

**STATE OF NEW MEXICO
COUNTY OF LEA
FIFTH JUDICIAL DISTRICT**

**REPUBLICAN PARTY OF NEW MEXICO, et al.,
Plaintiffs,**

vs.

Case No. D-506-CV-2022-00041

**MAGGIE TOLOUSE 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
BRIAN EGOLF,
in his official capacity as Speaker of the New Mexico
House of Representatives,
Defendants.**

**DEFENDANTS' JOINT PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

THIS MATTER came before the Court on Plaintiff's February 3, 2022 Motion for Preliminary Injunction for hearing on April 18, 2022. Having reviewed the briefing, arguments of counsel, and the evidence elicited at the hearing, the Court makes these Findings of Fact and Conclusions of Law.

I. FINDINGS OF FACT

1. Senate Bill 1, 2021 Leg., 2nd Spec. Sess., 55th leg (N.M. 2021) (“Senate Bill1”), was passed by the Legislature and signed into law by the Governor on December 17, 2021.

2. Senate Bill 1 established the Federal Congressional Districts in the State of New Mexico.

3. Plaintiffs filed their *Verified Complaint for Violation of New Mexico Constitution Article II, Section 18*, on January 21, 2022 (“Complaint”).

4. Plaintiffs filed their *Motion for Preliminary Injunction* on February 3, 2022 (“Motion”).

5. Plaintiffs served their *Complaint* and *Motion* on February 4, 2022, on the Executive Branch defendants.

6. On March 30, 2022, the Supreme Court of New Mexico issued an Order designating Hon. Fred T. Van Soelen to preside over this case “as all judges in the Fifth Judicial Court have recused themselves or are otherwise unavailable to preside over the case.”

7. The testimony and Declaration of Mandy Vigil, State Elections Director in the Office of the New Mexico Secretary of State (“SOS”), established the following:

a. Even a minor delay or alteration of the primary election calendar at this stage would cause serious disruptions for state and county election administrators, candidates and voters.

b. The Primary Election Day is scheduled for June 7, 2022.

c. Early voting in New Mexico begins on May 10, 2022.

d. Voting for the 2022 Primary Election actually begins no later than April 23, 2022, pursuant to federal and state law that require that ballots are mailed to Uniform Military and

Overseas Voters no later than 45 days before the primary election. If this deadline is not met the state is in violation of federal law.

e. Finalized ballots must be certified to the ballot printer 60 days before the primary and sent to the printer, which occurred on April 8, 2022.

f. A sufficient number of final ballots must be received by the county clerks no later than the last business day before the 45 days prior to the election, which is April 22, 2022. All other preprinted ballots must be received by the county clerk 40 days before the election, which is April 28, 2022.

g. Federal Congressional Candidate filing day occurred on February 1, 2022. Multiple candidates filed their declaration of intent and were qualified as candidates.

h. Federal candidates must obtain nominating petition signatures from qualified electors from the district they seek represent. All qualified candidates submitted nominating petition signatures of qualified electors from the current congressional districts based on Senate Bill 1.

i. Qualified voters from each congressional district were updated and their voter information was publicly available prior to candidate filing day to ensure the voters and candidates understood their voting district.

j. Candidate contests and the political parties' pre-primary conventions have passed and on March 8, candidates for federal congressional representative were set.

k. Once candidates are set, election administrators design and proof the ballots, program the ballots into the voting machines, and conduct logic and accuracy testing to ensure no errors. Once this is complete the ballot machines are locked.

l. The ballots have been finalized and the machines have been programmed and locked for the 2022 Primary Election.

m. March 8 is the statutory deadline that county clerks had to finish creating the congressional districts. This was the culmination of over three months of work by county clerks.

n. Changes requested by Plaintiffs are not feasible before voting begins for the 2022 Primary Elections. Plaintiffs' request to change the ballots based on alternate congressional districts is not feasible by April 23, 2022, as it would affect the larger counties in the state.

o. Ballot programming, ballot proofing, and ballot printing takes at least one and a half months to accomplish correctly and accurately.

p. Reprogramming districts, changing ballots, reassigning voters, and re-programming and proofing ballots creates significant costs in time, resources, and hardship. This timeline applies even if a county clerk is not adding or removing candidates from the ballot itself. This is the only way to ensure every voter moved from their programmed district receives the proper ballot based on their assigned precinct.

q. The 2022 Primary Election will cost New Mexico taxpayers \$7.8 million. Any delays or additional work will increase this amount significantly due to the amount of expedited work that is required.

r. State law mandates the SOS mail out a statewide notice to all voters regarding the 2022 Primary Election at an estimated cost of \$732,000. This mailing is based on voter precincts and districts established under Senate Bill 1 and would need to be adjusted if the districts change. This notice will start being mailed out on April 27, 2022.

8. Curry County Clerk Annie Hogland testified that of New Mexico's thirty-three (33) counties, each county has a different number of voting precincts and electoral staff and she would be "just guessing" as to procedures in counties outside of Curry County.

9. Clerk Hogland speculated that her office could turn around ballot changes caused by adopting a new redistricting map in "four to five days."

10. However, Clerk Hogland also testified that she was not aware of the effect that granting Plaintiffs' requested relief would have upon the Office of the New Mexico Secretary of State, but admitted that many election deadlines regarding candidates have already passed.

11. Further, State Election Director Mandy Vigil testified that while other counties would be significantly affected by the adoption of Plaintiffs' proposed Congressional Redistricting Map Concept "E", Curry County would not experience any changes.

12. Therefore, this Court finds that Curry County is not a representative sample by which to assess the harm or impact of granting Plaintiffs' requested injunctive relief.

II. CONCLUSIONS OF LAW

1. To obtain a preliminary injunction, a movant must show that (1) the plaintiff will suffer irreparable injury unless the injunction is granted, (2) the threatened injury outweighs any damage the injunction might cause the defendant, (3) issuance of the injunction will not be adverse to the public's interest, and (4) there is a substantial likelihood of success on the merits. *LaBalbo v. Hymes*, 1993-NMCA-010, ¶ 11, 115 N.M. 314. "The [second] and [third] factors 'merge' when, like here, the government is the opposing party." *Aposhian v. Barr*, 958 F.3d 969, 978 (10th Cir. 2020).

13. Where the movant also seeks a disfavored preliminary injunction—(1) injunctions that alter the status quo, (2) mandatory injunctions that compel, rather than prohibit, activity on the enjoined party’s part, or (3) injunctions that afford the movant all the relief that it could recover at the conclusion of a full trial on the merits—the movant must not only demonstrate that the four factors “weigh heavily and compelling” in movant’s favor but also must make a strong showing that the balance of harms tips in the movant’s favor and the preliminary injunction is not adverse to the public interest. *Lujan Grisham v. Romero*, 2021-NMSC-009, ¶ 20; *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1258-59 (10th Cir. 2005); *RoDa Drilling Co. v. Siegel*, 552 F.3d 1203, 1208 (10th Cir. 2009); *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004).

14. Plaintiffs’ Motion for Preliminary Injunction seeks disfavored injunctive relief. First, Plaintiffs request the Court alter the status quo by blocking SB-1. Second, Plaintiffs ask the Court to compel the Secretary of State to administer a reapportionment plan that was neither approved by the Governor nor adopted by the Legislature. Third, Plaintiffs’ requested injunction awards all the relief that Plaintiffs could recover under their Complaint.

15. Therefore, Plaintiffs must satisfy a heightened burden of proof for issuance of the requested injunction. *Grisham*, 2021-NMSC-009, ¶ 20.

16. 52 U.S.C.A § 20302(a)(8)(A) requires states to “transmit a validly requested absentee ballot to an absent uniformed services voter or overseas voter...not later than 45 days before the election.”

Plaintiffs' Alleged Injury Does not Demonstrate Irreparable Harm

17. Plaintiffs allege that they will suffer a constitutional injury via vote dilution if the election proceeds under SB-1. Where a movant seeks injunctive relief regarding constitutional injury, the evaluation of injury turns on the likelihood of success on the merits. Here, because Plaintiffs have not demonstrated a compelling likelihood of succeeding on the merits of their Equal Protection claim, injunctive relief is disfavored.

18. Plaintiffs only claim of irreparable harm flows from a purported equal protection violation in conducting an election using allegedly unconstitutional Federal Congressional districts. However, Plaintiffs have failed to demonstrate that they are likely to succeed on the merits of their equal protection claim and are therefore not entitled to a presumption of irreparable injury based on any purported constitutional injury. *See Schrier*, 427 F.3d at 1266. Accordingly, Plaintiffs fail to demonstrate any irreparable harm in the absence of a preliminary injunction.

The Balance of Harm to Plaintiffs Versus Damage Caused by Injunction

19. In awarding disfavored injunctions, this Court is first required to balance the alleged harm to the Plaintiffs if denied against the public interest and then find that the damages tip in Plaintiffs' favor.

20. In this case, Plaintiffs allege that they will suffer a constitutional injury if the election proceeds, but have not presented evidence of the alleged harm to be incurred.

21. Defendants presented evidence that it would be significantly difficult, if not impossible, to begin the election process anew at this late date. FOF 7a-7h. As noted in *Purcell*, 549 U.S. 1, late judicial intervention into the election process poses significant risks.

22. Where an impending election is imminent and a State's election machinery is already in progress, equitable considerations may justify denial of immediately effective relief

because a court hearing redistricting or apportionment challenges should consider the proximity, mechanics, and complexities of impending elections. *Reynolds v. Sims*, 377 U.S. 533, 585, 84 S.Ct. 1362, 1393–94 (1964).

23. Judicial intervention late in the electoral process risks practical concerns including disruption, confusion, or other unforeseen deleterious effects. *Purcell v. Gonzalez*, 549 U.S. 1, 4–5, 127 S. Ct. 5, 7 (2006).

24. “State and local election officials need substantial time to plan for elections. Running elections state-wide is extraordinarily complicated and difficult. Those elections require enormous advance preparations by state and local officials, and pose significant logistical challenges.” *Merrill v. Milligan*, 142 S. Ct. 879, 880 (U.S. Feb. 7, 2022).

25. The Purcell Principle heightens the showing necessary for a plaintiff to overcome the State’s extraordinarily strong interest in avoiding late, judicially imposed changes to its election laws and procedures. *Id.*

26. The U.S. Supreme Court directs federal courts to refrain from enjoining a state’s election laws in the period close to an election, permitting plans that may not “measure up” to certain legal and constitutional requirements to avoid chaos and confusion. *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022); *Upham v. Seamon*, 456 U.S. 37, 44, 102 S. Ct. 1518, 1522 (1982).

27. Where neither heroic efforts nor realistic or effective remedy can be accomplished, trial courts avoid enjoining state elections because the “equities and public interest weigh heavily against” such relief. *Kostick v. Nago*, 878 F. Supp. 2d 1124, 1128 (D. Haw. 2012).

28. Although Plaintiffs attempt to minimize the disruption to the election by suggesting that the Court may simply adopt a map proposed by the Citizens Redistricting Committee, they have not provided any authority that the Court may do so. Courts only adopt a redistricting map if

the legislative and executive branches of government cannot work together as outlined in the New Mexico Constitution. *See Maestas v. Hall*, 2012-NMSC-006, 274 P.3d 66 (discussing litigation following the Legislature’s failure to enact new maps over the Governor’s veto). Thus, the Court could not simply adopt a new map without giving the Legislature another opportunity to do so. *See Sanchez v. King*, 550 F. Supp. 13, 14-15 (D.N.M. 1982) (“Reapportionment is a legislative function, and the location and shape of districts is within the discretion of the State Legislature so long as the Constitution is complied with...Courts are not designed to perform the task of reapportionment and judicial relief becomes appropriate *only when a State Legislature fails to reapportion according to federal constitutional standards, after having had an adequate opportunity to do so.*” (emphasis added)).

29. Plaintiffs also attempt to minimize the disruption by suggesting that the Court adjust statutory election deadlines. However, Plaintiffs have also failed to establish that the statutory deadlines listed in the Election Code may be amended by the Court. Instead, the “statutory framework makes ‘clear that the Secretary of State must follow the Election Code, and does not have power to change its mandatory provisions.’” *State ex rel. Riddle v. Oliver*, 2021-NMSC-018, ¶ 40, 487 P.3d 815 (quoting *State ex rel. League of Women Voters v. Herrera*, 2009-NMSC-003, ¶ 12, 145 N.M. 563, 203 P.3d 94). Since the Election code sets forth in detail the procedures for primary elections, the Court’s equitable powers do not “allow [it] to disregard procedures set for by statute or to rearrange the Election Code. To do so would violate the separation of powers.” *Id.* at ¶ 40.

30. Here, Plaintiffs have not demonstrated that the alleged constitutional violations to Plaintiffs outweigh the public’s interest in an orderly election conducted pursuant to a duly enacted map.

Substantial Likelihood of Success on the Merits

31. Plaintiffs have not established that they are substantially likely to prevail on the merits. Plaintiffs' prayed for relief is grounded upon the novel theory that Article II, Section 18 of the New Mexico Constitution, the State Equal Protection Clause, prohibits partisan gerrymandering.

32. Plaintiffs have not presented authority interpreting the State's Equal Protection Clause in such a manner, nor have Plaintiffs presented authority imposing more exacting redistricting standards upon the New Mexico Legislature.

33. New Mexico's courts interpret the Equal Protection Clauses of the United States and New Mexico Constitutions as providing the same protections. *Valdez v. Wal-Mart Stores, Inc.*, 1998-NMCA-030, ¶ 6, 124 N.M. 655; *Mieras v. Dyncorp*, 1996-NMCA-095, ¶ 16, 122 N.M. 401.

34. In *Rucho v. Common Cause*, 139 S.Ct. 2484 (2019), the Supreme Court of the United States held that partisan gerrymandering claims were not actionable under the Equal Protection Clause of the United States Constitution. The Court recognized that it could not articulate a measure of "fairness" or "unfairness" so as to determine whether any particular political redistricting process implicated or violated the Equal Protection Clause. *See id.* at 2498-502. Other state supreme courts have similarly held that partisan gerrymandering claims are not actionable under their state constitutions. *See, e.g., Johnson v. Wis. Elections Comm'n*, 2021 WI 87, 399 Wis. 2d 623.

35. While *Rucho* left open the possibility that state courts may address such claims when their state constitution or statutes provided necessary standards to apply, *Rucho*, 139 S. Ct. at 2507, New Mexico does not have such constitutional provisions or statutes.

36. Although Plaintiffs argue the Court may look to NMSA 1978, Section 1-3A-9 of the Redistricting Act of 2021, for such guidance, that provision only applies to the Citizen Redistricting Committee. Moreover, the Redistricting Act does not require the Legislature to adopt any map proposed by the Committee. *See id.* Accordingly, the standards contained in Section 1-3A-9 cannot be applied to Legislatively drawn maps such as SB 1, as it would violate the Legislature’s intent. *See Jordan v. Allstate Ins. Co.*, 2010-NMSC-051, ¶ 15, 149 N.M. 162, 245 P.3d 1214 (“This Court’s primary goal when interpreting statutes is to further legislative intent.”).

37. Plaintiffs also contend that the Court may look to *Maestas*, 2012-NMSC-006, for guidance. However, the Supreme Court in that case emphasized that those standards “apply only to court-drawn maps.” *See id.* ¶ 46. The Supreme Court also cautioned that “[c]ourts ought not to enter this political thicket” of addressing partisanship in reapportionment. *Maestas*, 2012-NMSC-006, ¶ 27, (quoting *Colegrove v. Green*, 328 U.S. 549, 554 (1946)). While the Court was forced to do so in *Maestas* because the Legislature and Governor Martinez could not agree on maps, the Legislature and Governor Michelle Lujan Grisham have enacted a map with Federal Congressional districts that indisputably complies with the Voting Rights Act and core equal protection standards such as one person, one vote. Accordingly, there is no need for this Court to dive into the political thicket.

38. The out-of-state authorities Plaintiffs rely on to the contrary are unpersuasive. In *Adams v. DeWine*, 2022-Ohio-89, 2022 Ohio LEXIS 27 (Ohio 2022), the Ohio Supreme Court focused solely on a recently passed constitutional amendment guiding the redistricting process that explicitly provided that their general assembly “shall not pass a plan that unduly favors or disfavors a political party.” Oh. Const. Art. XIX, § 1(C)(3)(a). In contrast, New Mexico has no such constitutional provision. While the North Carolina Supreme Court recently held that partisan

gerrymandering claims were justiciable under, inter alia, its state equal protection clause, *see Harper v. Hall*, No. 413PA21, 2022 N.C. LEXIS 166 (Feb. 14, 2022), its constitution is sufficiently different from New Mexico's to warrant a different result. For example, North Carolina does not have a citizen referendum process and therefore "the only way that partisan gerrymandering can be addressed is through the courts[.]" *Id.* at *5. In contrast, the citizens of New Mexico have a robust citizen referendum measure. *See generally* N.M. Const. Art. IV, § 1. Moreover, the Court is weary of following North Carolina's lead when it has yet to "articulate a manageable standard" for the lower courts to "reliably differentiate unconstitutional from constitutional political gerrymandering." *Harper*, 2022 N.C. LEXIS 166, at *257 (Newby, J., dissenting) (quoting *Rucho*, 139 S. Ct. at 2499).

39. Thus, Plaintiffs have not met their burden of showing a substantial likelihood of success on the merits.

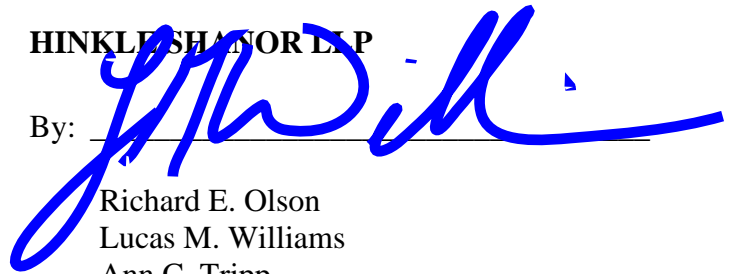
40. Under the factors set forth above, Plaintiffs have not met their burden to obtain a preliminary injunction to reapportion the Federal Congressional districts.

THEREFORE IT IS ORDERED, ADJUDGED, AND DECREED that Plaintiff's Motion for Preliminary Injunction is denied.

Respectfully Submitted,

HINKLE SHANOR LLP

By: _____

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CERTIFICATE OF SERVICE

Pursuant to Rule 1-005(E) NMRA, the foregoing Defendants' Joint Proposed Findings of Fact and Conclusions of Law was served on the following on April 18, 2022, by the method reflected:

Person Served

All counsel of record

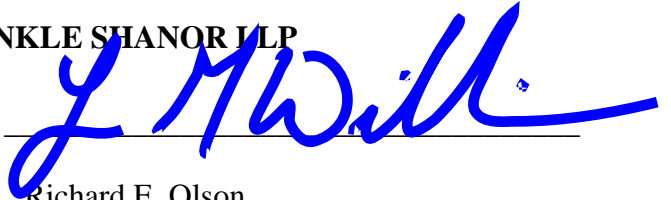
Method

Via E-File/E-Service and E-Mail

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