** But, even assuming that assertion is true, it is a function of New Mexico's current political geography rather than an indictment of this Court's appropriately demanding test. This Court explained in *Grisham* that the

test it announced "requir[es] plaintiffs to make difficult showings," so that "judges do not become omnipresent players in the political process." *Id.* ¶ 52 (quoting *Rucho,* 139 S. Ct. at 2509 (Kagan, J., dissenting)). Justice Kagan's *Rucho* dissent lends further color to what may constitute "egregious" partisan gerrymandering. The test's stated intent is to "set the bar high, so that courts could intervene in the worst partisan gerrymanders, but no others." *Rucho*, 139 S. Ct. at 2522 (Kagan, J. dissenting). Justice Kagan's choice of descriptors reinforces how high the bar really is—the test targets only "the *extreme* manipulation of district lines for partisan gain." *Id.* at 2520, 2523 (emphasis added); *see also id.* at 2516 ("Respect for state legislative processes—and restraint in the exercise of judicial authority—counsels intervention in only egregious cases."). The evidence here does not remotely rise to the level of extreme manipulation.

II. The district court correctly found that SB 1 does not have an egregious partisan effect.

As contemplated by this Court's demanding standard for partisan gerrymandering claims, distinctions of degree are significant; "entrenchment" only rises to the level of constitutional concern when "elections are effectively predetermined." *Grisham*, 2023 WL 6209573,

¶ 30. And as the district court correctly found, elections in CD-2 are not "predetermined" because either party can win elections in that district. **[23 RP 5975, FOF 33]**

A. The Enacted Map does not "entrench" the Democratic Party in power.

Before New Mexico enacted its current map in 2022's Senate Bill 1 ("SB 1"), New Mexico had two majority-Democratic congressional districts, and one competitive district. And after SB 1, New Mexico has two majority-Democratic districts and one competitive district. The district court thus correctly concluded that "Plaintiffs have not provided sufficient evidence that the Defendants were successful in their attempt to entrench their party in Congressional District 2." **[23 RP 5980, COL 8]**

SB 1 modified New Mexico's congressional plan so that all districts—and CD-2 in particular—would have more competitive elections. The district court correctly found that, as a result of SB 1, CD-2 had more competitive elections in 2022, and the record suggests it will continue to do so going forward. The district court rightly credited the testimony of Brian Sanderoff, New Mexico's foremost redistricting expert, **[23 RP 5977, FOF 40]** who concluded that post-SB 1 elections in

CD-2 are a "toss-up" that either party can win. *See* **8 RP 1864** ("By drawing CD 2 as a competitive, toss-up district that could be won by a candidate of either party, the Legislature did not entrench the Democratic party in power in CD 2."); **SRP 510-11**.[4] Because both parties have a realistic chance of winning CD-2 going forward, SB 1 makes New Mexico's elections *more* competitive, not less, and does not entrench the Democratic Party in power by "effectively predetermining" electoral outcomes.

Dr. Warshaw's analysis confirms that finding under various definitions of "competitive." Looking at election results since 2012, Dr. Warshaw calculated "the number of districts that each party would win at least once over the course of the decade" and found that one of three districts was likely to switch hands—just as in the 2012 plan. Ex. A-1 at 20. Dr. Warshaw also tallied the number of district elections since 2012 in which both parties received between 45% and 55% of the vote, and found that "about 49% of congressional elections would have been competitive on the enacted plan compared to 21% of the elections on the 2012 plan." *Id*. Using third-party probabilistic modeling, Dr. Warshaw

[4] "SRP" refers to the "Supplemental Record Proper," or trial transcript.

also calculated that both parties had a realistic chance of winning one district instead of zero under the Enacted Plan. Finally, averaging these results together, Dr. Warshaw concluded that the Enacted Map is likely to lead to more competitive elections overall—26% of all congressional elections, compared to 17% on the 2012 plan. *Id*. Dr. Warshaw also concluded that the Enacted Map "increases the number of competitive elections compared to two of the Citizen Redistricting Committee plans (Concepts A and E), [which the Plaintiffs' prefer,] and achieves roughly the same level of competitiveness as the third (Concept H)." *Id*. at 21.

Dr. Warshaw also found that the Enacted Map is highly responsive to changes in voter preferences. Partisan gerrymandering occurs when one party's politicians "entrench[ ] themselves in office" by "substantially diluting the votes of citizens favoring their rivals." *Rucho*, 139 S. Ct. at 2519 (Kagan, J., dissenting); *see also Whitford v. Gill*, 218 F. Supp. 3d 837, 887 n. 170 (W.D. Wis. 2016), *vacated, Gill v. Whitford*, 138 S. Ct. 1916 (2018) ("The intent we require, therefore, is not simply an 'intent to act for political purposes,' but an intent to make the political system systematically unresponsive to a particular segment of the voters based on their political preference." (citation omitted)). Dr. Warshaw's analysis

demonstrates exactly the opposite—"New Mexico's congressional map is *highly responsive* to changes in voter preferences." Ex. A-1 at 19 (emphasis added). Dr. Warshaw reached this conclusion based on his analysis of the "vote-seat curve," which illustrates how each party's allocation of seats changes based on modifications to the two-party vote share.[5] The vote-seat curve demonstrates that as either Democrats or Republicans increase their share of the statewide vote, that party would proportionally gain more seats. Under the Enacted Map, if Democrats win 52.5% of the statewide vote, they receive two congressional seats; if Republicans win 52.5% of the vote, they receive all three. Therefore, Dr. Warshaw concluded, "[t]he two parties' seat shares change as their vote shares change. This suggests that [the plan] is probably not an extreme gerrymander." *Id*.

In sum, the enacted map scores the same or better on aggregate measures of both partisan fairness and competitiveness than the alternatives considered by the legislature—namely New Mexico's prior congressional map as well as the Citizen Redistricting Committee's

[5] Dr. Warshaw's report used the 2020 election results, re-aggregated onto the Enacted Map, as his baseline for these calculations.

Concept A, E, and H maps. *See* Ex. A-1 at 11–13, 19–20. That the Legislature chose a *more competitive* map is itself evidence that its decision-making raises no constitutional concerns. *Cf. Rucho*, 139 S. Ct. at 2520 (asking whether the enacted plan is an "extreme outlier" as compared "to the other maps the State could have produced given its unique political geography and its chosen districting criteria," "[n]ot as to the maps a judge, with his own view of electoral fairness, could have dreamed up").

B. The Enacted Map does not have "egregious" partisan effects.

As *Grisham* made clear, only "egregious partisan gerrymandering" rise to the level of constitutional injury; "some degree of partisan gerrymandering is permissible." *Grisham*, 2023 WL 6209573, ¶ 30. The district court correctly concluded that any vote dilution in the Enacted map does not "rise[] to the level of an egregious gerrymander." **[23 RP 5979-80, COL 7]**. To determine whether the enacted map has an egregious partisan effect, Dr. Warshaw cited three established metrics of partisan fairness.

First, Dr. Warshaw analyzed the efficiency gap, defined as "the difference between the parties' respective wasted votes, divided by the

total number of votes cast in the election." Ex. A-1 at 5. A "wasted" vote in this context means a vote that does not translate to electoral victory—either a vote cast for a losing candidate or a surplus vote cast for a winning candidate. *See generally* Eric M. McGhee, "Measuring Partisan Bias in Single-Member District Electoral Systems," 39 Legis. Stud. Q. 55 (2014); Nicholas O. Stephanopoulos and Eric M. McGhee, "Partisan Gerrymandering and the Efficiency Gap," 82 U. Chi. L. Rev. 831 (2015). While Dr. Warshaw found that the enacted plan has a high efficiency gap score, he noted that the efficiency gap's use in New Mexico, which has only three congressional districts, is also "likely to be substantially less reliable than in states with larger numbers of districts." Ex. A-1 at 5.

Second, Dr. Warshaw calculated the "mean-median difference," which is "the difference between a party's vote share in the median district and its average vote share across all districts." *Id.* Mean-median analysis relies on the insight that "if [a] party wins more votes in the median district than in the average district, it has an advantage in its translation of votes to seats." *Id.* at 5–6; *see also* Jonathan S. Krasno et al., "Can Gerrymanders Be Detected? An Examination of Wisconsin's State Assembly," 47 Am. Pol. Rsch. 1162 (2018); Robin E. Best et al.,

"Considering the Prospects for Establishing a Packing Gerrymandering Standard," 17 Election L. J. 1 (2018); Samuel Wang, "Three Tests for Practical Evaluation of Partisan Gerrymandering," 68 Stan. L. Rev. 1263 (2016). As applied to the Enacted Map, Dr. Warshaw found "a mean-median difference close to zero (0.2 percentage points), which implies that the New Mexico congressional plan has no skew or asymmetry in how it treats Democrats and Republicans. In other words, it implies that the New Mexico plan is fair." Ex. A-1 at 6.

Third, Dr. Warshaw conducted an analysis of partisan symmetry, "which is based on the idea that basic fairness indicates that each party should receive the same share of seats for identical shares of votes." *Id.* at 6. *See also* Richard G. Niemi and John Deegan, "A Theory of Political Districting," 72 Am. Pol. Sci. Rev. 1304 (1978); Andrew Gelman and Gary King, "A Unified Method of Evaluating Electoral Systems and Redistricting Plans," 38 Am J. Pol. Sci. 514 (1994); Jonathan N. Katz et al., "Theoretical Foundations and Empirical Evaluations of Partisan Fairness in District-based Democracies," 114 Am. Pol. Sci. Rev. 164 (2020). Overall, "[t]he symmetry metric is typically a reliable indicator of gerrymandering in states such as New Mexico with competitive

statewide elections." Ex. A-1 at 7. This Court has previously held that "partisan symmetry may be one consideration" in judging the fairness of a redistricting plan. *Maestas v. Hall*, 2012-NMSC-006, ¶ 31, 274 P.3d 66, 76–77. Though partisan symmetry may not prove an unconstitutional gerrymander on its own, "it should be considered as 'a measure of partisan fairness in electoral systems.'" *Id.* (*quoting Perry*, 548 U.S. at 126 (Stevens, J., concurring in part and dissenting in part)). Dr. Warshaw found that, as applied here, "both parties typically win a majority of the seats when they win a majority of the votes. Overall, Democrats receive an average of 47% of the seats, while Republicans win 53%. This implies a pro-Republican bias of just 3% using the symmetry metric. This is a relatively small amount of partisan bias and implies that the plan is fair." Ex. A-1 at 7. If the plan is fair, it definitionally does not have an egregious partisan effect.

Taken together, this statistical evidence—some of which shows a partisan bias towards *Republicans*—does not demonstrate the egregious gerrymandering required under the *Grisham* test. Drawing a "robust conclusion" about the extreme or egregious effect of a redistricting plan based on partisan fairness, Dr. Warshaw indicated, typically requires all

three fairness metrics to "point in the same direction." *Id.* at 8. Conversely, "if the metrics disagree with one another… the totality of the evidence is less likely to indicate" a partisan gerrymander. *Id.* Dr. Warshaw found that New Mexico's Enacted Map is firmly in the latter camp, leading him to conclude that "the enacted plan does not have an extreme or egregious partisan effect." *Id.* at 1.

Comparing New Mexico's map to other states' congressional plans further undermines Plaintiffs' arguments. Individually, "the enacted plan has a large pro-Democratic bias compared to other plans around the country on the efficiency gap, but not on symmetry and the mean-median difference. In fact, the enacted plan looks more neutral than both the 2012 plan and most other plans around the country on these metrics." *Id.* at 13. Furthermore, when Dr. Warshaw averaged the partisan fairness metrics, he placed the enacted map "near the middle of the distribution of previous plans . . . in small states," *id.* at 12; found it "more neutral than the 2012 plan across the average of the four metrics," *id.*; and ranked it as less biased than *any* of the CRC's Concept maps, *id.* at 12.

Dr. Warshaw's conclusions echo studies of the plan conducted by third party academics and data journalists, which have reached mixed

conclusions about the partisan consequences of New Mexico's Enacted Map. "[S]ome of these studies find evidence, usually based on the efficiency gap, that the 2022 enacted plan is biased in favor of Democrats. But according to other metrics, these studies find little or no evidence of pro-Democratic bias. Some even find evidence of pro-Republican bias." Ex. A-1 at 16. *See, e.g.*, Christopher T. Kenny et al., "Widespread Partisan Gerrymandering Mostly Cancels Nationally, but Reduces Electoral Competition," 120 Proc. Nat'l Acad. Sci. (2023) (finding slight Democratic advantage); New Mexico Congressional Districts, ALARM (June 17, 2023), https://alarm-redist.org/fifty-states/NM_cd_2020/ (finding wide range of partisan impacts depending on choice of fairness metric); Marion Campisi et al., "Geography and Election Outcome Metric: An Introduction," 21 Election L. J. 200 (2022) (finding no measurable bias); "What Redistricting Looks Like in Every State: New Mexico," FiveThirtyEight (July 19, 2023, 3:50 PM), https://projects.fivethirtyeight.com/redistricting-2022-maps/new-mexico/ (finding pro-Democratic bias on some metrics and pro-Republican bias on others); Citizen Redistricting Comm., "CRC District Plans & Evaluations," 41 (Nov. 2, 2021), https://www.nmredistricting.org/wp-

content/uploads/2021/11/2021-11-2-CRC-Map-Evaluations-Report-Reissued-1.pdf (finding that Concept Map H, which formed the basis for the Enacted Map, produced more Democratic districts while its partisan symmetry favored Republicans). Even beyond the findings of any one of these studies, their sheer number and disparate conclusions show all that is needed to uphold the Enacted Map: there is no credible argument that the 2022 plan is an "egregious" gerrymander, or that it "entrenches" the Democratic Party in CD-2.

Simply put, the metrics indicate that the Enacted Map is not an extreme outlier but instead a middle-of-the-road plan, especially when compared to any of the alternatives seriously considered by the Legislature—including Plaintiffs' preferred plans—or enacted in other states. *Cf. Rucho*, 139 S. Ct. at 2521–22 (Kagan, J., dissenting) (finding North Carolina's map to be "[t]he absolute worst of 3,001 possible maps").

III. Competitiveness is a permissible non-partisan interest.

While the district court considered the competitiveness of the Enacted Map under the "effects" prong of the *Grisham* analysis, it also supports the Map's constitutionality under the third prong, which asks whether the Legislature had a legitimate non-partisan justification for

enacting the map it did. Justice Kagan's test requires that plaintiffs "essentially show[ ] that no other explanation (no geographic feature or non-partisan districting objective) could explain the districting plan's vote dilutive effects." *Rucho*, 139 S. Ct at 2523 (Kagan, J., dissenting).

Promoting competitive elections is a legitimate non-partisan interest. *See id*. at 2520 (recognizing "competitive districts" as a non-partisan state redistricting objective). As this Court explained during the last redistricting cycle, "[c]ompetitive districts are healthy in our representative government because competitive districts allow for the ability of voters to express changed political opinions and preferences." *Maestas*, 2012-NMSC-006, ¶ 41 (*citing Alexander v. Taylor*, 51 P.3d 1204, 1212 (Okla. 2002)). The Court's observation is in line with a number of pre-*Rucho* federal court decisions, which considered gerrymandering and competitiveness to be antithetical. *See, e.g.*, *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, 835 F. Supp. 2d 563, 579 (N.D. Ill. 2011) ("The Republicans' representational rights are not unfairly burdened where they remain competitive in a district."); *League of Women Voters of Mich. v. Benson,* 373 F. Supp. 3d 867, 930 (E.D. Mich. 2019) (identifying lack of competitiveness as the main issue in more than a

dozen gerrymandered state legislative districts, since placing a plaintiff "in a more competitive district" would "redress[ ] her harm") *vacated*, 140 S. Ct. 429, 205 L. Ed. 2d 250 (2019); *Ohio A. Philip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978, 1107 (S.D. Ohio 2019) ("The lack of competitive elections compared to what one would expect based on Ohio's natural political geography also indicates that Democratic voters have been packed and cracked") *vacated*, 140 S. Ct. 101, 205 L. Ed. 2d 1 (2019) *and* 140 S. Ct. 102, 205 L. Ed. 2d 1 (2019).

Therefore, even if Plaintiffs *had* met their burden under the first two prongs of the test, the map must be upheld because it furthers a permissible nonpartisan interest in electoral competition.

CONCLUSION

For all these reasons, the Court should affirm the district court's conclusion that the Enacted Map is not an unconstitutional partisan gerrymander.

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Respectfully submitted,

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