IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

MICHELLE LUJAN GRISHAM,
in her official capacity as Governor of New Mexico,
HOWIE MORALES,
in his official capacity as New Mexico Lieutenant Governor and President of the New Mexico Senate,
MIMI STEWART,
in her official capacity as President *Pro Tempore* of the New Mexico Senate,
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.

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

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

New Mexico Cases

New Mexico Statutes & Rules

Other Cases

Other Authorities

STATEMENT OF COMPLIANCE

I hereby certify that the body of the Petitioners' Reply Brief is thirteen (13) pages long and consists of approximately 2,838 words and that Microsoft Word 2209 indicates that that the body of the Reply Brief uses the proportionally spaced typeface of Century Schoolbook 14.

INTRODUCTION

In filing an Answer Brief that is a near-verbatim restatement of their September 6, 2022 Response to the Petition, Plaintiffs ignore this Court's Order for supplemental briefing and fail to respond to the arguments presented in Petitioners' Brief in Chief.[1] Plaintiffs thus add nothing further to assist the Court in deciding the matter of great public importance and interest presented here—and effectively concede the arguments set forth by Petitioners by failing to address them.[2]

In this Reply, aside from highlighting how Plaintiffs have failed to challenge SB-1 on the merits or identify a standard for this Court to employ, Petitioners also urge the Court to consider the Kansas Supreme Court's well-reasoned approach in *Rivera v. Schwab*, 315 Kan. 877, 512 P.3d 168 (Kan. 2022), addressing near-identical arguments under a

[1] Not only do Plaintiffs fail to address the legitimate public policies and purposes served by SB-1, but they avoid any recognition of SB-1's competitiveness. Far from Plaintiffs' dire prediction of a "severe partisan swing" in CD-2, **[AB 4]**, the outcome of the recent election turned on just 1,350 votes—one of the five closest in the nation. New Mexico Secretary of State, *Election Results*, https://www.sos.state.nm.us/voting-and-elections/election-results/.

[2] *See Delta Automatic Sys., Inc. v. Bingham*, 1999-NMCA-029, ¶ 31, 126 N.M. 717 (holding that failure to address arguments "constitutes a concession on the matter"); *Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339 (court will not guess at what the party's arguments might be where unclear or absent).

strikingly similar legal landscape, and finding jurisdiction without a justiciable political question.

ARGUMENT

I. PLAINTIFFS DO NOTHING TO DEFEAT SB-1.

Petitioners' Brief in Chief demonstrates that New Mexico's Equal Protection Clause does not address political redistricting. **[BIC 12–15]** In the event a cognizable claim could arise, Plaintiffs' claim cannot survive review because SB-1 serves a legitimate and fundamental governmental purpose. **[BIC 16–19]** SB-1 complies with federal law and constitutional standards[3] while creating more politically competitive congressional districts.[4]

[3] *See* **[BIC 18-19]** (creating districts of exactly equal population based on the 2020 Census in light of uneven regional population growth; incorporating the Native American consensus plan in full; and increasing CD-2's Hispanic majority from 51.8% to 56.0% to maintain the district as an effective majority Hispanic district under the Voting Rights Act).

[4] 1,350 votes determined the CD-2 2022 election. More than 350,000 voting age citizens did not participate. 87 Fed. Reg. 18354 (Mar. 30, 2022); New Mexico Secretary of State, *Election Results*, https://www.sos.state.nm.us/voting-and-elections/election-results/. While statewide voter turnout in the 2022 Election fell to 52.31%, as compared to 68.67% in 2020 and 55.61% in 2018, CD-2 registration and turnout consistently lags: (continues)

Justice Ginsberg observed that gerrymandered districts "subordinate adherents of one political party and entrench a rival party in power." *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 791 (2015). In politically competitive districts, like those created by SB-1, outcomes are neither fixed nor preordained. As demonstrated by November's election, individual voters in Southeast New Mexico, Republican and Democratic alike, have the opportunity to elect a candidate of their choice.

II. PLAINTIFFS' ARGUMENT IS GROUNDED IN ERROR.

Plaintiffs' argument is unpersuasive on multiple levels. First, there is no federally recognized action for alleged partisan gerrymandering. Second, partisan registration or performance does not and never has been held to justify or require what Plaintiffs are contending, a species of proportionate representation. Last, the principles Plaintiffs rely on from *Maestas v. Hall*, 2012-NMSC-006, 274 P.3d 66, apply—as the *Maestas*

	2018		2020		2022	
	Registration	Turnout	Registration	Turnout	Registration	Turnout
CD-1	62.34%	57.27%	65.51%	69.49%	70.61%	56.22%
CD-2	**55.36%**	**51.57%**	**59.11%**	**63.50%**	**58.66%**	**46.48%**
CD-3	63.67%	55.11%	66.66%	67.47%	63.69%	51.26%

court directed—only to redistricting done by courts, not to the body elected by the people and charged by the New Mexico Constitution with conducting the political process of redistricting.

Plaintiffs' assertion of a "federally recognized injury for partisan gerrymandering" is undercut by *Rucho*'s opening summary that "[t]his Court has not previously struck down a redistricting plan as an unconstitutional partisan gerrymander." *Rucho v. Common Cause*, 139 S.Ct. 2484, 2491 (2019). And the U.S. Supreme Court long ago dispensed with the premise that partisanship and partisan asymmetry equates to individual injury.[5] Thus, Plaintiffs' claim of constitutional injury falls apart.

Failing that approach, Plaintiffs rely on population deviation precedent as the basis for their partisan gerrymandering claim. **[AB 10, 11 & 14]**. The analogy is inapposite, however. While partisan claims center on a particular party's performance, equal population challenges

[5] *Gaffney v. Cummings*, 412 U.S. 735, 752–53 (1973) (dismissing premise that "any political consideration" in reapportionment works injury because redistricting "inevitably has and is intended to have substantial political consequences"); *Gill v. Whitford*, 138 S.Ct. 1916, 1933 (2018) ("Partisan-asymmetry metrics…measure something else entirely: the effect that a gerrymander has on the fortunes of political parties.… But this Court is not responsible for vindicating generalized partisan preferences.").

have the individual's vote as the basis.[6] One Person-One Vote dilution standards, which are absolute in that any departure from equality results in constitutional injury, cannot serve as adequate guidelines for this Court to draw a discretionary line between permissive and prohibited partisan effects under New Mexico's Equal Protection Clause.[7]

Having failed to articulate constitutional injury or a basis for their claim in New Mexico's Equal Protection jurisprudence,[8] Plaintiffs erroneously ask this Court to enforce standards that simply do not apply to the Legislature's task of redistricting. **[AB 16–17]** Plaintiffs urge the

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[6] *Reynolds v. Sims*, 377 U.S. 533, 579 (1964) ("the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen").

[7] Compare actual vote dilution in *Reynolds*, 377 U.S. at 545 (addressing population-variance ratios of 41:1 and 16:1), *Ely v. Klahr*, 403 U.S. 108, 110 (1971) (Arizona plan with county population variance of 7:1 "shot through with invidious discrimination"), *Baker v. Carr*, 369 U.S. 186, 255-56 (1962) (Clark, J., concurring) (no rational basis for plan with 19:1 urban to rural vote dilution), and *Maestas*, 2012-NMSC-006, ¶¶ 5 & 25 (finding Equal Protection violation where total deviation range was 125.2%), *to* CD-2 election outcomes from 1968 to 2022 (of 8 elected Representatives serving CD-2, 4 Republican and 4 Democratic, last three elections decided by 1.8%, 13.5%, and 0.6%), New Mexico Secretary of State, *Election Results*, https://www.sos.state.nm.us/voting-and-elections/election-results/.; *see also Rucho*, 139 S.Ct. at 2497 (citing string of authority that legislature "may engage in constitutional political gerrymandering").

[8] *See* Part I, *supra*.

Court to apply the principles announced in *Maestas*. But *Maestas* involved judicial map-drawing where the political process had failed to yield duly enacted districts. Thus, the overarching directive in *Maestas* is that of judicial independence and scrupulous neutrality. *Id.* ¶ 28. Neither of those goals applies to the Legislature, which is an inherently and historically political body[9] charged with making policy.[10]

The *Maestas* opinion references the Court's February 10, 2012 Order (the "Order"), which "articulat[es] the legal principles that should govern redistricting litigation in New Mexico." *Maestas*, 2012-NMSC-006, ¶ 4. In that Order, the *Maestas* Court recognized that adhering to the state policies expressed in "reapportionment plans proposed by the state legislature…give[s] effect to the will of the majority of the people,"

[9] *See* Thomas C. Donnelly, *The Making of the New Mexico Constitution, Part II*, 12 N.M. Q. 435, 441 (1942) (describing how the conservative Republicans at the constitutional convention obtained a two-thirds majority and made no attempt at holding a non-partisan convention because "[t]o make it non-partisan means that we would have to give away some of our strength, and I do not believe any political party can succeed by surrendering its strength" (quoting T.B. Catron to Wm. H.H. Allison, June 28, 1910)), https://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=2108&context=nmq; *see id.* at 446 (quoting W.B. Walton from The Albuquerque Journal, Nov. 16, 1910 on partisan bias in initial districting during convention).

[10] *See Gaffney,* 412 U.S. at 752–53.

Order at 6–7, and found that "it is the duty of the court to accommodate legitimate state interests."[11] Further, whereas the "guidelines"[12] were to be "considered by a state court when called upon to draw a redistricting map," Order at 7, nothing in *Maestas* then or the Redistricting Act now binds the Legislature.[13] A set of permissive guidelines—subject to change at any time by the Legislature—cannot serve as the precise, politically

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[11] February 10, 2012 Order at 13; *see also Maestas*, 2012-NMSC-006, ¶ 33 ("Adhering to policies adopted by the Legislature gives effect to the will of the majority of the people."). Likewise, the *Maestas* Court also understood that courts lack a "principled way to choose between plans" where any choice has "unknown but intended political consequence." Order, 11 (*citing Wilson v. Eu*, 823 P.2d 545, 576–77 (Cal. 1992)); *accord Maestas*, 2012-NMSC-006, ¶ 28.

[12] Order at 7(a)–(e) (requiring district court to use low population deviation, comply with federal law, and consider traditional redistricting principles), *see also Maestas*, 2012-NMSC-006, ¶ 34 (directing judicially drawn maps to consist of contiguous precincts and be reasonably compact, while other factors considered "to the extent feasible"). *Compare id.* ¶ 34 *to Rivera*, 315 Kan. at 881–82, 512 P.3d at 173–74 (describing the Kansas Guidelines, which set forth the familiar "traditional redistricting criteria": district based on latest census data, districts with numerically equal population, avoid diluting minority voting strength, compact and contiguous districts, preserve political subdivisions, recognize communities of interest, and avoid contests between incumbents).

[13] A similar situation confronted the court in *Rivera*, 315 Kan. at 905–06, 512 P.3d at 186–87 (rejecting invitation by plaintiffs to look for standards of "fairness" in Kansas redistricting guidelines because guidelines were neither rule nor actual law and, as such, could not provide "binding authority that can give rise to a legal challenge that courts can adjudicate").

neutral, and judicially manageable standard necessary for the Court to adjudge constitutional injury for partisan effect. *Vieth v. Jubelirer*, 541 U.S. 267, 306–08 (2004) (Kennedy. J., concurring); *see id.* at 308–09 (cautioning that even facially neutral standards, like contiguity and compactness, "cannot promise political neutrality" in electoral outcomes); *Rivera*, 315 Kan. at 905–06, 512 P.3d at 186-87 (rejecting invitation by plaintiffs to look for standards of "fairness" in Kansas redistricting guidelines because guidelines were neither rule nor actual law and, as such, could not provide "binding authority that can give rise to a legal challenge that courts can adjudicate").

SB-1 incorporates legitimate State policies as the legislatively expressed will of the People which the judiciary should not infringe by second-guessing the wisdom of these policy decisions. *U.S. Xpress, Inc. v. N.M. Taxation & Revenue Dep't*, 2006-NMSC-017, ¶ 11, 139 N.M. 589 (stating that it is not the role of the judiciary to second guess the policy choices of the Legislature). Nor is it appropriate to analyze the Legislature's predominant intent or deliberative process in adopting SB-1.[14]

[14] *Compare* **[AB 16, 18]** (asking Court to determine "when illegitimate reasons for line drawing results in an unconstitutional political

III. THE KANSAS SUPREME COURT'S *RIVERA* DECISION PROVIDES A WELL-REASONED ROADMAP FOR RESOLVING THIS MATTER.

In *Rivera v. Schwab*, 315 Kan. 877, 512 P.3d 168 (Kan. 2022), the Kansas Supreme Court reviewed a partisan gerrymandering challenge to Kansas' congressional districts.[15] A group of Democratic plaintiffs alleged that the new congressional map discriminated against Democrats and violated Kansas' Equal Protection Clause, among other constitutional rights. Like New Mexico, Kansas has no statutory or constitutional provision prohibiting partisan consideration or effect in redistricting or mandating that the legislature adhere to any "traditional redistricting principles."[16] Nor was there any precedent in Kansas's Equal Protection jurisprudence for recognizing a partisan gerrymandering claim. While the *Rivera* Court made clear that it did not condone "excessive partisan

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gerrymander"), *to Vieth*, 541 U.S. at 282 & 306 (overruling the *Davis v. Bandemer*, 478 U.S. 109 (1986) standard of discriminatory intent and effect as judicially unmanageable after eighteen years of "puzzlement and consternation").

[15] The *Rivera* Court also reviewed and rejected a racial gerrymandering challenge to the congressional map.

[16] While the Kansas Legislature's bipartisan Redistricting Advisory Group adopted a set of "guidelines" that included traditional redistricting principles, the guidelines were never adopted by the Kansas House or Senate and were never made binding on the Legislature's redistricting process. *Rivera*, 315 Kan. at 881–82, 512 P.3d at 173–74.

gerrymandering," *id.* at 901,184 (quoting *Rucho*, 139 S.Ct. at 2507), the court concluded that there was no legal basis for defining or adopting a standard of "partisan fairness" for redistricting in Kansas. The court stated:

> Considering all of this, we conclude that until such a time as the Legislature or the people of Kansas choose to follow other states down the road of limiting partisanship in the legislative process of drawing district lines, neither the Kansas Constitution, state statutes, nor our existing body of caselaw supply judicially discoverable and manageable standards "for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral." *Rucho*, 139 S. Ct. at 2500. We hold that the question presented is nonjusticiable as a political question, at least until such a time as the Legislature or the people of Kansas choose to codify such a standard into law.

Id. at 906, 187. The same reasoning applies here. New Mexico, like Kansas, lacks a set of binding redistricting guidelines or criteria applicable to the Legislature's redistricting process that can be used to create an enforceable standard.[17] The Court should likewise acknowledge that because political considerations play an inherent role in redistricting, equal protection principles and general concepts of

[17] Respondents' reliance on the standards laid out in Section 1-3A-7 is misplaced, as those only apply to the Citizen Redistricting Committee—not the Legislature. To apply those standards to the Legislature's maps would violate bedrock principles of separation of powers. *See U.S. Xpress, Inc.*, 2006-NMSC-017, ¶ 11.

"fairness" fail to provide meaningful standards by which to evaluate political redistricting claims.

Lastly, it bears emphasizing that, intentional or not, judicially redrawing a legislatively-approved plan substitutes the Court's own political/policy preferences[18] for that of the democratically expressed will of the People.[19] Like Kansas, New Mexico's citizens—acting through their representatives and senators—may propose and ratify an amendment to the State Constitution or enact binding statutory standards requiring a "partisan neutral" model of redistricting.[20] However, until such a time

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[18] *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").

[19] *See Rivera*, 315 Kan. at 903, 512 P.3d at 186 ("Any decisions made about redistricting—even if made by a neutral, independent court—would inherently involve making an initial policy determination."); *see also Maestas*, 2012-NMSC-006, ¶ 32 (recognizing that "[t]he Legislature is the voice of the people" and it would be unacceptable for courts to muzzle that voice); *Baker*, 369 U.S. at 217 (announcing as one criteria for modern political question doctrine "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion").

[20] *See, e.g.*, *Rivera*, 315 Kan. at 903-05, 512 P.3d at 185-86 (contrasting state constitutional amendments and provisions addressing fairness from Ohio, Maryland, Michigan, Missouri, Iowa, New York, Colorado, and North Carolina against the absence of statutory, constitutional, and

as they do so, the Court is left without judicially discernible, manageable, and politically neutral standards which remove Plaintiffs' claim from the political question doctrine. *Rivera*, 315 Kan. at 906 (citing *Rucho*, 139 S.Ct. at 2500); *accord Johnson v. Wis. Elections Comm'n*, 2021 WI 87, ¶¶ 40-63, 399 Wis. 2d 623, 967 N.W.2d 469 (recognizing that whether a map is "fair" to the two major political parties is a political question that cannot be answered by the courts without an express grant of authority to do so by the people).

IV. CONCLUSION

Plaintiffs, as challengers of SB-1, have the burden of demonstrating injury and the requisite elements of an Equal Protection claim under Art. II, § 18 of the New Mexico Constitution. This they have failed to do. *See* Part I, *supra*. Additionally, in this matter of first impression following the U.S. Supreme Court's decision in *Rucho*, Plaintiffs also carry the burden of identifying a precise, workable, and judicially manageable standard under New Mexico law for evaluating

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case precedent standards in Kansas); *see also Rucho,* 139 S. Ct. at 2507-08 (relying on statutes and amendments adopted by Florida, Missouri, Iowa, and Delaware as proof that states, as laboratories of democracy, may choose to address partisan gerrymandering, but the Court could not).

political redistricting claims, rather than gesturing generically toward inapplicable judicial map-drawing considerations or non-binding guidelines. Plaintiffs have failed to meet this burden as well. *See* Part II, *supra*. The Court should hold that New Mexico's Equal Protection Clause does not provide a basis for a claim for political or partisan redistricting, and Plaintiffs' claim should be dismissed.

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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 Reply Brief was served on the following on December 5, 2022, by the method reflected:

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