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,
Defendants-Appellants,

v.

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,

S. Ct. No.: S-1-SC-40121

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.

PLAINTIFFS' RESPONSE TO EXECUTIVE DEFENDANTS' EMERGENCY VERIFIED PETITION FOR WRIT OF SUPERINTENDING CONTROL

(Counsel for Plaintiffs listed on following page)

MISHA TSEYTLIN*
MOLLY S. DIRAGO*
KEVIN M. LEROY*
TROUTMAN PEPPER
HAMILTON SANDERS LLP
227 W. Monroe Street
Suite 3900
Chicago, IL 60606
(608) 999-1240 (MT)
(312) 759-1926 (MD)
(312) 759-1938 (KL)
(312) 759-1939 (fax)
misha.tseytlin@troutman.com
molly.dirago@troutman.com
kevin.leroy@troutman.com

Attorneys for Plaintiffs Manuel Gonzales, Jr., Dinah Vargas, David Gallegos, and Timothy Jennings

**Admitted Pro Hac Vice*

HARRISON & HART, LLC

CARTER B. HARRISON, IV
924 Park Avenue SW, Suite E
Albuquerque, New Mexico 87102
(505) 312-4245
(505) 341-9340 (fax)
carter@harrisonhartlaw.com

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

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INTRODUCTION

Executive Defendants—who are typical defendants in New Mexico redistricting cases—brought to this Court on the eve of trial this frankly perplexing Emergency Verified Petition, asking to be dismissed from this case based upon arguments that Executive Defendants raised for the first time on remand from this Court. With all respect to Executive Defendants, there is no reason for this Court to involve itself in these issues, in this emergency posture, given that Executive Defendants are not actively participating in this case. Indeed, while Plaintiffs and Legislative Defendants have filed hundreds of pages of findings of fact and conclusions of law and responses thereto, Executive Defendants filed only a perfunctory notice alerting the district court that they did not intend to submit any such proposed legal or factual findings. As far as Plaintiffs can tell, Executive Defendants intend to take a similarly minimal role at trial.

Thus, while Plaintiffs believe the district court correctly denied Executive Defendants' motion to dismiss, there is no reason for this Court to review that decision now. But to the extent this Court chooses to decide the issue and rules for Executive Defendants, Plaintiffs

respectfully request that this Court make clear that such dismissal does not prejudice Plaintiffs in obtaining full remedial relief, in the form of a constitutional congressional map, should they prevail in the present case.

STATEMENT

On January 21, 2022, the Republican Party of New Mexico and a bipartisan group of New Mexico voters (collectively, "Plaintiffs") filed a Verified Complaint challenging Senate Bill 1 as an unlawful partisan gerrymander, in violation of Article II, Section 18 of the New Mexico Constitution. Ex.1 ¶¶ 1–7. They named as Defendants Michelle Lujan Grisham, in her official capacity as Governor of New Mexico, and Howie Morales, in his official capacity as New Mexico Lieutenant Governor and President of the New Mexico Senate ("Executive Defendants"), as well as two individual state legislators ("Legislative Defendants") and New Mexico's Secretary of State. *Id.* ¶¶ 8–12. Legislative Defendants then filed a motion to dismiss this action on justiciability grounds, which the District Court denied, and Legislative Defendants challenged that order by petitioning this Court for a writ of superintending control. *See* Ex.2; Ex.3.

After this Court remanded this case for discovery and trial on Plaintiffs' partisan-gerrymandering claim, Executive Defendants for the first time moved the District Court for an order dismissing them from this lawsuit on the basis that Plaintiffs lacked standing to sue Executive Defendants and that Executive Defendants' asserted legislative immunity bars Plaintiffs' claim. *See* Ex.4. Plaintiffs opposed dismissal while expressing concern that the Governor's presence may be necessary to provide Plaintiffs complete relief. Ex.5.

Thereafter, Executive Defendants did not meaningfully participate on the merits. On September 15, 2023, Plaintiffs submitted their Annotated Findings Of Fact And Conclusions Of Law, attached hereto as Exhibit 6, and attached exhibits, which contain hundreds of pages of briefing and exhibits. On the same day, Legislative Defendants filed their own Proposed And Annotated Findings Of Fact And Conclusions Of Law, attached hereto as Exhibit 7, with their own attached evidence. Both Plaintiffs and Legislative Defendants then filed respective responses in opposition to those proposed findings and conclusions of law. *See* Ex.8; Ex.9. Executive Defendants, on the other hand, merely filed a

perfunctory notice confirming that they would not be making any such substantive filing. *See* Ex.10.

As trial was approaching, on September 22, 2023, the district court denied Executive Defendants' motion to dismiss. Ex.11. The court explained that it "reviewed the pleadings" and was "sufficiently advised," and determined that it was "unpersuaded by the Executive Defendants' arguments regarding standing and legislative immunity." *Id.* Accordingly, the Court denied Executive Defendants' motion to dismiss. *Id.*

On September 26, 2023—the day before trial on Plaintiffs' partisan-gerrymandering claim is scheduled to begin—Executive Defendants filed this Emergency Verified Petition For Writ Of Superintending Control And Request For Stay ("Pet."), asking this Court to "*immediately* order[ ] the district court to dismiss the Executive Defendants," or, in the alternative, stay the district court proceedings until this Court can fully assess Executive Defendants' Petition. Pet.2. This Court denied Executive Defendants' stay request and ordered Plaintiffs to respond to Executive Defendants' writ request by 8:00 a.m. on September 27, 2023.

LEGAL STANDARD

Article VI of the New Mexico Constitution gives this Court "superintending control over all inferior courts," as well as "the power to 'issue writs necessary or proper for the complete exercise of . . . [its] jurisdiction and to hear and determine the same.'" *Kerr v. Parsons*, 2016-NMSC-028, ¶ 16, 378 P.3d 1 (first alteration in original; citation omitted). This Court exercises its "power of superintending control to control the course of ordinary litigation if the remedy by appeal seems wholly inadequate," or if "it is deemed to be in the public interest to settle the question involved at the earliest moment." *Id.* (citations omitted).

ARGUMENT

I. This Court Should Deny Executive Defendants' Petition For A Writ Of Superintending Control

A. Executive Defendants Will Suffer No Prejudice By Raising These Issues In The Expedited Appellate Process That This Court Already Established For This Case

This Court should deny Executive Defendants' Petition, given that Executive Defendants will suffer no material prejudice from this Court not deciding the issues they raise in their Petition in this emergency posture, rendering the expedited appeal process already established by this Court a "wholly []adequate" option. *Id.* By filing no proposed

findings of fact and conclusions of law, not responding in any respect to Plaintiffs' or Legislative Defendants' proposed findings, Executive Defendants have strongly indicated that they do not intend to participate meaningfully in the trial. In all likelihood, Executive Defendants thus will not suffer the "burdens of litigation" from the trial moving forward with them as, essentially, nominal parties, *see Chavez v. Bd. of Cnty. Comm'rs*, 2001-NMCA-065, ¶ 10, 130 N.M. 753, 31 P.3d 1027, contrary to their claimed concern that the trial moving forward with them as parties will somehow impair their "ability to mount a defense in other pending lawsuits," *see* Pet.8. And to the extent Executive Defendants have concerns about their status as parties after trial concludes, they can raise those arguments as part of the expedited appellate procedure that this Court has ordered. Ex.3 at 4–5.

B. Plaintiffs' Merits Arguments, Which This Court Should Not Reach In This Emergency Posture, Are Wrong

While this Court should decline to reach the merits of Plaintiffs' standing and legislative-immunity arguments in this emergency posture, those arguments are wrong in any event.

As to Plaintiffs' standing to sue the Governor, in particular, if the district court agrees with Plaintiffs that Senate Bill 1 is an impermissible

partisan gerrymander, *see* Ex.1 at 27, and orders the Legislature to adopt a new redistricting map as a remedy, the Governor may need to call a special session of the Legislature or issue a special message for the regular legislative session before the Legislature can adopt that new map, *see* N.M. Const. art. IV, §§ 5(B)(2), 6. The Governor's presence here may, accordingly, become a necessary component to Plaintiffs' obtaining relief for their constitutional injuries. *See Forest Guardians v. Powell*, 2001-NMCA-028, ¶ 25, 130 N.M. 368, 24 P.3d 803 (discussing traceability component of standing). Although Executive Defendants contend that the courts lack authority under the separation-of-powers doctrine to order the Governor to call a special session, Pet.17, such relief is appropriate when remedying a constitutional violation, *see, e.g.*, *Dungan v. Sawyer*, 253 F. Supp. 352, 353 (D. Nev. 1966) (per curiam) (noting that the "Court ordered the Governor of Nevada to convene a special session of the Legislature for the sole purpose of constitutionally apportioning the Senate and Assembly"), and could become necessary if the district court orders the Legislature to adopt a new redistricting map.

It is, moreover, of no moment for standing or legislative-immunity purposes that 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* Pet.12–13 (standing), 10 (legislative immunity). The Governor and Lieutenant Governor have historically participated as named parties in this State's redistricting litigation. *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).[1] Although Executive Defendants try to limit the import of this precedent by arguing that their "predecessors voluntarily participated in redistricting litigation," Pet.16, that voluntary participation shows that in this State, the Governor and Lieutenant Governor are properly named as defendants in redistricting litigation. That is, moreover, consistent with typical practice, as parties regularly name a State's governor as a defendant in redistricting cases. *See, e.g.*, *League of United Latin Am. Citizens v. Abbott*, 601 F. Supp. 3d 147 (W.D. Tex. 2022) (denying

[1] Available at https://redistricting.lls.edu/wp-content/uploads/NM-egolf-20120227-house-decision.pdf (all websites last visited Sept. 27, 2023).

preliminary injunction in redistricting case without questioning whether state governor was a proper party); *Moore v. Lee*, 644 S.W.3d 59 (Tenn. 2022) (vacating temporary injunction in redistricting matter without addressing whether state governor was a proper party); *Ohio A. Philip Randolph Inst. v. Householder*, 367 F. Supp. 3d 697 (S.D. Ohio 2019) (holding that plaintiffs had standing in redistricting matter without addressing whether state governor was a proper party).

Finally, although Executive Defendants reference several standing and legislative-immunity cases throughout their Petition, including cases from different jurisdictions, *see generally* Pet.9–18, many of these cases do not involve redistricting at all, while the redistricting-related cases that Executive Defendants reference either do not address dismissal of executive-branch defendants from redistricting challenges, *see* Pet.9 n.4 (citing *In re Perry*, 60 S.W.3d 857, 860 (Tex. 2001)); Pet.14 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)), or were decided under the law of other States and so do not address the fact that in New Mexico, the Governor and Lieutenant Governor typically participate as named parties in redistricting litigation, *see* Pet.16 n.7.

II. If This Court Does Grant Executive Defendants' Petition For A Writ Of Superintending Control, Its Order Should Expressly Provide That Plaintiffs May Obtain Full Relief On Their Partisan-Gerrymandering Claim In Executive Defendants' Absence From This Lawsuit

In all events, if this Court is inclined to summarily grant the writ notwithstanding Plaintiffs' arguments above, this Court should order that Executive Defendants be bound by any judgment in Plaintiffs' favor on their partisan-gerrymandering claim, to the extent Executive Defendants' participation is necessary for Plaintiffs to obtain the relief awarded by such judgment.

CONCLUSION

This Court should deny Executive Defendants' Petition For A Writ Of Superintending Control.

Dated: September 27, 2023

Respectfully Submitted,

HARRISON & HART, LLC

/s/ Carter B. Harrison, IV
CARTER B. HARRISON, IV
924 Park Avenue SW, Suite E
Albuquerque, New Mexico 87102
(505) 312-4245
(505) 341-9340 (fax)
carter@harrisonhartlaw.com

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

MISHA TSEYTLIN*
MOLLY S. DIRAGO*
KEVIN M. LEROY*
TROUTMAN PEPPER
HAMILTON SANDERS LLP
227 W. Monroe Street
Suite 3900
Chicago, IL 60606
(608) 999-1240 (MT)
(312) 759-1926 (MD)
(312) 759-1938 (KL)
(312) 759-1939 (fax)
misha.tseytlin@troutman.com
molly.dirago@troutman.com
kevin.leroy@troutman.com

Attorneys for Plaintiffs Manuel Gonzales, Jr., Dinah Vargas, David Gallegos, and Timothy Jennings

**Admitted Pro Hac Vice*

CERTIFICATE OF COMPLIANCE

I certify, according to Rule 12-504(C)(1), (G) NMRA, that the foregoing complies with the type-volume, size, and word limitations of the New Mexico Rules of Appellate Procedure because it contains no more than 6,000 words of substantive text and was prepared in size 14-point Century Schoolbook font, which is a proportionally-spaced type face, using Microsoft Word.

Dated: September 27, 2023

/s/Carter B. Harrison, IV
CARTER B. HARRISON, IV
924 Park Avenue SW, Suite E
Albuquerque, New Mexico 87102
(505) 312-4245
(505) 341-9340 (fax)
carter@harrisonhartlaw.com

CERTIFICATE OF SERVICE

I hereby certify that I caused to be electronically filed the foregoing with the Tyler/Odyssey New Mexico Court e-file and serve system. All counsel of record are registered as service contacts through that system, and will be served by the Tyler/Odyssey New Mexico Courts system.

Dated: September 27, 2023

/s/Carter B. Harrison, IV
CARTER B. HARRISON, IV
924 Park Avenue SW, Suite E
Albuquerque, New Mexico 87102
(505) 312-4245
(505) 341-9340 (fax)
carter@harrisonhartlaw.com