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,

Petitioners,

v.

S-1-SC-40121

S. Ct. No. _____

THE HONORABLE FRED VAN SOELEN,

Respondent,

and

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

Plaintiffs/Real Parties in Interest

and

MAGGIE TOULOUSE OLIVER in her official capacity as New Mexico Secretary of State, 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/Real Parties in Interest.

EMERGENCY VERIFIED PETITION FOR WRIT OF SUPERINTENDING CONTROL AND REQUEST FOR STAY

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-September 26, 2023-

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INTRODUCTION

This emergency petition arises out of the partisan gerrymandering suit this Court just addressed in *Lujan Grisham v. Van Soelen*, 2023-NMSC-___, ___ P.3d ___ (S-1-SC-39481, Sept. 22, 2023), and requires this Court's immediate intervention. Shortly after this Court issued its writ of superintending control determining that partisan gerrymandering claims are justiciable and remanding the case back to the district court, the Governor and Lieutenant Governor (collectively, "Executive Defendants") filed a motion to dismiss themselves as parties on the basis of legislative immunity and the plaintiffs' lack of standing. Plaintiffs filed a short response that failed to meaningfully rebut either of these points. Despite having this issue fully briefed since early August, the district court did not rule on it until today—*two days before a three day, in-person bench trial is set to begin*. And despite being presented with significant authority supporting the dismissal of Executive Defendants and no real argument to the contrary, the district court summarily denied the motion.

Executive Defendants have no way to remedy the district court's erroneous denial of their motion to be dismissed as parties other than seeking an emergency writ from this Court. Trial is set for two days from now—at which point Executive Defendants' rights to absolute legislative immunity will be irretrievably lost. Further, requiring undersigned counsel to sit through a three-day, in-person trial will

significantly diminish their ability to defend the Governor in a multitude of pending emergency lawsuits challenging her recent declarations of public health emergency. Executive Defendants therefore invokes this Court's jurisdiction pursuant to Article VI, Section 3 of the New Mexico Constitution and Rule 12-504 NMRA, and respectfully request a writ of superintending control ***immediately*** ordering the district court to dismiss Executive Defendants or, alternatively, staying the underlying proceedings until the Court can determine the propriety of this writ petition.

BACKGROUND

I. The 2021 redistricting process

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). 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 several proposed Congressional maps to the Legislature in early November 2021. *Lujan Grisham*, 2023-NMSC-___, ¶ 2. Shortly thereafter, the Governor called the Legislature into a special session to adopt new Congressional and legislative maps. *See id.* The Legislature introduced several bills proposing different Congressional district maps, including S.B. 1., 55th Leg., 2nd Spec. Sess. (N.M. 2021). *Lujan Grisham*, 2023-NMSC-___, ¶ 2. 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. *Id.* 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 litigation. Thus, the Governor declined to exercise her discretionary veto power and signed the Legislature's chosen map into law. *Lujan Grisham*, 2023-NMSC-___, ¶ 2.

II. The instant challenge to SB 1

The Republican Party of New Mexico and several individuals residing in different parts of the State subsequently filed a lawsuit to challenge SB 1. *See* Exhibit

A. In addition to 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 id.* 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 Lujan Grisham*, 2023-NMSC-___, ¶ 7. After the district court denied the motion to dismiss, Defendants filed a petition for writ of superintending control with this Court for clarification on whether partisan gerrymandering presents a justiciable issue, and if so, what standards should apply. *Id.* On July 5, 2023, the 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). *Lujan Grisham*, 2023-NMSC-___, ¶ 8. Accordingly, the Court remanded the case back to the district court to take all actions necessary to resolve the case by early October, including conducting a standing analysis for all parties. *See* Order at 3 ¶¶ 1-2, *Lujan Grisham v. Republican Party of N.M.*, S-1-SC-93481 (N.M. July 5, 2023). The district court subsequently set an in-person, three-day bench trial for September 27 to 29. *See* Exhibit B.

III. Executive Defendants' motion to be dismissed

On July 28, 2023, Executive Defendants filed a motion to be dismissed as parties under Rule 1-012(C) NMRA on the basis of legislative immunity and Plaintiffs' lack of standing (the "Motion"). *See* Exhibit C.[1] Executive Defendants explained that Plaintiffs lacked standing to sue Executive Defendants because neither caused Plaintiffs' alleged injuries (i.e., the dilution of their voting power), nor will a favorable decision against Executive Defendants remedy the alleged injuries. *See* Exhibit C at 6-9. Executive Defendants also pointed out that they were entitled to absolute legislative immunity because the sole basis for Plaintiffs' suit against them involved acts Executive Defendants took in their legislative capacities (i.e., presiding over the senate and signing SB 1 into law). *See id.* at 9-10.

On August 4, 2023, Plaintiffs filed a short response, arguing: (1) the Motion was procedurally untimely under Rule 1-012(G) because its arguments were not contained in Executive Defendants initial motion to dismiss based on the political question doctrine; and (2) Executive Defendants were proper parties because previous governors and lieutenant governors had participated in redistricting litigation in New Mexico and "the presence of the Governor here may be a necessary

[1] Undersigned counsel was prepared to file this motion two weeks earlier but delayed filing after Plaintiffs' counsel indicated that they were "seriously considering" whether they would oppose the motion or not. *See* Exhibit D. Plaintiffs' counsel eventually informed undersigned counsel they would oppose the motion on July 28, 2023. *See id.*

component to Plaintiffs' obtaining relief for their constitutional injuries in this case." Exhibit E. Three days later, Executive Defendants filed a reply in support of the Motion, explaining why the argument were procedurally timely under Rule 1-012(G) and why Plaintiffs' counterarguments regarding the merits were wrong. *See* Exhibit F. That same day, Executive Defendants filed a notice of completion of briefing that requested a hearing at the district court's "earliest convenience given the expedited nature of this litigation and the ongoing burden on Executive Defendants." Exhibit G at 2.[2]

Despite being fully briefed since August 7, the district court did not set a hearing on the Motion or even indicate when it might decide the Motion until announcing at a last-minute scheduling hearing on September 22, 2023, that the decision would be issued that day. However, it was not until September 25—*two days before the bench trial is set to begin*—that the district court entered its order denying the Motion. *See* Exhibit I. The court did not explain the basis for its ruling other than stating that it was "unpersuaded by the Executive Defendants' arguments regarding standing and legislative immunity." *Id.*

[2] Executive Defendants also emailed the briefing packet, notice of completion of briefing, and request for hearing to the district court's proposed text email. *See* Exhibit H.

DISCUSSION

I. The Court should immediately issue a writ of superintending control

This Court has exclusive original jurisdiction over this petition. *See* N.M. Const. art. VI, § 3. "The power of superintending control is the power to control the course of ordinary litigation in inferior courts." *State ex rel. Schwartz v. Kennedy*, 1995-NMSC-069, ¶ 7, 120 N.M. 619, 904 P.2d 1044 (cleaned up). It is "an extraordinary power," "unlimited," and "hampered by no specific rules or means for its exercise." *Id.* (citation omitted). In considering whether to grant previous petitions, "[t]his Court has held that the writ of superintending control is appropriate when the remedy by appeal seems wholly inadequate or where otherwise necessary to prevent irreparable mischief, great, extraordinary, or exceptional hardship; costly delays and unusual burdens of expense." *In re Extradition of Martinez*, 2001-NMSC-009, ¶ 12, 130 N.M. 144, 20 P.3d 126 (cleaned up).

The Court should grant the writ here for two reasons. First, Executive Defendants will have *no* ability to redress the injury of being forced to participate in a trial for actions to which they are entitled to absolute legislative immunity. *Cf. Chavez v. Bd. of Cnty. Com'rs of Curry Cnty.*, 2001-NMCA-065, ¶ 10, 130 N.M. 753, 31 P.3d 1027 (explaining that qualified immunity "is not only a defense to liability but also an entitlement not to stand trial or face the other burdens of litigation," and therefore "a pretrial order denying qualified immunity on purely

legal grounds is immediately reviewable under the collateral order doctrine because it 'implicates rights that will be irretrievably lost, absent immediate review and regardless of the outcome of an appeal from the final judgment'" (cleaned up)); *see also Woods v. Gamel*, 132 F.3d 1417, 1419 n.3 (11th Cir. 1998) (noting that collateral order doctrine applies to denial of claim of legislative immunity because it provides immunity from suit, not merely damages).

Second, denying Executive Defendants' requested writ will significantly impair the Governor's ability to mount a defense in other pending lawsuits. As this Court is probably aware, the Governor is facing myriad litigation challenging her recent declarations of public health emergencies for gun violence and drug abuse. *See, e.g.*, *Nat'l Ass'n for Gun Rights v. Lujan Grisham*, 2023 WL 5951940 (D.N.M. Sept. 13, 2023); Verified Petition for Extraordinary Writ and Request for Stay, *Amador v. Lujan Grisham*, S-1-SC-40105 (N.M. Sept. 14, 2023). Indeed, a federal district court judge has set a preliminary injunction hearing on October 3, the Tuesday after trial in this matter is set to conclude. *See Nat'l Ass'n for Gun Rights*, 2023 WL 5951940, at *5. Forcing undersigned counsel to unnecessarily sit through a three-day, in-person bench trial instead of preparing for this hearing or preparing expedited briefing defending the Governor's actions will significantly impair their ability to provide meaningful counsel to the chief officer of this Court's sister branch

at a time when she needs it most. Accordingly, the Court should immediately issue a writ of superintending control.[3]

II. Executive Defendants are entitled to 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).[4] But this immunity does not only apply to legislators. "[O]fficials outside 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

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[3] For the same reasons that an emergency exercise of superintending control is appropriate (i.e., to prevent immediate and irreparable damage and hardship), Executive Defendants respectfully request the Court briefly stay the underlying proceedings should it need more time to determine the propriety of this writ petition.

[4] The Court should find this federal 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 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).

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)). Appellate courts review a district court's decision regarding legislative immunity de novo. *See Leapheart v. Williamson*, 705 F.3d 310, 313 (8th Cir. 2013).

Here, Plaintiffs do not, as they cannot, point to any action by 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. *See generally* Exhibit A. 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). As a result, Executive Defendants should be dismissed as parties.

II. Plaintiffs lack standing to sue Executive Defendants[5]

"Standing is a judicially created doctrine designed to insure that only those with a genuine and legitimate interest can participate in a proceeding." *Prot. &*

[5] Although Plaintiffs' lack of standing would not necessitate an emergency petition in and of itself, Executive Defendants raise the argument here to further demonstrate that Executive Defendants' presence in this suit is both unnecessary and improper.

Advocacy Sys. v. City of Albuquerque, 2008-NMCA-149, ¶ 18, 145 N.M. 156, 195 P.3d 1 (cleaned up). 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*, 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."). Whether Plaintiffs have standing is an issue of law subject to de novo review. *See ACLU*, 2008-NMSC-045, ¶ 6.

A. Plaintiffs' alleged injury is not fairly traceable to 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, 24 P.3d 803 ("The injury has to be fairly traceable to the challenged action of the defendant." (cleaned up). Plaintiffs fail to do so with regard to 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 (cleaned up); *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 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) (cleaned up).

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* Exhibit A at 27.[6] While such relief could be granted against the Secretary of State, it would be meaningless with respect to Executive Defendants because they had no meaningful role in drawing the allegedly unconstitutional map or administering the upcoming election using the map. Put differently, telling Executive Defendants SB 1 is unconstitutional and prohibiting them from using the

[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* Exhibit A 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, and give the Legislature an opportunity to adopt a new map.

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 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.*, 416 F.3d at 1159).

IV. Plaintiffs failed to meaningfully rebut Executive Defendants' arguments regarding standing and legislative immunity

Plaintiffs only made two (very short) arguments addressing the merits of the Motion below. First, Plaintiffs claimed that Executive Defendants' standing and legislative immunity arguments were incorrect simply because previous governors and lieutenant governors "have historically participated as named parties in redistricting litigation in New Mexico." Exhibit E at 4. But this argument ignores

the fact that previous governors and lieutenant governors never raised these arguments in previous redistricting litigation—probably because those cases involved an entirely different situation in which the political branches were unable to enact new maps. "[C]ases are not authority for propositions not considered." *Dominguez v. State*, 2015-NMSC-014, ¶ 16, 348 P.3d 183 (cleaned up)). Thus, the fact that Executive Defendants' predecessors voluntarily participated in redistricting litigation involving the failure to reapportion districts is of no moment. Rather, the Court should find persuasive the significant authority cited above demonstrating that Plaintiffs do not have standing to sue Executive Defendants and that they are protected by legislative immunity.[7]

Second, Plaintiffs, in passing, argued that the Governor's presence "may be necessary" for them to obtain their requested relief because the Court may "order[]

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[7] Plaintiffs tried to distinguish this authority on the basis that many of the cases do not involve redistricting litigation, yet they make no effort to explain why the nature of this action changes the result. *See* Exhibit E at 5. The answer is that it does not. *See, e.g.*, *Brown v. Jacobsen*, 590 F. Supp. 3d 1273, 1284 (D. Mont. 2022) (rejecting Montana secretary of state's argument that the proper defendants in a redistricting challenge are the State of Montana, the Montana legislature, or the governor and noting that "*those parties are either immune from suit or likewise would be unable to implement Plaintiffs' requested relief*" (emphasis added)); *cf. Simpson v. Hutchinson*, 636 F. Supp. 3d 951, 962 (E.D. Ark. 2022) (dismissing governor from suit challenging congressional district maps given his "tenuous" role in administering elections); *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 301 (D. Md. 1992) (concluding that Maryland governor had legislative immunity for his actions in preparing and presenting the challenged legislative redistricting plan).

the Legislature to adopt a new redistricting map," and the Governor may need to call a special session or issue a special message for the upcoming regular session to facilitate this relief. Exhibit E at 4-5. But this argument is based on a fundamental misunderstanding of the judiciary's authority.[8] The courts cannot order the Governor to call a special session or sign legislation enacting a new map. *See Serrano v. Priest*, 18 Cal. 3d 728, 751, 557 P.2d 929, 941 (1976) ("[T]he courts may not order the Legislature or its members to enact or not to enact, or the Governor to sign or not to sign, specific legislation[.]"); *In re Legislative Reapportionment*, 150 Colo. 380, 382, 374 P.2d 66, 67 (1962) ("[W]e wish to state at the outset that under the separation of powers doctrine we cannot and will not command the Governor to do anything, the doing of which lies within his sound discretion, and we deem his authority to call the Legislature into special session to be such prerogative."); *Maryland Comm. for Fair Representation v. Tawes*, 228 Md. 412, 440, 180 A.2d 656, 671 (1962) ("Of course, the courts cannot direct the Governor to call the General Assembly into extraordinary session; that is a power the exercise of which lies entirely within his discretion.").

Rather, the proper remedy—should the Court ultimately find SB 1 unconstitutional—would be to simply enjoin the Secretary of State from using the

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[8] This argument also ignores the fact that the Legislature can call itself into an extraordinary session at any time "for all purposes." *See* N.M. Const. art IV, § 6.

map for the upcoming election and issue a court-drawn map if the political branches fail adopt a new map in a timely manner. *See Sanchez*, 550 F. Supp. at 15. Executive Defendants are not necessary for the Court to provide this relief.[9] *See Larios v. Perdue*, 306 F. Supp. 2d 1190, 1199 (N.D. Ga. 2003) ("Put differently, because we can enjoin the holding of elections pursuant to the 2002 plan (assuming, of course, that the plan is in fact unconstitutional) and subsequently require elections to be conducted pursuant to a constitutional apportionment system, the Lieutenant Governor is not a necessary party to this action."). Plaintiffs' arguments to the contrary are, therefore, misplaced.

V. The Motion was procedurally timely, and its merits should be addressed

Plaintiffs also argued below that the Motion was procedurally untimely under Rule 1-012(G) because Executive Defendants did not raise standing or legislative immunity in their initial motion to dismiss based on the political question doctrine. *See* Exhibit E at 2-3. The Court should reject this argument for two reasons.

First, Rule 1-012(G)'s requirement that a party raise certain defenses in its initial Rule 1-012 motion only applies to the defenses of lack of jurisdiction over the person, improper venue, insufficiency of process, and insufficiency of service of process. *See* Rule 1-012(G), (H)(1); *see also Rupp v. Hurley*, 1999-NMCA-057, ¶

[9] Executive Defendants also note that Plaintiffs have not subpoenaed either the Governor or the Lieutenant Governor to testify at trial, further demonstrating that their presence in this suit is wholly unnecessary.

19, 127 N.M. 222, 979 P.2d 733 ("Thus, it now is clear that any time defendant makes a preanswer Rule 12 motion, he must include, on penalty of waiver, the defenses set forth in subdivisions (2) through (5) of Rule 12(b)." (cleaned up)). As the Motion was based on lack of standing and legislative immunity, it was not subject to the constraints of Rule 1-012(G). *See Deutsche Bank Nat. Tr. Co. v. Johnston*, 2016-NMSC-013, ¶ 18, 369 P.3d 1046 ("When standing is a prudential consideration, it can be raised for the first time at any point in an active litigation, just like a defense of failure to state a claim, and unlike defenses relating to personal jurisdiction, venue, and insufficient service of process, all of which must be raised in an initial or amended responsive pleading."); *State Employees Bargaining Agent Coal. v. Rowland*, 494 F.3d 71, 77 (2d Cir. 2007) ("It is well-settled that legislative immunity is . . . a personal defense that may be asserted to challenge the sufficiency of a complaint [for failure to state a claim] under Rule 12(b)(6)."); *see generally* Rule 1-012(G)-(H) (recognizing exception for the defense of failure to state a claim).

Second, even if the Court determines that Rule 1-012(G) applies to the Motion's arguments, the Court should still address the merits of the arguments. Generally, courts disfavor avoiding substantive issues based on procedural technicalities. *See Montoya v. Dep't of Fin. & Admin.*, 1982-NMCA-051, ¶ 27, 98 N.M. 408, 649 P.2d 476 ("In interpreting the Rules of Civil Procedure, New Mexico courts favor the right of a party to a hearing on the merits over dismissal of actions

on procedural technicalities."). This policy is even stronger in this case, as disregarding the Motion based on a procedural technicality will mean unconstitutionally forcing the head of this Court's coordinate branch to continue being a party to significantly expedited and complex litigation. And Executive Defendants' failure to include these defenses in their initial motion to dismiss is excusable given the rushed nature of the initial stages of the litigation caused by Plaintiffs' failure to timely bring this action seeking to overturn SB 1 in the middle of election season. *See generally Lujan Grisham*, 2023-NMSC-___, ¶¶ 1-8.

REQUEST FOR RELIEF

WHEREFORE, Executive Defendants respectfully request the Court award the following relief:

1. Immediately issue a writ of superintending control directing Respondent to dismiss Executive Defendants as parties, or, alternatively, enter an order immediately staying the underlying proceedings until this Court has rendered its decision as to the requested writ; and

2. Order such further relief as this Court deems necessary and appropriate.

Respectfully submitted,

/s/ Holly Agajanian
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Counsel for Governor Michelle Lujan Grisham and Lieutenant Governor Howie Morales

CERTIFICATE OF COMPLIANCE

I certify that this Petition complies with the type-volume, font size, and word limitations set forth in Rule 12-504(G)(3) NMRA. The body of this Petition is in 14-point Times New Roman font and contains 4,912 words, according to a count by Microsoft Word.

/s/ Holly Agajanian
Holly Agajanian

VERIFICATION

I, Holly Agajanian, counsel for Executive Defendants, being duly sworn upon my oath, state that I have read this Petition, and that the factual statements it contains are true and correct to the best of my knowledge, information, and belief.

/s/ Holly Agajanian
Holly Agajanian

Date: September 26, 2023

CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2023, I caused a true and correct copy of the foregoing Petition to be served upon the following parties and counsel by email using the email addresses below.

/s/ Holly Agajanian
Holly Agajanian

Respondent:

The Honorable Fred T. Van Soelen
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STATE OF NEW MEXICO
COUNTY OF LEA
FIFTH JUDICIAL DISTRICT

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

Plaintiffs,

v.

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.

D-506-CV-2022-00041

Case assigned to Sanchez, Mark

No. _____

VERIFIED COMPLAINT FOR VIOLATION OF NEW MEXICO CONSTITUTION ARTICLE II, SECTION 18

COME NOW Plaintiffs Republican Party of New Mexico, David Gallegos, Timothy Jennings, Dinah Vargas, Manuel Gonzales Jr., Bobby and Dee Ann Kimbro and Pearl Garcia (collectively "Plaintiffs"), by and through their attorneys, Brownstein Hyatt Farber Schreck, LLP (Eric Burris, Harold D. Stratton, Jr., Chris Murray (pro hac vice forthcoming), and Julian Ellis (pro hac vice forthcoming)) and Harrison Hart, LLC (Carter Harrison), and for their Complaint for Violation of Article II, Section 18 of the New Mexico Constitution (the "Complaint") against Defendants allege as follows:

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PARTIES, JURISDICTION, AND VENUE

1. The Republican Party of New Mexico is an unincorporated nonprofit association and a political party. Steve Pearce is its Chairman and its headquarters are located at 5150 San Francisco Road NE #A, Albuquerque, New Mexico 87109.

2. Plaintiff David Gallegos resides at 907 20th Street, Eunice, New Mexico 88231, and is an elected State Senator from Senate District 41. Senator Gallegos is a registered Republican in New Mexico and a supporter of Republican candidates and policies. Senator Gallegos' ability to affiliate with like-minded Republicans and to pursue Republican associational goals has been impaired by Senate Bill 1. Senator Gallegos' home is in CD 2, which includes southwest New Mexico and parts of southeastern New Mexico, including parts of Chaves, Eddy, Lea, and Otero Counties. To create the congressional districts in Senate Bill 1, partisan drafters intentionally "cracked" Republicans like Senator Gallegos in southeastern New Mexico, thereby substantially diluting their votes. The State Legislature's cracking of Republicans in southeastern New Mexico was unnecessary, as evidenced by two maps the New Mexico Citizen Redistricting Committee adopted and presented to the State Legislature.

3. Plaintiff Timothy Jennings resides at 2716 North Pennsylvania Avenue, Roswell, New Mexico 88201. He served in the New Mexico State Senate for 34 years from 1978-2012, representing Senate District 32. He served as the Senate President Pro-Tempore from 2008-2012. Plaintiff Jennings is a registered Democrat in New Mexico and a supporter of Democratic candidates and policies. Plaintiff Jennings' ability to affiliate with like-minded members of his community in Chaves County and the greater Roswell area has been impaired by Senate Bill 1. Plaintiff Jennings' home is in CD 3, which includes northern New Mexico and parts of southeastern New Mexico, including parts of Chaves, Eddy, and Lea Counties. Historically,

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Plaintiff Jennings' home has been in CD 2, which previously included all of Chaves, Eddy, Lea, and Otero Counties. To create the congressional districts in Senate Bill 1, partisan drafters intentionally "cracked" Republicans in southeastern New Mexico, thereby substantially diluting their votes. In doing so, the State Legislature also "cracked" the non-Republican voters of these counties, and especially Plaintiff Jennings' home of Chaves County, which is split between all three of New Mexico's congressional districts under Senate Bill 1. The State Legislature's cracking of Republicans in southeastern New Mexico and resulting cracking of all voters in these four counties was unnecessary, as evidenced by two maps the New Mexico Citizen Redistricting Committee adopted and presented to the State Legislature.

4. Plaintiff Dinah Vargas resides at 4707 Coors Boulevard SW, Albuquerque, New Mexico 87121, and was the Republican candidate for House District 10 in 2020. Plaintiff Vargas is a registered Republican in New Mexico and a supporter of Republican candidates and policies. Plaintiff Vargas' ability to affiliate with like-minded Republicans and to pursue Republican associational goals has been impaired by Senate Bill 1. Plaintiff Vargas' home is in CD 2, which includes southwest New Mexico and parts of southeastern New Mexico, including parts of Chaves, Eddy, Lea, and Otero Counties. To create the congressional districts in Senate Bill 1, partisan drafters intentionally "cracked" Republicans in southeastern New Mexico, thereby substantially diluting their votes. To accomplish the cracking of southeastern New Mexico, Senate Bill 1 also cracked parts of Albuquerque, including shifting Plaintiff Vargas' home from CD 1 to CD 2. Under Senate Bill 1, the same congressperson who will represent Plaintiff Vargas in southwest Albuquerque will also represent constituents as far as the City of Lordsburg and the City of Hobbs. The State Legislature's cracking of Republicans in southeastern New Mexico was unnecessary, as evidenced by two maps the New Mexico Citizen Redistricting Committee

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adopted and presented to the State Legislature.

5. Plaintiff Manuel Gonzales, Jr. resides at 5 Briarwood Court, Alamogordo, New Mexico 88310-9536. Plaintiff Gonzales is the former Chairman of the Republican Party of Otero County, former Republican Party of New Mexico Vice Chairman – CD 2, and former First Vice Chairman of the Republican Party of New Mexico. Plaintiff Gonzales is a registered Republican in New Mexico and supporter of Republican candidates and policies. His ability to affiliate with like-minded Republicans and to pursue Republican associational goals has been impaired by Senate Bill 1. Plaintiff Gonzales' home is in CD 2, which includes southwest New Mexico and parts of southeastern New Mexico, including parts of Chaves, Eddy, Lea, and Otero Counties. To create the congressional districts in Senate Bill 1, partisan drafters intentionally "cracked" Republicans like Plaintiff Gonzales in southeastern New Mexico, thereby substantially diluting their votes. The State Legislature's cracking of Republicans in southeastern New Mexico was unnecessary, as evidenced by two maps the New Mexico Citizen Redistricting Committee adopted and presented to the State Legislature.

6. Plaintiffs Bobby and Dee Ann Kimbro are husband and wife and reside at 3908 West Payne Road, Lovington, New Mexico 88260. They have lived in Lovington for over twenty years. The Kimbros are registered Republicans in New Mexico and supporters of Republican candidates and policies. Their ability to affiliate with like-minded Republicans and to pursue Republican associational goals has been impaired by Senate Bill 1. The Kimbros live in CD 3, which includes northern New Mexico and parts of southeastern New Mexico, including parts of Chaves, Eddy, and Lea Counties. Historically, their home has been in CD 2, which previously included all of Chaves, Eddy, Lea, and Otero Counties. To create the congressional districts in Senate Bill 1, partisan drafters intentionally "cracked" Republicans in southeastern

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New Mexico, thereby substantially diluting their votes. The State Legislature's cracking of Republicans in southeastern New Mexico was unnecessary, as evidenced by two maps the New Mexico Citizen Redistricting Committee adopted and presented to the State Legislature.

7. Plaintiff Pearl Garcia resides at 2601 Pajarito Road SW, Albuquerque, New Mexico 87105. She is retired from Sandia National Laboratories. Plaintiff Garcia is a registered Republican in New Mexico and a supporter of Republican candidates and policies. Plaintiff Garcia's ability to affiliate with like-minded Republicans and to pursue Republican associational goals has been impaired by Senate Bill 1. Plaintiff Garcia's home is in CD 2, which includes southwest New Mexico and parts of southeastern New Mexico, including parts of Chaves, Eddy, Lea, and Otero Counties. To create the congressional districts in Senate Bill 1, partisan drafters intentionally "cracked" Republicans in southeastern New Mexico, thereby substantially diluting their votes. To accomplish the cracking of southeastern New Mexico, Senate Bill 1 also cracked parts of Albuquerque, including shifting nearly all the South Valley where Plaintiff Garcia lives from CD 1 to CD 2. Under Senate Bill 1, the same congressperson who will represent Plaintiff Garcia in the South Valley will also represent constituents as far as the City of Lordsburg and the City of Hobbs. The State Legislature's cracking of Republicans in southeastern New Mexico was unnecessary, as evidenced by two maps the New Mexico Citizen Redistricting Committee adopted and presented to the State Legislature.

8. Defendant Maggie Tolouse Oliver is the elected Secretary of New Mexico. Her office is in Santa Fe County.

9. Defendant Michelle Lujan Grisham is the elected Governor of New Mexico. Her office is in Santa Fe County.

10. Defendant Howie Morales is the elected Lieutenant Governor of New Mexico.

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Under the New Mexico Constitution, he is the President of the New Mexico State Senate. His office is in Santa Fe County.

11. Defendant Mimi Stewart is an elected State Senator from Senate District 17 in Bernalillo County and serves as the President Pro Tempore of the New Mexico State Senate. Her office is in Santa Fe County.

12. Defendant Brian Egolf is an elected State Representative from House District 47 in Santa Fe County and serves as the Speaker of the New Mexico House of Representatives. His office is in Santa Fe County.

13. This Court has jurisdiction over this Complaint and the matters addressed herein because the events and occurrences giving rise to the cause of action occurred in the State of New Mexico.

14. Venue is also proper in Lea County, pursuant to NMSA 1978, § 38-1-3(G), because this suit is against state officers and one or more Plaintiffs reside in Lea County.

GENERAL ALLEGATIONS

15. This complaint challenges Senate Bill 1, which redraws New Mexico's three congressional districts in contravention of traditional redistricting principles endorsed by the State Legislature and the New Mexico Supreme Court in order to accomplish a political gerrymander that unconstitutionally dilutes the votes of residents of southeastern New Mexico in order to achieve partisan advantage.

16. Because the State Legislature ran roughshod over traditional redistricting principles and used illegitimate reasons to draw lines impermissibly diluting the voting strength of one region and one political party, Senate Bill 1 violates Article II, Section 18 of the New Mexico Constitution: the state's Equal Protection Clause.

17. Plaintiffs ask the Court to set aside Senate Bill 1 and to adopt a map proposed by the New Mexico Citizen Redistricting Committee ("Citizen Redistricting Committee") in order to vindicate the rights of New Mexicans to congressional districts that do not illegitimately favor the political interests of one group over another.

New Mexico's Equal Protection Clause (Article II, Section 18) and Its Guarantees

18. The New Mexico Constitution guarantees that "[n]o person shall be deprived of life, liberty or property without due process of law; **nor shall any person be denied equal protection of the laws.**" N.M. Const. art. II, § 18 (emphasis added). New Mexico's equal protection clause mirrors the Fourteenth Amendment's Equal Protection Clause and is coextensive with this federal analog. *See* U.S. Const. amend. XIV, § 1.

19. In interpreting the state constitution, New Mexico follows the "interstitial approach." *State v. Gomez*, 1997-NMSC-006, ¶¶ 20-22, 33, 122 N.M. 777, 932 P.2d 1. Under this approach, New Mexico courts only reach state constitutional protections if the right being asserted is not effectively protected under the U.S. Constitution. *Id.* ¶ 19.

20. New Mexico courts also "provid[e] broader protection" under the state constitution when the federal analysis is unpersuasive, either because it is deemed "flawed," "because of distinctive state characteristics," or "because of undeveloped federal analogs." *See id.* ¶ 20 (collecting cases); *see also State v. Wright*, 2022-NMSC-002, ¶ 21, 2022 WL 92114.

21. In its seminal redistricting case, *Maestas v. Hall*, the New Mexico Supreme Court recognized the "right to vote for the candidates of one's choice" is "precious" and "the essence of our country's democracy." 2012-NMSC-006, ¶ 1, 274 P.3d 66. Indeed, "[t]he idea that every voter must be equal to every other voter when casting a ballot has its genesis in the Equal Protection Clause." *Id.* (citing U.S. Const. amend. XIV, § 1). The *Maestas* court recognized that

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it is for this reason the U.S. Supreme Court has stated "that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable"—i.e., the "one person, one vote" doctrine. *Id.* (quoting *Reynolds v. Sims*, 377 U.S. 533, 577 (1964)).

22. Importantly, in *Maestas*, the supreme court also expressly found that "an equal protection challenge will lie" if the drafters of legislative or congressional maps "use[] illegitimate reasons for population disparities and create[] the deviations *solely* to benefit certain regions at the expense of others." *See id.* ¶ 25 (emphasis in original) (quoting *Legislative Redistricting Cases*, 629 A.2d 646, 657 (Md. 1993)). In other words, the court admonished the use of "illegitimate reasons" to draw maps that benefit voters in one region at the expense of voters in other regions of the state.

23. In doing so, the supreme court noted New Mexico's adherence to the bipartisan New Mexico Legislative Council's guidelines, which have been "recognized as legitimate by numerous courts" and which "have been followed in New Mexico since 1991." *Id.* ¶ 34.

Federal Political Gerrymandering Under the Equal Protection Clause and *Rucho*

24. This case is admittedly about "political gerrymandering." The constitutional injury in a political gerrymandering case is vote dilution, much like the injury in one-person-one-vote decisions, which prohibit creating districts with significantly different populations. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2514 (2019) (Kagan, J., dissenting). "In such a case, . . . the districters have set out to reduce the weight of certain citizens' votes, and thereby deprive them of their capacity to 'full[y] and effective[ly] participat[e] in the political process[].'" *Id.* (quoting *Reynolds v. Sims*, 377 U.S. 533, 565 (1964)).

25. In *Davis v. Bandemer*, a majority of the U.S. Supreme Court first recognized that gerrymandering based on political discrimination is unlawful under the Equal Protection Clause. 478 U.S. 109, 116–117 (1986). The Supreme Court, however, split on the applicable standard to apply to political gerrymandering claims. *See Rucho*, 139 S. Ct. at 2597 (majority opinion) (discussing *Bandemer* and its progeny).

26. In the years following *Bandemer*, the Supreme Court continued to struggle with defining the standard applicable in political gerrymandering cases. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 414 (2006) (noting "persist[ing]" disagreement over the applicable standard). As a result of this struggle, the justices expressed doubt on the viability of such claims in federal court. *See, e.g., Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) ("Our considerable efforts in *Gaffney*, *Bandemer*, *Vieth*, and *LULAC* leave unresolved whether such claims may be brought in cases involving allegations of partisan gerrymandering.").

27. The struggle over a definable federal standard for political gerrymandering cases came to a head in *Rucho*, where a 5-4 majority held that such claims are nonjusticiable in federal court as a prudential matter because "[t]here are no legal standards discernible in the Constitution for making such judgments." *Rucho*, 139 S. Ct. at 2500. What's clear is that the Supreme Court, in the nearly 40 years between *Bandemer* and *Rucho*, was unable to settle on a nationwide, one-size-fits-all constitutional standard to apply in federal political gerrymandering cases.

28. While the Supreme Court in *Rucho* ended political gerrymandering claims in **federal court**, it offered some comfort that political gerrymandering complaints will not "echo into a void." *Id.* at 2507. "The States, for example, are actively addressing the issue on a number of fronts," including "[p]rovisions in state statutes and state constitutions [that] **can provide standards and guidance for state courts to apply**." *Id.* (emphasis added).

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29. New Mexico has adopted such standards. As discussed next, the State Legislature has effectively codified standards and guidance in response to a tumultuous and partisan history of redistricting in this state. And, it is soundly within the province of the state's judiciary to interpret and apply these standards.

History of Redistricting in New Mexico

30. Consistent with the U.S. Supreme Court's observation of the experience of many states, New Mexico's history of legislative and congressional redistricting has been characterized by partisan rancor and litigation.

31. Indeed, with the exception of the state legislative and congressional redistricting accomplished in 1991, New Mexico's state legislative or congressional maps have been the subject of litigation in state or federal court each decade beginning in the 1960s. *See* A Guide to State and Congressional Redistricting in New Mexico at 8-13, N.M. Legis. Council Serv., dated Apr. 2011, https://bit.ly/3nwyeVK.

32. In 2011, the New Mexico Supreme Court decided *Maestas v. Hall*, which for the first time systematically articulated the "legal principles that should govern redistricting litigation in New Mexico." 2012-NMSC-006, ¶ 4, 274 P.3d 66.

33. In *Maestas*, the supreme court noted that since at least 1991, redistricting in New Mexico has been governed by policies articulated in a set of seven guidelines adopted by the bipartisan New Mexico Legislative Council. *See id.* ¶ 34.

34. These seven guidelines are:

(i) Congressional districts shall be as equal in populations as practicable.

(ii) State districts shall be substantially equal in population; no plans for state office will be considered that include any district with a total population that deviates more than plus or minus five percent from the ideal.

(iii) The legislature shall use federal decennial census data generated by the United

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States bureau of the census.

(iv) Since the precinct is the basic building block of a voting district in New Mexico, proposed redistricting plans to be considered by the legislature shall not be comprised of districts that split precincts.

(v) Plans must comport with the provisions of the Voting Rights Act of 1965, as amended, and federal constitutional standards. Plans that dilute a protected minority's voting strength are unacceptable. Race may be considered in developing redistricting plans but shall not be the predominant consideration. Traditional race-neutral districting principles (as reflected in paragraph seven) must not be subordinated to racial considerations.

(vi) All redistricting plans shall use only single-member districts.

(vii) Districts shall be drawn consistent with traditional districting principles. Districts shall be composed of contiguous precincts, and shall be reasonably compact. To the extent feasible, districts shall be drawn in an attempt to preserve communities of interest and shall take into consideration political and geographic boundaries. In addition, and to the extent feasible, the legislature may seek to preserve the core of existing districts, and may consider the residence of incumbents.

Guidelines for the Development of State and Congressional Redistricting Plans, N.M. Legis. Council, dated Jan. 17, 2011.

35. The *Maestas* court noted approvingly that these guidelines "are similar to policies that have been recognized as legitimate by numerous courts," and "should be considered by a state court when called upon to draw a redistricting map." *Id.* ¶ 34.

36. Regarding the seventh guideline, the *Maestas* court observed that "[c]ompactness and contiguity are important considerations" in part because "it has been suggested [these considerations] greatly reduce, although they do not eliminate, the possibilities of gerrymandering." *Id.* ¶ 35.

37. Similarly, the *Maestas* court concluded that "considering political and geographic boundaries furthers our representative government" and that "[m]inimizing fragmentation of political subdivisions, counties, towns, villages, wards, precincts, and neighborhoods allows

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constituencies to organize effectively . . . ." *Id.* ¶ 36.

38. The *Maestas* court made these observations regarding the desirability of the traditional redistricting principles applicable in New Mexico in light of its overarching concern that "[d]istricts should be drawn to promote fair and effective representation for all, not to undercut electoral competition and protect incumbents. It is preferable to allow the voters to choose their representatives through the election process, as opposed to having their representative chosen for them through the art of drawing redistricting maps." *Id.* ¶ 31.

The New Mexico Redistricting Act of 2021

39. In light of this history, in April of 2021, the State Legislature adopted the Redistricting Act of 2021 ("Redistricting Act"), Laws 2021, ch. 79, § 2. The legislation is codified at NMSA 1978, § 1-3A-1, *et seq.* (2021).

40. The Redistricting Act created the Citizen Redistricting Committee, which is comprised of seven members. NMSA 1978, § 1-3A-3 (2021).

41. The majority and minority leadership in the State House and the State Senate each appoint a committee member, for a total of four members appointed by the two largest political parties in the State Legislature. *Id.*

42. The remaining three members are appointed by the State Ethics Commission: the first two of these appointees may not be members of the Democratic or Republican parties (the two largest political parties in New Mexico). *Id.* The final member appointed by the State Ethics Commission is the committee chair, and this appointee must be a retired justice of the New Mexico Supreme Court or a retired judge of the New Mexico Court of Appeals. *Id.*

43. The Redistricting Act further provides that no more than three members of the seven-member committee may be members of the same political party, *id.*, and prohibits persons

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particularly interested in the redistricting process (such as those who are or who have been public officials, candidates for public office, lobbyists, or family members of office holders who will be affected by redistricting) from serving as committee members. NMSA 1978, § 1-3A-4 (2021).

44. The Redistricting Act charges the Citizen Redistricting Committee with adopting at least three redistricting plans for New Mexico's congressional districts, the State House, the State Senate, and any other offices requiring redistricting. NMSA 1978, § 1-3A-5 (2021).

45. The Citizen Redistricting Committee is required to hold at least six public meetings before publishing potential redistricting plans for comment and at least another six public meetings after publishing potential redistricting plans, but before adopting them. *Id.*

46. Indeed, the Citizen Redistricting Committee is mandated to publish, for public comment, proposed redistricting plans based at least in part on the testimony, documents, and information received from the public prior to publishing its potential redistricting plans. NMSA 1978, § 1-3A-6 (2021).

47. Tellingly, the State Legislature chose to—for the first time—enshrine the traditional redistricting principles favorably relied upon by the supreme court in *Maestas* in this statute. The Redistricting Act requires that the Citizen Redistricting Committee develop district plans in accordance with 10 provisions, which are, almost word-for-word, the Legislative Council's redistricting guidance from prior years. *See* NMSA 1978, § 1-3A-7(A) (2021).

48. Even more, the Redistricting Act adds a further protection against political gerrymandering beyond these traditional redistricting principles: an affirmative requirement that the Citizen Redistricting Committee "***shall not use, rely upon or reference partisan data***, such as voting history or party registration data; provided that voting history in elections may be considered to ensure that the district plan complies with applicable federal law." NMSA 1978, §

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1-3A-7(C) (2021) (emphasis added).

49. Finally, after adopting the required three plans for each set of offices required to be redistricted, "the committee shall provide written evaluations of each district plan that address the satisfaction of the requirements set forth in the Redistricting Act, the ability of racial and language minorities to elect candidates of their choice, a measure of partisan fairness and the preservation of communities of interest." NMSA 1978, § 1-3A-8 (2021).

The Citizen Redistricting Committee Proposes Three Congressional Maps With Two Clearly Based On Traditional Redistricting Principles

50. Former New Mexico Supreme Court Justice Edward Chávez—the author of the *Maestas* opinion—was appointed as Chair of the Citizen Redistricting Committee.

51. After the other members were appointed, the Citizen Redistricting Committee held its first two meetings on July 2, 2021 and July 23, 2021. At these initial meetings, the Citizen Redistricting Committee adopted rules of procedure and set a schedule for its substantive work.

52. Next, the Citizen Redistricting Committee held eight public meetings between August 2 and August 15, 2021, in different parts of New Mexico to receive testimony, documents, and information regarding the identification of communities of interest and the creation of district plans. Of these eight meetings, two were on tribal lands and all were open to the public at a minimum through Zoom. These eight meetings exceeded the six meetings required under the Redistricting Act.

53. During this first round of eight meetings, over 1,000 people attended in-person or via Zoom and over 120 individuals provided testimony to the Citizen Redistricting Committee.

54. From August 15 to September 16, 2021, the Citizen Redistricting Committee considered this testimony. It also considered submissions it received through the Committee's

online public comment portal and drew and published initial map concepts.

55. On September 16, 2021, the Citizen Redistricting Committee met and adopted several map concepts to be published for additional public input.

56. The Citizen Redistricting Committee initially published seven potential congressional map concepts for public input and eventually added two additional congressional map concepts and one partial map concept submitted by third parties.

57. The Citizen Redistricting Committee then held an additional eight public meetings, including two on tribal lands, at which members of the public presented testimony regarding the map concepts. In total, over 900 people attended these meetings in-person or online and 242 provided testimony to the Committee.

58. The Citizen Redistricting Committee held an additional public meeting on October 15, 2021, at which it adopted three congressional redistricting plans: congressional Concepts A, E, and H.

59. Concepts A and E were drawn consistent with traditional redistricting principles.

60. Concept A was expressly adopted to "maintain status quo." It largely maintained the existing congressional districts as drawn by the state courts in 2012 and only divided four cities and four counties, while at the same time eliminating the division of McKinley County from the 2012 map. *See* New Mexico Citizen Redistricting Committee Report on District Plans & Evaluations to the New Mexico Legislature at 30-32, dated Nov. 2, 2021, https://bit.ly/3Ic2HrN (Citizen Redistricting Committee Report).

61. Concept E, known as the "Justice Chávez Map" was drawn by Justice Chávez in response to public comment on an earlier version published by the Citizen Redistricting Committee for public consideration. Citizen Redistricting Committee Report at 38-40.

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62. Concept E emphasized compactness in creating a single urban district (CD 1) centered on the city of Albuquerque and other incorporated urban and suburban communities immediately adjacent to Albuquerque, including Rio Rancho. *Id.*

63. Concept E expressly retained the core of CD 3 in northern New Mexico and CD 2 in southern New Mexico and only divided five cities and six counties. *Id.*

64. Concept E was the concept supported by the most members of the Citizen Redistricting Committee. Six of the seven members voted to approve this Concept E, including all four members appointed by legislative leadership. *Id.*

65. The final congressional redistricting concept adopted by the Citizen Redistricting Committee was Concept H. *Id.* at 34-36.

66. Unlike Concepts A and E, Concept H was not initially developed by the Citizen Redistricting Committee—it was based on a map submitted by a coalition of politically liberal community organizations on October 1, 2021. *See id.* at 36.

67. A core argument by the proponents of what would become Concept H was to "create a solid Hispanic voting age majority district" in CD 2. *See id.* at 36 (citing to comment of Melanie Aranda, Citizen Redistricting Committee Public Comment Portal, dated Oct. 1, 2021, https://bit.ly/3GCtxZN ("Aranda Comment")).

68. Neither Concept H's proponents nor the Citizen Redistricting Committee discussed the fact that CD 2 **is already a majority Hispanic district** and that Concept E would increase the Hispanic majority in the district to 54.4%

69. Tellingly, the proponents of Concept H argued that the map intentionally split counties in southeastern New Mexico, which had formed the core of CD 2, into three congressional districts:

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> This map uplifts overlooked communities in southeast NM by affording them an opportunity to be heard. In both Roswell in particular, but also in in Hobbs, we heard about the harsh economic realities facing workers and their families from communities located in and on the periphery of the Permian Basin. The challenges facing this region have enormous ripple effects, impacting the entire state economically and environmentally. Yet two-thirds of our congressional delegation is not much engaged with these constituencies. This map addresses this concern by ensuring that the entire NM congressional delegation hears the voices of these impacted communities.

Aranda Comment.

70. Indeed, Concept H disregards the traditional redistricting principles the Citizen Redistricting Committee was charged with applying. It splits seven cities—including Albuquerque—and nine counties. It also fails to preserve the core of CD 1 (by splitting Albuquerque into two congressional districts) and CD 2 (by splitting Chaves, Eddy, Lea, and Otero counties into three congressional districts).

71. The Citizen Redistricting Committee submitted a report detailing all three congressional map concepts to the State Legislature on November 2, 2021. It reissued the report with corrections on November 8, 2021. *See generally* Citizen Redistricting Committee Report.

The State Legislature Adopts a Modified Version of Concept H Creating a Gerrymandered Congressional Map

72. The State Legislature did not adopt any of the congressional map concepts proposed by the Citizen Redistricting Committee.

73. Instead, in four legislative days, it introduced and adopted Senate Bill 1 to draw New Mexico's congressional district lines.

74. Beyond splitting nine counties, the City of Hobbs, and the greater Albuquerque area, Senate Bill 1 went even further in disregarding traditional redistricting principles than Concept H: it also divided the greater Roswell area into two districts and split Chaves County into **all three congressional districts.**

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75. In essence, Senate Bill 1 seized on Concept H's scrambling of Chaves, Eddy, Lea, and Otero Counties into all three congressional districts and went even further.

76. The result is a gerrymander that does not serve New Mexicans and that cannot survive constitutional scrutiny.

COUNT I
Political Gerrymander – Equal Protection, N.M. Const. art. II, § 18

77. Plaintiffs incorporate each of the preceding paragraphs, including subparts, as if fully restated herein.

78. Senate Bill 1 is a partisan gerrymander of such proportion that it violates Plaintiffs' rights under the New Mexico Constitution's Equal Protection Clause by unconstitutionally diluting their votes. *See* N.M. Const. art. II, § 18. When drafters of congressional maps use "illegitimate reasons" to discriminate against regions at the expense of others, including failing to adhere to New Mexico's "traditional districting principles," aggrieved voters may seek redress of this constitutional injury in the courts through an equal protection challenge. *See Maestas v. Hall*, 2012-NMSC-006, ¶ 25, 274 P.3d 66.

79. The supreme court has enshrined the use of "historic legislative redistricting policies" in "drawing redistricting maps [to] avoid partisan advantage." *Id.* ¶ 31. These traditional redistricting principles have been followed since 1991, and include the bipartisan New Mexico Legislative Council's guidance that:

> Districts shall be drawn consistent with traditional districting principles. Districts shall be composed of contiguous precincts, and shall be reasonably compact. To the extent feasible, districts shall be drawn in an attempt to **preserve communities of interest** and shall take into **consideration political and geographic boundaries**. In addition, and to the extent feasible, the legislature may seek to **preserve the core of existing districts**, and may consider the residence of incumbents.

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Id. ¶ 34 (emphasis added) (citing New Mexico's Guidelines for the Development of State and Congressional Redistricting Plans).

80. The State Legislature codified these traditional redistricting principles in the Redistricting Act eight months before the adoption of Senate Bill 1. *See* NMSA-1978, § 1-3A-7 (2021).

81. Relevant here, New Mexico's traditional redistricting principles provide that drafters should "preserve communities of interest," "consider[] political and geographic boundaries," and "preserve the core of existing districts."

82. To the first principle, communities of interest are "contiguous population[s] that share[] common economic, social, and cultural interests which should be included within a single district for purposes of its effective and fair representation." *Maestas*, 2012-NMSC-006, ¶ 37. These communities should be included within a single district because, "To be an effective representative, a legislator must represent a district that has a reasonable homogeneity of needs and interests; otherwise the policies he supports will not represent the preferences of most of his constituents." *Id.* (quoting *Prosser v. Elections Bd.*, 793 F. Supp. 859, 863 (W.D. Wis. 1992)).

83. Next, traditional principles emphasize preserving political and geographic boundaries to further our representative government. By "[m]inimizing fragmentation of political subdivisions, counties, towns, villages, wards, precincts, and neighborhoods," it "**allows constituencies to organize effectively** and decreases the likelihood of voter confusion regarding other elections based on political subdivision geographics." *Id.* ¶ 36 (emphasis added).

84. Lastly, preserving the core of existing districts protects against vote dilution through unlawful partisan swings. This is particularly true in New Mexico. The judiciary has drawn the maps for last two redistricting cycles. In completing its work, the courts strived for

EXHIBIT A

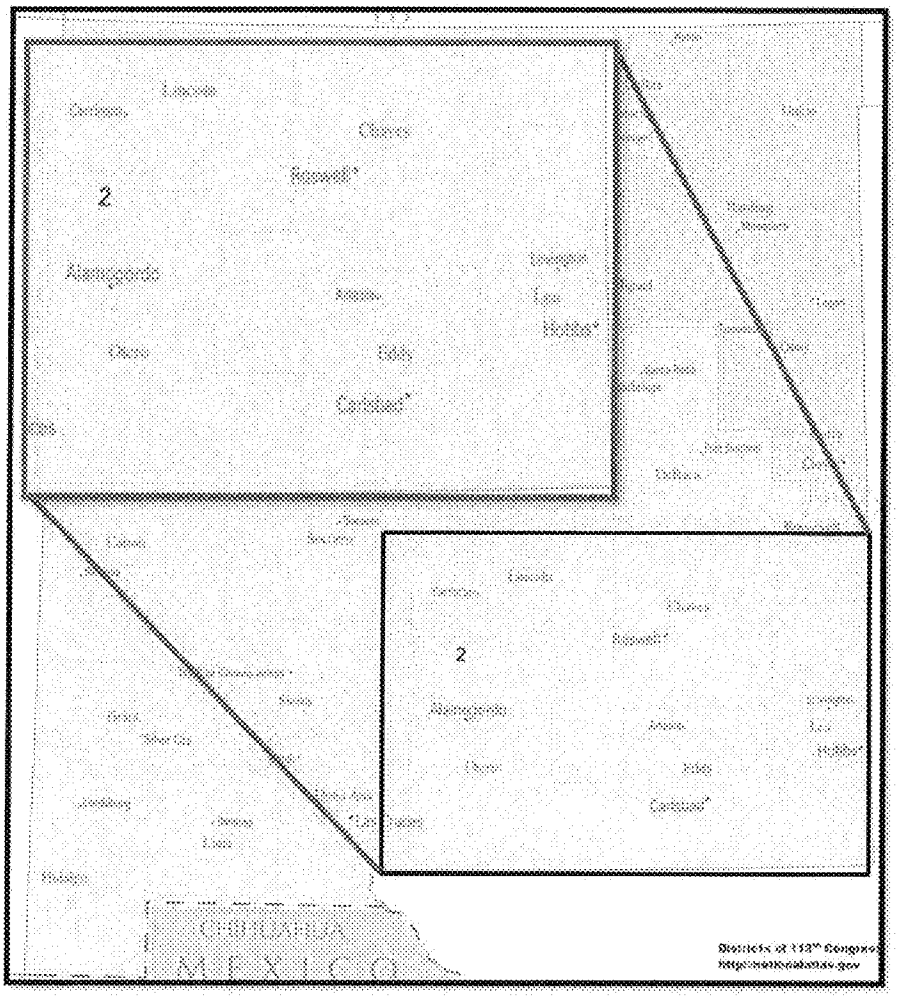
"the appearance of and actual neutrality" and aimed "to draw a partisan-neutral map that complie[d] with both the one person, one vote doctrine and the requirements of the Voting Rights Act." *Id.* ¶ 31. The judiciary's past involvement and its vision to produce partisan-neutral maps is all the more reason to avoid partisan fragmentation of the political core of these judicially drawn congressional districts.

85. To be clear, the Citizen Redistricting Committee attempted to do so in Concepts A and E, which it substantively developed.

86. In passing Senate Bill 1, the State Legislature largely ignored the citizen-committee process they adopted in 2021, electing instead to approve a congressional map that was never reviewed, considered, or studied by the Citizen Redistricting Committee. In doing so, these politically motivated actors adopted a severely partisan congressional map that violates nearly every traditional redistricting principle followed since 1991.

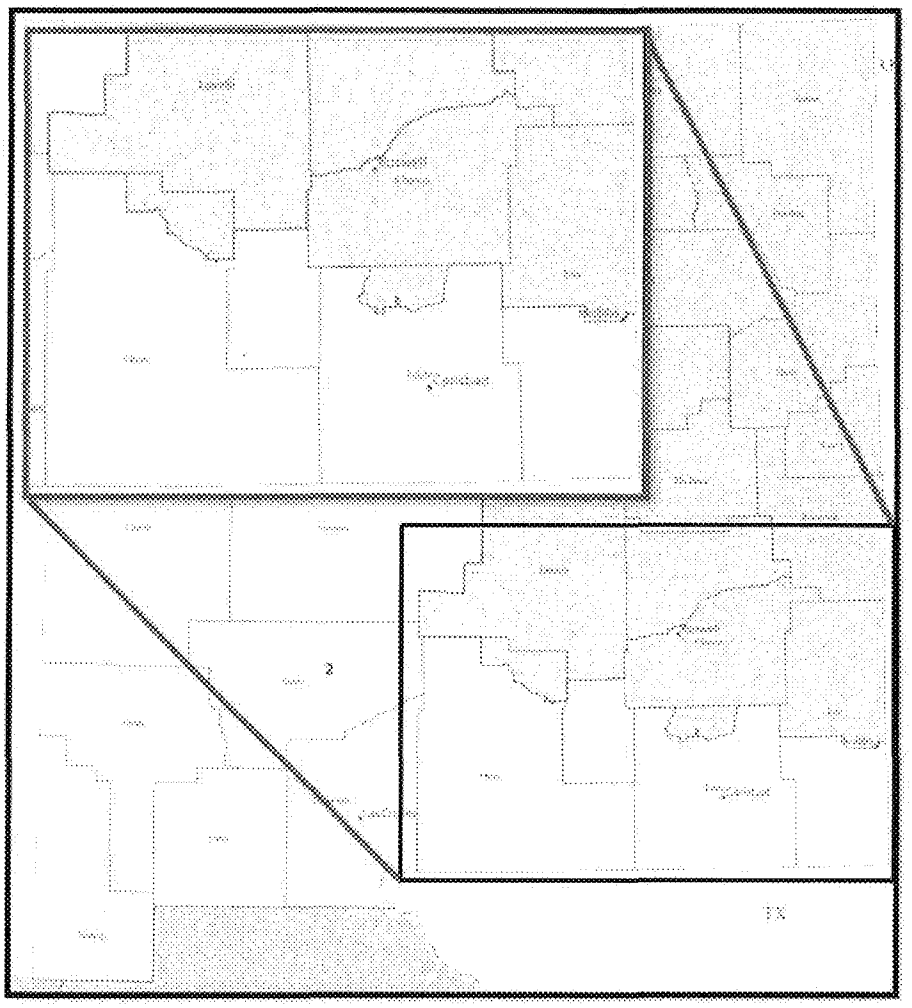
87. Senate Bill 1 dilutes critical communities of interest, particularly in the southeast corner of the state. It is undisputed that the communities in Chaves, Eddy, Lea, and Otero Counties share common economic, social, and cultural interests, based in part on the robust agricultural and oil and gas presence in the area. Under the prior congressional map, these communities remained in-tact and thus their interests were represented by a single congresswoman:

EXHIBIT A



88. Yet, under Senate Bill 1, those same communities are fractured into **all three congressional districts** in New Mexico:

EXHIBIT A



89. It is no secret why partisan map drawers were keen on splitting the communities of interest in southeastern New Mexico: Fracturing these communities of interest drastically "cracked"—and thereby diluted—a significant block of registered Republicans.

90. For instance, as of December 30, 2021, CD 2 (which prior to Senate Bill 1 covered a 17-county area) had 413,795 registered voters, 155,608 (or 38%) of whom were registered Republicans. N.M. Voter Registration Statistics by Congressional District, N.M. Sec'y of State, dated Dec. 30, 2021, https://bit.ly/3Kjzf4Z. Significantly, the four-county area including Chaves, Eddy, Lea, and Otero Counties accounted for approximately 45% of the registered Republicans in the district and represented 34% of the total registered voters in the entire district.

EXHIBIT A

Compare id., *with* N.M. Voter Registration Statistics by County Precinct, N.M. Sec'y of State, dated Dec. 30, 2021, https://bit.ly/3GEyjFX. In other words, this four-county area in New Mexico contains a highly concentrated block of registered Republicans—indeed, almost one-half of the registered Republicans in all of CD 2.

91. It is for this reason that Senate Bill 1's treatment of southeastern New Mexico—specifically, Chaves, Eddy, Lea, and Otero Counties—is so troubling. Under New Mexico's previous congressional map, this community of interest was housed in a single congressional district and had a real opportunity to elect a Republican member of congress. In fact, a Republican has held CD2 for all but one term since 2012. Under Senate Bill 1, however, the registered Republicans in southeastern New Mexico were split between all three congressional districts, drastically disbursing (and "cracking") their votes.

92. Senate Bill 1's treatment of southeastern New Mexico also illustrates the utter disregard the legislature had for geographic and political boundaries. In this one example, ***all four*** of the counties—Chaves, Eddy, Lea, and Otero Counties—are split between multiple districts. In addition to Chaves, Eddy, Lea, and Otero Counties, Senate Bill 1 spits McKinley, Sandoval, Bernalillo, Valencia, and Santa Fe Counties. In total, nearly one-third of New Mexico's counites are split in one way or another under Senate Bill 1, and Chaves County is split the maximum three ways.

93. The New Mexico legislature's disregard for geographic and political boundaries is not limited to counites. Senate Bill 1 also splits the City of Hobbs in half and splits greater-Albuquerque into thirds and greater-Roswell in half.

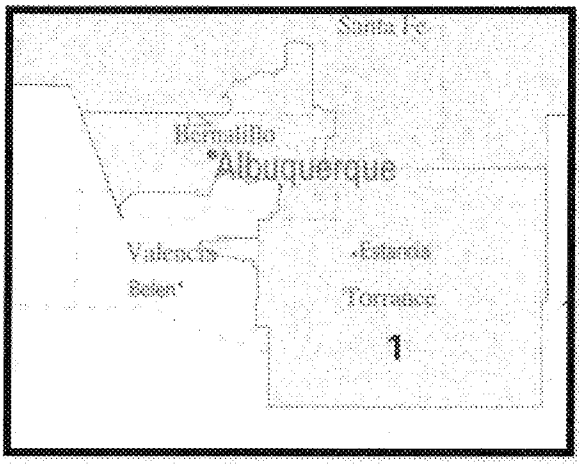
94. Senate Bill 1's treatment of greater-Albuquerque is an overt attempt to use Albuquerque to dilute the votes in what was previously CD 2. By doing so, the New Mexico

EXHIBIT A

legislature imposed a severe partisan performance swing by shifting CD 2's strong Republican block in Chaves, Eddy, Lea, and Otero Counties into majority-Democratic seats. Commentators agree: The Albuquerque Journal Editorial Board described the legislature's move as "a gerrymandered bill with congressional boundaries that split Albuquerque, Roswell and Hobbs for naked political gain." *Gov.'s Legacy Just Got More Partisan With Redistricting Maps*, Albuquerque Journal (Dec. 28, 2021, 5:02 A.M.), https://bit.ly/3rnxriR (Journal Editorial Board).

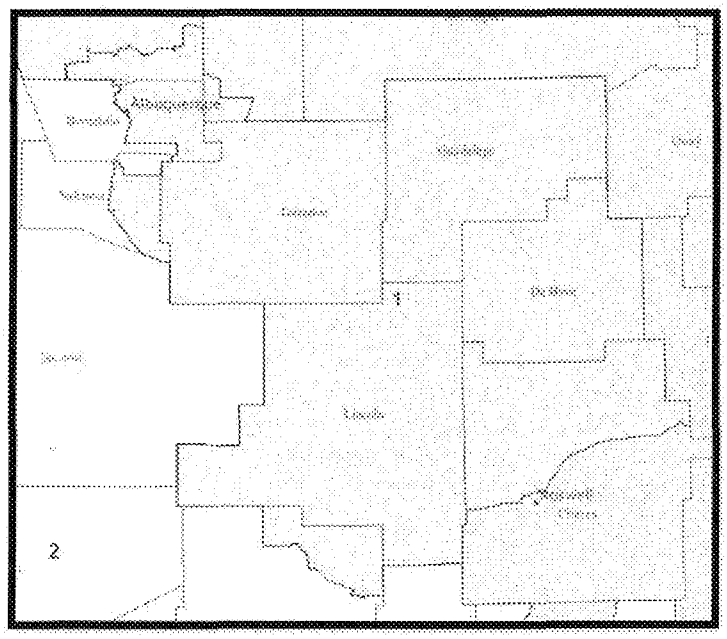
95. This partisan gerrymander is perhaps best shown through analysis of whether Senate Bill 1 preserves the cores of New Mexico's prior congressional districts.

a. **CD 1:** Senate Bill 1 in no way preserves the core of CD 1, which previously included the City of Albuquerque and the counties of Bernalillo and Torrance.

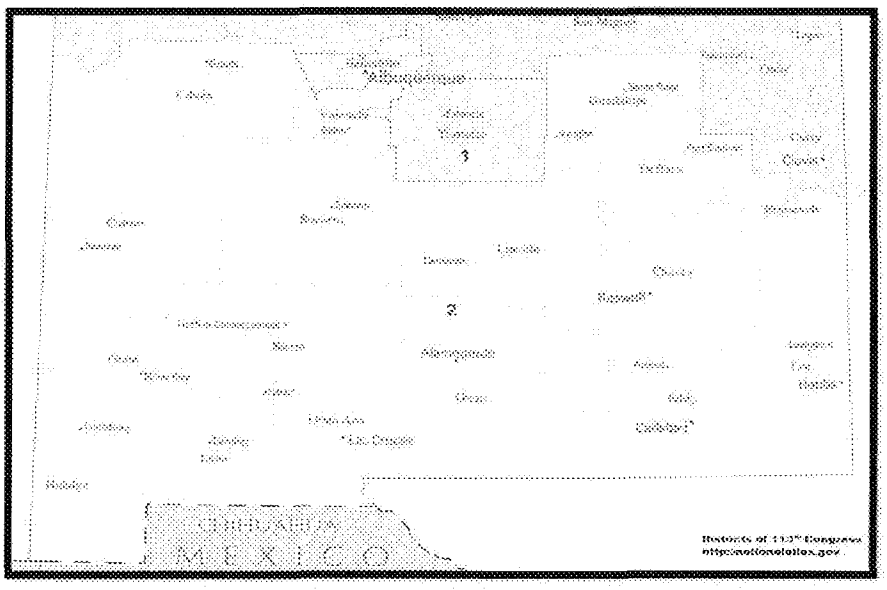


Instead, Senate Bill 1's version of the CD 1 lops off much of Bernalillo County, splits west Albuquerque from east Albuquerque, and captures parts of a new five-county area southeast of Torrance County.

EXHIBIT A

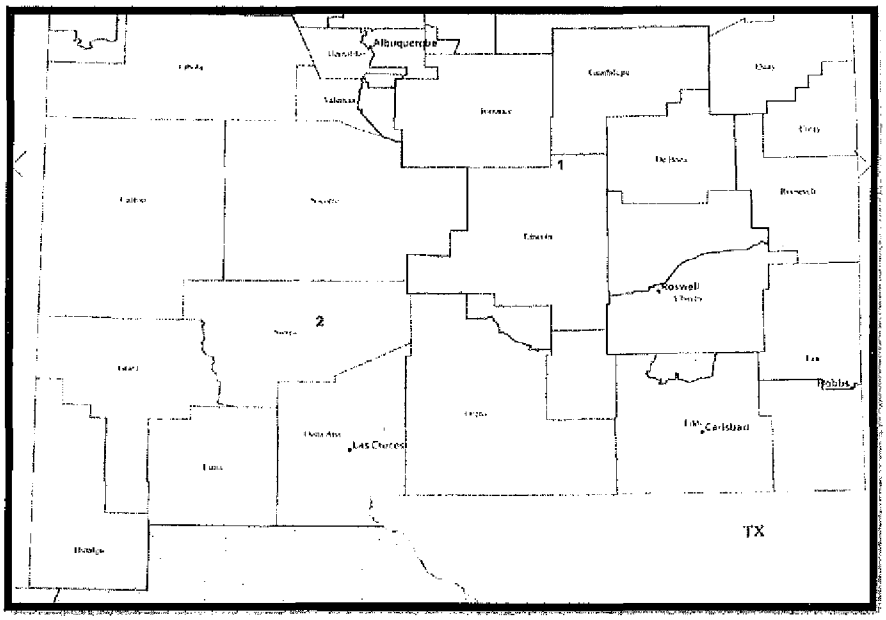


b. **CD 2:** Likewise, Senate Bill 1 completely overhauls the core of CD 2. Previously, CD 2 kept most of southern New Mexico in-tact, including the unique communities of interest in southeastern New Mexico.



But under Senate Bill 1, core portions of what was CD 2—particularly the southeastern core—are split into three different districts.

EXHIBIT A



Strikingly, Defendant Speaker Egolf promised this gerrymander in November 2020, **over a year before the State Legislature adopted Senate Bill 1**. After Republican Yvette Herrell defeated incumbent Democrat Xochitl Torres Small, Speaker Egolf "warned [CD 2] would be redrawn in such a way that 'we'll have to see what that means for Republican chances to hold it.'" Journal Editorial Board (quoting Speaker Egolf). With Senate Bill 1's overhaul of CD 2 Defendant Speaker Egolf has made good on his word.

c. **CD 3:** The core of CD 3 is mostly preserved.

96. The result of Senate Bill 1's machinations is a wildly gerrymandered congressional map through illegitimate means that drastically dilutes the votes of Plaintiffs.

97. Before, New Mexico had a partisan-neutral congressional map that was drawn using traditional redistricting principles that preserved communities of interests and preserved political and geographic boundaries. Now, New Mexico's congressional map is a hopelessly partisan map that casts aside traditional redistricting principles to ensure a Democratic sweep through the dilution of votes. As the Journal Editorial Board put it,

EXHIBIT A

> It wasn't enough for [Speaker Egolf] that Democrats have super-majorities in both houses of the state Legislature, hold every state office from governor to state treasurer and occupy both U.S. Senate and two of the state's three congressional seats. He and other Democrats wanted it all and took it at the expense of conservative and rural voters.
>
> Then, the governor joined the gerrymandering circus and cemented these congressional boundaries for the next decade.

Journal Editorial Board.

98. Senate Bill 1 created a politically gerrymandered congressional map. Because the map violates the New Mexico Constitution, Plaintiffs seek redress in this Court.

WHEREFORE, Plaintiffs respectfully request it be awarded the following relief against Defendants:

a. Final Judgment against Defendants;

b. Declaration that Senate Bill 1 violates the New Mexico Constitution;

c. Adoption of a partisan-neutral congressional map consistent with Congressional Concept E (Justice Chávez's map);

d. Attorneys' fees and costs; and

e. Such other and further relief as the Court deems just and proper.

EXHIBIT A

Dated: January 21, 2022.

Respectfully submitted,

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By */s/ Eric R. Burris*

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Facsimile: (505) 341-9340

Attorneys for Plaintiffs

EXHIBIT A

VERIFICATION

I, Dee Ann Kimbro, being sworn upon oath, depose and state as follows:

I am a Plaintiff in this action and have reviewed the information contained in the Verified Complaint for Violation of New Mexico Constitution Article II, Section 18. The information contained therein is true and correct.

I declare under penalty of perjury under the laws of the State of New Mexico that the foregoing statement is true and correct.

Executed this 21 day of January, 2022.

Dee Ann Kimbro

Dee Ann Kimbro

3:31 PM
1-21-2022

EXHIBIT A

VERIFICATION

I, Bobby Kimbro, being sworn upon oath, depose and state as follows:

I am a Plaintiff in this action and have reviewed the information contained in the Verified Complaint for Violation of New Mexico Constitution Article II, Section 18. The information contained therein is true and correct.

I declare under penalty of perjury under the laws of the State of New Mexico that the foregoing statement is true and correct.

Executed this 21 day of January, 2022.

Bobby Kimbro 1/21/22 3:41PM

Bobby Kimbro

EXHIBIT A

VERIFICATION

I, Dinah Vargas, being sworn upon oath, depose and state as follows:

I am a Plaintiff in this action and have reviewed the information contained in the Verified Complaint for Violation of New Mexico Constitution Article II, Section 18. The information contained therein is true and correct.

I declare under penalty of perjury under the laws of the State of New Mexico that the foregoing statement is true and correct.

Executed this 21st day of January, 2022.

Dinah Vargas

Dinah Vargas

EXHIBIT A

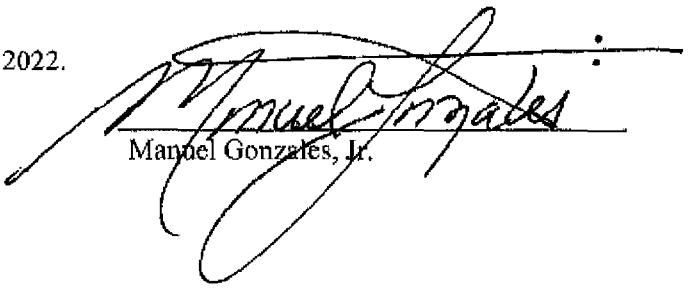
VERIFICATION

I, Manuel Gonzales, Jr., being sworn upon oath, depose and state as follows:

I am a Plaintiff in this action and have reviewed the information contained in the Verified Complaint for Violation of New Mexico Constitution Article II, Section 18. The information contained therein is true and correct.

I declare under penalty of perjury under the laws of the State of New Mexico that the foregoing statement is true and correct.

Executed this 21st day of January, 2022.



Manuel Gonzales, Jr.

EXHIBIT A

VERIFICATION

I, Steve Pearce, being sworn upon oath, depose and state as follows:

I am the Chairman of the Republican Party of New Mexico, a Plaintiff in this action, and have reviewed the information contained in the Verified Complaint for Violation of New Mexico Constitution Article II, Section 18. The information contained therein is true and correct.

On behalf of the Republican Party of New Mexico, I declare under penalty of perjury under the laws of the State of New Mexico that the foregoing statement is true and correct.

Executed this 21st day of January, 2022.

Steve Pearce, Chairman

Republican Party of New Mexico

23641212.1

EXHIBIT A

VERIFICATION

I, Pearl Garcia, being sworn upon oath, depose and state as follows:

I am a Plaintiff in this action and have reviewed the information contained in the Verified Complaint for Violation of New Mexico Constitution Article II, Section 18. The information contained therein is true and correct.

I declare under penalty of perjury under the laws of the State of New Mexico that the foregoing statement is true and correct.

Executed this 21st day of January, 2022.

Pearl Garcia

Pearl Garcia

EXHIBIT A

VERIFICATION

I, Timothy Jennings, being sworn upon oath, depose and state as follows:

I am a Plaintiff in this action and have reviewed the information contained in the Verified Complaint for Violation of New Mexico Constitution Article II, Section 18. The information contained therein is true and correct.

I declare under penalty of perjury under the laws of the State of New Mexico that the foregoing statement is true and correct.

Executed this 21 day of January, 2022.

Timothy Jennings

EXHIBIT A

VERIFICATION

I, David Gallegos, being sworn upon oath, depose and state as follows:

I am a Plaintiff in this action and have reviewed the information contained in the Verified Complaint for Violation of New Mexico Constitution Article II, Section 18. The information contained therein is true and correct.

I declare under penalty of perjury under the laws of the State of New Mexico that the foregoing statement is true and correct.

Executed this 21st day of January, 2022.

David Gallegos

EXHIBIT A

FILED
5th JUDICIAL DISTRICT COURT
Lea County
9/13/2023 8:34 AM
NELDA CUELLAR
CLERK OF THE COURT
Cory Hagedoorn

STATE OF NEW MEXICO
LEA COUNTY
FIFTH JUDICIAL DISTRICT COURT

REPUBLICAN PARTY OF NEW MEXICO, ET. AL.,
V.
MAGGIE TOLOUSE OLIVER, ET. AL. **No: D-506-CV-2022-00041**

AMENDED NOTICE OF Bench Trial

NOTICE IS HEREBY GIVEN that a hearing in this case has been set before the Honorable Fred Van Soelen, as follows:

3 DAY BENCH TRIAL
September 27 – September 29, 2023 @ 9:00am 3 Days Lea County Judicial Complex Courtroom 402 100 N. Love St, Lovington, NM 88260

ALL PARTIES TO APPEAR IN PERSON

If this hearing requires more or less time than the court has designated, or if this hearing conflicts with any prior setting, please contact us immediately as continuances may not be granted on late notice. The District Court complies with the Americans with Disabilities Act. Counsel or PRO SE persons may notify the Clerk of the Court of the nature of the disability at least five (5) days before ANY hearing so appropriate accommodations may be made. Please contact us if an interpreter will be needed.

The NM Courts What's Next Text program provides courtesy text message reminders to defendants for future adult criminal court dates to the cell phone number provided to the court on the Opt-In form. If you would like to participate in the voluntary program complete the Opt-in form and return to the court clerk's office. Forms are available in the clerk's office.

NELDA CUELLAR
CLERK OF THE DISTRICT COURT

CERTIFICATE OF SERVICE

I, the undersigned Employee of the District Court of Lea County, New Mexico, do hereby certify that I served a copy of this document to all parties listed below on 8/4/2023.

*Amended address of Judicial Complex to 100 N. Love St. Lovington NM 88260.

By: Susie Bessette

EXHIBIT B

ROBERT J. GORENCE
REPUBLICAN PARTY OF NEW MEXICO
CARTER B. HARRISON, IV
ERIC R. BURRIS
HAROLD DUANE STRATTON, JR
SARA N SANCHEZ
MARK TRAVIS BAKER
MIMI STEWART
RICHARD E. OLSON
DEE ANN KIMBRO
KYLE P DUFFY
DINAH VARGAS
BOBBY KIMBRO
JUSTIN ROSS KAUFMAN
HOWIE MORALES
MANUEL GONZALES, JR
DEMOCRATIC PARTY OF NEW MEXICO
LUCAS WILLIAMS
TIMOTHY JENNINGS
JEFFREY THOMAS LUCKY
MICHELLE LUJAN GRISHAM
BRIAN EGOLF
LUIS G. STELZNER
HOLLY AGAJANIAN
DAVID GALLEGOS
PEARL GARCIA
PETER S. AUH
MAGGIE TOLOUSE OLIVER
MICHAEL B. BROWDE
JEFFRY H. RAY

EXHIBIT B

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.

EXHIBIT C

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.

EXHIBIT C

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/.

EXHIBIT C

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.

EXHIBIT C

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).

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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

EXHIBIT C

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,

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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.

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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

EXHIBIT C

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).

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Respectfully submitted,

/s/ Holly Agajanian

HOLLY AGAJANIAN
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KYLE P. DUFFY
Deputy General Counsel to Governor Michelle Lujan Grisham
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kyle.duffy@exec.nm.gov

Counsel for Governor Michelle Lujan Grisham and Lieutenant Governor Howie Morales

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
Holly Agajanian

EXHIBIT C

From: Duffy, Kyle, GOV
To: Carter B. Harrison IV
Cc: gorence@golaw.us; Agajanian, Holly, GOV
Subject: RE: [EXTERNAL] FW: Draft motion to dismiss - Republican Party of NM v. Toulouse Oliver
Date: Friday, July 21, 2023 8:54:00 AM

Good morning, Carter,

Yes, we agree that you can still seek non-party discovery under Rule 1-045 NMRA. You are correct that we would likely oppose such discovery requests, but we won't argue that you can't obtain it because you dismissed us.

Kyle

Kyle P. Duffy
Deputy General Counsel
Office of Governor Michelle Lujan Grisham
P: 505-476-2210 | kyle.duffy@exec.nm.gov
Website: governor.state.nm.us

From: Carter B. Harrison IV <carter@harrisonhartlaw.com>
Sent: Friday, July 21, 2023 2:41 AM
To: Duffy, Kyle, GOV <Kyle.Duffy@exec.nm.gov>; Agajanian, Holly, GOV <Holly.Agajanian@exec.nm.gov>
Cc: gorence@golaw.us
Subject: [EXTERNAL] FW: Draft motion to dismiss - Republican Party of NM v. Toulouse Oliver

And Kyle, do you agree that dismissal does not impair whatever right we may have to depose or seek discovery post-dismissal, written production of documents by subpoena) from the Governor and Lt. Governor? (To be clear, I'm not asking you to say that such procedures are appropriate — I fully expect you to say we can't depose the Gov — just that we won't run into the specific argument that 'if they wanted this depo they shouldn't have dismissed them.')

Best,
Carter

From: Carter B. Harrison IV
Sent: Friday, July 21, 2023 2:36 AM
To: Lucas Williams <LWilliams@hinklelawfirm.com>; Mark Baker <mbaker@peiferlaw.com>; Sara Sanchez <ssanchez@peiferlaw.com>; Rich Olson <ROlson@hinklelawfirm.com>
Cc: Duffy, Kyle, GOV <Kyle.Duffy@state.nm.us>; Holly.Agajanian@state.nm.us; Amanda Bustamante <amandab@harrisonhartlaw.com>; gorence@golaw.us
Subject: FW: Draft motion to dismiss - Republican Party of NM v. Toulouse Oliver

Counsel:

EXHIBIT D

I've been taking an unacceptably long time to formulate a response to the Executive Defendants on this motion.

Do the Legislative Defendants and the Secretary of State agree that the Executive Defendants are not necessary parties to this action, and that the Court could (assuming arguendo that the map is unconstitutional) award all the same relief that would be available were they to remain in the case?

Best,
Carter

Carter B. Harrison IV
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Fax: (505) 341-9340

From: Duffy, Kyle, GOV <Kyle.Duffy@exec.nm.gov>
Sent: Friday, July 14, 2023 3:37 PM
To: Carter B. Harrison IV <carter@harrisonhartlaw.com>
Cc: Agajanian, Holly, GOV <Holly.Agajanian@exec.nm.gov>
Subject: Draft motion to dismiss - Republican Party of NM v. Toulouse Oliver

Good afternoon, Carter,

Per our conversation, please find attached a draft motion to dismiss the Governor and Lieutenant Governor as defendants. While it did not make the final cut of the motion, I would note that there is authority for the proposition that you can still obtain the relief you are seeking without the addition of the Governor or Lieutenant Governor. *See, e.g., Larios v. Perdue*, 306 F. Supp. 2d 1190, 1199 (N.D. Ga. 2003) ("Put differently, because we can enjoin the holding of elections pursuant to the 2002 plan (assuming, of course, that the plan is in fact unconstitutional) and subsequently require elections to be conducted pursuant to a constitutional apportionment system, the Lieutenant Governor is not a necessary party to this action. By contrast, the Georgia Secretary of State is a necessary party because she is designated by state law as being responsible for administering state-wide elections, and accordingly we cannot require that state-wide elections in Georgia be conducted using constitutional apportionment system in her absence."); *Brown v. Jacobsen*, 590 F. Supp. 3d 1273, 1284 (D. Mont. 2022) (rejecting Montana secretary of state's argument that the proper defendants in a redistricting challenge are the State of Montana, the Montana legislature, or the Governor and noting that "those parties are either immune from suit or likewise would be unable to implement Plaintiffs' requested relief").

Please let us know your position whenever you get a chance. Thank you.

Kyle

EXHIBIT D

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Deputy General Counsel
Office of Governor Michelle Lujan Grisham
P: 505-476-2210 | kyle.duffy@exec.nm.gov
Website: governor.state.nm.us

EXHIBIT D

STATE OF NEW MEXICO
COUNTY OF LEA
FIFTH JUDICIAL DISTRICT

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

Plaintiffs,

v.

Cause 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 JAVIER MARTINEZ, in his official capacity as Speaker of the New Mexico House of Representatives,

Defendants.

PLAINTIFFS' RESPONSE IN OPPOSITION TO EXECUTIVE DEFENDANTS' MOTION TO DISMISS[1]

Executive Defendants Governor Michelle Lujan Grisham and Lieutenant Governor and President of the New Mexico Senate Howie Morales have moved this Court for an order dismissing them from this lawsuit under Rule 1-012(C) of the New Mexico Rules of Civil Procedure for the District Courts. In that Motion, Executive Defendants claim that Plaintiffs lack standing to sue Executive Defendants and that Executive Defendants' asserted legislative immunity wholly bars Plaintiffs' partisan-

[1] At Executive Defendants' request, Plaintiffs agreed to file this Opposition on an expedited basis (in less than half the time allotted for responses by Rule 1-007.1(D) of the New Mexico Rules of Civil Procedure for the District Courts), given the extraordinarily truncated timeline of this case.

EXHIBIT E

gerrymandering claim. *See* Mot. To Dismiss Exec. Defs. ("Mot.") 6–10. Plaintiffs the Republican Party of New Mexico and a bipartisan group of New Mexico voters (collectively, "Plaintiffs") file this short Opposition to Executive Defendants' Motion, raising only three brief points.

First, Executive Defendants' Motion is procedurally untimely under Rule 1-012(G), at least as to their legislative-immunity argument.

Under Rule 1-012(G), a party who makes a motion under Rule 1-012 "may join with it *any* other motions [ ] provided for [in Rule 1-012] and then available to him," Rule 1-012(G) (emphasis added)—including, as relevant here, motions to dismiss for failure to state a claim under Rule 1-012(B)(6) and motions for judgment on the pleadings under Rule 1-012(C). However, "[i]f a party makes a motion under [Rule 1-012] but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, *he shall not thereafter make a motion based on the defense or objection so omitted*[.]" *Id.* (emphasis added); *see, e.g.*, *Rupp v. Hurley*, 1999-NMCA-057, ¶¶ 26–27, 127 N.M. 222, 979 P.2d 733. Finally, Rule 1-012(G) recognizes an exception to this time-bar rule for motions described in Rule 1-012(H)(2), which exception covers motions that assert: "[1] A defense of failure to state a claim upon which relief can be granted, [2] a defense of failure to join a party indispensable under Rule 1-019 NMRA[,] and [3] an objection of failure to state a legal defense to a claim." Rule 1-012(H)(2).

Here, Executive Defendants' Motion is procedurally untimely under Rule 1-012(G), since they failed to combine their defenses or objections in this Motion with

EXHIBIT E

their prior Motion To Dismiss in this case—a motion that the New Mexico Supreme Court itself ultimately reviewed. *See* Order, *Grisham v. Van Soelen*, No.S-1SC-39481 (N.M. July 5, 2023) (hereinafter "Superintending Order"). Executive Defendants' present Motion raises standing and legislative-immunity arguments that were "available" to them from the inception of this case. Rule 1-012(G); *see Rupp*, 1999-NMCA-057, ¶¶ 26–27. That is because those arguments depend solely upon facts established prior to Plaintiffs' filing their Complaint and within Executive Defendants' own knowledge—specifically, the Governor's and Lieutenant Governor's involvement in the passage of Senate Bill 1. Mot.7, 10. Yet, Executive Defendants did *not* assert these standing and legislative-immunity arguments in their previous Motion To Dismiss in this case, filed well over a year ago on February 18, 2022. *Compare* Exec. Defs.' Mot. To Dismiss 1, 6–9, *with* Mot.6–10. Nor does Executive Defendants' present Motion fall within the exception recognized in Rule 1-012(H)(2). Accordingly, Executive Defendant's Motion is procedurally untimely under Rule 1-012(G).

That said, this Court may be able to address Executive Defendants' apparent standing concerns as part of its consideration of any objections to standing already built into this Court's Scheduling Order. In remanding this case to this Court, the New Mexico Supreme Court ordered this Court to, "as a threshold mater, . . . conduct a standing analysis for all parties." Superintending Order 3. However, the Superintending Order does not make clear whether the Court should consider Executive Defendants' standing objections—which arguments, under New Mexico

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law, do not rest on jurisdictional concerns, *ACLU of N.M. v. City of Albuquerque,* 2008-NMSC-045, ¶¶ 9–10, 144 N.M. 471, 188 P.3d 1222—despite Executive Defendants' failure to raise those objections consistent with Rule 1-012(G). Nevertheless, as explained immediately below, Executive Defendants' standing concerns are misplaced.

Second, Executive Defendants' standing and legislative-immunity arguments are incorrect. Executive Defendants claim that Plaintiffs cannot name them as Defendants here—either for standing reasons or for legislative-immunity reasons—because the Governor's only relevant action here was to sign Senate Bill 1 into law, while the Lieutenant Governor's only relevant action was to preside over the Senate while it passed Senate Bill 1. *See* Mot.6–9 (standing), 9–10 (legislative immunity). However, the Governor and Lieutenant Governor have historically participated as named parties in redistricting litigation in New Mexico, *see, e.g.*, *Maestas v. Hall*, 2012-NMSC-006, 274 P.3d 66 (Governor and Lieutenant Governor as "Real Parties in Interest" in redistricting case); Decision On Remand, *Egolf v. Duran*, No.D-101-CV-2011-02942 (Santa Fe Cnty. 1st Jud. Dist. Ct. Feb. 27, 2012) (Governor and Lieutenant Governor as defendants in redistricting case),[2] and Executive Defendants do not even attempt to distinguish this case from that longstanding precedent, *see generally* Mot.6–9. Further, with respect to Plaintiffs' standing to sue the Governor, in particular, if this Court agrees with Plaintiffs that Senate Bill 1 is an unconstitutional partisan gerrymander, *see* V. Compl. at 27, and it orders the

[2] Available at https://redistricting.lls.edu/wp-content/uploads/NM-egolf-20120227-house-decision.pdf (all websites last visited Aug. 4, 2023).

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Legislature to adopt a new redistricting map as a remedy, the Governor may have to call a special session of the Legislature or issue a special message for the regular legislative session before the Legislature could adopt that new map, *see* N.M. Const. art. IV, §§ 5(B)(2), 6. Thus, the presence of the Governor here may be a necessary component to Plaintiffs' obtaining relief for their constitutional injuries in this case. *See Forest Guardians v. Powell,* 2001-NMCA-028, ¶ 25, 130 N.M. 368, 24 P.3d 803 (discussing traceability component of standing). Finally, while Executive Defendants cite various standing and legislative-immunity cases throughout their Motion (including cases from different jurisdictions), *see generally* Mot.6–10, the vast majority of those cases arise outside of the redistricting context, while the only two redistricting-related cases that Executive Defendants cite do not address dismissal of executive-branch defendants from redistricting challenges, *see* Mot.9, n.7 (citing *In re Perry*, 60 S.W.3d 857, 860 (Tex. 2001), in which the court ordered the quashing of a subpoena based on legislative privilege, without addressing dismissal of executive-branch defendants); Mot.8, n.6 (citing *Sanchez v. King,* 550 F. Supp. 13, 15 (D.N.M. 1982), *aff'd, King v. Sanchez,* 459 U.S. 801 (1982), in which the court noted that a state legislature must have an adequate opportunity to address reapportionment concerns, without addressing dismissal of executive-branch defendants). Thus, none of those authorities is helpful here.

Finally, and in all events, if this Court is inclined to dismiss Executive Defendants from this case, notwithstanding Plaintiffs' arguments above, the Court should impose two conditions on Executive Defendants prior to ordering that

EXHIBIT E

dismissal. First, the Court should require Executive Defendants to agree to respond to discovery served upon them by Plaintiffs, notwithstanding issues of legislative privilege.[3] Second, the Court should require Executive Defendants to agree to be bound by any judgment from this Court in Plaintiffs' favor on Plaintiffs' partisan-gerrymandering claim, to the extent that Executive Defendants' participation is necessary for Plaintiffs to effectively obtain the relief awarded by any such judgment. Notably, these two conditions would ensure that a dismissal of Executive Defendants does not cause unexpected and unnecessary delays here, which is especially important given the "extraordinarily truncated timeline of this case." Scheduling Order 3.

* * *

This Court should deny Executive Defendants' Motion To Dismiss under Rule 1-012(C).

[3] *See, e.g., Bennett v. Ohio Redistricting Comm'n*, 164 Ohio St. 3d 1457, 2021-Ohio-3607, 174 N.E.3d 806 (allowing discovery against the Ohio Governor, Senate President, and House Speaker, among other officials, in a partisan gerrymandering case before the Ohio Supreme Court, notwithstanding legislative immunity).

EXHIBIT E

Dated: August 4, 2023

Respectfully Submitted,

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Attorneys for Plaintiff Republican Party Of New Mexico, David Gallegos, Timothy Jennings, Dinah Vargas, Bobby and Dee Ann Kimbro, and Pearl Garcia

**Pro Hac Vice Forthcoming*

EXHIBIT E

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing will be served on all counsel via the e-filing system.

Dated: August 4, 2023

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EXHIBIT E

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.

REPLY IN SUPPORT OF MOTION TO DISMISS EXECUTIVE DEFENDANTS

Come now Defendants Governor Michelle Lujan Grisham and Lieutenant Governor Howie Morales (collectively, "Executive Defendants"), by and through their counsel of record in this matter, and hereby provides their reply in support of their Motion to Dismiss Executive Defendants ("Motion"). As grounds for this reply, the Executive Defendants state as follows.

INTRODUCTION

As thoroughly explained in the Motion, Plaintiffs do not have standing to sue Executive Defendants, nor can they get around Executive Defendants' legislative immunity. Plaintiffs' arguments to the contrary are unpersuasive. First, the Court should reject Plaintiffs' attempts to

EXHIBIT F

dodge the merits of the Motion. Second, the Court should not attribute any weight to the fact that the Executive Defendants' predecessors *voluntarily* participated in redistricting litigation when the political branches failed to enact new maps. Third, Executive Defendants' presence is not necessary for Plaintiffs to receive the relief to which they would be entitled to should the Court find SB 1 unconstitutional. And lastly, the Court need not, and should not, impose any conditions on Executive Defendants if it dismisses them.

DISCUSSION

I. The Court should address the merits of the Motion

Plaintiffs first argue the Motion is procedurally untimely under Rule 1-012(G) NMRA because Executive Defendants did not raise standing or legislative immunity in their initial motion to dismiss based on the political question doctrine. *See* Plaintiffs' Response in Opposition to Executive Defendants' Motion to Dismiss ("Response") at 2 (filed Aug. 4, 2023). The Court should reject this argument for several reasons.

First, Rule 1-012(G)'s requirement that a party raise certain defenses in its initial Rule 1-012 motion only applies to the defenses of lack of jurisdiction over the person, improper venue, insufficiency of process, and insufficiency of service of process. *See* Rule 1-012(G), (H)(1); *see also Rupp v. Hurley*, 1999-NMCA-057, ¶ 19, 127 N.M. 222, 979 P.2d 733 ("Thus, it now is clear that any time defendant makes a preanswer Rule 12 motion, he must include, on penalty of waiver, the defenses set forth in subdivisions (2) through (5) of Rule 12(b)." (quoting 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1391, at 741-44 (2d ed.1990)). As the instant motion is based on lack of standing and legislative immunity, it is not subject to the constraints of Rule 1-012(G). *See Deutsche Bank Nat. Tr. Co. v. Johnston*, 2016-NMSC-013, ¶ 18, 369 P.3d 1046 ("When standing is a prudential consideration, it can be raised for the first time at

EXHIBIT F

any point in an active litigation, just like a defense of failure to state a claim, and unlike defenses relating to personal jurisdiction, venue, and insufficient service of process, all of which must be raised in an initial or amended responsive pleading."); *State Employees Bargaining Agent Coal. v. Rowland*, 494 F.3d 71, 77 (2d Cir. 2007) ("It is well-settled that legislative immunity is . . . a personal defense that may be asserted to challenge the sufficiency of a complaint [for failure to state a claim] under Rule 12(b)(6)."); *see generally* Rule 1-012(G)-(H) (recognizing exception for the defense of failure to state a claim).

Second, even if the Court determines that Rule 1-012(G) applies to the Motion, the Court should still address the Motion's merits. Generally, courts disfavor avoiding substantive issues based on procedural technicalities. *See Montoya v. Dep't of Fin. & Admin.*, 1982-NMCA-051, ¶ 27, 98 N.M. 408, 414, 649 P.2d 476 ("In interpreting the Rules of Civil Procedure, New Mexico courts favor the right of a party to a hearing on the merits over dismissal of actions on procedural technicalities."). This policy is even stronger in this case, as disregarding the Motion based on a procedural technicality will mean unconstitutionally forcing the head of this Court's coordinate branch to be a party to significantly expedited and complex litigation. And the Executive Defendants' failure to include these defenses in their initial motion to dismiss is excusable given the rushed nature of the initial stages of the litigation caused by Plaintiffs' failure to timely bring this action seeking to overturn SB 1 in the middle of election season.

Lastly, the Court should, at the very least, address Executive Defendants' standing argument. The Supreme Court has directed that this Court "*shall* conduct a standing analysis *for all parties*." *See* Order at 3, *Lujan Grisham v. Republican Party of N.M.*, S-1-SC-93481 (July 5, 2023) (emphases added). The plain language of this order makes clear that the Court should

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address Executive Defendants' standing argument. Accordingly, the Court should, at a minimum, reject Plaintiffs' procedural argument to the extent it applies to standing.

II. The voluntary participation of previous governors and lieutenant governors in redistricting litigation is irrelevant

Plaintiffs next claim that the Executive Defendants' standing and legislative immunity arguments are incorrect because they "have historically participated as named parties in redistricting litigation in New Mexico." Response at 4. But this argument ignores that previous governors and lieutenant governors have never raised these arguments in previous redistricting litigation—probably because those cases involved an entirely different situation in which the political branches were unable to enact new maps. "Cases are not authority for propositions not considered." *Piedra, Inc. v. N.M. Transp. Comm'n*, 2008-NMCA-089, ¶ 32, 144 N.M. 382, 188 P.3d 106 (alteration, internal quotation marks, and citation omitted)). Thus, the fact that Executive Defendants' predecessors voluntarily participated in redistricting litigation involving the failure to reapportion districts is of no moment. Rather, the Court should find persuasive the significant authority cited in the Motion demonstrating that Plaintiffs do not have standing to sue Executive Defendants and that they are protected by legislative immunity.[1]

III. The Governor's presence is not necessary for Plaintiffs to receive the relief this Court may provide should it find SB 1 unconstitutional

Plaintiffs, in passing, argue that the Governor's presence may be necessary for them to obtain their requested relief because the Court may "order[] the Legislature to adopt a new

[1] Plaintiffs try to distinguish this authority on the basis that many of the cases do not involve redistricting litigation, yet they make no effort to explain why the nature of this action changes the result. *See* Response at 5. The answer is that it does not. *See, e.g.*, *Brown v. Jacobsen*, 590 F. Supp. 3d 1273, 1284 (D. Mont. 2022) (rejecting Montana secretary of state's argument that the proper defendants in a redistricting challenge are the State of Montana, the Montana legislature, or the governor and noting that "*those parties are either immune from suit or likewise would be unable to implement Plaintiffs' requested relief*" (emphasis added)).

EXHIBIT F

redistricting map," and the Governor may need to call a special session or issue a special message for the upcoming regular session to facilitate this relief. *See* Response at 5. But this argument is based on a fundamental misunderstanding of the judiciary's authority.[2] The Court cannot order the Legislature to enact a new map, nor can it order the Governor to call a special session, issue a special message, or sign legislation enacting a new map. *See Serrano v. Priest*, 18 Cal. 3d 728, 751, 557 P.2d 929, 941 (1976) ("[T]he courts may not order the Legislature or its members to enact or not to enact, or the Governor to sign or not to sign, specific legislation[.]"); *In re Legislative Reapportionment*, 150 Colo. 380, 382, 374 P.2d 66, 67 (1962) ("[W]e wish to state at the outset that under the separation of powers doctrine we cannot and will not command the Governor to do anything, the doing of which lies within his sound discretion, and we deem his authority to call the Legislature into special session to be such prerogative."); *Maryland Comm. for Fair Representation v. Tawes*, 228 Md. 412, 440, 180 A.2d 656, 671 (1962) ("Of course, the courts cannot direct the Governor to call the General Assembly into extraordinary session; that is a power the exercise of which lies entirely within his discretion."); *Sweeney v. Notte*, 95 R.I. 68, 82, 183 A.2d 296, 303 (1962) ("In the absence of constitutional warrant to the contrary this court has no authority to require the general assembly to meet in special session, nor to require the governor to exercise his constitutional prerogative to call such a session.").

Rather, the proper remedy—should the Court ultimately find SB 1 unconstitutional—would be to simply enjoin the Secretary of State from using the map for the upcoming election and issue a court-drawn map if the political branches fail adopt a new map in a timely manner. *See Sanchez v. King*, 550 F. Supp. 13, 15 (D.N.M. 1982), *aff'd, King v. Sanchez*, 459 U.S. 801 (1982)

[2] This argument also ignores the fact that the Legislature can call itself into an extraordinary session at any time "for all purposes." *See* N.M. Const. art IV, § 6.

EXHIBIT F

("[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)). Executive Defendants are not necessary for the Court to provide this relief. *See Larios v. Perdue*, 306 F. Supp. 2d 1190, 1199 (N.D. Ga. 2003) ("Put differently, because we can enjoin the holding of elections pursuant to the 2002 plan (assuming, of course, that the plan is in fact unconstitutional) and subsequently require elections to be conducted pursuant to a constitutional apportionment system, the Lieutenant Governor is not a necessary party to this action."). Accordingly, Plaintiffs' arguments to the contrary are misplaced.

IV. The Court need not, and should not, "conditionally" dismiss Executive Defendants

Finally, Plaintiffs argue that "if this Court is inclined to dismiss Executive Defendants from this case, . . . the Court should impose two conditions on Executive Defendants prior to ordering that dismissal." Response at 5-6. Specifically, Plaintiffs ask that the Court "require Executive Defendants to agree to respond to discovery served upon them by Plaintiffs, notwithstanding issues of legislative privilege" and "agree to be bound by any judgment from this Court in Plaintiffs' favor on Plaintiffs' partisan-gerrymandering claim, to the extent that Executive Defendants' participation is necessary for Plaintiffs to effectively obtain the relief awarded by any such judgment." *Id.* at 6. Both requests are improper.

As a general matter, should the Court find that Plaintiffs lack standing to sue Executive Defendants or that Executive Defendants are entitled to legislative immunity, it should simply dismiss them. Plaintiffs cite no authority for the Court's authority to issue conditions on dismissed parties solely for Plaintiffs' convenience. *See generally* Response. "Where a party cites no authority to support an argument, [the Court] may assume no such authority exists" and decline to address that argument. *Curry v. Great Nw. Ins. Co.*, 2014-NMCA-031, ¶ 28, 320 P.3d 482.

EXHIBIT F

Further, even if the Court did have the authority to "conditionally" dismiss Executive Defendants, Plaintiffs' requested conditions are either improper or unnecessary. With regard to Plaintiffs' first requested condition, it is clear the Court cannot order Executive Defendants to participate in party discovery once they are dismissed, *see* Rule 1-026 NMRA, nor can it force them to respond to third-party discovery under Rule 1-045 NMRA to the extent it would violate legislative immunity.[3] And Plaintiffs' second requested condition is unnecessary because, as explained in the Motion and above, Plaintiffs do not need Executive Defendants to obtain the relief this Court may provide should it find SB 1 unconstitutional. Because Executive Defendants have no real role in administering elections, it does not matter if they are "bound" by any order of this Court enjoining the Secretary of State from using SB 1 in the upcoming election. In other words, there is nothing Executive Defendants could do to prevent the Court from remedying Plaintiffs' purported injuries should it find SB 1 unconstitutional. Regardless, Executive Defendants have no intention of ignoring or disputing the Court's ultimate determination in this case. Therefore, the Court need not "conditionally" dismiss Executive Defendants.

CONCLUSION

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

[3] Executive Defendants do not dispute that they would be subject to third-party discovery under Rule 1-045. However, such discovery is limited by both executive privilege and legislative immunity. Executive Defendants intend to file a motion for protective order later this week, in which they will explain in detail why Plaintiffs' requested discovery is largely barred by these privileges and immunities.

EXHIBIT F

Respectfully submitted,

/s/ Holly Agajanian

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Counsel for Governor Michelle Lujan Grisham and Lieutenant Governor Howie Morales

CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2023, I filed the foregoing through the New Mexico Electronic Filing System, which caused all counsel of record to be served by electronic means. I have additionally emailed a copy of the foregoing to all counsel of record per this Court's scheduling order.

Respectfully submitted,

/s/ Holly Agajanian
Holly Agajanian

EXHIBIT F

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.

NOTICE OF COMPLETION OF BRIEFING

The Governor and Lieutenant Governor, by and through undersigned counsel, hereby gives notice to the Court that briefing is complete on the Motion to Dismiss Executive Defendants. The following motions and papers have been filed:

1. Motion to Dismiss Executive Defendants, filed July 28, 2023;

2. Request for Hearing, filed July 28, 2023;

3. Plaintiffs' Response in Opposition to Executive Defendants' Motion to Dismiss, filed August 4, 2023; and

EXHIBIT G

4. Reply in Support of Motion to Dismiss Executive Defendants, filed August 7, 2023.

Accordingly, this matter is ripe for decision. Executive Defendants respectfully request that the Court set a hearing at its earliest convenience given the expedited nature of this litigation and the ongoing burden on Executive Defendants.

Respectfully submitted,

/s/ Holly Agajanian
HOLLY AGAJANIAN
Chief General Counsel to Governor Michelle Lujan Grisham
KYLE P. DUFFY
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Counsel for Governor Michelle Lujan Grisham and Lieutenant Governor Howie Morales

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I hereby certify that on August 7, 2023, I filed the foregoing through the New Mexico Electronic Filing System, which caused all counsel of record to be served by electronic means. I have additionally emailed a copy of the foregoing to all counsel of record per this Court's scheduling order.

Respectfully submitted,

/s/ Holly Agajanian
Holly Agajanian

EXHIBIT G

From:	Herrera, Donicia, GOV
To:	cloddiv3proposedtxt@nmcourts.gov
Cc:	Agajanian, Holly, GOV; Duffy, Kyle, GOV; roison@hinklelawfirm.com; lwilliams@hinklelawfirm.com; atripp@hinklelawfirm.com; mbaker@peiferlaw.com; ssanchez@peiferlaw.com; pstelzner@aol.com; pstelzner01@gmail.com; mbrowde@me.com; carter@harrisonhartlaw.com; mallen@nmag.gov; eburris@bhfs.com; hstratton@bhfs.com; cmurray@bhfs.com; jellis@bhfs.com; gorence@golaw.us
Subject:	D-506-CV-2022-00041_FVS_Motion package_Motion to Dismiss Executive Defendants
Date:	Monday, August 7, 2023 11:43:12 AM
Attachments:	072823 Motion to Dismiss Executive Defendants.pdf 072823 Request for Hearing - Motion to Dismiss Executive Defendants.pdf 080423 Plaintiffs Response in Opposition to Executive Defendants Motion to Dismiss.pdf 080723 Reply in Support of Motion to Dismiss Executive Defendants.pdf 080723 Notice of Completion of Briefing.pdf D-506-CV-2022-00041 Notice of Hearing - Motion to Dismiss Executive Defendants.docx

The Honorable Fred T. Van Soelen,

Attached please find a Motion package and a proposed Notice of Hearing regarding Defendants Motion to Dismiss Executive Defendants.

Thank you for your assistance,

Donicia Herrera
Paralegal | Records Custodian
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-
Please note my email address has changed to donicia.herrera@exec.nm.gov

EXHIBIT H

FILED
5th JUDICIAL DISTRICT COURT
Lea County
9/22/2023 4:01 PM
NELDA CUELLAR
CLERK OF THE COURT
Cory Hagedoorn

STATE OF NEW MEXICO
COUNTY OF LEA
FIFTH JUDICIAL DISTRICT COURT

REPUBLICAN PARTY OF NEW MEXICO, ET AL.,
Plaintiffs,
v.

MAGGIE TOULOUSE OLIVER, ET AL.,
Defendants. No. D-506-CV-202200041

ORDER DENYING MOTION TO DISMISS EXECUTIVE DEFENDANTS

THIS MATTER having come before the Court on the Motion to Dismiss Executive Defendants ("Motion to Dismiss") filed on July 28, 2023 by Defendant's Governor Michelle Lujan Grisham and Lieutenant Governor Howie Morales ("Executive Defendants"), and the Court having reviewed the pleadings and being sufficiently advised, I am unpersuaded by the Executive Defendants' arguments regarding standing and legislative immunity, and hereby deny the Motion to Dismiss.

IT IS SO ORDERED.

HON. FRED VAN SOELEN
DISTRICT JUDGE, DIVISION III

EXHIBIT I