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 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.

LEGISLATIVE DEFENDANTS' AMENDED REBUTTAL AND SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

When the Legislature developed new congressional districts for New Mexico in 2021, it was presented with the first opportunity in 30 years to adopt a plan that addresses the many societal and population changes the state has experienced since 1991—the last time a congressional map was enacted through legislative policy making rather than imposed by the courts through litigation. The enacted map, SB-1, provides districts that are virtually equal (0% deviation) in population; honors the expressed preferences of Native American sovereign nations; responds to overwhelming public support for combining communities of interest along the Rio Grande south of Albuquerque; preserves the cores of previous districts; and increases the number of congressional representatives who must answer to and represent the needs of the extractive

industries, which indisputably drive the economic engine of the entire state. Moreover, in adopting SB-1, the Legislature made each district more politically competitive, such that CD-2 is now a highly competitive district in which either party can win the seat—as evidenced by the tiny (0.7%) margin by which the Democrat won the district in 2022.

Plaintiffs, unhappy with SB-1, claim that the New Mexico Constitution required the Legislature to adopt a congressional districting map that makes it easier for Republicans to win CD-2. The Legislative Defendants have already demonstrated in their *Proposed and Annotated Findings of Fact and Conclusions of Law* (filed Sept. 15, 2023) that Plaintiffs cannot satisfy the elements of Justice Kagan's test for extreme partisan gerrymandering set forth in her dissent in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), and that the districts adopted in SB-1 are substantially related to important government interests—namely, the legitimate, non-partisan policy objectives reflected in the map.

Plaintiffs' own proposed findings and conclusions (also filed Sept. 15, 2023) fall far short of establishing their claim that SB-1 is unconstitutional. In that filing, Plaintiffs reveal that their arguments are grounded in unwarranted presumptions, flawed analysis, misapplication of law, and a deliberate indifference to much of the evidence in the record. These Rebuttal and Supplemental Findings and Conclusions address the most significant of Plaintiffs' errors.

A. Plaintiffs incorrectly analogize to *Benisek* in Maryland, where—unlike here—Democrats flipped a safe Republican seat to a safe Democratic seat.

FOF 135. Plaintiffs rely heavily on *Rucho*'s companion case, *Benisek v. Lamone*, 348 F. Supp. 3d 493 (D. Md. 2019), in assuring the Court that "this case"—being the first ever New Mexico decision adjudging political gerrymandering claims under New Mexico's Equal Protection Clause—is "…an exceedingly easy one." *See Plaintiffs' Annotated Findings of Fact and Conclusions of Law* dated Sept. 15, 2023 (hereinafter "Plf. FFCLs") at ¶5; *see also id.* at ¶¶ 34,

36, 37, 46, 48, 51, & 59. Plaintiffs argue *Benisek* is analogous here because: (i) *Benisek* challenged the 2011 redistricting of Maryland's sixth congressional district (CD-6) as flipping the formerly safe Republican district to a "safe" Democratic district, *Rucho v. Common Cause*, 139 S. Ct. 2484, 2511 (2019) (Kagan, J., dissenting); (ii) the *Benisek* plaintiffs presented "statements from mapdrawers" demonstrating partisan intent, and (iii) close election results under the 2011 Maryland map. *Id.* at ¶5. But on closer review of the factual and legal underpinnings of *Benisek*, it becomes clear that it is wholly distinguishable from the case at bar.

FOF 136. *Facts of Benisek:* In July 2011, Democratic Maryland Governor Martin O'Malley appointed a Governor's Redistricting Advisory Committee, but separately asked U.S. Representative Steny Hoyer to draft a congressional redistricting map. The outside consulting firm hired to draft the map was given only two explicit instructions: (1) maximize incumbency protection and (2) deliver 7 Democratic seats. *Id.* at 517. Governor O'Malley then submitted the congressional plan to Maryland's legislature for enactment (the "2011 Map"). In *Benisek*, the factual record established that the Governor, Rep. Hoyer, and Democratic leadership in the Senate and General Assembly openly confirmed before, during, and after redistricting that CD-6 was redrawn with the express intent to elect 7 Democratic congressmen by targeting the 84-year old Rep. Roscoe Bartlett, a twenty-year incumbent.[1] The 2011 Map accomplished this flip by drawing a horribly disfigured CD-6 and neighboring district (CD-8), which moved a net 60,000 Republican voters out of CD-6 and increased federal Democratic performance by 16% in the district.[2] In the twenty years of Rep. Bartlett (R) tenure, CD-6 voters consistently elected him as a Republican

[1] *Benisek*, 348 F. Supp. 3d at 517-18 ("The sorts of statements…are legion."); *see also id.* at 506, 507-08.

[2] *Id.* at 505; *see also id.* at 519 (CD-6 voter registration in 2010: 47% Republican, 36% Democratic; CD-6 voter registration in 2011: 33% Republican, 44% Democratic).

candidate by margins of as high as 38%. Then, in the first election under the 2011 Map, the Democratic challenger and newcomer won by 20.9%. In the four subsequent elections, a Democratic candidate carried CD-6 by 1.5%, 15.9%, 21.0%, and 19.6% of the vote. Thus, the three-judge panel deciding the partisan gerrymandering claim in *Benisek* had not only direct statements of intent by the mapdrawers, but also direct evidence from four subsequent, separate election outcomes. The record before the Court regarding New Mexico's CD-2 lacks both.

FOF 137. Legal Theory in *Benisek*: Unlike Plaintiffs in the case at bar, the *Benisek* plaintiffs brought their claim under the U.S. Constitution's First Amendment right to representation and association, alleging that the 2011 Map was drafted in retaliation against their political viewpoint. In bringing their claim as a First Amendment violation, plaintiffs were required to prove three elements:

> [F]irst, specific intent—"that those responsible for the map redrew the lines of [their] district with the specific intent to impose a burden on [them] and similarly situated citizens because of how they voted or the political party with which they were affiliated"; second, injury—that the plaintiffs had, in fact, experienced a concrete burden on their legally protected interests; and third, causation — "that, absent the mapmakers' intent to burden a particular group of voters by reason of their views, the concrete adverse impact would not have occurred.

Id. at 509 (quoting *Shapiro v. McManus*, 203 F.Supp.3d 579, 596-97 (D. Md. 2016)). In evaluating the injury requirement, the *Benisek* court explained that plaintiffs can establish a "demonstrable and concrete adverse effect" by showing they have been individually "placed at a concrete electoral disadvantage." *Id.* at 519. Most notably, when compared to the Equal Protection test outlined by Justice Kagan, a First Amendment retaliation claim requires "but for" causation in addition to evidence of associational harms (participation, organization, fundraising). *Id.* at 521-24. Thus, *Benisek* does not provide a 1-to-1 analog for this Court to follow in evaluating (1) predominant, invidious intent, (2) substantial vote dilution with the goal to entrench a favored

political party, and (3) a legitimate, important government interest that passes intermediate scrutiny. *See* Amended Order of New Mexico Supreme Court at ¶¶ 2-5 (Aug. 25, 2023). In fact, the panel in *Benisek* does not conduct much analysis of the government's proffered justification, dispensing it as post-hoc rationalization when confronted by so many statements of blatant partisan intent made to the contrary. *Id.* at 520.

FOF 138. Outcome of *Benisek*: As the Court is aware, *Benisek* went up on appeal to the U.S. Supreme Court with *Rucho v. Common Cause*, and the Supreme Court dismissed both claims of partisan gerrymandering for lack of jurisdiction as nonjusticiable, political questions. *See e.g., Rucho v. Common Cause*, 139 S. Ct. 2484, 2504 & 2508 (2019) (describing First Amendment association claim in *Benisek*, remanding with instruction to dismiss for lack of jurisdiction). Thus, even if *Benisek* were instructive as to the facts of SB-1 and CD-2 (which it is not), the *Benisek* decision lacks precedential value within its own jurisdiction, further diminishing its persuasiveness to a New Mexico State Court. *See, e.g., Johnson v. Sears, Roebuck & Co.*, 1992-NMCA-039, ¶ 15, 113 N.M. 736, 739, 832 P.2d 797, 800 (rejecting authority cited by plaintiff because "reliance….is misplaced" where decision without precedential value under controlling state law); *see also United States v. Hernandez*, 216 F.3d 1088 (10th Cir. 2000) (where decision vacated, it was "a nullity with no precedential value. In legal effect, it was as though it was never filed."); *J.B. O'Connor v. Donaldson*, 422 U.S. 563, 577 n. 12 (1975) ("…decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect"); *Zeneca Ltd. v. Novopharm Ltd.*, 919 F.Supp. 193, 196 (D. Md.) ("[a]s a general rule, a vacated judgment and the factual findings underlying it have no preclusive effect; the judgment is a legal nullity."). Thus, like the Maryland state court judges facing partisan gerrymandering claims lodged in state court following *Rucho*, this Court should likewise disregard reliance on *Benisek* as, at best,

misplaced. *See Matter of 2022 Legislative Districting of State*, 481 Md. 507, 594, 282 A.3d 147, 199 (2022).

FOF 139. Because *Benisek* was ultimately overturned and dismissed, the separate opinion of Chief District Judge Bredar, concurring in the judgment only, merits review. In this, Judge Bredar cautioned against adoption of an unworkable representational rights standard that leaned too heavily on electoral predictions and outcomes, which requires courts to discern "the inherent uncertainty in what causes individuals to vote as they do in a particular election," separating "legislative manipulation" from simple changing of voters' minds. *Id.* at 526-27 (Bredar, J., concurring).[3] Instead, Judge Bredar relied on objectively observable evidence of associational harm in fundraising, registration, and candidate recruitment. *Id.* at 527. Although Plaintiffs challenging CD-2 have not made a representational or associational claim, Judge Bredar's concern about incorporating assumption after assumption regarding voter behavior and electoral outcomes warrants consideration, especially because Plaintiffs' claim here is so dependent on the "sophisticated social-science analysis" and "simulation evidence" constructed by their expert, Sean P. Trende.[4] Plaintiffs rely on this branch of evidence because they are without

[3] This concern may have been based, in part, on the specific candidates involved in the 2012 CD-6 race, which pitted a then 86-year old conservative Republican incumbent Bartlett, who faced 7 challengers in his own primary, against 49-year old John Delaney, whose campaign outmatched Bartlett in dollars almost 2:1; *see also Vieth v. Jubelirer*, 541 U.S. 267, 287, 124 S. Ct. 1769, 1782, 158 L. Ed. 2d 546 (2004) (plur. op.) ("We dare say (and hope) that the political party which puts forward an utterly incompetent candidate will lose even in its registration stronghold.").

[4] *Cf. Harper v. Hall*, 380 N.C. 317, 346, 868 S.E.2d 499, 523 (2022), *cert. granted sub nom. Moore v. Harper*, 142 S. Ct. 2901, 213 L. Ed. 2d 1114 (2022), *overruled*, 384 N.C. 292, 886 S.E.2d 393 (2023), *aff'd sub nom. Moore v. Harper*, 600 U.S. 1, 143 S. Ct. 2065, 216 L. Ed. 2d 729 (2023) (reviewing district court finding that expert simulation analysis was not wholly persuasive because the process treats both candidates and voters as inanimate objects, discounts the myriad variables in individual elections, assumes that voters will always vote along party lines effect, and "believe[s] the computer can take the human element out of the human").

the detailed record of ample, direct evidence cited to in *Benisek*: Plaintiffs have no statement of invidious partisan intent by mapdrawers, no record of overwhelming electoral outcomes, and no evidence of associational harms in organization or fundraising.[5]

COL 54. Ultimately, neither the fact patterns nor the legal theories at play in *Benisek* are before the Court here. As discussed in Legislative Defendants' proposed findings, CD-2 has been a swing district in the past and continues to perform as a toss-up district today—nowhere close to the "safe Democratic" district challenged in *Benisek*. Leg. Def. FFCL at ¶¶ 25–30. And prior to SB-1, in the absence of a popular incumbent, CD-2 was never a "Republican stronghold" like Maryland's CD-6. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2519 (2019) (Kagan, J., dissenting). Further, Plaintiffs cannot produce evidence of a concrete, tangible and adverse electoral disadvantage worked by SB-1—to the contrary, their candidate lost CD-2 by less than a percentage point in the 2022 election. *Benisek*, 348 F. Supp. 3d at 519. For all these reasons, Plaintiffs' strenuous analogizing to *Benisek* misses the mark and fails to move Plaintiffs any closer to meeting their burden.

B. Plaintiffs wrongly assert that the 2022 election was "favorable" for Republicans, when in fact the CD-2 Republican candidate's loss was only one of many unexpected Republican losses around the country.

FOF 140. Plaintiffs cannot dispute the extremely narrow margin by which the Democratic candidate won CD-2 in 2022. *See* Leg. Def. FFCLs ¶¶ 105, 108-112 (Democratic candidate won by 1,350 votes, or a 0.7% margin of victory, demonstrating that CD-2 is a "toss-up" district). Instead, they contend that the district is not truly competitive because a Republican

[5] Plaintiffs cobble together an argument regarding Presidential Vote Share of voters in certain, unidentified precincts, *see* Plf FFCL ¶4, as grounds for their claim, but provide no source or cite for such information. Unsupported Findings should be disregarded. *See* NMRA 1-052 (2023) (findings must be supported by substantial evidence in the record); *compare to* Plf FFCL ¶ 25 (discussing voter numbers in aggregate, but not associated Presidential Voter Share).

incumbent lost the seat, despite 2022 being a so-called "favorable" election for Republicans. *See e.g.*, PLF FFCLs ¶¶ 30, 34, 58, 67.

FOF 141. But the 2022 election was, in fact, a disappointing one for the Republican party, with many candidates underperforming and losing in districts throughout the country where they had been predicted to win. *See* Sanderoff Depo. 24:20-25:6 ("Republicans were very disappointed in what happened in the …U.S. Senate. And they did take over in the House, but not by the kind of margins they were hoping"); Brace Depo. 49:7-50:11 (explaining that Republicans did not perform to expectations in the 2022 election).[6]

FOF 142. As explained by Legislative Defendants' expert Kimball Brace, the "red wave" of Republican performance that was anticipated for the 2022 election never materialized. *See* Exhibit 36 hereto (Supplemental Declaration of Kimball W. Brace) at ¶ 5. Indeed, Republicans failed to win control of the U.S. Senate in 2022, and while they did win a majority of seats in the U.S. House of Representatives, it was by a much narrower margin than expected. *Id*., ¶¶ 6, 7. When viewed in the context of the 2022 election nationally, it is clear that CD-2 was in 2022 and will continue to be a very competitive district. *Id*., ¶ 8.

FOF 143. The highly competitive nature of CD-2 was recently underscored by a September 13, 2023 poll conducted by SurveyUSA, which found that Republican candidate Yvette Herrell and Democratic incumbent Representative Gabe Vasquez are once again in a neck-and-neck race for the CD-2 seat, with Ms. Herrell leading Rep. Vasquez in the poll by 46% to 45%, with 9% of voters undecided. *See* Exhibit 36, ¶ 9.

[6] Plaintiffs' contention that CD-2 is not competitive—and thus that Democrats have purportedly "entrenched" themselves in that district—is also belied by the low voter turnout numbers in that district in the 2022 election. *See* Leg. Def. FFCL ¶ 111.

COL 55. In sum, Plaintiffs have not presented any evidence to rebut the conclusions of Brian Sanderoff—a trusted, well-recognized expert in New Mexico politics—or Mr. Brace—a nationally recognized election data expert and analyst—that CD-2 is a highly competitive, toss-up district that can be won by a candidate of either party. As such, it is the antithesis of the "entrenchment" and "election rigging" that Justice Kagan identified as the evils of egregious partisan gerrymandering. Leg. Def. FFCLs at COLs ¶¶ 23-25.

C. Under Plaintiffs' misapplication of Justice Kagan's test, there is no room for partisanship in redistricting—a result that is both unrealistic and contrary to the pronouncements of both Justice Kagan and the New Mexico Supreme Court.

FOF 144. Plaintiffs rely heavily on two pieces of evidence to contend that SB-1 constitutes an unconstitutional partisan gerrymander: a string of text messages sent by a single Democratic legislator, discussing improving the Democratic performance of CD-2; and a complaint by a Republican legislator that SB-1 was developed by Democratic lawmakers without meaningful involvement by Republicans. Plf FFCLs ¶¶ 2, 3, 21, 40, 42, and Exhs. 2 and 8.

COL 56. Plaintiffs' persistent focus on one legislator's private text messages as purported evidence of legislative intent is misplaced and contrary to well-established law in New Mexico and other jurisdictions. The Legislature speaks and demonstrates its intent as a body through its vote. *See U.S. Brewers Ass'n, Inc. v. Dir. of the New Mexico Dept. of Alcoholic Beverage Control*, 1983-NMSC-059, ¶¶8 & 9, 100 N.M. 216, 218, 668 P.2d 1093, 1095 (viewing testimony of individual legislators as "incompetent" evidence of intent of the legislative body because "that body speaks solely through its concerted action as shown by its vote.") (quoting *Haynes v. Caporal*, 571 P.2d 430, 434 (Okl.1977)); *Cf. Fann v. Kemp in & for Cnty. of Maricopa*, 253 Ariz. 537, 547, 515 P.3d 1275, 1285 (2022) (in review of legislation, court looks to action and effect of the legislation as a whole, not to legislator's individual motive). *See also* Leg. Def. FFCLs at COLs

¶¶ 15-19 (citing additional authorities establishing that individual legislators' motives are not relevant to determining legislative intent).[7]

COL 57. And, even if an individual legislator's private comments about developing legislation were relevant to any of the issues before the Court, Plaintiffs erroneously overlook the fact that partisan considerations are constitutionally permissible in the redistricting process. *See Amended Order of the New Mexico Supreme Court*, Aug. 25, 2023 at ¶ 3 ("some degree of partisan gerrymandering is permissible under Article II, Section 18 of the New Mexico Constitution"); *Rucho v. Common Cause*, 139 S. Ct. 2484, 2517 (Kagan, J., dissenting) ("the intent to inject 'political considerations' into districting may not raise any constitutional concerns"); *Vieth v. Jubelirer*, 541 U.S. 267, 285, 124 S. Ct. 1769, 1781, 158 L. Ed. 2d 546 (2004) ("The Constitution clearly contemplates districting by political entities, see Article I, § 4, and unsurprisingly that turns out to be root-and-branch a matter of politics.").

COL 58. Moreover, while the Redistricting Act required that the Citizens Redistricting Committee develop maps without reference to partisan performance data, no such restriction bound the Legislature in carrying out its redistricting mandate. *See* Leg. Def. FFCLs ¶¶ 37, 38, 44.

COL 59. Particularly here, where legislative line-drawing resulted in a map in which each district is more competitive than before, and where CD-2 remains a toss-up district that either

[7] Other individual legislator comments highlighted by Plaintiffs, by then-Speaker Egolf, Senator Cervantes or Senator Stewart, have little to no relevance to determining the legislative intent of the body in adopting SB-1, which is one of the issues before the Court. Additionally, the statements of legislators after the passage of legislation (*e.g.,* Sen. Cervantes' email, Sen. Stewart's tweet months after passage) are inadmissible to determine the intent of the legislative body at the time of enactment. *Whitely v. New Mexico State Pers. Bd.*, 1993-NMSC-019, ¶ 16, 115 N.M. 308, 313, 850 P.2d 1011, 1016. Despite Plaintiffs' efforts to magnify and spin these statements into meaningful evidence, they fall short of establishing a claim for egregious partisan gerrymandering.

party can win, it is clear that the predominant purpose behind SB-1 is not entrenchment of the Democratic Party—regardless of personal sentiments or motivations expressed by individual legislators. *See* Leg. Def. FFCLs at COLs ¶¶ 13-26.

COL 60. Similarly, Plaintiffs' reliance on complaints by the Republican Senate Minority Floor Leader, asserting that Republican lawmakers were not given an opportunity to give meaningful input into the development of SB-1, is also misplaced and based on inapposite case law. *See* Plf FFCLs ¶¶ 37, 42. First, nothing about the New Mexico Supreme Court's Amended Order finding claims of partisan gerrymandering to be justiciable requires that the Legislature develop bipartisan redistricting legislation or depart from the normal political process when drafting maps. *See* Amended Order, Aug. 25, 2023 at ¶¶ 3, 4.

COL 61. Second, Plaintiffs rely for their argument on cases applying New York and Florida law—two states that have adopted constitutional provisions prohibiting any form of partisanship or partisan intent in redistricting—thereby calling for an entirely different analysis than the one applicable here. *See Harkenrider v. Hochul*, 167 N.Y.S.3d 659, 664 (N.Y. App. Div. 2023) (New York's constitution provides that "[d]istricts shall not be dawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties."); *Leage of Women Voters of Florida v. Detzner*, 172 So.3d 363, 368 (Sup. Ct. Fla. 2015) (Florida's Fair Districts Amendment to the state constitution forbids the Florida Legislature from drawing a districting plan or an individual district with the "intent to favor or disfavor a political party or an incumbent").[8]

[8] The Southern District of Ohio case cited by Plaintiffs was subsequently vacated and remanded by the Supreme Court of the United States in light of *Rucho*. Pltfs' FOF 37, citing *Ohio A. Philip Randolph Inst. V. Householder*, 373 F.Supp.3d 978, 1096 (S.D. Ohio 2019), *vacated and remanded sub nom. Chabot v. Ohio A. Philip Randolph Inst*., 140 S. Ct. 102 (2019).

COL 62. Unless or until there is an amendment to New Mexico's constitution to take redistricting out of the political process or prohibit partisan considerations in redistricting, there is no requirement that the Legislature depart from the normal political process or undertake a bipartisan approach to redistricting.

COL 63. Moreover, regardless of individual legislators' experiences with the legislative process that led to SB-1, and unlike the redistricting plans at issue in the cases cited by Plaintiffs, the congressional map adopted by SB-1 clearly reflects many of the non-partisan policy concerns and preferences expressed by hundreds of New Mexicans at the Citizens Redistricting Committee meetings and in legislative committee hearings. Leg. Def. FFCLs ¶¶ 50-52, 70-88.

D. Plaintiffs overlook the significant population and societal changes in New Mexico over the past 30 years—and the fact that decades of "least change" court-drawn maps prevented policymakers from addressing those changes until 2021.

FOF 145. Plaintiffs make much of the relative "stability" of New Mexico's historical congressional districts, even while admitting that the maps have not been legislatively redrawn for three decades. *Compare* Plf FFCLs at ¶¶ 9 & 10, *to id.* at ¶11, Leg. Def. FFCLs at ¶¶ 5-15.

FOF 146. Moreover, Plaintiffs ignore significant shifts in the state's population and political composition. Dona Ana County grew over 60% from 1990 to 2020, more than doubling the population growth of Eddy, Chaves, and Lea Counti*es* <u>*combined*</u>. *See* Leg. Def. FFCLs at ¶¶ 16 & 18 (30-year growth in Dona Ana County of over 84,000 residents); *see also id.* at Ex. 6-1 & 6-2 (collective change in population for all three counties, Eddy, Chaves, and Lea over thirty years totaling 41,705 residents). Thus, Plaintiffs' entire premise requires that district boundaries should remain frozen in time, no matter how important issues of concern or political makeup of a district evolves.

FOF 147. As a state, New Mexico has grown more Democratic-leaning but still comprises some of the most competitive districts in the Nation. *See* Leg. Def. FFCLs at ¶¶ 24 & 32. Within CD-2—even before the 2021 redistricting with a 53-54% Republican performance index—voters twice elected Democratic congressional candidates. Leg. Def. FFCLs ¶ 28.

FOF 148. The "last clear expression" of legislative policy occurred in the 1991 legislatively enacted congressional districts. But because courts and judges are arbiters of law and not of the policy-making persuasion, that expression echoed unchanged because of government impasse in the redistricting process. Leg Def. FFCLs at ¶¶ 5-15.

COL 64. In executing a plan to address the myriad concerns raised by prior stagnation and public testimony, the Legislature was required to change some of district lines which did move voters between districts. First, Plaintiffs' theory as to the degree of harm caused by these shifts rests on the unsupported, false premise that the Legislature was somehow required to draw a least-change, status quo map only addressing population deviation as New Mexico courts had done in past cycles. But New Mexico's Constitution delegates the matter of apportionment to Legislature. N.M. Const. art IV, § 3. Second, no voter has the right to be drawn into or remain in a desired district. *Benisek v. Lamone,* 348 F. Supp. 3d 493, 514 (D. Md. 2018), *vacated and remanded sub nom. Rucho v. Common Cause,* 139 S. Ct. 2484, 204 L. Ed. 2d 931 (2019) ("To be sure, citizens have no constitutional right to be assigned to a district that is likely to elect a representative that shares their views.").

COL 65. Moreover, far from being a radical overhaul of the congressional map, SB-1 retained over 70% of the state's population in the same district as under the 2011 map. *See* Leg. Def. FFCL at ¶ 86 (Brace Report at 5); Brace Dep., 65:5-66:11 (discussing the fact that "70 percent-plus are staying in the same district, and noting that, "[g]iven that you had two decades'

worth of court-drawn plans, I think it's probably understandable that a legislature would end up making somewhat different changes than what a court might do…").

E. Plaintiffs' criticisms of Legislative Defendants' expert Dr. Jowei Chen's analysis are misplaced and ignore the evidence.

FOF 149. The Legislative Defendants have presented the expert opinions of Dr. Jowei Chen, an Associate Professor in the Department of Political Science at the University of Michigan and a Research Associate Professor and Research Associate for the university of Michigan and Stanford University. Leg. Def FFCLs ¶ 96. Dr. Chen programmed a computer algorithm to create 1,000 independent simulated congressional maps meeting eight non-partisan criteria that approximate the policy choices testified to and made by the Legislature in drafting SB-1. *Id.*, ¶ 97. When compared to the 1,000 computer-simulated plans generated by the algorithm, SB-1 "is clearly not a statistical outlier in terms of its partisanship." *Id.*, ¶ 98.

FOF 150. Plaintiffs present two critiques of Dr. Chen's work, neither of which is valid. First, Plaintiffs contend that it was "inappropriate" for defense counsel to instruct Dr. Chen to use certain criteria, particularly the criterion to increase the congressional representation of New Mexico's oil industry by requiring that "no single congressional district in any computer-simulated plan contains more than 60% of the state's active oil wells." Plf FFCLs ¶¶ 69-70. Plaintiffs contend that this criterion was provided to Dr. Chen in an attempt to "reverse-engineer" the exercise and "bake a partisan gerrymander into Dr. Chen's simulations. *Id.* This accusation is false and not supported by the evidence.

FOF 151. In fact, each of the criteria Dr. Chen used are based on the testimony given in CRC meetings and legislative hearings in which constituents and legislators expressed non-partisan policy objectives for the congressional map. *See* Leg. Def. FFCLs ¶¶ 51, 52, 74-85. Specifically with regard to oil industry considerations, there was discussion in the Senate Rules

Committee, during the Senate Floor Debate, in the House State Government, Elections and Indian Affairs Committee and the House Floor Debate about the importance of extractive industry, and particularly the oil-producing Permian Basin, to the health of New Mexico's entire economy—and the desirability of increasing the number of congressional representatives with a direct constituent interest in that area. *See* Leg. Def. FFCLs ¶ 82, and Exhibit 27.

FOF 152. Legislative Defendants' political expert, Brian Sanderoff, testified that the idea of splitting oil wells across multiple congressional districts makes sense: "it just depends on the perspective of the author, whether you want to concentrate all your power in one district or have two voices, I've seen a lot of people try different arguments of consolidating power or having two voices…". Sanderoff Depo., 65:5-13. Particularly in light of the industry's importance to the state's economy—as underscored by Mr. Pearce's testimony in Plaintiffs' Exhibit 7—there is nothing inherently wrong or "inappropriate" about ensuring that more than one of New Mexico's congressional representatives has a vested interest in listening to the concerns of that industry and addressing its priorities in Washington, D.C.

FOF 153. Plaintiffs' second criticism of Dr. Chen's methodology is to accuse him of failing to "add a redistricting criteria that New Mexico does actually follow—core retention." Plf FFCLs ¶ 72. However, contrary to Plaintiffs' assertion, Dr. Chen did effectively instruct his algorithm to generate simulated maps that retain the cores of existing districts through his "municipal boundary considerations" criterion, which required him to create simulations that place Santa Fe, Las Cruces and at least 60% of Albuquerque Metro in their own districts. *See* Leg. Def. FFCLs ¶ 97, Exh. 31 (Chen Report) at ¶ 9(d) (explaining that "First, Albuquerque, Las Cruces and the Santa Fe metro area were each primarily assigned to their own respective districts."). Because each of those urban areas had previously been assigned to separate districts (Albuquerque in CD-

1, Las Cruces in CD-2 and Santa Fe in CD-3), application of this criterion effectively ensured that the cores of the previous districts were generally preserved in Dr. Chen's simulated maps.

F. Far from having conducted "sophisticated social science analysis," Plaintiffs' expert Sean Trende admits to serial, serious errors which render his simulation-based conclusions unreliable.

FOF 154. Plaintiffs point to their political science expert Sean P. Trende for evidence of partisan intent in drawing CD-2, Plf. FFCLs at ¶¶ 23-30, 43-46, and dilution effect. Plf. FFCLs at ¶¶ 53-62, 64, 64, 67, 71 & 72. Legislative Defendants have filed a separate motion challenging the admissibility of Mr. Trende's opinions and incorporate those findings and arguments in full here. *See Legislative Defendants' Motion to Exclude the Simulation-Based Testimony of Sean P. Trende* filed September 20, 2023. Mr. Trende's opinions based on his simulation analysis should not be relied upon by the Court because neither the Court nor Defendants can examine, test, or challenge the bases for his opinions.

FOF 155. First, Mr. Trende failed to preserve the data on which his opinions are based, neglected to design his code to make the simulations reproducible, and then attempted to pass off "regenerated" maps as replicating the originals. *See* Ex. 32, Trende Dep. 22:18-25; 24:8-25:7; 39:3-40:16; September 13, 2023 Deposition of Sean Trende (Vol. II), 161:23-162:2; *see also* Trende Dep. 158:11-159:5; Trende Dep. 163:12-164:20 & 165:1-5.

FOF 156. Second, Mr. Trende's report and testimony are so replete with self-contradictions that little remains to assist the Court as trier of fact. *Compare* Ex. 12, Trende Report (describing a "million" maps, then 50,000 maps), *to* Ex. 32, Trende Dep. 43:8-44:17, 49:11-49:16 (code produced by Plaintiffs designed to generate 100,000 simulations, not "one million"), *to* Ex. 32, Trende Dep. 72:12-73:3, 35:18-35:23 (admitting errors in his report). Inconsistent testimony regarding the actual computer, components, and software versions that Mr. Trende used in his

analysis, *see* Ex. 32, Trende Dep. 14:25-15:8, 121:14-122:7, and complete obfuscation regarding the number of simulations Mr. Trende claims to have created or that the code which he produced could have actually created, *id.* 44:13-44:17, unmoor his opinion from testable statistical analysis.

FOF 157. Third, in conducting his alleged simulations, Mr. Trende programs an unconstitutional level of population deviation into his maps, *see* Ex. 12, Trende Report at 21; does not explicitly control for reasonable redistricting criteria, *id.*; accepts without questioning a 50% duplication rate among the simulations generated, Ex. 32, Trende Dep. 53:18-54:16; and elects not to test or evaluate the accuracy or performance of his algorithm. Ex. 32, Trende Dep. 39:13-40:25 (testifying that because simulation "ran through without crashing" that he believed the results were accurate).

COL 66. Plaintiffs bear the burden of demonstrating to the Court that Mr. Trende's "sophisticated social science" testimony has a reliable basis. *See State v. Torres*, 1999-NMSC-001, ¶ 23, 127 N.M. 20; *see also State v. Alberico*, 1993-NMSC-047, ¶ 52, 116 N.M. 156 (scientific evidence can assist the trier of fact only if it is "reliable enough to prove what it purports to prove"); *Lee v. Martinez*, 2004-NMSC-027, ¶ 18, 136 N.M. 166, 173 ("…[T]he trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.") (quotation and citation omitted).

COL 67. Because Mr. Trende failed to preserve his work, and because he neglected to include in his software code the proper parameters to allow for another expert, computer coder or programmer to reproduce his results for examination—and depended on that functionality as grounds for accuracy—his opinion and the underlying methods are not testable. *Lee v. Martinez*, 2004-NMSC-027, ¶ 19, 136 N.M. 166, 173. Without this "hallmark," Mr. Trende's simulation-

based opinions are unreliable, and therefore inadmissible. *State v. Torres*, 1999-NMSC-010, ¶26, 127 N.M. 20; *Alberico*, 1993-NMSC-047, ¶ 52.

COL 68. Excluding these unreliable, untestable portions of Mr. Trende's expert report, Part 6.4 and after, and related testimony, Plaintiffs are without sufficient evidence to demonstrate either of Justice Kagan's first two prongs of intent and effect.

G. In a two-party electorate, every redistricting decision affects both parties. Plaintiffs ask this Court to make the policy decision to prioritize their individual interests over other Southeastern New Mexico communities and statewide policy objectives.

FOF 158. In the United States, even though a growing percentage of voters decline to state, redistricting remains a binary process. Thus, the execution of partisan-neutral policies will often bear corresponding, if unintended, political consequences. *Vieth v. Jubelirer*, 541 U.S. 267, 308, 124 S. Ct. 1769, 1794, 158 L. Ed. 2d 546 (2004) (Kennedy, J., concurring) (even if map were drawn with non-partisan, neutral criteria like compactness and continuity, likely to have political effect).

FOF 159. Therefore, in heeding border and immigration concerns of the South Valley, designing districts to incorporate both urban and rural concerns, and addressing representation opportunities for New Mexico's native population and Pueblos, SB-1 works changes in the political make-up of New Mexico's Congressional Districts.

FOF 160. But the changes in SB-1 came about through the legislative process, executed by elected representatives serving as the voice and will of the people of New Mexico.

FOF 161. Those same voices testified at 16 CRC meetings, provided hours of public commentary at legislative committee hearings, and submitted hundreds of public comments. *See* Leg. Def. FFCL at ¶¶ 47-53, 77-82, & 87-88.

COL 69. In stark contrast, Plaintiffs ask the Court to override the will of the majority and substitute its own conception of a fair map—which, by precedent—would merely yield another ten years of "least-change," preserving the status quo, yet forsaking progress. Plaintiffs root their argument for favoritism in alleging that Republicans garnered 44.9% of the vote statewide in the last congressional election without winning a seat. *See* Plf. FFCLs at ¶¶ 30, 58 & 67 (same fact and argument repeated). This theory is alien to districted, winner-take-all elections. *Vieth*, 541 U.S. at 289 (plur. op) ("In any winner-take-all district system, there can be no guarantee, no matter how the district lines are drawn, that a majority of party votes statewide will produce a majority of seats for that party.").

FOF 162. Whereas the Legislative Defendants have cited to public testimony and legislative debate in favor of the communities of interest served by the policies of SB-1, Plaintiffs' only identified "community" appears to be that of the Republican party in Southeast New Mexico. In fact, of the 77 paragraphs and 52 pages comprising Plaintiff's proposed Findings and Conclusions to guide this Court, the individual Plaintiffs—Mr. David Gallegos, Mr. Timothy Jennings, Ms. Dinah Bargas, Mr. Manuel Gonzales, Jr, Mr. Bobby Kimbro, Ms. Dee Ann Kimbro, and Ms. Pearl Garcia—merit mention only in the caption and the signature block. Plaintiffs have cited to no other testimony, evidence, or even raised argument that these individual plaintiffs comprise some other community of interest or have experienced a concrete burden or disadvantage.

COL 70. Finally, before venturing into such thicket, it bears remembering that CD-2 voters, even when that district had an average Republican performance of 53%, *see* Leg. Def. FFCL at Ex. 33 (2011 plan summary chart), twice elected Democratic candidates to Congress.

Leg. Def. FFCL at ¶¶ 25-30. Therefore, CD-2 has not been a "safe" Republican district without a powerful, popular incumbent. *Id.*

H. Plaintiffs misrepresent Legislative Defendants' expert Kim Brace's statewide election data, which—when read correctly—does not support Plaintiffs' gerrymandering argument.

FOF 163. Plaintiffs claim that Mr. Brace calculated a "statewide composite score" of "54.13% Democratic" for SB-1. Plf. FFCLs ¶ 64. This assertion is wrong.

FOF 164. The figure of 54.13% in Mr. Brace's report is not a composite score at all and has nothing to do with SB-1. Rather, that figure is simply the total percentage of Democratic votes (13,506,401) vs. Republican votes (11,445,540) added up from the many statewide elections from which Mr. Brace pulled election results.

FOF 165. Indeed, that 54.13% figure unsurprisingly remains the same across Mr. Brace's tables for SB-1, the 2011 congressional map, and the three CRC Concept Maps. *See* Leg. Def. FFCLs at Exh. 8 (Brace Report) at pp. 51 (labeled NM_Previous2011_Matrix_poli_formatted.xlsx at page 16 of 20); 73 (labeled NM_PassedSB1_Matrix_poli_formatted.xlsx at page 16 of 20); 95 (labeled NM_PlanA_Matrix_poli_formatted.xlsx at page 16 of 20); 117 (labeled NM_PlanEmod_Matrix_ppoli_formatted.xlsx at page 16 of 20); and 139 (labeled NM_PlanH_Matrix_poli_formatted.xlsx at page 16 of 20).

COL 71. Plaintiffs mischaracterize the 54.13% figure to tie it to SB-1 and argue that "the perfect gerrymander for Democrats in New Mexico is a composite score of 54.13%". Because this argument is based on a complete misuse or misapprehension of the meaning and import of Mr. Brace's figures in his report, it adds nothing to Plaintiffs' gerrymandering argument and should be disregarded by the Court. The 54.13% figure also has no connection whatsoever to Mr. Sanderoff's testimony that he considers a district *with a partisan performance index* between 46%

and 54% to be a competitive district, despite Plaintiffs' improper attempt to link those two topics. *Compare* Plf. FFCL ¶ 64 *with* Sanderoff Dep. 46:2-47:25.

CONCLUSION

Plaintiffs have not met their burden under the Kagan test for extreme partisan gerrymandering. SB-1 did not entrench the Democratic party in power, did not result in an egregious partisan gerrymander, and did not substantially dilute the votes of Republican voters. Moreover, the evidence establishes that SB-1 is grounded in legitimate, non-partisan policy objectives, thereby satisfying intermediate scrutiny. For all these reasons, the Legislative Defendants urge the Court to rule that SB-1 does not violate Article II, Section 18 of the New Mexico Constitution and dismiss Plaintiffs' complaint.

Respectfully Submitted by:

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CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2023, I caused the foregoing Legislative Defendant's Amended Rebuttal and Supplemental Findings of Fact and Conclusions of Law along with this Certificate of Service, to be served and filed electronically through the Tyler Technologies Odyssey File & Serve electronic filing system, which caused all parties or counsel of record to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

HINKLE SHANOR LLP