

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

REPUBLICAN PARTY OF NEW MEXICO, et al.,

Plaintiffs,

v.

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

**MAGGIE TOLOUSE 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.

**LEGISLATIVE DEFENDANTS' AMENDED AND RESTATED
FINDINGS OF FACTS AND CONCLUSIONS OF LAW**

COME NOW 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 (the "Legislative Defendants"), and submit these Amended and Restated Proposed Findings of Fact and Conclusions of Law ("FFCL"). The Legislative Defendants expressly incorporate their Proposed FFCL filed Sept. 15, 2023 (**FOF 1-134; COL 1-53**), and Amended¹ Supplemental FFCL filed Sept. 10, 2023 (**FOF 135-165, COL 54-71**) hereto. Legislative Defendants' Amended and Restated FFCL captures all additional evidence and testimony elicited at trial on this matter, held September 27-28, 2023, restating prior findings ("FOF __") and conclusions ("COL __") as necessary.

¹ Legislative Defendants filed an Amended version of their Supplemental FFCL on even date herewith only to reflect sequential numbering for reference and convenience.

FINDINGS OF FACT:

I. INTRODUCTION

A. Procedural Background of the Litigation

FOF 166. Plaintiffs Republican Party of New Mexico (“RPNM”), David Gallegos, Timothy Jennings, Dinah Vargas, Manuel Gonzales, Jr., Bobby and Dee Ann Kimbro, and Pearl Garcia filed suit against the New Mexico Secretary of State, the Governor and Lieutenant Governor of New Mexico, and the New Mexico Legislature, on the basis that the 2021 congressional redistricting legislation, (“SB-1”) violated their rights under New Mexico’s Equal Protection Clause, N.M. Const. art. II, § 18. *See Plaintiffs’ Verified Complaint*, filed Jan. 21, 2022.

FOF 167. Plaintiffs request the Court declare SB-1 unconstitutional and judicially adopt the Citizens Redistricting Committee Concept E congressional map. *Id.* at 27.

FOF 168. Although the Executive and Legislative Defendants challenged Plaintiffs in early motions to dismiss, on writ of superintending control the New Mexico Supreme Court determined that New Mexico’s Equal Protection Clause providing a basis for Courts to review legislative enactments to determine whether there has been extreme, unconstitutional partisan gerrymandering. *See Amended Order of the Supreme Court of New Mexico*, dated August 25, 2023.

FOF 169. The Supreme Court directed the parties and the District Court to proceed under the three-part test announced by Justice Kagan in her dissent in *Rucho v. Common Cause*, 139 S. Ct. 2484, 2516 (2019). Prior to trial, the Supreme Court released the slip copy of its Opinion, containing further guidance on application of Justice Kagan’s test under New Mexico Equal Protection Clause. *See generally Grisham v. Van Soelen*, ___-NMSC-___, (S-1-SC-39481, Sept. 22, 2023) (slip op.) (hereinafter “*Grisham*”).

B. The Redistricting Plaintiffs

FOF 170. Plaintiff Dinah Vargas and Pearl Garcia are registered Republican voters residing in Albuquerque, New Mexico, who moved from CD-1 to CD-2 under SB-1. **FOF 121-124.** Plaintiff Timothy Jennings is a registered Democrat voter who moved from CD-2 to CD-3 under SB-1. **FOF 125-127.** Plaintiffs David Gallegos and Manuel Gonzales are registered Republican voters who remain in CD-2 under SB-1, but allege that their vote has been diluted by the “cracking” of registered Southeastern New Mexico Republican voters. **FOF 128-130.** Plaintiffs Bobby and Dee Ann Kimbro are registered Republican voters who live in Lovington, New Mexico and allege that, under SB-1, Mr. and Mrs. Kimbro’s move from CD-2 to CD-3 diluted their vote. **FOF 131-134.**

FOF 171. Plaintiffs submitted identical declarations in support of their individual injuries. *See Plaintiffs’ Response to Legislative Defendants’ Motion to Dismiss for Standing* filed Aug. 16, 2023.

FOF 172. When questioned about his Declaration at trial, Plaintiff Senator Gallegos testified that the vote dilution he experienced and complained of was more of a “feeling” than based on any observable metric or specific complaint after the enactment of SB-1. See Trial Testimony of Plaintiff Sen. David M. Gallegos [9-27-23 Tr. 140:10-17]

FOF 173. No other Plaintiff offered testimony or evidence as to their asserted injuries or theory of dissimilar treatment or discrimination caused by SB-1.

II. INTENT IN THE 2021 CONGRESSIONAL REDISTRICTING PROCESS

First, the plaintiffs challenging a districting plan must prove that state officials’ predominant purpose in drawing a district’s lines was to entrench their party in power by diluting the votes of citizens favoring its rival.

- *Grisham*, ¶ 50.

A. New Mexico’s Citizen Redistricting Committee

FOF 174. In past redistricting efforts, members of the Legislature formed an interim redistricting committee to solicit public input. **FOF 33-35**; Trial Testimony of Senator William “Bill” Sharer [9-27-23 Tr. 96:15-21; 104:16-106:1] (describing past redistricting process in legislature).

FOF 175. With the Redistricting Act in April 2021, an independent Citizen Redistricting Committee (“CRC”) took over that role. The CRC proposals of nonbinding plans are considered by the Legislature “in the same manner as for legislation recommended by interim legislative committees.” NMSA 1978, § 1-3-A-9; **FOF 36-46**.

FOF 176. The Redistricting Act applies solely to the CRC and does not bind the Legislature. *See Grisham*, ¶ 46 (“Neither *Maestas* nor the Redistricting Act is a source of redistricting standards that bind the Legislature...those plans are merely recommendations which the Legislature is not required to follow.”). Therefore, “reliance on the traditional redistricting principles in *Maestas* and the Redistricting Act as standards to satisfy *Rucho* is misplaced.” *Id.*

FOF 177. The CRC held sixteen public meetings where they heard testimony from over 350 New Mexicans and received hundreds of written comments submitted through the CRC’s online portal. NMSA 1978, § 1-3A-6(C); *id.* at §§ 1-3A-5(A)2 & (A)(3); **FOF 47-53**.

FOF 178. Neither Plaintiffs, nor the Republican Legislators called as witnesses for Plaintiffs at trial were prohibited or excluded from commenting or participating in the CRC process. *See* Trial Testimony of Sen. Sharer [9-27-23 Tr. 108:19-109:8] and Sen. Gallegos [9-27-23 Tr. 138:11-14]; *Cf.* Ex. 5 Chavez Dep. 66:15-68:5 (recalling testimony received by CRC from Republican Rep. Ezzell and Plaintiff former Sen. Tim Jennings in Southeast New Mexico).

B. SB-1 Legislative Process

FOF 179. The Governor called the Legislature into special session for redistricting

from December 6 to December 17, 2021, and directed the Senate to “begin the redistricting process” for the United States House of Representatives. N.M. Const., art. IV, § 6; **FOF 60-62**.

FOF 180. Plaintiffs raise no allegations regarding procedural error or defect in the enactment of SB-1. Senate Bill 1 followed the normal course of introduction, vetting through committees, and vote by the body in both the state Senate and House. **FOF 63-69**; *see also* Ex. 27 (excerpts of legislator testimony during committee hearings and floor debate); *see* Sen. Sharer Testimony [9-27-23 Tr. 108:13-19]; *see* Sen. Gallegos Testimony [9-27-23 Tr. 136:3-10].

FOF 181. Plaintiffs allege that Republican legislators were generally excluded from the legislative redistricting process. It is undisputed, however, that during the redistricting session all members of the Legislature were:

a. free to comment and question during committee and floor sessions; *see* Rep. Townsend Testimony [9-27-23 Tr. 74:25-775:12]; Sen. Sharer Testimony [9-27-23 Tr. 98:2-7]; Plaintiff Sen. David Gallegos Testimony [9-27-23 Tr. 136:15-137:4];

b. able to propose substitutions or amendments to the congressional redistricting bill; *see* Rep. Townsend Testimony [9-27-23 Tr. 75:13-18]; *see also* Plaintiff Sen. Gallegos Testimony [9-27-23 Tr. 137:5-22]; and

c. entitled to full use of the services of Research and Polling, Inc. to develop and introduce their own competing legislation. *See* Sen. Sharer Testimony [9-27-23 Tr. 115:5-18].

FOF 182. Further, the legislative history of SB-1 belies such exclusion. First, Senator Greg Baca introduced an amendment in the Senate Judiciary Committee to change certain boundaries in Bernalillo and Valencia County, which did not pass committee. *See* Senate Judiciary Committee Hearing (Dec. 9, 2021), [Senate Judiciary Committee 12/9/2021 10:13:54](#).

FOF 183. Second, Senator Mark Moores proposed a floor amendment, similar to

Concept E (map 221667.1), which was not adopted. *See* https://www.nmlegis.gov/Sessions/21%20Special2/Floor_Amendments/221667.1.pdf

FOF 184. Third, Representative Gerg Nibert proposed a separate floor substitute (map 221735.1), which was also not adopted. *See* https://www.nmlegis.gov/Sessions/21%20Special2/Floor_Amendments/.221735.1.pdf

FOF 185. Plaintiffs' witness Senator William "Bill" Sharer testified that he informally proposed changes to SB-1, but his proposed changes affected only six precincts in Northeast New Mexico located within CD-3, and did not affect Southeastern New Mexico or CD-2. Sen. Sharer Testimony [9-27-23 Tr. 106:12-22].

FOF 186. The only specific example of exclusion was related by Sen. Sharer as to a single meeting between Democratic legislators and members of a Native American/Tribal coalition. *See* Trial Testimony of Sen. Sharer. [9-27-23 Tr. 99:20-100:22]

FOF 187. All other allegations raised by Plaintiffs in declarations and supplemental affidavits either rely on belief or speculation alone, or reflect that the Republican caucus was able to voice its concerns, but was not prohibited from introducing its own substitutions and amendments. *See, e.g.*, Plfs. FFCL Ex. 8, Declaration of Senator Greg Baca, Plfs. FFCL Ex. 32, Declaration of Rep. Jim Townsend.

FOF 188. Plaintiffs heavily rely on communications between individual legislators and third parties, or communications between individual legislative staff and third parties as evidence of predominant purpose and partisan intent of the Legislature. *See, e.g.*, Plfs. FFCL Ex. 2, Plfs. Trial Ex. 1; *but see* **FOF 144, COL 56-63.**

FOF 189. But communications received by and from legislators, like Plaintiffs' Trial Ex. 1 (Senator Stewart texts), are not indicative of an intent to entrench. They merely reflect the

performance metrics related to the introduced legislation, numbers which reflect a more competitive balance of seats than previously existed. If anything, Plaintiffs Trial Ex. 1 confirms that the Legislature’s intent and goal of SB-1 was not entrenchment through vote dilution, but to achieve competitive districts that protected the remedy of the franchise by ensuring accountable and responsive representatives. *Cf.* Sanderoff Trial Testimony [9-28-23 Tr. 231:9 -232:14]; *Maestas v. Hall*, 2012-NMSC-006, ¶ 41.

C. SB-1 Characteristics

FOF 190. SB-1 bears an 86% resemblance to Concept Map H and is evenly populated, with a population deviation of 0% or 14 persons, and comparable compactness scores. **FOF 70, 74-76.** Rep. Townsend, Sen. Sharer, and Sen. Gallegos all testified that SB-1 reflected many characteristics of the CRC’s Concept H map. *See, e.g.* Trial Testimony of Rep. Townsend [9-27-23 Tr. 73:17-74:1]; Testimony of Sen. Sharer [9-27-23 Tr. 97:11-14].

FOF 191. Compared to the 2011 judicially drawn “least-change” map, SB-1’s congressional districts maintain 70% of each districts’ core metropolitan base, such that Albuquerque anchors CD-1, Las Cruces remains in CD-2, and Santa Fe/Rio Rancho remain in CD-3. *See* Trial Testimony of Dr. Jowei Chen [9-28-23 Tr. 101:21-103:9]; **FOF 83-86**; *see also* Sen. Sharer Testimony [9-27-23 Tr. 107:14-108:4] (Farmington and Senate District 1 has always been in CD-3 since New Mexico gained a third congressional seat, and remains so under SB-1).

FOF 192. Additionally the boundaries of each congressional district under SB-1 adjust geographically to balance urban and rural populations, respond to Native American representation requests, increase the opportunity for competitive races, and distribute oil and gas interests—a primary driver of New Mexico’s economy—across districts. *See generally* Ex. 27, **FOF 51-52; 71-73, 77-82**; *see also* Part IV, *infra*; *see also* Leg. Def. Trial Exhibit “E”, New Mexico

Legislative Finance Committee *Legislating for Results: Post-Session Review* (May 2023) (reflecting 51% of projected state budget, \$7.1 billion, attributable to oil and gas production, of which 92% of production derives from federal and state trust lands).

III. EFFECT OF SB-1 ON VOTING STRENGTH AND ENTRENCHMENT

Second, the plaintiffs must establish that the lines drawn in fact have the intended effect by substantially diluting their votes.

Grisham, ¶ 50.

A. Guidance from the New Mexico Supreme Court

FOF 193. As determined by the New Mexico Supreme Court, “some degree of vote dilution under a partisan gerrymander does not offend the United States Constitution.” *Grisham*, ¶ 29 (citing *Rucho*, 139 S. Ct. at 2497). Therefore, “depending on the degree of vote dilution under a political gerrymander,” Plaintiffs’ claims “may not rise to the level of constitutional harm.” *Id.*

FOF 194. To be deemed unconstitutional, “egregious partisan gerrymandering can effect vote dilution to a degree that denies individuals their inalienable right to full and effective participation in the political process and enables politicians to entrench themselves in office as against voters’ preferences.” *Grisham*, ¶ 30 (text only).

FOF 195. “The consequences of such entrenchment under a partisan gerrymander include that ensuing elections are effectively predetermined, essentially removing the remedy of the franchise from a class of individuals whose votes have been diluted.” *Id.*, ¶ 30.

FOF 196. Thus, “the touchstone of an egregious partisan gerrymander under Article II, Section 18 is political entrenchment through intentional dilution of individuals’ votes.” *Id.*, ¶ 51; *see also id.*, ¶ 67 (same).

FOF 197. This standard invalidates the “worst-of-the-worst cases,” the “most egregious, but only the most egregious partisan gerrymanders.” *Id.*, ¶52 (quoting *Rucho*, 134 S.

Ct. at 2513, 2516).

FOF 198. “To satisfy the effects prong, however, a plaintiff must provide sufficient evidence that the plaintiff’s own district was either packed or cracked, depending on the allegations, and that the resultant dilution of the plaintiff’s vote is substantial.” *Grisham*, ¶ 64.

FOF 199. “For a district court to find a violation of Article II, Section 18, such district-specific evidence of disparate treatment should be as objective as possible, for example, by comparing voter registration percentages or data for the political party affiliation of the individual plaintiffs under the prior districting map against parallel percentages or data under the challenged districting map.” *Id.*

FOF 200. As an example of substantial vote dilution, the Republican voter registration of Maryland’s Sixth Congressional District dropped from 47% under the prior map to 33% under the challenged map. *See Grisham*, ¶65 n.13 (citing *Rucho*, 139 S. Ct. at 2519 (Kagan, J., dissenting)).

FOF 201. “A district court adjudicating a partisan gerrymandering claim must determine whether the evidence shows the challenged redistricting map substantially diluted the votes of plaintiffs within their district.” *Id.*, ¶ 65.

B. Plaintiffs’ Fact Witnesses & Evidence

FOF 202. Plaintiffs Gallegos and Gonzales are Republican voters in CD-2 both before and after the 2021 redistricting. Plaintiffs Bobby and Dee Ann Kimbro are Republican voters who moved from CD-2 (2011 plan) to CD-3 (SB-1).

FOF 203. Plaintiffs Gallegos and Gonzales allege that their vote was diluted based on the distribution of registered Republican voters in Southeastern New Mexico (specifically Chaves, Eddy, Lea, and Otero Counties). Ver. Compl, ¶ 90; Sen. Gallegos Testimony [9-27-23 Tr. 142:5-

22]. Under SB-1, registered Republican voters in CD-2 decreased from 37.6% to 30.5%. *See* Leg. Ex. 28.

FOF 204. Plaintiffs admitted at trial to calling Plaintiff Senator David Gallegos to testify because of the New Mexico Supreme Court’s explicit guidance regarding the need for district-specific objective evidence of individual vote dilution. [9-27-23 Tr. 128:23-29:6]

FOF 205. Plaintiff Senator Gallegos testified that his injury of vote dilution was not based on any objective evidence, but a “feeling” that his vote was diluted. Sen. Gallegos Testimony [9-27-23 Tr. 140:10-14] Upon further examination, Plaintiff Sen. Gallegos’ assessment of vote dilution derived from changes in the percentage of Hispanic voters in CD-2, [9-27-23 Tr. 139:24-140:3], and not on the weight of his vote as a Republican voter in CD-2.

FOF 206. Plaintiff Senator Gallegos also testified that the outcome of the very close 2022 midterm election in CD-2, being a margin of less than 1%, was an effect of low turnout among Republican voters in CD-2. *See* Sen. Gallegos Testimony [9-27-23 Tr. 142:5-18] (“...we have a strong group of voters in the are. Not that they all showed up to the election cycle...”); [9-27-23 Tr. 143:15-144:8] (describing difficult in winning election when “[w]e had a lot of people that did not come to the polls...we have a statewide problem of disenchantment by voters, and it just seemed to be in the Republican sector.”); [9-27-23 Tr. 146:25-147:7] (with better candidate, “our voter numbers will increase and that would possibly be the difference.”); *see also* **FOF 111** (comparing CD-2 voter registration and turnout as lagging all other congressional districts)..

FOF 207. No other Plaintiff offered testimony or evidence as to a specific harm or injury evidencing vote dilution, outside of Plaintiffs’ Verified Complaint and Plaintiffs’ identical individual Declarations. *See* Plaintiffs’ Response to Legislative Defendants’ Motion to Dismiss for Standing filed Aug. 16, 2023.

FOF 208. In those Declarations, Plaintiffs also point to the results of the 2022 election in CD-2 as evidence of substantial vote dilution. *See Declarations* dated Aug. 16, 2023 at ¶¶ 7 & 8. But Sen. Gallegos admitted that the national Republican “huge great wave” in the 2022 election “did not make it here to New Mexico.” *See Plaintiff Sen. Gallegos Testimony* [9-27-23 Tr. 149:22-150:1]; *see also FOF 140-143*.

C. Plaintiffs Expert Witness Sean Trende

FOF 209. Plaintiffs expert Sean Trende testified as to the partisan performance and election trends in New Mexico statewide and specifically that of CD-2 under SB-1. *See generally FOF 154-157; COL 66-68*. However, Mr. Trende’s qualitative conclusions regarding the difficulty of electing a Republican congressional candidate in CD-2 was directly rebutted at trial by testimony from Plaintiff Sen. Gallegos, **FOF 205**; *see also* Sean P. Trende Trial Testimony [9-28-23 Tr. 67:9-17]; Legislative Defendants’ expert Brian Sanderoff, **FOF 232-240** *infra*, and the 2022 election outcomes. **FOF 227-229**, *infra*.

FOF 210. Much of Mr. Trende’s analysis “centered” New Mexico elections against the national stage and relied on the fact that Rep. Herrell was one of only two Republican incumbents to lose 2022 re-election in “red wave” year. But, nationally, the 2022 election did not result in major gains for the Republican party. *See Plaintiff Sen. Gallegos Testimony* [9-27-23 Tr. 149:22-150:1] (Republican wave in 2022 did not materialize in New Mexico); *see also* Sean Trende, “What Happened?” REAL CLEAR POLITICS (Nov. 17, 2022) (observing that “The [election] night was clearly disappointing for Republicans....Obviously this is not the result that Republicans had hoped for.”); *see also id.* (explaining that the disappointing Republican performance in 2022 midterm elections attributable to candidate quality, i.e. “candidates do matter”, job performance, and that the American electoral system does not “guarantee[] proportional representation.”).

FOF 211. At trial, Mr. Trende acknowledged that he did not save any of the 2,040,000

simulated maps that he claims formed the basis for his quantitative "simulation-based" analysis found in Sections 6.4, 6.4.1, and 6.4.2 of his expert report.

FOF 212. Mr. Trende also acknowledged that it was impossible to reproduce the 2,040,000 simulated maps.

FOF 213. Other than Mr. Trende's self-serving testimony regarding the destroyed 2,040,000 simulated maps, Plaintiffs did not produce any evidence substantiating or reflecting that Mr. Trende's analysis based upon those 2,040,000 simulated maps was reliable.

FOF 214. To the contrary, Mr. Trende testified that his simulations had an approximate 50% duplication rate and that he had not used the simulation software's diagnostic tools to determine whether his simulations could be interpreted based upon that lack of "sample diversity": e.g., experiencing numerous duplicates. Mr. Trende was aware of problems presented by duplicate simulations and in prior litigation where Mr. Trende served as an expert, he discarded duplicates in his simulated maps.

FOF 215. Mr. Trende testified that he knew that defendants and their experts would want to review his maps but did not take appropriate actions to preserve those maps so that they could be reviewed. Mr. Trende's knowledge of the need to preserve his simulated maps is reflected in Plaintiff's eliciting testimony from Mr. Trende regarding the 1,000 simulated maps created, preserved, and produced by Dr. Chen.

FOF 216. The Legislative Defendants sought to exclude Mr. Trende's quantitative "simulation-based" testimony as unreliable based upon Mr. Trende's destruction of the 2,040,000 simulations underlying his opinions and the inability of anyone to test the bases for Mr. Trende's opinions. The trial court denied that Motion.

FOF 217. However, based upon arguments of counsel regarding that motion, and

based upon Mr. Trende's testimony at trial, Mr. Trende's quantitative "simulation-based" opinions are unreliable and are accorded no weight whatsoever.

D. Legislative Defendants Fact Evidence

(i) Objective Evidence of Voter Registration and Partisan Performance under SB-1

FOF 218. By 2020, not only was the 2011 map malapportioned, but it also favored Republicans in CD-2 and Democrats in CD-3 at disproportionate levels:

District	Population	Democrat		Republican	
		Registered Voters	Performance	Registered Voters	Performance
1	694,482	46.8%	57.6%	28.0%	42.4%
2	714,034	37.7%	45.1%	37.6%	54.9%
3	709,906	49.3%	58.3%	28.0%	41.7%
	2,117,522	44.9%	54.2%	30.9%	45.8%

FOF 219. In contrast, SB-1 distributes registered voters by party to better reflect registration and create more competitive races in each district:

District	Population	Democrat		Republican	
		Registered Voters	Performance	Registered Voters	Performance
1	705,832	43.2%	53.5%	32.1%	46.5%
2	705,846	43.8%	53.0%	30.5%	47.0%
3	705,844	47.6%	56.0%	30.1%	44.0%
	2,117,522	44.9%	54.2%	30.9%	45.8%

FOF 220. SB-1 makes each congressional district more politically competitive than it was previously, narrowing performance gaps from double-digit margins (15.2%, 9.8%, 16.6%) to more competitive ranges (7%, 6%, 12%). **FOF 89-93.**

FOF 221. CD-2 is now a competitive district, with partisan performance measures (53.0% D- 47.0% R) narrower than the 54% to 46% range at which political consultants consider a district competitive. **FOF 89 & 92**

FOF 222. In New Mexico, voters may register by party or decline to designate. Over

the past decade, this category has grown to 25% of the electorate, while Republicans consistently comprised approximately 30-31%, and Democrats have comprised 44% to 47% of the state's registrants during the same period. **FOF 24, 30-32.**

FOF 223. The partisan performance index calculated for the congressional districts above is provided by Research and Polling, Inc. and based on an average of the last ten years of statewide elections excluding races where the candidate won by 20% or more. In the races considered here, only two were excluded. Sanderoff Testimony [9-28-23 Tr. 204:23-206:6]. Election outcomes specific to CD-2, *i.e.* endogenous races, were evaluated by Legislative Defendants' expert Brian Sanderoff and support the same conclusion that CD-2 is a competitive district, winnable by a strong candidate from either party. *See* Sanderoff Testimony [9-28-23 Tr. 221:21-222:7]; **FOF 25-30.**

FOF 224. The range of 54-46% as a competitive district is supported by election results from districts in New Mexico. *See* Sanderoff Testimony [9-28-23 Tr. 218:12-219:10] For example, in the 2014 State House District 39 race, with a Democratic Performance of 56%, the Republican candidate won with 53% of the vote. *See* Sanderoff Testimony [9-28-23 Tr. 220:3-221:18]. In fact, over the past ten years, a Republican candidate has won HD39 three (3) times with a Democratic performance rating of 56%. *See id.*

FOF 225. Additionally, in Senate District 30, a Republican candidate won with 56% of the vote despite that district having a Democratic Performance rating of 54.1%. *See id.*; *see also* **FOF 110.**

(ii) *Objective Evidence of 2022 Election Results Confirming CD-2 a Competitive District.*

FOF 226. As conducted under the new district boundaries of SB-1, the 2022 election produced more competitive races and narrower margins across all three districts. **FOF 103-109.**

FOF 227. Any time the margin of victory in an election falls within one percentage point, that race is considered a “toss up.” In a toss-up election, the winner is extremely vulnerable to being challenged and possibly defeated in the next general election cycle. *See Sanderoff Testimony* [9-28-23 Tr. 223:4-7] (in a toss-up race, “any party, any candidate could win, absolutely”).

FOF 228. Given the very slim margin in CD-2 of only 0.7% and that the congressional race in 2022 was a toss-up, the Democrat incumbent, is likely vulnerable in the next election. Therefore, the Democratic party is not entrenched under SB-1. [9-28-23 Tr. 224:7-25]; **FOF 108-109; 112.**

E. Legislative Defendants Expert Brian Sanderoff

FOF 229. Brian Sanderoff is the principal of Research and Polling Inc., a well-recognized and long-established research and polling organization in New Mexico, with over five decades of experience in redistricting. Mr. Sanderoff estimates that 95% of his work in polling and demographics is done in New Mexico.

FOF 230. Currently, Research and Polling, Inc. is one of only four (4) companies rated A+ in accuracy by the national election analysis website FiveThirtyEight. *See Sanderoff Testimony* [9-28-23 199:6-21]

i. Mr. Sanderoff’s Analysis of Election Results from CD-2 Races

FOF 231. Because the partisan performance index uses only statewide election results, Mr. Sanderoff also reviewed the results of past CD-2 elections. In his words, “there’s nothing like looking at actual elections and actual candidates” to evaluate the partisan performance within a district, which takes into account key local factors. *See Trial Testimony of Brian Sanderoff*, [9-28-23 Tr. 221:21-222:7; 225:12-226:10, 250:13-14].

FOF 232. Under current local conditions in CD-2, Mr. Sanderoff testified that incumbency has benefits and drawbacks, where candidates gain a slight advantage in campaign fundraising and recognition, but also must run on their performance and voting records. Sanderoff Testimony [9-28-23 Tr. 245:19-246:15] For example, Mr. Sanderoff testified that current Rep. Vasquez may be too liberal for more conservative voters in CD-2, which makes him vulnerable as a candidate. *Id.*

FOF 233. Because congressional districts were relatively constant for thirty years under past “least change” maps, Mr. Sanderoff compared endogenous election results from CD-2 from 2002 to 2020. Sanderoff Testimony [9-28-23 Tr. 221:21-222:7].

FOF 234. The history of congressional election results in CD-2 over the past 20 years shows that while CD-2 most often elected the same Republican candidate, voters in CD-2 twice elected a Democratic candidate when there was not a popular, powerful Republican incumbent on the ticket. **FOF 25-29**

FOF 235. Therefore, based upon the partisan performance numbers and the congressional district election history in CD-2 from 2002-2020, CD-2 was a strong-leaning Republican congressional district, not a safe Republican district, where—in the absence of a powerful Republican incumbent—voters supported a Democratic candidate in past elections. *See* Sanderoff Testimony [9-28-23 Tr. 227:18-230:3]; *see also* Ex. 11, Sanderoff Report at 8; *see* Ex. 8, Brace Report at 9, **FOF 29**.

ii. *Mr. Sanderoff's Assessment of CD-2 as a Competitive, Toss-Up District such that SB-1 does not entrench the Democratic Party.*

FOF 236. Overall, New Mexico is a politically competitive state between the major parties in its three congressional districts. *See* Exhibit 12, Report of Sean P. Trende Report dated August 11, 2023 at 14 (concluding New Mexico voters elect Democrats by small margins but are

willing to vote for Republicans).

FOF 237. Specifically, under SB-1, CD-2 is a competitive, toss-up district. Trial Testimony of Brian Sanderoff Testimony [9-28-23 Tr. 221:25-225:5]. Using the common definition of entrenchment as difficult or impossible to change, and based on the competitive performance indexes and 2022 election results, Mr. Sanderoff concludes that CD-2 does not entrench the Democratic party, because a candidate from either party could win the district. *See id.*

FOF 238. Applying guidance from the New Mexico Supreme Court as to whether SB-1 predetermines the outcome of elections, Mr. Sanderoff concluded that because CD-2 is a toss up district, a big question remains as to the outcome of the 2024 election. Indeed, Mr. Sanderoff expects CD-2 will continue to be “a really competitive district” and that the race in CD-2 “could go either way.” Sanderoff Trial Testimony [9-28-23 Tr. 261:24-262:6]; *see also* [9-28-23 Tr. 224:17-25] (noting that the district “can go back and forth over the years or what have you. It is no [sic] predetermined outcome in future races.”).

FOF 239. Fundamentally, a toss up district is the opposite of a predetermined election. *See* Sanderoff Testimony [9-28-23 Tr. 223:17-225:5].

F. Legislative Defendants Expert Dr. Jowei Chen

FOF 240. Dr. Jowei Chen testified as Legislative Defendants expert regarding the partisan effect of SB-1 nonpartisan criteria. **FOF 94-101.**

FOF 241. Dr. Chen programmed a computer algorithm to create 1,000 independent simulations meeting all eight non-partisan criteria (non-partisan districting criteria incorporated population equality, district contiguity, precinct preservation, municipal boundary considerations, Indian (Native American) reservation considerations, avoiding county splits, oil industry considerations, and district compactness). The criteria included in Dr. Chen’s algorithm

approximate the policy choices testified to and made by the Legislature in drafting SB-1. *See also* **FOF 149-153.**

FOF 242. Using the Republican Performance Index (measured using election results from over 26 actual, competitive statewide elections), CD-2 in SB-1 performs better for Republicans than 33% of the 1,000 simulated maps. “Hence, CD-2 is squarely within the normal partisan distribution when compared to the most-Republican districts created by the 1,000 computer-simulated plans. It is clearly not a statistical outlier in terms of its partisanship.” Ex. 31, Chen Report at 19.

FOF 243. Using the Republican Share of Registered Voters, “the Republican share of registered voters in CD-2 is higher than 79.5% of the simulated districts’ second-most-Republican districts.” Ex. 31, Chen Report at 23. While CD-2 under SB-1 is more favorable to Republicans than most of the simulated plans, “CD-2 is still within the normal partisan distribution of these simulated districts. Hence, it is clear that CD-2 is not a statistical outlier in terms of its partisanship when measured using party registration.” Ex. 31, Chen Report at 23.

FOF 244. Overall, Dr. Chen found that “the partisan characteristics of the SB 1 plan are well within the normal range of these computer-generated districting plans drawn with the partisan-blind algorithm. Thus, the SB 1 plan is neither extreme nor a statistical outlier in terms of its partisanship.” Ex. 31, Chen Report at 4.

FOF 245. Thus, in Dr. Chen’s opinion, “the partisan characteristics of the SB 1 plan could reasonably have emerged from a partisan-neutral map drawing process adhering to all of the aforementioned districting criteria.” Ex. 31, Chen Report at 4.

IV. LEGITIMATE, NON-PARTISAN POLICY BASIS OF SB-1

Third, if the plaintiffs make those showings, the State must come up with a legitimate, non-partisan justification to save its map.

- *Grisham*, ¶50 (quoting 139 S. Ct. at 2516 (Kagan, J., dissenting) (text only)

FOF 246. In forty years, New Mexico has only once adopted legislatively enacted congressional districts. Historically, redistricting in New Mexico has required the intervention of federal or state courts. **FOF 1-13.**

FOF 247. Congressional districts in New Mexico have remained virtually unchanged from 1990 through 2020. **FOF 14.** As a result, the last time congressional districts in New Mexico reflected the “the last, clear expression of state policy”² through the choices of elected representatives—rather than constrained least change line-drawing by the judiciary in response to litigation—was in 1991. **FOF 15.**

FOF 248. Unlike past Court-drawn boundaries reflecting a least-change approach³ approved by a reluctant judiciary to avoid being thrust into the political thicket, SB-1 is a clear expression of current State policies that answer the express concerns of New Mexicans.

FOF 249. The policies behind SB-1 focus on fashioning a representative and accountable government in politically competitive congressional districts rather than protecting traditional incumbencies. *Cf.* Ex. 5, Chavez Dep. 38:22-39:7 (in drafting and adopting maps, as chair of CRC he did not consider incumbencies); *see* FOF ¶ a below, *infra*.

FOF 250. Many factors relating to state policies—decisions left to the legislature as the political branch of government—impact the manner and method in which districts are drawn. Any policy decision made may have some impact on the partisan composition of a district. *Allen v. Milligan*, 599 U.S. ----, 143 S.Ct. 1487, 1513 (2023) (“Districting involves myriad

² *Jepsen v. Vigil-Giron*, Findings, 2002 WL 35459960, ¶¶ 21-33, 34 (D.N.M. Jan. 4, 2002).

³ Research & Polling, Inc., *NM Congress 2010 Census Redistricting*, p.15, December 15, 2011, https://www.nmlegis.gov/Sessions/11Redistricting/187963/CD_187963_2_Packet.pdf (showing boundaries of last court-drawn redistricting plan).

considerations—compactness, contiguity, political subdivisions, natural geographic boundaries, county lines, pairing of incumbents, communities of interest, and population equality. Yet quantifying, measuring, prioritizing, and reconciling these criteria requires map drawers to make difficult, contestable choices.”) (internal quotation and citation omitted). *See also* Ex. 4, Sanderoff Dep. 38:12-25 (“there are many, many factors that come into play in the drawing of a map and some of them have tension with each other... There’s no such thing as a perfect map. So the map-drawer has to decide which are their highest priorities compared to others and try to come up with a map that fits their particular objective.”); *See* Ex. 9, Brace Dep. 21:1-14 (noting that “anytime you draw districts, it will probably have a political impact”).

A. SB-1 Reflects Population Changes in New Mexico

FOF 251. In the 30-year period during which New Mexico’s congressional district boundaries remained fixed, the state experienced significant demographic and societal changes. Populations in Dona Ana County and Rio Rancho grew by large numbers, while other regions of the state shrank. **FOF 16-22, 83-85.**

FOF 252. Thus, in drawing districts to meet a 0% population deviation between districts, the Legislature was required to redraw malapportioned districts and SB-1 is the product of those population changes in New Mexico. SB-1 moved Rio Rancho from CD-3 into CD-1 where it joins the majority of Albuquerque and the East Mountain communities.

FOF 253. As a result, CD-3 had to pick up additional population in the southeastern area of the state, while honoring the Native American consensus plan on the west side of the state, which sought to split Zuni Pueblo between CD-2 and CD-3 and Mescalero Apache between CD-1 and CD-2.

FOF 254. Despite these population changes, SB-1 kept over 70% of the state’s

population – over 500,000 New Mexicans—in the same congressional district as in the last decade and population deviation at 0% (14 people). **FOF 86.**

B. SB-1 reflects and incorporates CRC Public Comment and Testimony

FOF 255. New Mexicans appeared at the CRC meetings in-person and on Zoom to testify, raise and supported a number of policy considerations in statements presented to the CRC. *See Leg. Def FFCL Ex. 16, CRC Meeting Public Testimony.* These considerations included:

a. that certain Native American nations, namely the Zuni Pueblo and the Mescalero Apache Nation, desired to be split between two congressional districts to increase the amount and opportunity of available, responsive representation. **FOF 51.**

b. That South Valley and Southern New Mexico residents expressed the desire to combine communities in the Rio Grande Valley—from the South Valley of Albuquerque down to the border with the State of Texas—into a single district due to affinities, culture, lifestyle, immigration status, access to services, and other common concerns. **FOF 52.**

C. SB-1 is Clear Legislative Expression of State Policy

FOF 256. SB-1 incorporates both the public input provided to the CRC and the CRC proposed Concept maps, while reflecting a number of important government interests in drawing congressional districts:

a. Combining urban and rural constituencies in every district; **FOF 78 & 79.**

b. honoring the expressed desire of two Native American nations to be split between congressional districts; **FOF 80 & 51.**

c. to combine communities in the Rio Grande Valley from the South Valley of Albuquerque; **FOF 52 & 81.**

d. increasing the number of congressional representatives with a direct constituent

interest relating to the extractive industries located in southeast New Mexico as a significant driver of the statewide economy and tax revenue. **FOF 82**; *see also* Sanderoff Trial Testimony [9-28-23 Tr. 236:5-236:23] (agreeing with importance of oil and gas industry in New Mexico and testifying as to validity and merit of policy decision to obtain greater representation by splitting across districts, as reflected by Zuni/Mescalero, Los Alamos County, and Eddy County in past redistricting cycles); *see also* Rep. Townsend Testimony [9-27-23 Tr. 82:24-83:7] (importance of oil and gas industry “to New Mexico as a whole.”); Leg. Def. Trial Ex. E (\$7.1 billion, or 51%, of New Mexico economy attributable to oil and gas).

FOF 257. Controlling for the above policies incorporated in SB-1, Legislative Defendants’ expert Dr. Jowei Chen conducted an analysis of 1,000 alternative maps and found that SB-1 is not a partisan outlier and could have plausibly emerged from a nonpartisan process.

FOF 258. SB-1’s boundaries for electing congressional representatives are clear expressions of State policy articulated by its Legislature and Governor through the political process. *See Findings of Fact and Conclusions in Jepsen v. Vigil-Giron*, Cause No. D-101-CV-2001-02177 (N.M. 1st Jud. Dis. Jan 2, 2002) at ¶ 34.

FOF 259. SB-1 reflects the Legislature’s policy decisions while adhering to the constitutional requirements of one person, one vote; respecting the rights of minorities in compliance with the Voting Rights Act; and honoring the consensus of the sovereign indigenous nations located within New Mexico’s boundaries.

CONCLUSIONS OF LAW

Having made the foregoing Findings of Fact, this Court concludes as follows:

I. Senate Bill-1 Meets All Federal Constitutional Requirements and is Presumed Constitutional.

COL 72. The U.S. Constitution and New Mexico Constitution tasks the state legislative bodies with districting and reapportioning congressional districts every ten years. **COL 1, 3 & 4; FOF 1.**

COL 73. Where all legislation is presumed constitutional, **COL 2**, redistricting is specifically the province of the legislature and “An act of the Legislature will not be declared unconstitutional in a doubtful case, and if possible, it will be so construed as to uphold it.” *Grisham*, ¶ 55 (slip op.) (quoting *Bounds*, 2013-NMSC- 037, ¶ 11).

COL 74. Therefore, “[J]udges should not be apportioning political power based on their own vision of electoral fairness, whether proportional representation or any other. And judges should not be striking down maps left, right, and center, on the view that every smidgen of politics is a smidgen too much. Respect for state legislative processes—and restraint in the exercise of judicial authority—counsels intervention in only egregious cases.” *Grisham*, ¶ 52 (citing *Rucho*, 134 S. Ct. at 2513 (Kagan, J., dissenting))

COL 75. Because SB-1 meets the 0% population deviation requirement with a maximum deviation among the three congressional districts of only 14 people, SB-1 does not violate Plaintiffs Garcia, Vargas, Gonzales, and Gallegos, as individual voters in CD-2, right to participate in the political process as individual under one person, one vote.

II. Senate Bill-1 Is Not an Egregious Partisan Gerrymander.

A. Plaintiffs have not established that the predominant purpose of the Legislature, as a body, in enacting SB-1 was to substantially dilute Plaintiffs’ votes.

COL 76. Article II, Section 18 of the New Mexico Constitution, the Equal Protection Clause, provides protection against the most egregious partisan gerrymanders. *See generally Grisham v. Van Soelen*, ____-NMSC-____, (S-1-SC-39481, Sept. 22, 2023) (slip op.).

COL 77. The threshold issue under any equal protection claim is whether the legislation creates a class of similarly situated individuals treated dissimilarly. *Grisham*, ¶51 (quoting *Breen v. Carlsbad Municipal Schools*, 2005-NMSC-028, ¶ 10).

COL 78. Given the inherent political nature of redistricting, however, some partisan gerrymandering is permissible and some degree of vote dilution under a partisan gerrymander does not offend the United States Constitution. *Grisham*, ¶¶ 29 & 30.

COL 79. Thus, depending on the degree of vote dilution demonstrated by Plaintiffs, the enacted plan may treat voters differently, but not rise to the level of constitutional harm. *Id.*, ¶ 29.

COL 80. A redistricting plan runs afoul of the Equal Protection Clause where it is an *egregious* partisan gerrymander that so dilutes an individual’s vote as to deprive “full and effective participation in the political process,” *Reynolds*, 377 U.S. at 565, and “enable politicians to entrench themselves in office as against voters’ preferences,” *Rucho*, 139 S. Ct. at 2509 (Kagan, J., dissenting).

COL 81. “[T]he touchstone of an egregious partisan gerrymander under Article II, Section 18 is political entrenchment through intentional dilution of individuals’ votes.” *Grisham*, ¶51.

COL 82. This standard allows “judicial intervention in the worst-of-the-worst cases of democratic subversion, causing blatant constitutional harms.” *Id.*

COL 83. “[P]laintiffs in such cases will bear the burden to establish that the evidence

places defendants' actions within the range of constitutional harm.” *Grisham*, ¶ 55

COL 84. Plaintiffs in this case challenge the new boundaries of CD-2 in SB-1 as an unconstitutional egregious partisan gerrymander that substantially diluted their individual vote with the purpose of entrenching the opposite party.

COL 85. In New Mexico, legislative intent is determined by the legislation and the actions of the Legislature as a body. **COL 15-19.** Here, no express language in the enacted plan, codified at NMSA 1978, § 1-15-16(A)(-C) (2021), demonstrates a predominant purpose to entrench the Democratic party in CD2. **COL 20.**

COL 86. Under Justice Kagan’s test in *Rucho*, many forms of evidence may be considered to prove intent, through direct or circumstantial evidence. **COL 56-60.** The statement of one representative or one legislative staff cannot be inferred to the body of 112 elected representatives who voted on SB-1. *See* Rep. Townsend Testimony [9-27-23 Tr. 88:17-89:4].

COL 87. Plaintiffs must show that that the predominant, invidious partisan intent in SB-1 rises to the level of “mak[ing] the political system systematically unresponsive to a particular segment of the voters based on their political preference.” *Whitford v. Gill*, 218 F. Supp. 3d 837, 909 (W.D. Wis. 2016), *vacated and remanded*, *Gill v. Whitford*, 138 S. Ct. 1916, 201 L. Ed. 2d 313 (2018).

COL 88. The predominant purpose test in redistricting is a heightened, demanding standard.

COL 89. Here, the congressional districts drawn by SB-1 do not reflect an intent to entrench either party in power because SB-1 makes each district more competitive and draws a very competitive, swing district in CD-2. **COL 21 & 22.**

COL 90. Competitive districts are vital to the health of a representative democracy,

keeping elected officials responsive and accountable to their constituents. **COL 23**; *see also* Sanderoff Trial Testimony [9-28-23 Tr. 231:9-232:14] (commenting that often elected representatives from safe districts become inflexible, but representatives from swing districts are more likely to work across the aisle to accomplish bipartisan solutions).

COL 91. Indeed, competitiveness is the antithesis and antidote to entrenchment, where the intent is to make the political system unresponsive. Far from “rigging elections,” competitive districts increase candidates and parties’ sensitivity to voter concerns. Recall, toss-up districts are the opposite of predetermined elections.

COL 92. Plaintiffs have not met their burden of showing that the predominant purpose of the congressional districts drawn in SB-1 was to entrench the Democratic party in power through vote dilution. The first element of Justice Kagan’s three-part conjunctive test has not been satisfied.

B. Plaintiff’s Votes are not Substantially Diluted by SB-1.

COL 93. The second prong of the test articulated by Justice Kagan is that “the lines drawn in fact have the intended effect by “‘substantially’ diluting” the votes of Plaintiffs. *Rucho*, 139 S. Ct. at 2516 (Kagan, J., dissenting).

COL 94. Vote dilution is typically accomplished by packing or cracking, where a voter’s preferred candidate wins or loses without reference to the voter’s participation *Grisham*, ¶64, n.8 & n.12; **COL 28 & 29.**

COL 95. Plaintiffs argument of the “near perfect gerrymander” rests upon the false premise of aggregate proportionality – that because Republican voters account for roughly 1/3 of the voters in New Mexico, Republican voters are *entitled* to 1/3 of the congressional seats. Moreover, Plaintiffs’ statewide considerations miss the mark. The inquiry in vote dilution must be

individual and district-specific. *See Grisham*, ¶¶ 64 & 65.

(i) *Plaintiffs fail to demonstrate substantial dilution through voter registration statistics.*

COL 96. In assessing voter registration changes under SB-1, the percentage of registered Republican voters in CD-2 fell from 37.6% to 30.5%, a change of 7.1%. **FOF 218 & 219.** In comparison, the egregious partisan gerrymander at issue in the Maryland redistricting challenge considered in *Rucho* worked a swing of 14%, from 47% under the prior map to 33% under the challenged map. *See Grisham*, ¶65 n.13 (citing *Rucho*, 139 S. Ct. at 2519 (Kagan, J., dissenting)).

COL 97. Based on voter registration data alone, the Court cannot conclude that Plaintiffs' votes are substantially diluted by SB-1. *Cf. Grisham*, ¶¶ 52 & 67 (as applied, the standard invalidates "only the most egregious" of gerrymanders, given that some partisan vote dilution is permissible).

(ii) *Plaintiffs fail to demonstrate vote dilution through election outcomes.*

COL 98. Electoral predictions are notoriously difficult and fail to account for local factors or incorporate local results. Therefore, actual election results provide more direct and reliable evidence of vote dilution. **COL 30**; Sanderoff Trial Testimony [9-28-23 Tr. 225:12-226:10, 250:13-14].

COL 99. In the first election under SB-1, CD-2 voters elected a Democratic candidate by a mere 1,350 votes or 0.7%. Thus, elections conducted under the enacted plan do not demonstrate or provide direct evidence of a substantial vote dilution caused by or attributable to the district boundaries of SB-1.

COL 100. First, Plaintiff Gallegos testified that the 2022 outcome in CD-2 was likely affected by low Republican voter turnout. *See FOF 206.* Although the 2022 election turned on

just 1,350 votes, over 30,000 registered Republican voters failed to participate in that election. Leg. Def. FFCL Ex. 28 & 34. Taking into account the entire pool of registered voters in CD-2, that number grows to over 200,000 unexercised votes. *Id.*

COL 101. Second, Defendants presented testimony from Brian Sanderoff, the principal of Research and Polling Inc., a well-recognized and long-established research and polling organization in New Mexico. Mr. Sanderoff has been involved in legislative and congressional redistricting efforts in the State of New Mexico under contract with the New Mexico Legislative Council Service since 1991.

COL 102. Mr. Sanderoff testified regarding the partisan performance measures of the three congressional districts both as they existed prior to the adoption of SB-1 and after as reconfigured by SB-1 in the 2022 election. From that testimony and based upon the actual observed metrics of the 2022 election, CD-2 is a very competitive district in which candidates from either of the major parties can both compete and win. The competitiveness of potential Republican Party candidates in CD-1 and CD-3 were also enhanced by the passage of SB-1. Ex. 11, Sanderoff Report at 9-10; COL 36.

COL 103. Third, the district-specific objective evidence submitted establishes that the Plaintiffs' individual votes are not, in fact, "substantially diluted" under SB-1. Given the narrow margins in the 2022 election, CD-2 Plaintiffs have a proportionally increased opportunity to impact the outcome of elections (weight" or "consequence"). A Plaintiff-by-Plaintiff analysis follows.

COL 104. Under SB-1, Ms. Vargas and Ms. Garcia moved from CD-1 into CD-2. The partisan performance measure for CD-2 under SB-1 is 53.0% Democrat and 47% Republican. *See* Ex. 28. Accordingly, under SB-1 Ms. Vargas and Ms. Garcia, both Republican voters, were moved into a congressional district with a higher Republican performance measure than their previous

district, giving them both a better opportunity to elect a candidate of their choice. **FOF 121-124.** Therefore, Plaintiffs Vargas and Garcia have not demonstrated that their vote is “substantially diluted” by SB-1.

COL 105. Under SB-1, Plaintiff Jennings, a Democratic voter, was also moved into a district with a higher Democratic performance measure than his previous district, giving him a better opportunity to elect a candidate of his party. **FOF 125-127.** Therefore, Plaintiff Jennings has not demonstrated that his vote has been so substantially diluted as to deprive him of the right of franchise.

COL 106. For Republican voters in CD-2 like Plaintiffs Gallegos and Gonzales, given the competitiveness of the last election where Republican voters were able to perform in CD-2 at 49.6% with a 46% voter turnout, the importance of each Republican vote is enhanced—not diluted. In a very tight swing district like CD-2, each vote, regardless of party affiliation, is of more consequence—not less—in the outcome of the election. *Cf. Grisham*, ¶ 64, n.8; **FOF 128-130.**

COL 107. Although Mr. and Mrs. Kimbro moved from CD-2 to CD-3, their vote continues to carry equal weight with that of Democratic voters and Decline-to-State voters in CD-2 and CD-3, because of SB-1’s zero percent population deviation. **COL 5.** Additionally, in CD-3 total registered Republican voters and “Other” voters exceeds registered Democratic voters. **FOF 131-134.** Legislative Defendants expert Brian Sanderoff testified as to several New Mexico contests with successful Republican candidates in districts with Democratic Performance indexes of 54 to 56%. **FOF 221-222.** Accordingly, the Kimbros’ Republican votes have not been “substantially diluted” under SB-1.

COL 108. At bottom, none of the Plaintiffs have demonstrated that they reside in a cracked district where the election outcome for a congressional candidate of a given party is certain

or foregone. *Gill v. Whitford*, 138 S. Ct. at 1936. Therefore, based on objective, district-specific evidence Plaintiffs’ votes as registered Republicans are not substantially diluted as to deprive them of the right to full and effective participation in the political process. *Grisham*, ¶ 30.

C. SB-1 Does not Entrench the Democratic Party through Vote Dilution.

COL 109. Plaintiffs carry the burden to establish that the enacted redistricting plan “enable[s] politicians to entrench themselves in office as against voters’ preferences.” *Grisham*, ¶ 30 (quoting *Rucho*, 139 S. Ct. at 2509 (Kagan, J., dissenting)). This is the touchstone and hallmark of an unconstitutional, egregious partisan gerrymander. *Id.*, ¶ 51 & ¶ 67 (same).

COL 110. “The consequences of such entrenchment under a partisan gerrymander include that ensuing elections are effectively predetermined, essentially removing the remedy of the franchise from a class of individuals whose votes have been diluted.” *Id.*, ¶ 30.

COL 111. An entrenched district is impervious to “the potential fluidity of American political life.” *Ohio A. Philip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978, 1097 (S.D. Ohio 2019), *vacated and remanded*, *Householder v. Ohio A. Philip Randolph Inst.*, 140 S. Ct. 101, 205 L. Ed. 2d 1 (2019) (quoting *Jenness v. Fortson*, 403 U.S. 431, 439, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971)); *see also Vieth v. Jubelirer*, 541 U.S. at 356, 124 S.Ct. 1769 (Breyer, J., dissenting) (noting that entrenchment freezes the status quo, making it impossible to “throw the rascals out”).

COL 112. “Plaintiffs may show entrenchment by demonstrating that the partisan bias of the enacted plan persisted over time. Evidence that a map is extremely unresponsive or noncompetitive—that voting patterns can change but the electoral result does not—helps to prove durability of the partisan effects and therefore supports an inference of entrenchment.” *Householder*, 373 F. Supp. 3d at 1097–98.

COL 113. Evidence that weighs against a finding of substantial vote dilution also

weighs against a finding of entrenchment, because a competitive district yields more responsive, accountable elected representatives.

COL 114. Additionally, SB-1 makes each district more competitive, reducing the likelihood of entrenchment in all three districts.

COL 115. Further, in Legislative Defendants' expert Brian Sanderoff's own words, a "toss up district like CD-2 is the opposite of predetermined." [9-28-23 Tr. 223:17-225:5].

COL 116. Plaintiffs expert Sean Trende agreed that CD-2 is competitive, and, even under SB-1 boundaries, not impossible for a Republican candidate to win.

COL 117. In a district election determined by less than 1% of the vote, where the incumbent currently trails by the same margin, the Court cannot conclude that the remedy of the franchise is unavailable to Plaintiffs.

COL 118. Plaintiffs have failed to establish that SB-1 has the effect of entrenching the Democratic party by the substantial dilution of Plaintiffs votes.

D. SB-1 is Supported by and substantially related to Legitimate, Important Non-Partisan Government Interests.

COL 119. Even if the Court were to find that Plaintiffs successfully demonstrated that the predominant purpose and actual effect of the enacted plan establishes partisan entrenchment through substantial vote dilution, the current district is constitutional if supported by legitimate, nonpartisan justifications substantially related to the challenged map. *Grisham*, ¶¶ 50 & 67.

COL 120. Under the intermediate scrutiny test required by the Supreme Court, the congressional districts drawn by SB-1 shall be upheld if "the classification or discrimination caused by the legislation is 'substantially related to an important government interest.'" *Breen v. Carlsbad Mun. Schools*, 2005-NMSC-028, ¶ 13, 138 N.M. 331, 120 P.3d 413.

COL 121. There are numerous appropriate policy reasons that were articulated both at

the Citizen Redistricting Committee and during legislative committee deliberations and floor debate—unrelated to partisan affiliation—that demonstrate that the district lines in SB-1 are substantially related to important government interests, both in policy and purposes vital to the functioning of a representative democracy.

(i) *SB-1 draws more competitive districts by narrowing the performance margins.*

COL 122. The *Maestas* Court endorsed the creation of more competitive districts whenever practicable as “healthy” for representative democracy by allowing “voters to express changed political opinions and preferences.” *Maestas*, 2012-NMSC-0006, ¶ 41.

COL 123. Legislative Defendants’ expert Mr. Brian Sanderoff testified that, from a policy perspective, competitive swing districts tend to yield more flexible, more accountable elected representatives willing to work towards bipartisan solutions, as opposed to safe districts. *See Sanderoff Trial Testimony* [9-28-23 Tr. 231:9 -232:14]

COL 124. A competitive district better protects the remedy of the franchise, through which voters can express changes in opinions and preferences.

COL 125. Because of population growth, polarization, and political geography, by 2020 the 2011 map was not only malapportioned, but each district had become less competitive.

COL 126. Thus, to restore competitiveness to the districts, SB-1 was drawn to reduce the performance margins. To accomplish this objective, CD-2 was made slightly more democratic, and CD-1 and CD-3 were made slightly more Republican.

(ii) *SB-1 draws new districts to reflect 30 years of change and new expression of state policies.*

COL 127. As chair of the Committee, Justice Chavez was moved by the degree of public participation because “to witness people actively participate in the democracy is a beautiful thing.” Ex. 5, Chavez Dep. 110:19-111:8; *see also* Ex. 5, Chavez Dep. 61:9-62:11.

COL 128. The underlying policies supported by New Mexico citizens in their testimony before the CRC included: incorporation of urban and rural constituencies in all of the state's congressional districts; the unique issues that remain critical for all three New Mexico congresspersons relating to proximity of the U.S./Mexico border; enhancement of the representation and understanding of the oil and gas industries across multiple congressional districts; a desire by two Native American nations, the Zuni Pueblo and the Mescalero Apache Nation, to be split between two congressional districts; and a desire to combine communities in the Rio Grande Valley from the South Valley of Albuquerque to the Texas border due to similarities in interests and concerns.

COL 129. SB-1 was crafted to address and reflect those policy considerations. SB-1 is 86% similar to Concept Map H which was recommended by the Citizen Redistricting Committee and determined by its political scientist contractor, Dr. Cottrell, to be within an acceptable range of partisan fairness. *See* Ex. 18, CRC Report at Appendix 1.

COL 130. Moreover, SB-1's boundaries for electing congressional representatives are clear expressions of State policy articulated by its Legislature and Governor through the political process. *See Findings of Fact and Conclusions in Jepsen v. Vigil-Giron*, Cause No. D-101-CV-2001-02177 (N.M. 1st Jud. Dis. Jan 2, 2002) at ¶ 34. Specifically:

COL 131. To accomplish the combination of the South Valley of Albuquerque and the southern Rio Grande Valley, CD-2 now extends further north to unite this community of interest.

COL 132. To accomplish a more complete incorporation of urban and rural populations, the metropolitan bases in each district—Albuquerque, Las Cruces, Santa Fe/Rio Rancho—are maintained while each district adjusts differently. CD-1 extends to the Southeast to encompass more rural areas, CD-2 runs further north to include the more-urban precincts along

the west side of Albuquerque, and CD-3 drops further south along the Eastern Border into Lea County.

COL 133. To accomplish the expressed representation considerations of the Zuni Pueblo, the CD-3 and CD-2 boundary along the state’s western border was adjusted. To honor the Mescalero Apache tribe request, the CD-1 and CD-2 boundary was required run more south through Otero County.

COL 134. To accomplish a broader distribution of oil and gas interests across congressional districts, SB-1 divides the major producing areas in New Mexico across congressional districts. Although expressed as a qualitative policy during legislative debate, when converted to quantitative data for evaluation this criteria requires that some of the Permian Basin counties divide between CD-2 and CD-3. *See* Trial Testimony of Dr. Jowei Chen [9-28-23 Tr. 172:23-173:10; 184:15-22]

COL 135. SB-1 reflects the above policy decisions and serves the important government interests in drawing districts that preserve one person, one vote constitutional requirements, respect the rights of minorities in compliance with the Voting Rights Act, protect an outside contributor to New Mexico’s economy by increasing representation, and honors the consensus of the sovereign indigenous nations located within New Mexico’s boundaries.

COL 136. The Legislative Defendants submitted testimony from Dr. Jowei Chen, a political scientist who is a professor at the University of Michigan with a significant background in the analysis of redistricting legislation utilizing computer generated algorithms. Utilizing many of the same non-partisan policy considerations expressed at the CRC meetings and on the legislative record—including population equity, district contiguity, precinct preservation, municipal boundary considerations, Native American reservation considerations, avoiding county

splits, oil industry considerations, and district compactness--Dr. Chen concluded that SB-1 did not constitute an outlier given the policy goals articulated in connection with SB-1. Utilizing those goals, SB-1 did not appear to be an extreme partisan gerrymander. Ex. 31, Chen Report at 30.

COL 137. Here, Defendants have shown that the manner in which the congressional districts have been drawn is substantially related to important government interests. Thus, Defendants have met their burden as set forth in the intermediate scrutiny test. *See Breen v. Carlsbad Mun. Schools*, 2005-NMSC-028, ¶ 13, 138 N.M. 331, 120 P.3d 413.

COL 138. Much of the evidence and testimony in this matter has been focused on “sophisticated social science” to prove or disprove. However, redistricting is a process performed by human politicians, affecting human voters—not inanimate statistics. No matter how sophisticated or how many trillions of simulations, it is unlikely that an algorithm will ever be able to calculate out the various, myriad human concerns and issues encompassed in the political and electoral process.

COL 139. Given the above, and the standard set forth by the New Mexico Supreme Court that invalidates “only the most egregious” partisan gerrymanders, Plaintiffs have not met their burden. The evidence of record here establishes that SB-1 did not entrench the Democratic party in power by diluting Plaintiffs’ votes, did not result in an egregious partisan gerrymander, and that the lines drawn did not substantially dilute the votes of Republican voters in the district.

COL 140. Furthermore, the evidence of record establishes that Defendants have met the burden of intermediate scrutiny and proven legitimate, non-partisan policy reasons support and substantially relate to SB-1.

V. REMEDY

COL 141. Plaintiffs request this Court adopt the CRC proposed Concept E congressional map. However, redistricting and apportionment is committed in the first instance to the legislature. N.M. Const. art. IV, § 3.

COL 142. New Mexico’s constitutional standard of equal protection does not permit this Court “to rely on [its] own ideas of electoral fairness.... judges do not become omnipresent players in the political process.” *Grisham*, ¶ 52 (quoting *Rucho*, 1342 S. Ct. at 2513 (Kagan, J., dissenting))

COL 143. Therefore, where an enacted redistricting plan is determined to violate statutory or constitutional requirements, Courts should “afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan.” *League of Women Voters of Michigan v. Benson*, 373 F. Supp. 3d 867, 960 (E.D. Mich. 2019), *vacated sub nom. Chatfield v. League of Women Voters of Michigan*, 140 S. Ct. 429, 205 L. Ed. 2d 250 (2019) (quoting *Wise v. Lipscomb*, 437 U.S. 535, 539–40, 98 S.Ct. 2493, 57 L.Ed.2d 411 (1978)).

COL 144. Accordingly, the Court will provide the Legislature the opportunity to devise remedial maps that are consistent with this opinion, that remedy the constitutional violations discussed above, and that otherwise comply with the United States and New Mexico Constitution, with the aid of the recent guidance from the New Mexico Supreme Court. *See also League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, 2022-Ohio-65, ¶ 165, 167 Ohio St. 3d 255, 294, 192 N.E.3d 379, 414 (where redistricting plan determined invalid, returning matter to commission to adopt a plan in conformity with state constitution); *In re Reapportionment of Towns of Hartland, Windsor & W. Windsor*, 160 Vt. 9, 18, 624 A.2d 323, 328 (1993) (sending redistricting

back to the Legislature “for further consideration” where court found district failed to meet all constitutional and statutory criteria)

WHEREFORE, the Legislative Defendants urge this Court to rule that SB-1 does not violate the equal protection clause of N.M. Const. Art. II, § 18, and dismiss Plaintiffs’ complaint.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2023, I caused the foregoing Legislative Defendant's Amended and Restated Findings of Facts 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

A handwritten signature in black ink, appearing to read "A. Shanor", written over a horizontal line.