STATE OF NEW MEXICO
COUNTY OF LEA,
FIFTH JUDICIAL DISTRICT COURT

REPUBLICAN PARTY OF NEW MEXICO, DAVID GALLEGOS, TIMOTHY JENNINGS, DINAH VARGAS, MANUEL GONZALES, JR., BOBBY AND DEE ANN KIMBRO, and PEARL GARCIA,

Plaintiffs,

v. **No. D-506-CV-2022-00041**

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.

MOTION TO DISMISS EXECUTIVE DEFENDANTS[1]

Defendants Governor Michelle Lujan Grisham and Lieutenant Governor Howie Morales (collectively, "Executive Defendants"), by and through their counsel of record in this matter, hereby move to dismiss the instant action under Rule 1-012(C) NMRA.

INTRODUCTION

This lawsuit presents a challenge to New Mexico's Congressional district map drawn by the Legislature on the basis that legislators engaged in impermissible partisan gerrymandering.

[1] Although not required, *see* Rule 1-007.1(C) NMRA, Executive Defendants confirmed Plaintiffs oppose this motion.

Although the Governor signed the challenged map into law, it is undisputed that Executive Defendants had no role in drawing the allegedly unconstitutional boundaries, nor do they have any real role in conducting elections using the challenged map. Accordingly, Plaintiffs cannot show that the Executive Defendants caused their alleged injuries (i.e., the dilution of their voting power) or that a favorable ruling against Executive Defendants would do anything to redress those alleged injuries—two things necessary to establish standing. Further, the Executive Defendants are protected by absolute legislative immunity, as the only acts they took that relate to this controversy are presiding over the senate and signing legislation. The Court should, therefore, dismiss the Executive Defendants.

BACKGROUND

New Mexico, like all states, must regularly reapportion its Congressional districts to ensure compliance with the constitutional mandate of "equal representation for equal numbers of people." *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964). To aid in the redistricting process, the Legislature enacted the Redistricting Act of 2021, NMSA 1978, §§ 1-3A-1 to -10 (2021). That Act created the Citizen Redistricting Committee, which was required to adopt and deliver to the Legislature three district plans for New Mexico's congressional districts "no later than October 30, 2021, or as soon thereafter as practicable." Section 1-3A-5(A). Each plan was to be developed in accordance with an enumerated list of requirements and adopted following public input. Section 1-3A-7. However, the Committee's proposals are not binding on the Legislature, which chose to retain the ultimate authority to redistrict Congressional and state legislative districts. *See* § 1-3A-9.

Consistent with the Redistricting Act, the Committee submitted three proposed Congressional maps to the Legislature in early November 2021.[2] Shortly thereafter, the Governor called the Legislature into a special session to adopt new Congressional and legislative maps.[3] The Legislature introduced several bills proposing different Congressional district maps, including S.B. 1., 55th Leg., 2nd Spec. Sess. (N.M. 2021). SB 1 proposed three Congressional districts which combined both rural and urban voters in each district. SB 1's sponsor, Senator Joseph Cervantes, described his motivation for the map as follows:

> This congressional map is unique in that it includes both significant urban and rural populations within each of our three congressional districts. Having our entire congressional delegation represent both urban and rural constituencies and communities will assure advocacy on behalf of every New Mexican from our entire delegation. This is a great opportunity for us to focus on creating unified priorities rather than exacerbating our divisions and differences.[4]

A majority of both chambers of the Legislature voted in favor of SB 1—sending it to the Governor's desk for signature or veto.

While SB 1 deviated from the Committee's maps, it was the Legislature's prerogative to go its own way, and the Governor still found it to be a good faith effort to comply with federal and New Mexico law. Additionally, vetoing SB 1 would have left the State with an indisputably unconstitutional map mere weeks before important election deadlines—assuredly subjecting the State to a whirlwind of expensive litigation. *See, e.g.*, NMSA 1978, § 1-8-26(A); NMSA 1978, §

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[2] *Adopted Maps*, N.M. Citizen Redistricting Comm., https://www.nmredistricting.org/adopted-maps/ (last visited July 11, 2023).

[3] *Gov. Lujan Grisham to formally call Legislature into special session on redistricting*, Office of Gov. Michelle Lujan Grisham (Dec. 2, 2021), https://www.governor.state.nm.us/2021/12/02/gov-lujan-grisham-to-formally-call-legislature-into-special-session-on-redistricting/.

[4] Carol A. Clark, *New Mexico Senate Passes CD Map Proposal*, Los Alamos Daily Post (Dec. 11, 2021), https://ladailypost.com/new-mexico-senate-passes-cd-map-proposal/.

1-8-30 (2011); *see generally Maestas v. Hall*, 2012-NMSC-006, 274 P.3d 66 (addressing litigation following the Legislature's failure to enact new maps over the Governor's veto). Thus, the Governor declined to exercise her discretionary veto power and signed the Legislature's chosen map into law on December 17, 2021.[5]

II. The instant action

The Republican Party of New Mexico and several individuals residing in different parts of the State filed the instant action to challenge SB 1. *See* Verified Complaint for Violation of New Mexico Constitution Article II, Section 18 (filed Jan 21, 2022) ("Complaint"). In addition to the Executive Defendants, the Complaint names the president pro tempore and the speaker of the house (collectively, "Legislative Defendants") and the Secretary of State. *Id.* at 1. Plaintiffs challenge SB 1 on the basis that it allegedly constitutes improper partisan gerrymandering, in violation of the State equal protection clause. *See generally* Complaint. Plaintiffs ultimately seek to have SB 1 declared unconstitutional and replaced with another map. *Id.* at 27.

The Executive and Legislative Defendants subsequently moved to dismiss the action on the basis that Plaintiffs' claims of partisan gerrymandering were nonjusticiable political questions. *See* Executive Defendants' Motion to Dismiss (filed Feb 18, 2022); Legislative Defendants' Motion to Dismiss (filed Feb 18, 2022). After the Court denied the motion to dismiss, Defendants filed a petition for writ of superintending control with the New Mexico Supreme Court for clarification on whether partisan gerrymandering presents a justiciable issue, and if so, what standards should apply. *See* Verified Petition for Writ of Superintending Control and Request for Stay, *Lujan Grisham v. Republican Party of N.M.*, S-1-SC-93481 (July 22, 2022). On July 5, 2023,

[5] Gov. Michelle Lujan Grisham, *Senate Executive Message No. 3* (Dec. 17, 2021), https://www.governor.state.nm.us/wp-content/uploads/2021/12/Senate-Executive-Message-No.-3-1.pdf.

the Supreme Court held that partisan gerrymandering claims are justiciable and adopted the test set forth in Justice Kagan's dissent in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). *See* Order at 3 ¶¶ 1-2, *Lujan Grisham v. Republican Party of N.M.*, S-1-SC-93481 (July 5, 2023). Accordingly, the Supreme Court remanded the case back to this Court to take all actions necessary to resolve the case no later than October 1, 2023, including conducting a standing analysis for all parties. *Id.* at 2. Earlier this week, this Court entered a scheduling order instructing the parties to file motions directed to standing on or before August 10, 2023. *See* Scheduling Order (filed July 24, 2023).

DISCUSSION

I. Standard of review

"A [motion for] judgment on the pleadings is treated as a motion to dismiss when the district court considers matters contained solely within the pleadings." *Glaser v. LeBus*, 2012-NMSC-012, ¶ 8, 276 P.3d 959. "A motion to dismiss under Rule 1-012(B)(6) merely tests the legal sufficiency of the complaint, by inquiring whether the complaint alleges facts sufficient to establish the elements of the claims asserted." *Schmidt v. Tavenner's Towing & Recovery, LLC*, 2019-NMCA-050, ¶ 5, 448 P.3d 605 (alteration, internal quotation marks, and citation omitted). Thus, courts "accept as true all material allegations of the complaint and construe the complaint in favor of the complaining party." *South v. Lujan*, 2014-NMCA-109, ¶ 7, 336 P.3d 1000. Courts need not, however, accept the complaint's conclusions of law or "unwarranted deductions of fact." *Schmidt*, 2019-NMCA-050, ¶ 5 (internal quotation marks and citation omitted).

II. Plaintiffs lack standing to sue the Executive Defendants because neither caused Plaintiffs' alleged injuries nor will a favorable decision against the Executive Defendants remedy the alleged injuries

"Standing is a judicially created doctrine designed to insure that only those with a genuine and legitimate interest can participate in a proceeding." *Prot. & Advocacy Sys. v. City of Albuquerque*, 2008-NMCA-149, ¶ 18, 145 N.M. 156, 195 P.3d 1 (internal quotation marks and citation omitted). Although standing in New Mexico is not jurisdictional, as it is in the federal system, New Mexico courts "have long been guided by the traditional federal standing analysis." *ACLU of New Mexico v. City of Albuquerque*, 2008-NMSC-045, ¶ 10, 144 N.M. 471, 188 P.3d 1222. Accordingly, state courts typically require plaintiffs to demonstrate: (1) an injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) a likelihood that the injury will be redressed by a favorable decision. *Prot. & Advocacy Sys.*, 2008-NMCA-149, ¶ 18; *see also ACLU of New Mexico*, 2008-NMSC-045, ¶ 10 ("Thus, at least as a matter of judicial policy if not of jurisdictional necessity, our courts have generally required that a litigant demonstrate injury in fact, causation, and redressability to invoke the court's authority to decide the merits of a case."). In cases where there are multiple defendants, "the plaintiff must demonstrate standing against each defendant." *Hernandez v. Lujan Grisham*, 499 F. Supp. 3d 1013, 1048 (D.N.M. 2020); *see also Disability Rights S.C. v. McMaster*, 24 F.4th 893, 900 (4th Cir. 2022) ("Even assuming Appellees possess standing against some of the individuals and entities named as defendants in this case, the standing inquiry must be evaluated separately as to each defendant.").

A. Plaintiffs' alleged injury is not fairly traceable to the Executive Defendants

To satisfy the causation element of standing, Plaintiffs must show that their alleged injury (i.e., the dilution of their voting power) is fairly traceable to each Defendant's actions. *See Forest Guardians v. Powell*, 2001-NMCA-028, ¶ 25, 130 N.M. 368, 377, 24 P.3d 803 ("The injury has

to be fairly traceable to the challenged action of the defendant." (alteration, internal quotation marks, and citation omitted). Plaintiffs fail to do so with regard to the Executive Defendants.

With respect to the Lieutenant Governor, it is undisputed that he played no role in enacting SB 1 other than serving in his largely ministerial role as president of the senate pursuant to Article V, Section 8 of the New Mexico Constitution. Nor does the Lieutenant Governor have any role in administering any election using SB 1's map. As for the Governor, while it is true she signed SB 1 into law, this act alone is insufficient to satisfy the traceability element of standing. For example, in *Disability Rights S.C.*, 24 F.4th at 901, the Fourth Circuit recently held that the plaintiffs did not have standing to sue the South Carolina governor on the basis that he signed the challenged act into law. In so holding, the court stated,

> To establish standing, a plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement. When a defendant has no role in enforcing the law at issue, it follows that the plaintiff's injury allegedly caused by that law is not traceable to the defendant.

Id. at 901-02 (alterations, internal quotation marks, and citation omitted); *see also Digital Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 958 (8th Cir. 2015) ("The governor and attorney general do not have authority to enforce the Reader System Act, so they do not cause injury to Digital Recognition."); *Bronson v. Swensen*, 500 F.3d 1099, 1110 (10th Cir.2007) ("[W]hen a plaintiff brings a pre-enforcement challenge to the constitutionality of a particular statutory provision, the causation element of standing requires the named defendants to possess authority to enforce the complained-of provision."). The same is true here: although the Governor signed SB 1, she has no real role in administering any election using the allegedly unconstitutional map. Nor do Plaintiffs allege she had any role in drawing SB 1's boundaries. Accordingly,

Plaintiffs cannot demonstrate that their alleged injuries are fairly traceable to the Governor or the Lieutenant Governor.

B. A favorable decision against Executive Defendants will not redress Plaintiffs' alleged injuries

For much of the same reasons discussed above, Plaintiffs fail to meet the redressability element of standing vis-à-vis the Executive Defendants. "To establish redressability, 'a plaintiff must . . . establish it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'" *Hernandez*, 499 F. Supp. 3d at 1053 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)). "A plaintiff seeking injunctive relief satisfies the redressability requirement 'by alleging a continuing violation or the imminence of a future violation of an applicable statute or standard.'" *Id.* (quoting *NRDC v. Sw. Marine*, 236 F.3d 985, 995 (9th Cir. 2000)). Likewise, "[a] plaintiff seeking declaratory relief establishes redressability if the practical consequence of a declaration would amount to a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered." *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1163 (10th Cir. 2005) (internal quotation marks and citation omitted).

Here, the relief Plaintiffs seek for the Court to declare SB 1 unconstitutional and enjoin its use for future elections—forcing the Legislature to adopt a new Congressional district map with boundaries more favorable to the Republican Party. *See* Complaint at 27. [6] While such relief could be granted against the Secretary of State, it would be meaningless with respect to the Governor

[6] Plaintiffs' request for the Court to adopt its own map would violate separation of powers unless it is clear the political branches cannot adopt an alternative map. *See* Complaint at 27; *Sanchez v. King*, 550 F. Supp. 13, 15 (D.N.M. 1982), *aff'd, King v. Sanchez*, 459 U.S. 801 (1982) ("[J]udicial 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." (citing *Reynolds v. Sims*, 377 U.S. 533, 586 (1964)). At most, the Court can declare SB 1 unconstitutional, enjoin its use SB 1, and give the Legislature an opportunity to adopt a new map.

and the Lieutenant Governor because they had no role in drawing the allegedly unconstitutional map or administering the upcoming election using the map. Put differently, telling the Executive Defendants SB 1 is unconstitutional and prohibiting them from using the map for future elections would do absolutely nothing to redress Plaintiffs' purported injuries of having their votes diluted.

Given the foregoing, Plaintiffs cannot satisfy the redressability prong with respect to the Executive Defendants. *See Bronson*, 500 F.3d at 1111 ("The redressability prong is not met when a plaintiff seeks relief against a defendant with no power to enforce a challenged statute."); *see also Okpalobi v. Foster*, 244 F.3d 405, 426 (5th Cir. 2001) (en banc) ("The [standing] requirements of *Lujan* are entirely consistent with the long-standing rule that a plaintiff may not sue a state official who is without any power to enforce the complained-of statute."); *Digital Recognition Network, Inc.*, 803 F.3d at 958 (observing that a declaration that a statute is unconstitutional would not redress the plaintiff's injuries "by virtue of its effect *on the defendant officials*" because those official had no authority to enforce the statute and "it must be *the effect of the court's judgment on the defendant* that redresses the plaintiff's injury" (quoting *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1159 (10th Cir.2005)).

III. The Executive Defendants are entitled to legislative immunity

The Court should also dismiss the Executive Defendants, as they are protected by legislative immunity. "The principle that legislators are absolutely immune from liability for their legislative activities has long been recognized in Anglo-American law." *Bogan v. Scott-Harris*, 523 U.S. 44, 48 (1998).[7] But this immunity does not only apply to legislators. "[O]fficials outside

[7] Although Executive Defendants rely on federal case law applying legislative immunity, the Court should find this case law persuasive—as the majority of other states have. *See, e.g., Mahler v. Judicial Council of California*, 67 Cal. App. 5th 82, 103 (2021); *Abuzahra v. City of Cambridge*, 101 Mass. App. Ct. 267, 273, 190 N.E.3d 553, 559 (2022); *Legislature of State v. Settelmeyer*, 137 Nev. 231, 239, 486 P.3d 1276, 1283 (2021); *Vereen v. Holden*, 121 N.C. App. 779, 782, 468 S.E.2d

the legislative branch are entitled to legislative immunity when they perform legislative functions." *Id.* at 55. Thus, "[a] governor who signs into law or vetoes legislation passed by the legislature is also entitled to absolute immunity for that act." *Kizzar v. Richardson*, 2009 WL 10706926, at *6 (D.N.M. Oct. 31, 2009) (quoting *Torres-Rivera v. Calderon-Serra*, 412 F.3d 205, 213 (1st Cir. 2005). When applicable, "[l]egislative immunity applies to actions seeking damages and declaratory or injunctive relief." *Bragg v. Chavez*, 2007 WL 6367133, at *9 (D.N.M. Nov. 13, 2007) (citing *Sup. Ct. of Va. v. Consumers Union of U.S.*, 446 U.S. 719, 732 (1980)).

Here, Plaintiffs do not, as they cannot, point to any action by the Executive Defendants other than acts they took in their legislative functions. The only relevant acts Executive Defendants took consist of the Governor signing SB 1 into law and the Lieutenant Governor presiding over the senate. But it is clear these are core legislative functions protected by absolute legislative immunity. *See Women's Emergency Network v. Bush*, 323 F.3d 937, 950 (11th Cir. 2003) ("Under the doctrine of absolute legislative immunity, a governor cannot be sued for signing a bill into law."); *Eslinger v. Thomas*, 476 F.2d 225, 228 (4th Cir. 1973) (holding that the Virginia lieutenant governor was entitled to legislative immunity when he was acting as president of the state senate). Accordingly, the Court should dismiss Executive Defendants.

CONCLUSION

For the foregoing reasons, the Court should dismiss the Executive Defendants as parties.

471, 473 (1996); *Campaign for Fiscal Equity, Inc. v. State*, 265 A.D.2d 277, 278, 697 N.Y.S.2d 40, 41 (1999); *Maynard v. Beck*, 741 A.2d 866, 871 (R.I. 1999); *In re Perry*, 60 S.W.3d 857, 860 (Tex. 2001).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2023, I filed the foregoing through the New Mexico Electronic Filing System, which caused all counsel of record to be served by electronic means.

Respectfully submitted,

/s/ Holly Agajanian
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