



**IN THE SUPREME COURT  
OF THE STATE OF NEW MEXICO**

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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,  
BRIAN EGOLF,  
in his official capacity as Speaker of the New Mexico  
House of Representatives,  
Petitioners-Defendants,

vs.

Case No. S-1-SC-39481

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.

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**ON PETITION FOR WRIT OF SUPERINTENDING CONTROL  
FROM THE FIFTH JUDICIAL DISTRICT COURT IN LEA COUNTY  
BEFORE JUDGE FRED VAN SOELEN**

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**PETITIONERS' BRIEF-IN-CHIEF**

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## STATEMENT OF COMPLIANCE

I hereby certify that the body of the Petitioners' Brief-in-Chief is twenty-one (21) pages long and consists of approximately 4,070 words and that Microsoft Word 2209 indicates that that the body of the Brief-in-Chief uses the proportionally spaced typeface of Century Schoolbook 14.

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## SUMMARY OF PROCEEDINGS

### I. NATURE OF THE CASE AND COURSE OF PROCEEDINGS.

After two decades of political stalemate, on December 17, 2021, New Mexico's legislative redistricting process successfully established new boundaries for elections. By way of Senate Bill 1 ("SB-1"), the political process reapportioned New Mexico's three congressional districts. This matter arises from Plaintiffs' January 21, 2022 lawsuit alleging that the Equal Protection Clause of the New Mexico Constitution prohibits the House of Representatives and the Senate from engaging in political redistricting, and from Plaintiffs' February 3, 2022 request that the district court preliminarily enjoin and set aside the policy choices of the Legislature in SB-1 and instead impose the Court's own political decision favoring political incumbencies on redistricting in the pending congressional election. Both the Legislative and Executive Defendants filed motions to dismiss. The district court denied both Plaintiffs' request for immediate political relief and the Defendants' request for dismissal. But, in doing so, it left for this Court to resolve whether New Mexico's Constitution recognizes a cause of action for political redistricting and what, if any, role New Mexico's courts should play in revising or setting aside legislative expressions of policy.

## II. SUMMARY OF RELEVANT FACTS

1. Following the 2000 Census, the political process of reapportioning New Mexico's three congressional districts failed when then-Governor Johnson vetoed Senate Bill 33.<sup>1</sup> The Judiciary was imposed upon to reapportion that political map in a neutral manner. *Jepsen*, Conclusions ¶ 10; *Maestas v. Hall*, 2012-NMSC-006 ¶ 9, 274 P.3d 66. Rather than make policy regarding the apportionment of congressional districts, the court adopted a "least change" approach to apportionment reflecting, as much as possible, "the last, clear expression of state policy on this issue enunciated in 1991 with the enactment of the [then] current districts." *Jepsen*, Findings ¶¶ 21-33 and 34.

2. New Mexico's political process fared no better after the 2010 Census when then-Governor Martinez vetoed House Bill 39 and New Mexico's congressional districts were thus rendered malapportioned *per*

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<sup>1</sup> Findings of Fact, *Jepsen v. Vigil-Giron*, ¶¶ 7-9, No. D-101-CV-02177 (1st Jud. Dis. Ct. Jan. 2, 2002), available at <https://www.nmlegis.gov/Redistricting2011/Documents/Pre-Trial%20Memo%20-%20Legislative%20Defendants%20-%20Omnibus%20-%20Exhibit%20C.pdf> (last visited Oct. 21, 2022); S.B. 33, 45th Leg., 1st Special Sess. (NM 2001), available at: <https://www.nmlegis.gov/Legislation/Legislation?Chamber=S&LegType=B&LegNo=33&year=01s> (last visited Nov. 3, 2022).



se.<sup>2</sup> Again, New Mexico's Judiciary was burdened with reapportioning political districts in a non-political forum. *Id.*

3. On December 17, 2021, and for the first time in thirty years, New Mexico's political process successfully established new boundaries for New Mexico's three congressional districts when the Governor signed Senate Bill 1 (SB-1) into law.<sup>3</sup> SB-1's boundaries for electing congressional representatives are clear expressions of State policy articulated by its Legislature and Governor through the political process.

4. SB-1 is the product of change in New Mexico. In the past ten years the State's population grew 2.8% to 2,117,522, but that growth was hardly uniform across the state. New Mexico's northwestern population declined by 3.1% and the north-central, central, and southwest experienced modest growth between 2.2%-3.3%.<sup>4</sup> In contrast, the

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<sup>2</sup> *Maestas*, 2012-NMSC-006, ¶ 2; H.B. 39, 50th Leg., 1st Special Sess. (N.M. 2011), available at <https://www.nmlegis.gov/Legislation/Legislation?Chamber=H&LegType=B&LegNo=39&year=11s> (last visited Nov. 3, 2022).

<sup>3</sup> S.B. 1, 55th Leg., 2d Special Sess. (N.M. 2021), available at <https://www.nmlegis.gov/Legislation/Legislation?chamber=S&legType=B&legNo=1&year=21s2> (last visited Nov. 3, 2022).

<sup>4</sup> Research & Polling, Inc., *New Mexico Regions Percent Population Change: 2010 to 2020*, August 12, 2021, [https://www.nmlegis.gov/Redistricting2021/Documents/NM\\_Regions\\_2020\\_Official\\_map\\_pct.pdf](https://www.nmlegis.gov/Redistricting2021/Documents/NM_Regions_2020_Official_map_pct.pdf) (last visited Nov. 3, 2022).

southeastern population grew significantly: Eddy County by 15.8% and Lea County by 15.0%.<sup>5</sup>

5. SB-1 also reflects the Legislature's experiment with alternative approaches to redistricting. For the first time, the Legislature received proposed redistricting plans created by a Citizens Redistricting Committee constrained by statutory requirements and prohibitions. NMSA 1978, § 1-3A-7 (2021). Those statutory requirements and prohibitions do not apply to the Legislature. *See*, NMSA 1978, § 1-3A-9 (2021).

6. The Legislature considered but did not adopt the Committee's proposed plans.<sup>6</sup> Unlike the Committee's constrained proposals or past

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<sup>5</sup> Research & Polling, Inc., *New Mexico Counties Percent Population Change: 2010 to 2020*, August 12, 2021, [https://www.nmlegis.gov/Redistricting2021/Documents/NM\\_Counties\\_2020\\_Official\\_map\\_pct.pdf](https://www.nmlegis.gov/Redistricting2021/Documents/NM_Counties_2020_Official_map_pct.pdf) (last visited Nov. 3, 2022).

<sup>6</sup> SB-1 incorporates much of the public input that was provided to the Committee through the testimony of hundreds of New Mexicans at public meetings throughout the state, and concept maps submitted by members of the public. *See, e.g., Meetings & Transparency*, N.M. REDISTRICTING COMM., <https://www.nmredistricting.org/meetings-transparency/> (recordings of public testimony on reapportioning congressional districts, including calls to increase Hispanic representation in CD 2 (last visited Nov. 3, 2022); to recognize communities of interest between Albuquerque's South Valley and the Mesilla Valley in the southern part of the state; and to honor the Native American consensus map, which sought to split both the Zuni Pueblo

court-drawn boundaries reflecting the least-change approach of a reluctant Judiciary thrust into the political process, SB-1 is the expression of different State policies more focused on fashioning representative and politically competitive congressional districts than protecting traditional incumbencies. By 2020, the judicially-imposed congressional apportionment in *Maestas* now strongly favored Republicans in Congressional District 2 (CD-2) while favoring Democrats in Congressional District 3 (CD-3), with disproportionate performance levels:<sup>7</sup>

District	Population	Democrats		Republicans	
		Voters	Performance	Voters	Performance
<b>1</b>	686,393	47.3%	53.9%	32.3%	46.1%
<b>2</b>	686,393	46.0%	46.6%	35.7%	53.4%
<b>3</b>	686,393	54.3%	57.5%	28.2%	42.5%
	<b>2,117,522</b>	<b>49.3%</b>	<b>53.0%</b>	<b>31.9%</b>	<b>47.0%</b>

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and the Mescalero Apache across two congressional districts) (last visited Nov. 3, 2022).

<sup>7</sup> Research & Polling, Inc., *NM Congress 2010 Census Redistricting*, at 15, Dec. 15, 2011), [https://www.nmlegis.gov/Sessions/11Redistricting/187963/CD\\_187963\\_2\\_Packet.pdf](https://www.nmlegis.gov/Sessions/11Redistricting/187963/CD_187963_2_Packet.pdf) (last visited Nov. 3, 2022).

In contrast, SB-1’s distribution of registered voters by party more closely reflects the State’s overall party registrations and creates more competitive races<sup>8</sup> in each district:<sup>9</sup>

District	Population	Democrats		Republicans	
		Voters	Performance	Voters	Performance
<b>1</b>	705,832	43.2%	53.5%	32.1%	46.5%
<b>2</b>	705,846	43.8%	53.0%	30.5%	47.0%
<b>3</b>	705,844	47.6%	56.0%	30.1%	44.0%
	<b>2,117,522</b>	<b>44.9%</b>	<b>54.2%</b>	<b>30.9%</b>	<b>45.8%</b>

7. SB-1’s map also reflects other non-partisan policy choices. For example, the city of Rio Rancho experienced significant growth over the last 20 years, such that it is now a major part of the Albuquerque Metropolitan area. In recognition of that change, SB-1 moves Rio Rancho

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<sup>8</sup> Various pre-election political polls reflect that level of competition. See, e.g., Ryan Best and Aaron Bycoffe, *What Redistricting Looks Like in Every State: New Mexico*, FIVETHIRTYEIGHT (Nov. 2, 2022), available at <https://projects.fivethirtyeight.com/redistricting-2022-maps/new-mexico/> (last visited Nov. 3, 2022); *2022 Election Forecast: New Mexico 2*, FIVETHIRTYEIGHT (Nov. 2, 2022), available at <https://projects.fivethirtyeight.com/2022-election-forecast/house/new-mexico/2/> (last visited Nov. 3, 2022); David Wasserman, *New Map and 2022 Ratings: New Mexico*, THE COOK POLITICAL REPORT (Dec. 21, 2021), <https://www.cookpolitical.com/analysis/house/redistricting/new-map-and-2022-ratings-new-mexico> (last visited Nov. 3, 2022).

<sup>9</sup> Research & Polling, Inc., *NM Congressional Districts CD 221711.1 SJC/SB-1*, (Dec. 10, 2021), [https://www.nmlegis.gov/Redistricting/2021/221711.1/CD\\_221711\\_summary\\_table.pdf](https://www.nmlegis.gov/Redistricting/2021/221711.1/CD_221711_summary_table.pdf) (last visited Nov. 3, 2022).

from CD-3 into CD-1 where it joins the majority of Albuquerque and the East Mountain communities.<sup>10</sup> As a result, CD-3 (which already contains communities as politically and demographically diverse as Santa Fe and Farmington, Taos and Aztec) had to pick up additional population in the southeastern area of the state, while honoring the Native American consensus plan on the west side of the state, which sought to split Zuni Pueblo between CD-2 and CD-3 to give Zuni a voice in two congressional districts. *Id.* at 2. In contrast to Plaintiffs' cramped view of communities of interest—which prioritizes a Republican voting bloc in the southeast part of the State over other communities and interests—SB-1 seeks to balance a variety of policy objectives and reflect the many changes New Mexico has undergone since 1991.

8. On January 21, 2022, dissatisfied with SB-1's expression of State policy reflected in the redrawn politically competitive congressional districts, Plaintiffs filed suit in Lea County asking New Mexico's courts

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<sup>10</sup> See *NM Congressional: 221711.1 SJC/SB 1* at 6-7 (Dec. 10, 2021), available at [https://www.nmlegis.gov/Redistricting2021/221711.1/CD\\_221711\\_atlas.pdf](https://www.nmlegis.gov/Redistricting2021/221711.1/CD_221711_atlas.pdf) (last visited Nov. 3, 2022).

invalidate SB-1 as unconstitutional and instead impose an already rejected redistricting map.<sup>11</sup>

9. Plaintiffs' challenge to SB-1 is notable in that it does not complain of recognized redistricting infirmities. SB-1 reflects the Legislature's policy decisions occasioned by population change while adhering to the constitutional requirements of one person, one vote, respecting the rights of minorities in compliance with the Voting Rights Act, and honoring the consensus of the sovereign indigenous nations located within New Mexico's boundaries.

10. At bottom, Plaintiff's challenge to SB-1 is an attack on the Legislature's decision to establish Congressional districts that address competitiveness and the expanding urban/rural divide across the State.

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<sup>11</sup> Plaintiff's Response to Petitioner-Defendant's Verified Petition for Writ of Superintending Control and Request for Stay, at 5 (Sept. 6, 2022) (last visited Nov. 3, 2022).

## ISSUES PRESENTED AND PRESERVATION

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

2. If alleged partisan gerrymandering claims are justiciable under New Mexico law, what standards should New Mexico courts apply in resolving those claims?

Both issues were preserved in the Legislative Defendants' February 22, 2022 Response to Motion for Preliminary Injunction, the Legislative Defendants' February 18, 2022 Motion to Dismiss, the Executive Defendants' February 18, 2022 Response to Plaintiffs' Motion for Preliminary Injunction, and the Executive Defendants' February 18, 2022 Motion to Dismiss.

## STANDARD OF REVIEW

Constitutional challenges to legislation are reviewed *de novo*. *Rodriguez v. Brand West Dairy*, 2016-NMSC-029, ¶ 10, 378 P.3d 13. In doing so, New Mexico's courts will not "question the wisdom, policy, or justness of legislation enacted by our Legislature," and presume the legislation constitutional. *Madrid v. St. Joseph Hosp.*, 1996-NMSC-064, ¶ 10, 122 N.M. 524. "A statute will not be declared unconstitutional unless the court is satisfied beyond all reasonable doubt that the

legislature went outside the constitution in enacting the challenged legislation.” *Benavides v. E. New Mexico Med. Ctr.*, 2014-NMSC-037, ¶ 43, 338 P.3d 1265 (internal quotation marks and citation omitted).

Equal protection claims are reviewed *de novo*. *State v. Ortiz*, 2021-NMSC-029, ¶ 27, 498 P.3d 264.

## ARGUMENT

### I. PLAINTIFF’S CLAIMS ARE NOT JUSTICIABLE.

In New Mexico, like all other states, politics and political considerations are inseparable from districting and apportionment. *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973). Within New Mexico’s constitutional system, each branch of government maintains its independent and distinct function. N.M. CONST. art. III, § 1; *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 21, 125 N.M. 343. While New Mexico’s Executive implements the law and its Judiciary construes it, its Legislature makes law. N.M. CONST. art. IV, § 1; *State ex rel. Taylor*, 1998-NMSC-015, ¶ 21. The Legislature is unique in that it, as the voice of the people, is also the branch of government primarily charged with making policy. *Id.* To the extent that policy-making falls to the Judiciary, courts do so only where the Legislature has not spoken. *Torres v. State*, 1995-NMSC-025, ¶ 10, 119 N.M. 609. Neither the executive nor the



Judiciary may infringe upon the Legislature's constitutional role in establishing public policy. *State ex rel. Taylor*, 1998-NMSC-015, ¶ 23.

Plaintiffs' lawsuit seeks to upend those well-established roles. Although novel in New Mexico, this claim has been considered and rejected by the Supreme Court of the United States in *Rucho v. Common Cause*, 139 S.Ct. 2484 (2019). The Equal Protection Clauses of the United States Constitution and the Constitution of the State of New Mexico are coextensive, see *Valdez v. Wal-Mart Stores, Inc.*, 1998-NMCA-030, ¶ 6, 124 N.M. 655, and the holding and rationale of *Rucho* inform this matter and strongly suggests the proper outcome. New Mexico law, like federal law, is silent as to any standard for evaluating political redistricting. There is no means for the Judiciary to supply a clear and discernable standard upon which New Mexico's courts could adjudge injury to those in disagreement with policy decisions underlying redistricting. For these reasons, and as more fully set out below, the Court should hold that the Equal Protection Clause of the New Mexico Constitution does not provide a remedy for a claim of alleged partisan gerrymandering.

A. ***RUCHO'S FEDERAL ANALYSIS IS SOUND AND APPLIES WITH PERSUASIVE FORCE TO PRECLUDE A STATE-BASED EQUAL PROTECTION CLAIM.***

The Supreme Court in *Rucho* reviewed its half-century struggle with defining the constitutional boundaries of political redistricting. While other States have incorporated standards of partisan fairness into their redistricting process through legislative enactment or constitutional referendum,<sup>12</sup> the *Rucho* Court found no such standards in

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<sup>12</sup> See *Rucho*, 139 S. Ct. at 2507-08, identifying the following states:

FLA. CONST. art. III, § 20(a) (“No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent.”);

MO. CONST. art. III, § 3 (“Districts shall be designed in a manner that achieves both partisan fairness and, secondarily, competitiveness. ‘Partisan fairness’ means that parties shall be able to translate their popular support into legislative representation with approximately equal efficiency.”);

Iowa Code §42.4(5) (2016) (“No district shall be drawn for the purpose of favoring a political party, incumbent legislator or member of Congress, or other person or group.”);

Del. Code Ann., Tit. xxix, § 804 (2017) (providing that in determining district boundaries for the state legislature, no district shall “be created so as to unduly favor any person or political party”);

See also OHIO CONST. art. XI, § 6(A) (“No general assembly district plan shall be drawn primarily to favor or disfavor a political party.”); OHIO CONST. art. XIX, § 1(C)(3)(a) (“The general assembly shall not pass a plan that unduly favors or disfavors a political party or its incumbents.”).

federal law. New Mexico law is equally silent. Whereas *Maestas* directs judicial map-drawing in the absence of legislatively adopted districts and the Redistricting Act controls the Committee, no such constraints in redistricting fall upon the Legislature. Hence, both federal courts and New Mexico courts—in considering an equal protection challenge under the guise of “partisan dilution”—face the same blank canvas devoid of constitutional or statutory guideposts.

*Rucho* recognizes that “[p]olitics and political considerations are inseparable from districting and apportionment.” *Gaffney*, 412 U.S. at 753; *see also Maestas*, 2012-NMSC-006, ¶ 27 (characterizing redistricting and apportionment as a “fundamentally political dispute”). Absent the concrete precision of the one-person, one-vote standard or the absolute bar on racial discrimination, the “central problem” for the Judiciary becomes one of degree: how to reliably differentiate between constitutional political gerrymandering and when a map’s partisan dominance is too far or too much. *Rucho*, 139 S. Ct. at 2497, 2499 (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 296 (2004), and *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 420 (2006)). Wading into the political thicket not only invites but “commit[s] federal and state courts

to unprecedented intervention in the American political process.” *Id.* at 2498 (quoting *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring)).

Second, *Rucho* addresses and dispenses with Plaintiffs’ implicit proportionality argument. Partisan vote dilution allegedly arises where challengers declare a map unconstitutional because it is more “difficult for one party to translate statewide support into seats in the legislature.” *Rucho*, 139 S.Ct. at 2499. But proportionality is a “norm that does not exist” in our electoral system, federal or state. *Id.* The U.S. Supreme Court dismissed this argument and its attendant unmanageable standards<sup>13</sup> directly. *Id.* at 2499-500. Adopting a proportionality standard also asks courts—rather than voters—to determine the amount of representation a particular political party deserves. No guidelines equip this Court to do so, nor do constitutional provisions grant such authority. Thus, *Rucho* aligns with New Mexico law and the New Mexico Judiciary’s wisdom in restraint. *Compare Rucho*, 139 S. Ct. at 2500 (“Any judicial decision on what is ‘fair’ in this context would be an ‘unmoored

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<sup>13</sup> See *Davis v. Bandemer*, 478 U.S. 109, 159 (1986) (opinion of O’Connor, J.) (“Our cases, however, clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be.”).

determination’ of the sort characteristic of a political question beyond the competence of the federal courts.”) (*quoting Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012)), *with Eturriaga v. Valdez*, 1989-NMSC-080, ¶ 17, 109 N.M. 205 (advising where conflict arises between legislative and judicial branches, “[i]t is not the province of this Court to invalidate substantive policy choices made by the legislature.”), *and Maestas*, 2012-NMSC-006, ¶ 27 (lamenting that the Judiciary “f[ound] itself embroiled in this political thicket” due to “the inability of [its] sister branches of government to find a way to work together”). This Court, like other state courts faced with this question in the absence of statutory or constitutional standards,<sup>14</sup> should adopt the reasoning and holding of *Rucho*.

**B. *EVEN ASSUMING A POLITICAL REDISTRICTING STANDARD EXISTS, PLAINTIFFS FAIL TO STATE A CLAIM UNDER THE NEW MEXICO EQUAL PROTECTION CLAUSE.***

Parties claiming a violation of their right to equal protection of the laws must “prove that they are similarly situated to another group but

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<sup>14</sup> *Rivera v. Schwab*, 315 Kan. 877, 901-02, 905, 512 P.3d 168, 184-86 (2022); *Johnson v. Wisconsin Elections Comm’n*, 2021 WI 87, ¶¶ 44-45, 399 Wis.2d 523, 651.

are treated dissimilarly...because of a legislative classification.” *Breen v. Carlsbad Mun. Schools*, 2005-NMSC-028, ¶ 8, 138 N.M. 331; *see also Rodriguez*, 2015-NMCA-097, ¶ 11. Plaintiffs, the Republican Party and Republican voters, allege to be treated dissimilarly under SB-1 in their “ability to affiliate with like-minded Republicans and to pursue Republican associational goals.”<sup>15</sup> Plaintiffs allege that this dissimilar treatment “unconstitutionally dilut[es] their votes” as Republicans.<sup>16</sup> Plaintiffs’ stated injury is wholly speculative, unsupported, and likely moot. Current polling in both CD-1 and CD-2 is much more competitive than predicted, demonstrating that Plaintiffs, as Republicans in CD-2, are just as able to affiliate and work together to pursue common partisan goals as Democrats in CD-2. CD-2 remains a “toss-up” district. *See State of Proceedings*, ¶ 6, *supra*. Thus, no legislative classification worked by SB-1 creates dissimilar treatment. Nor are Republicans in CD-2 a protected class or a historically vulnerable population. The right to vote and equal voting strength is guaranteed to the individual, not his or her

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<sup>15</sup> Plaintiffs’ Verified Complaint for Violation of New Mexico Constitution Article II, Section 18 ¶¶ 2-7, filed in D-506-CV-2022-00041 (Jan. 21, 2022).

<sup>16</sup> *Id.* ¶ 78.

party affiliation. *Gill v. Whitford*, 138 S. Ct. 1916, 1930-31 (2018). Therefore, Plaintiffs fail to allege discriminatory treatment, dissimilar treatment, a fundamental right, or protected class necessary for a *prima facie* equal protection claim.

Even if Plaintiffs made a *prima facie* case for an equal protection claim, such a claim would fail rational basis review. *Wagner v. AGW Consultants*, 2005-NMSC-016, ¶ 24, 137 N.M. 734 (providing modern articulation of rational basis test in which the challenging party must “demonstrate that the classification created by the legislation is not supported by a firm legal rationale of evidence in the record.”). Given that neither a suspect or sensitive class nor a fundamental or important right has been allegedly injured, rational basis review is the proper level of scrutiny. *Valdez*, 1998-NMCA-030, ¶ 13. Strict scrutiny only applies when legislation severely restricts the right to vote or the opportunity for equal participation by all voters. *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670 (1966) (applying strict scrutiny to review enacted poll taxes). Here, Plaintiffs contend that SB-1 interferes with their ability to “affiliate and associate,” but they are not prevented from participating in the political process or casting their individual vote. *Cf. Montano v. Los Alamos County*, 1996-NMCA-108, ¶¶ 8-9, 122 N.M. 454

(although plaintiffs' claim "concerns voting," finding strict scrutiny applies only when the right to vote is "subjected to severe restrictions"); *Lower Valley Water & Sanitation Dist. v. Public Serv. Co.*, 1981-NMSC-088, ¶ 23, 96 N.M. 532 (applying rational-basis review to alleged equal protection violation that was "a step removed from the actual voting process").

To succeed, rational basis review requires Plaintiffs prove that SB-1 lacks a reasonable relationship to a legitimate governmental purpose and the legislation is "clearly arbitrary and unreasonable." *Marrujo v. New Mexico State Highway Transp. Dept.*, 1994-NMSC-116, ¶ 12, 118 N.M. 753. The Court must uphold the redistricting map if any set of facts "reasonably sustain the classification" of SB-1's congressional districts. *Id.*

As to those facts: the Legislature is constitutionally bound to re-apportion districts of equal populations with minimal deviation. *See* N.M. CONST. art. IV, § 3(B)-(D); *see also* U.S. CONST. art. I, § 2. SB-1 creates three districts with 0.00% deviation. Thus, SB-1's district classifications bear a reasonable relationship to a legitimate governmental purpose. Additional facts include the Legislature and Executive's policy goal of creating more competitive and representative districts. SB-1 also



incorporates the Native American consensus plan and bolsters CD-2's Hispanic majority from 51.8% to 56.0% to maintain the district as an effective majority Hispanic district in accordance with *Maestas* and the Voting Rights Act. Therefore, even if Plaintiffs' claim were justiciable, their equal protection challenge fails. SB-1 serves a legitimate and fundamental governmental purpose.

## II. THE SEPARATION OF POWERS COUNSELS AGAINST THE JUDICIARY ENGAGING IN THE POLITICAL PROCESS.

The Court cannot rule that New Mexico's Equal Protection Clause prohibits political redistricting under the guise of "partisan gerrymandering" without doing violence to New Mexico's constitutional separation of powers.<sup>17</sup> The task of districting and apportionment is vested solely in the Legislature. N.M. CONST. art. IV, § 3(D); U.S. CONST. art. I, § 2.

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<sup>17</sup> *Eturriaga*, 1989-NMSC-080, ¶ 17 ("It is not the province of this Court to invalidate substantive policy choices made by the legislature."); *Cockrell v. Bd. of Regents of New Mexico State Univ.*, 2002-NMSC-009, ¶ 13, 132 N.M. 156 (stating that policy decisions of great magnitude that go to "New Mexico's most fundamental political processes," are "particularly unsuited for judicial resolution as a matter of state constitutional law," and rest within the "particular domain of the legislature, as the voice of the people").

Although the Judiciary is obligated to review legislation to assure that it is bounded by constitutional limits, the doctrine of separation of powers bars the Judiciary from finding violations of public policy where it is not expressed in the Constitution or in statute. *Hartford Ins. Co. v. Cline*, 2006-NMSC-033, ¶ 8, 140 N.M. 16. In redistricting, certain absolutes apply. Legislative redistricting must occur every ten years. U.S. CONST. art I, § 2, cl. 3. As an inherently political process, redistricting involves partisan considerations. The Judiciary reviews the Legislature's plan for violations of law: Does the plan violate the one-person, one-vote doctrine? *Maestas*, 2012-NMSC-006, ¶ 14. Does the plan infringe upon the rights of racial minorities? *Id.*, ¶ 15. Is the plan consistent with the Voting Rights Act? *Id.* In each act of review, the Judiciary measures the redistricting legislation against objective criteria.

But not in this case. Instead, Plaintiffs seek to entrench the Court in the non-justiciable mire of politics without a constitutional or statutory lifeline. Here, legitimate policy choices form the foundation for SB-1. Each district represents rural and urban populations. Each district brings different communities of interest together. Each district is more politically competitive than before. The Judiciary should not infringe

upon the Legislature by seconding-guessing the wisdom of these policy decisions. *U.S. Xpress, Inc. v. New Mexico Taxation & Revenue Dept.*, 2006-NMSC-017, ¶ 11, 139 N.M. 589. Nor are there standards against which to measure the Legislature’s public policy choices. *Citizens for Fair Rates & the Env't v. New Mexico Pub. Regulation Comm'n*, 2022-NMSC-010, ¶ 55, 503 P.3d 1138. Should this—or any—Court divine the “proper” mixing of rural and urban, dictate the nuances of competitive politics, or adjudge any other Legislative policy expressed by statute? No. Expressions of lawful public policy remains the domain of the Legislature, capturing the will and voice of the people.

### III. CONCLUSION

The Legislature and the Executive, being the two branches most accountable to the citizens of the State of New Mexico, adopted SB-1 to address thirty years of change within the State and to articulate a new set of State policies serving legitimate governmental purposes in creating more competitive, more representative districts. Plaintiffs invite the Court, an appointed and neutral arbiter, to insert itself into the political process of redistricting and to invalidate those policy choices. Because no justiciable standard exists to guide this Court through the requested precarious political analysis, the Court should hold that New Mexico’s

Equal Protection Clause does not provide a basis for a claim for political or partisan gerrymandering and issue a writ of superintending control directing the district court to dismiss Plaintiffs' action.

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## CERTIFICATE OF SERVICE

Pursuant to Rules 12-307(C) and 12-307.2(D)(2) NMRA, the foregoing Legislative Appellant's Brief-in-Chief was served on the following on November 3, 2022, by the method reflected:

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