IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

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

      Plaintiffs-Appellants,

      v.   No.S-1-SC-40146

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-Appellees.

On Appeal From The Fifth Judicial District, County Of Lea,
Cause No.D-506-CV-2022-00041
The Honorable Fred T. Van Soelen, District Judge, Division III

PLAINTIFFS-APPELLANTS' BRIEF-IN-CHIEF

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INTRODUCTION

Justice Elena Kagan outlined the three-part test to be applied here — although her test lacked the teeth of intermediate scrutiny — as follows:

> *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. *Second*, the plaintiffs must establish that the lines drawn in fact have the intended effect by "substantially" diluting their votes. And *third*, if the plaintiffs make those showings, the State must come up with a legitimate, non-partisan justification to save its map.

Rucho v. Common Cause, 139 S. Ct. 2484, 2516 (2019) (Kagan, J., dissenting) (emphases added) (citations omitted). Compare the words above to the district court's findings and conclusions here. On the first prong, the district court correctly found that the "predominant purpose in redrawing CD 2 in SB 1 was to entrench the Democratic Party in power by diluting the votes of citizens favoring Republicans." Record Proper ("R.P."), at 5978 ¶ 3. On the second prong, it found that "the objective evidence presented shows the resulting dilution of the Plaintiffs['] vote was substantial," R.P.5978 ¶ 5; in other words, "[t]he Defendants' intentions were to entrench their party in CD 2, and they succeeded in

substantially diluting their opponents' votes," R.P.5980 ¶ 8. And on the third, it found that "the Defendants in this case have not demonstrated a legitimate, nonpartisan justification for the challenged map." R.P.5979 ¶ 6. This is the complete analysis, and Senate Bill 1 ("SB1") is an egregious partisan gerrymander.

Plaintiffs presented an overwhelming showing that SB1 is an egregious partisan gerrymandering, more powerful than the one that Justice Kagan found to be a clear case in *Benisek v. Lamone*, 348 F. Supp. 3d 493 (D. Md. 2018), which was consolidated with *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). Plaintiffs presented admissions from the gerrymanderers that they intended to flip District 2 for the Democrats while also <u>maximizing</u> the Democrats' chance to win all three congressional seats in New Mexico by making each of those districts have a Democratic Performance Index ("DPI") of at least 53%. Plaintiffs established that the Democrats achieved this objective, as *every* expert in this case—including every one of Legislative Defendants' experts— agreed that the Democrats managed just what they intended, securing three congressional districts with a DPI of at least 53%. Plaintiffs also presented unrebutted evidence that this was a near-ideal Democratic

gerrymander—a "max-[Democrat]" plan, in the words of Justice Ruth Bader Ginsburg. Tr. of Oral Argument 7, *Gill v. Whitford*, No.16-1161 (U.S. Oct. 3, 2017) ("*Gill* Tr."). That is more egregious than what the gerrymanderers did in *Benisek*, where they stopped short of maximizing their gerrymander. And Plaintiffs refuted that Legislative Defendants' primary justification for SB1—which was also the heart of the analysis of Legislative Defendants' lead expert—was to spread New Mexico's oil wells across multiple districts, as that was a clear partisan charade.

The district court found in Plaintiffs' favor on much of this. The court correctly concluded that Legislative Defendants' "predominant purpose in redrawing CD2 in SB 1 was to entrench the Democratic Party in power by diluting the votes of citizens favoring Republicans," as evidenced by, among other things, "the 'cracking' of CD 2," the "public statements made by Defendants and other elected officials about their plans for redistricting," and "objective evidence" showing that "the resulting dilution of the [Plaintiffs'] vote was substantial." R.P.5978. As to the proffered justifications for SB1, the district court properly found that "the Defendants in this case have not demonstrated a legitimate, nonpartisan justification for the challenged map," R.P.5978, including

because their supposedly nonpartisan desire to divide the State's oil wells across districts was a "partisan criteri[on]," R.P.5976, that was "contradicted by testimony from legislators at trial from the affected area" and was not supported by "anybody from the industry or the affected area," R.P.5978. Yet, the district court ruled against Plaintiffs solely because it concluded that this "degree" of gerrymandering was not sufficiently "egregious," *despite the fact that the district court found that Democrats "succeeded in substantially diluting their opponents' votes," including Plaintiffs' votes.* R.P.5980–81 (emphasis added). That was because, in the district court's view, it was still possible for Republicans to win in District 2, although they had lost this district in 2022 with an incumbent, in a favorable Republican year nationwide such that, as the district court admitted, only one other such Republican incumbent lost in the entire nation in 2022. R.P.5977, 5980–81.

The district court's decision that SB1 did not have egregious partisan effect—notwithstanding that court's own clearly correct finding that SB1 "substantially diluted" Plaintiffs' votes—rests on two legal errors. First, the district court improperly defined an "egregious" gerrymander as one where it is impossible for the victims' party ever to

win. That is far too high of a burden, not justified by anything in Justice Kagan's dissent in *Rucho* or this Court's adoption of that dissent—which this Court magnified to the level of intermediate scrutiny—as the controlling standard. Indeed, the *district court's approach would mean here that there could never be unconstitutional gerrymandering in New Mexico*, and this Court's remand for a trial in this case was for no purpose whatsoever. After all, as the undisputed evidence at trial showed, the statewide distribution of voters means that, had Democrats made District 2 any more Democratic by taking more Democrat voters out of District 1 and District 3—thus making District 2 impossible for Republicans to win, satisfying the district court's standard—that would have undermined Democrats' ability to retain District 1 or District 3 and so make it possible for Republicans one of those Districts, thus again making the map not sufficiently egregious under the district court's test. Second, the court improperly gave no weight to whether the gerrymanderers had maximized their partisan advantage, which is what the Democrats did here. Indeed, Defendants did not even meaningfully contest that SB1 was—in Justice Ginsburg's words—a "max-[Democrat]" plan, yet the district court gave this undisputed point no weight.

This Court should reverse the judgment of the district court and enter judgment in Plaintiffs' favor.

SUMMARY OF PROCEEDINGS

A. For the last four decades, New Mexico's lines for its three congressional districts "have been more-or-less stable" and have "typically" relied upon a "regional basis," with limited splitting of the State's regions across districts. R.P.3641–45; R.P.5970; Appendix to Plaintiffs-Appellants' Brief in Chief ("App"), at 232–33; *see generally* R.P.3630–31. The Southeast region of the State is a cohesive community distinct from the rest of the State, *see* R.P.3956–57; App.82–83, and New Mexico's congressional maps have historically placed it almost entirely within District 2, R.P.3641–45 (discussing 1982, 1992, 2002, 2012 maps); *see* App.233. The State's regions also have an "overall stability" in voting patterns, R.P.3639, with the Southeast region "consistently the most heavily Republican region," *id.*; *see* R.P.3956–57; App.82–83; the "North Central" region the "most heavily Democratic region," R.P.3639; and the "Central region," which is the most populous, having "moved significantly toward the Democrats," *id.*; *see* App.237.

For the past two redistricting cycles, courts drew New Mexico's congressional maps. R.P.5968–69. In 2000, the State's political branches failed to adopt a map. R.P.5968–69. Due to that impasse, the district court adopted a congressional map for the State. R.P.5968–69. A similar result obtained in 2010, with the District Court adopting a court-drawn map for the State. R.P.5969.

In 2011, the New Mexico Legislative Council, *see* NMSA § 2-3-1, adopted redistricting guidelines "consistent with traditional districting principles" that require districts to be "contiguous" and "reasonably compact," while allowing mapdrawers to "preserve the core of existing districts" and "consider the residence of incumbents," N.M. Legis. Council, Guidelines for the Development of State & Congressional Redistricting Plans (Jan. 17, 2011) (reproduced as R.P.3989).[1]

New Mexico enacted the Redistricting Act of 2021 for the most recent redistricting cycle, which created the New Mexico Citizen Redistricting Committee ("Citizen Redistricting Committee" or "Committee") to propose redistricting maps for the Legislature's

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[1] Available at https://www.nmlegis.gov/Redistricting/Documents/Approved%20Redistricting%20Guidelines.pdf (all websites last visited October 27, 2023).

consideration. 2021 N.M. Laws, ch. 79, §§ 2, 4 (codified at NMSA § 1-3A-1, *et seq.*); R.P.5970–71. The Committee comprises seven members, with a total of four members appointed by the majority and minority leadership in both Houses and the remaining three appointed by the State Ethics Commission—including the Committee's chairperson, who must be a retired New Mexico Supreme Court Justice or a retired New Mexico Court of Appeals judge. NMSA § 1-3A-3; *see generally id.* § 1-3A-4. The Committee must hold an initial round of at least six public hearings; then publish draft maps for further consideration; then hold an additional round of at least six hearings; and finally propose at least three maps to the Legislature. *Id.* § 1-3A-5. The Committee "shall not . . . use, rely upon or reference partisan data, such as voting history or party registration data," *id.* § 1-3A-7(C)(1), and it must evaluate each map it proposes to the Legislature for "partisan fairness," *id.* § 1-3A-8.

B. In June 2021, the Citizen Redistricting Committee—chaired by Justice Edward L. Chávez—submitted three maps to the Legislature in accordance with the Redistricting Act. R.P.3996–97, 3999–4003; R.P.5970–71. The Committee's Concept A Map "[m]aintain[s] the status quo" by largely preserving the existing congressional districts drawn by

the district court in 2011. *See* R.P.4024. This map is generally the most favorable map for Republicans recommended by the Committee, as it creates two majority-Democrat districts and one district with a Republican composition between 55.0% to 54.1%. *See* R.P.4019. The Committee's Concept E-Revised Map (the Justice Chávez Compromise Map) emphasized the compactness of District 1 while retaining the cores of Districts 2 and 3. *See* R.P.4030–32. It is the most balanced map as between Democrats and Republicans, as it makes two majority-Democrat districts and one district with a Republican composition between 54.0% to 53.1%. *See* R.P.4019. Finally, the Concept H Map proposed by the Committee—the so-called "People's Map"—is the product of "a coalition of community-based organizations," R.P.4028, including "the Center for Civic Policy," *see* R.P.4165–72, which is "an advocacy group," R.P.5972. It significantly redrew the prior districts and split the Southeast region across the State's three districts. *See* R.P.4026. The Concept H Map makes all of New Mexico's three districts majority-Democrat districts, thus it is the most favorable map for Democrats recommended by the Committee. *See* R.P.4019.

C. Democrat legislative leadership took the Concept H Map—the map most favorable to Democrats—and significantly adjusted it to be a near-perfect partisan gerrymander for their party, *see* R.P.5768; R.P.5971–73, applying a consistent policy of no district falling below 53% on the Democratic Performance Index ("DPI"), R.P.5868–69; *see also* R.P.5877–78. That is, "the mapmakers took a map that was already favorably aligned toward Democrats," the Concept H Map, "and made it even more so." R.P.3681–82; App.264–67, 270–71. Further, legislative leadership blocked Republican legislators from their map-drawing process in all material respects, perfunctorily meeting with Republicans about redistricting yet refusing to incorporate any Republican input into the map ultimately proposed. R.P.5972; *see* App.74–82, 98–106; R.P.3962–63; R.P.4548–49.

The Legislature ultimately introduced its gerrymandered map as Senate Bill 1; the Legislature passed the map with only Democrats voting in support, while one Democrat Representative, an independent Senator, and all present and voting Republican legislators voted against the map; and the Governor signed it into law. *See* R.P.4174–75; App.74–82; *see generally* R.P.4177–78. Although Republicans attempted to introduce

Justice Chávez' map as an amendment, this was voted down along party lines, and the Legislature did not work with members of the Citizen's Redistricting Committee in considering modifications. *See* App.688:6-13 (Justice Chávez' statement that he "watched very little of the legislature and their adoption of the new maps, but what I saw didn't impress me . . . [t]hey didn't reach out to me.").

In a text-message conversation between the Center for Civic Policy and Defendant Senator and President of the Senate Mimi Stewart—who, along with other members of legislative leadership, was responsible for the redistricting process—reveals the Legislature's precise strategy. R.P.5768; R.P.5972. In this conversation, held during the drafting of SB1, Senator Stewart brags to a representative for Center for Civic Policy that "[w]e improved [the Concept H Map] and now have CD 2 at 53% dpi [Democratic Performance Index]!" R.P.5768. The representative from Center for Civic Policy then asks Senator Stewart, "Who takes the hit? . . . There's only so much dpi to go around, you know." *Id.* To this, Senator Stewart states that "[Legislative Defendant's expert] Sanderoff's dpi for your map H is 51.8% [for District 2]. That's not enough for a mid

term election so we adjusted some edges, scooped up more of abq [Albuquerque] and are now at 53%. CD 1 is 54%, CD 3 is 55.4%." *Id.*

> We improved the peoples map and now have CD 2 at 53% dpi!
>
> I had to leave . Anyway Sanderoff knows all this history. He must be rolling his eyes.
>
> That's good. You're using Sanderoffs dpi right?
> We didn't have the benefit of that.
> NCEC gave our map 53%.. BUT their methodology is too generous. Brian is better.
> Biden got 51% on our map and MLG 53.7%
>
> Who takes the hit?
> What's your map dpi for cd1 and cd3?
> There's only so much dpi to go around, you know.
>
> Sanderoffs dpi for your map H is 51.8%. That's not enough for a mid term election so we adjusted some edges, scooped up more of abq and are now at 53%. CD 1 is 54%, CD 3 is 55.4%.

R.P.5768; R.P.5978–79.

Email communications involving senior staff of the Democrat legislative leadership show that the Legislature applied a consistent policy of no district falling below 53% DPI with SB1, just as President of the Senate Stewart had bragged about doing. In those emails—involving Ms. Leanne Leith, an advisor to the New Mexico Speaker of the House, App.39; Mr. Kyle Quinn-Quesada, the lead staffer for the New Mexico

Senate Democrats; Ms. Kyra Ellis-Moore, the campaign manager of Congresswoman Teresa Leger Fernández; and others—these senior staffers debated various "options" for the map. R.P.5861, 5868–69. In those discussions, the question was raised whether the leadership "require[s] that all 3 districts be above 53 using Sanderoff numbers?" in the map—that is, Mr. Brian Sanderoff's DPI calculations. R.P.5868–69. And to this, Mr. Quinn-Quesada responds: "Yes all three should be above 53% Sanderoff DPI." R.P.5868–69; *see also* R.P.5877.

Michelle Mayorga <michellemayorga@gmail.com>　　　　　Fri, Dec 10, 2021 at 3:06 AM
To: Kyle Quinn-Quesada <kyle@nmsenatedemocrats.org>
Cc: Corrina Feldman <feldman.corrina@gmail.com>, Dave Contarino <dave@davecontarino.com>, Dominic Gabello <dominic@dominicgabello.com>, Juan Sanchez <jsanchez@martinheinrich.com>, Kyra Ellis-Moore <kellismoore@teresaforall.com>, Leanne Leith <lealeith@gmail.com>

This is helpful. Thank you. Just a couple of questions:

1. Do you require that all 3 districts be above 53 using Sanderoff numbers?

2. Are there any other requirements we should be aware of before offering thoughts and edits?

Thanks again- michelle

Kyle Quinn-Quesada <kyle@nmsenatedemocrats.org>　　　　　Fri, Dec 10, 2021 at 5:17 AM
To: Michelle Mayorga <michellemayorga@gmail.com>
Cc: Corrina Feldman <feldman.corrina@gmail.com>, Dave Contarino <dave@davecontarino.com>, Dominic Gabello <dominic@dominicgabello.com>, Juan Sanchez <jsanchez@martinheinrich.com>, Kyra Ellis-Moore <kellismoore@teresaforall.com>, Leanne Leith <lealeith@gmail.com>

Good morning,

Yes all three should be above 53% Sanderoff DPI.

We ask that the maps respect the Native American Tribal Redistricting Committee's request of splitting Mescalaro into two districts.

That there be a max of two ABQ districts.

R.P.5868–69 (excerpted).

The Legislature partisan gerrymandered SB1 for the Democrats by cracking the State's Southeastern region among the State's three congressional districts. R.P.3631, 3645–57, 3681–82; App.236–37, 280–82; R.P.5973–74, 5977. SB1 pushes District 1 and District 3 further into Southeastern New Mexico, while shifting District 2 substantially into the Central region, which region is the most populous and Strongly favors Democrats. R.P.3631, 3646. That is, with SB1, the Legislature made politically targeted changes to the prior congressional map, concentrated in the Southeastern and Central regions, R.P.3648–49, to "transform[ ]" District 2 "from one where Republicans would generally be favored into one where Democrats tend to win"—*without* making District 1 and District 3 "so much less Democratic that they might seriously threaten their incumbent Democrats" in the process, R.P.3656; R.P.5977.

Partisan-composition calculations prepared by every one of the four experts collectively presented by Plaintiffs and Legislative Defendants here demonstrate the Legislature's near-perfect gerrymander with SB1. Beginning with Mr. Sanderoff, he calculated District 2's DPI to be 53% Democrat, R.P.5938; District 1 to be 54% Democrat; and District 3 to be 55.4% Democrat, *see* R.P.5768—and also admitted that the statewide

DPI was 54.2%, R.P.4403. Mr. Trende calculated that, under the *prior* map, District 1 was 61.7% Democrat; District 2 was 44.0% Democrat; and District 3 was 59.0% Democrat. R.P.3656 (using 2020 presidential election vote data); App.244–45. Under *SB1,* however, District 1 was 57.4% Democrat; District 2 was 53.0% Democrat; and District 3 was 55.5% Democrat. R.P.3656; App.244–45; *see also* R.P.3656–57; App.245 (similar results under Mr. Trende's Democratic Index). Legislative Defendants' expert Mr. Brace calculated that, under the *prior* map, District 1 was 57.70% Democrat; District 2 was 44.75% Democrat; and District 3 was 58.25% Democrat, R.P.3753, while under *SB1*, District 1 is 53.57% Democrat, District 2 is 52.73% Democrat, and District 3 is 55.97% Democrat, R.P.3775. Finally, Legislative Defendants' expert Dr. Chen calculated that, under *SB1*, District 1 was 46.5% Republican (53.5% Democrat); District 2 was 47.0% Republican (53% Democrat); and District 3 was 44.0% Republican (56% Democrat).[2] R.P.5909.

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[2] Two things should be noted about the DPI numbers cited in this Brief. The first is that they all refer to Mr. Sanderoff's DPI, which is consistently more Republican-leaning (*i.e.*, it calculates lower DPIs) than any other major index; for example, the Democratic Congressional Campaign Committee ("DCCC") wanted all three districts to be >55% on an index produced by the National Committee for an Effective Congress ("NCEC"), *see* R.P.5889 (noting that the "DCCC says any districts under 55% [will be seen as competitive and be put on Republican] target lists"), which they in fact got, *see* R.P.5891 (noting that the NCEC DPIs of the

The voter-registration changes in each of SB1's three districts tell the same story. Under SB1, District 1 "gained 10,078 registered Democrats, 47,789 registered Republicans and 13,708 registered Independents," dropping the Democrat advantage there from 18.7% to 9.1%. R.P.3652; App.240. In District 3, Democrat registration "dropped by 19,810, while the number of registered Republicans increased by 2,261," decreasing the Democratic advantage "from 21.4% to 17.6%." R.P.3652; App.241. And "[w]ith the Democrats' advantage declining in two of the state's congressional districts, these voters could only go into the 2nd District." R.P.3652; App.241. District 2 "added 21,615 Democratic registrants, while giving up 31,483 Republican registrants," providing the Democrats with "a 13% registration advantage in the district," R.P.3652, whereas District 2 had roughly even registration

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three districts are 57.1%, 55.0%, and 57.2%), although the widely shared belief is that Mr. Sanderoff's index is superior and the NCEC index "runs high," *id.*

Second, while SB1 is not *quite* a 'perfect' gerrymander—the districts are roughly 53%, 54%, and 55% DPI, as opposed to having three ~54% DPI districts— the geographic distribution of voters makes achieving perfection virtually impossible. *Cf.*, *e.g.*, R.P.5894 (lead House staffer texting District 1 incumbent that "TLF [the District 2 incumbent] is fine, really, truly. we couldn't even get CD2 up to 52.8 giving Artesia to it. there literally isn't anywhere else as Republican in the state it could lose to balance it out.").

between Republicans and Democrats before SB1, R.P.3651; App.241; *see* R.P.5975.

While the 2020 census required only minor population adjustments to reapportion New Mexico's districts, "mapmakers substantially altered the map for the first time in decades," diluting Republican votes through cracking. R.P.3640, 3646, 3664, 3692; App.233–37; R.P.5973. SB1 shifted "more than twenty times the number of residents that had to be shifted to meet equal population requirements," R.P.3647, moving 505,952 residents instead of only about 23,000 as required, R.P.3647, 3650. After the 2020 census, New Mexico's districts were less than two percentage points away from the ideal population—District 1 only needed to gain 11,264 residents; District 2 only needed to lose 8,181; and District 3 only needed to lose 3,082. R.P.3646; App.234. Under SB1, District 1 shifted 166,485 residents to District 2, although District 1 was underpopulated. R.P.3647; App.235. District 3 gave 21,292 residents to District 2 and 122,222 residents to District 1, although it only had to give up 3,082 residents. R.P.3647; App.235–36. And while District 2 was only overpopulated by 8,181 residents, it lost over 195,000 residents, giving 55,518 residents to District 1 and 140,435 residents to District 3—

although, again, District 3 had to lose population. R.P.3647; App.234–36; *see also* R.P.3648 (quantifying these changes in chart form).

The Legislature focused its cracking and packing in the highly Republican Southeastern region and the highly Democrat Central region to pack a net "approximately 40,000 Democratic votes" into District 2 and flip District 2's partisan makeup. R.P.3649–50; *see also* R.P.3650–57. With respect to the Southeast region, SB1 fractures it among the State's three districts, "for the first time in the state's history." R.P.3649; *see also* R.P.3631 (listing counties in this region); App.236–37, 280–82; R.P.3580–604; *see* R.P.5974. Specifically, SB1 "cracked" Plaintiffs Gallegos, Gonzales, and the Kimbros into a district with a 53% DPI or higher—in these Plaintiffs' case, District 2—based on their affiliation with the Republican Party. R.P.5974. Further, SB1 "packed" Plaintiffs Jennings, Vargas, and Garcia into districts with a 53% DPI or higher, with Plaintiff Jennings' residence moving from District 2 to District 3, and Plaintiffs Vargas' and Garcia's residences moving from District 3 to District 2. R.P.5974. This packing and cracking resulted in a "dilution of the [Plaintiffs'] vote [that] was substantial." R.P.5978–79.

SB1 splits a record number of counties and is not compact, given New Mexico's geography. Specifically, SB1 "splits nine" counties, which is "the most in New Mexico's history." R.P.3689–90. By "any metric" of compactness, "the districts produced [by SB1] are some of the least compact districts in New Mexico history." R.P.3690–91; *see also* R.P.4193–94; R.P.3956–57 (same).

These changes make it extremely difficult for Republicans to win in District 2. Under SB1, District 2 has a DPI of 53%, which means that, in a typical year, with roughly equal candidates, the Democrat candidate will obtain 53% percent of the two-party vote, while the Republican candidate will receive 47% of the two-party vote. *See supra* pp.13–14. This conclusion that it would be difficult for Republicans to win in District 2 with a 53% DPI explains why the Democrat legislative leadership operated under a policy of not drawing any district below 53% DPI. *Supra* pp.9–12. Legislative Defendants' own expert Mr. Sanderoff could only provide four examples of Republican's winning any type of race—state or federal—in all of New Mexico's history with a 53%-type DPI, with three of those examples being in the same state-house district. App.508–09.

Proving how difficult it will now be for Republicans to win District 2, even in a pro-Republican year and with a Republican incumbent running for reelection in the district, District 2 elected Democrat Representative Gabriel Vasquez to Congress under SB1 rather than incumbent Republican Representative Yvette Herrell. R.P.4208–09; R.P.3657; App.248–49. This made Representative Herrell one of only two Republican incumbents who lost nationwide in 2022. R.P.3657; App.248; R.P.5977. Further, Representative Herrell's defeat meant that New Mexico Republicans, despite having won "44.9% of the statewide vote for Congress" in 2022, won none of the State's three congressional districts. R.P.3657; *see* App.248; R.P.5977. Now that the incumbent Representative from District 2 is a Democrat, it will be even harder for Republicans to win District 2, due to the incumbency advantage. App.248–49. As Mr. Sanderoff admitted at trial, incumbents "[o]ftentimes" have "an advantage at the polls." App.533; *see also* R.P.4412–13. Further, while SB1's changes make Districts 1 and 3 more Republican, it remains difficult for Republicans to win either District 1 or District 3, given that the DPI for District 1 and District 3 under SB1 are above 53% DPI, as all experts here agree. *See supra* pp.13–14.

Plaintiffs' expert, Sean P. Trende, conducted a simulation analysis that further demonstrates that SB1 is a partisan outlier. R.P.5975–76 ("The Court finds Mr. Trende's report credible[.]"). Mr. Trende randomly generated a total of 2,040,000 politically neutral, simulated maps in various sets to compare to SB1. R.P.3658, 3668–74, 3675–3689. This comparison revealed that SB1 had a "gerrymandering index" significantly higher than the mean indexes from the sets of simulated maps, meaning that "it is implausible, if not impossible, that [SB1] was drawn without a heavy reliance upon political data and was likely drawn to favor or disfavor a political party," R.P.3660–61.

Figure 22: Values of Gerrymandering Index, Simulated Maps (Red Line = 2022 Map), Using Political Index as the Metric for Partisanship
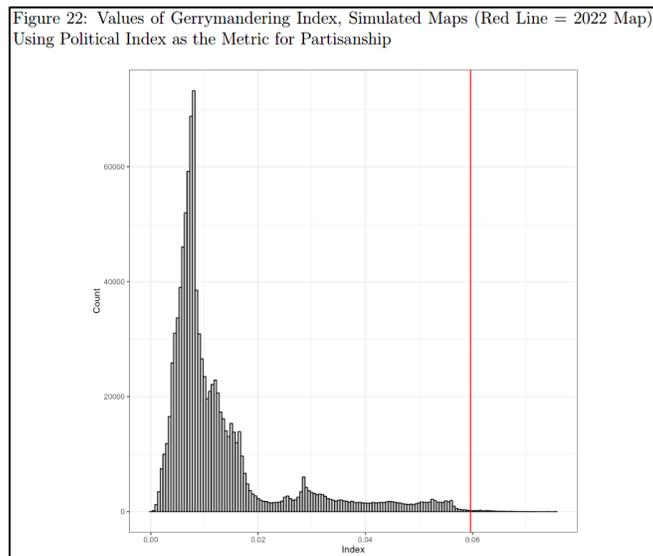
R.P.3665 (red line = SB1).

D. Plaintiffs filed their Verified Complaint on January 21, 2022, alleging that SB1 is an unlawful partisan gerrymander in violation of

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Article II, Section 18 of the New Mexico Constitution. R.P.2–7. Reviewing the district court's denial of Defendants' prior motions to dismiss, this Court held that Plaintiffs' partisan-gerrymandering claim was justiciable and that Justice Kagan's three-part test from her *Rucho* dissent—comprising intent, effects, and justification elements—governs such claims. *See* Order, *Grisham v. Van Soelen*, No.S-1-SC-39481 (N.M. July 5, 2023); Am. Order, *Grisham v. Van Soelen*, No.S-1-SC-39481 (N.M. Aug. 25, 2023).

This Court's opinion in this case, issued on September 22, 2023, reiterated that Justice Kagan's three-part test from her *Rucho* dissent governs partisan-gerrymandering claims in New Mexico and articulated the types of evidence that plaintiffs asserting a partisan-gerrymandering claim may rely upon. *Grisham v. Van Soelen*, ___ P.3d___, 2023 WL 6209573, at *13–14, 17 (N.M. Sept. 22, 2023). This Court pointed specifically to the "extensive evidence of intent and effect indicat[ing] that the districting plans in North Carolina [at issue in *Rucho*] and Maryland," at issue in *Benisek*, 348 F. Supp. 3d 493 (consolidated with *Rucho*), were "highly partisan," while noting that those two cases "support[ ]" the conclusion "that many forms of evidence may be relevant

to prove predominant intent and substantial effect for an egregious partisan gerrymander," *Grisham*, 2023 WL 6209573, at *17. *Benisek* and *Rucho* are "a useful evidentiary template" for partisan-gerrymandering claims like Plaintiffs' claim here. *Id.* The Court also stated that, in particular, "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" is relevant to determining whether an egregious partisan gerrymander has occurred. *Id.* at *16.

On remand, the district court held a bench trial and entered judgment in favor of Legislative Defendants. R.P.5968–81. On the egregious-partisan-intent element, the district court found that Legislative Defendants' "predominant purpose in redrawing CD2 in SB 1 was to entrench the Democratic Party in power by diluting the votes of citizens favoring Republicans"—relying for this finding upon evidence of SB1's "'cracking' of CD 2"; the "splitting of significant areas of southeastern New Mexico"; the "public statements made by Defendants and other elected officials about their plans for redistricting"; and "objective evidence" showing that "the resulting dilution of the

[Plaintiffs'] vote was substantial," including voter-registration evidence and Mr. Trende's simulation analysis presented by Plaintiffs. R.P.5978–79. On the justification element, the district court found that "the Defendants in this case have not demonstrated a legitimate, nonpartisan justification for the challenged map," R.P.5978, most notably because Legislative Defendants' claimed nonpartisan justification of dividing the State's oil wells across districts was, in fact, a "partisan criteri[on]," R.P.5976, that was "contradicted by testimony from legislators at trial from the affected area" and was not supported by "anybody from the industry or the affected area," R.P.5978. However, on the egregious-effects element, the district court concluded that the "degree" of Legislative Defendants' gerrymander with SB1 was "permissible" and not sufficiently "egregious"—despite its finding that the Democrats "succeeded in substantially diluting their opponents' votes"—given that Republicans could still conceivably win District 2. R.P.5980–81.

STANDARD OF REVIEW

This Court will not "disturb[ ] . . . the findings of fact entered by the trial court" if they "are supported by substantial evidence." *Whorton v. Mr. C's*, 1984-NMSC-080, ¶ 4, 101 N.M. 651, 687 P.2d 86. However, this

Court will review the district court's conclusions of law, as well as its "application of law to facts," under a "de novo standard." *TPL, Inc. v. N.N. Tax'n & Revenue Dep't*, 2003-NMSC-007, ¶ 10, 133 N.M. 447, 64 P.3d 474.

ARGUMENT

I. SB1 Is An Egregious Partisan Gerrymander, In Violation Of Article II, Section 18 of the New Mexico Constitution

A partisan-gerrymandering claim under Article II, Section 18 of the New Mexico Constitution proceeds as follows, *Grisham*, 2023 WL 6209573, at *13: "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." *Id.* (quoting *Rucho,* 139 S. Ct. at 2516 (Kagan, J., dissenting)). "Second, the plaintiffs must establish that the lines drawn in fact have the intended effect by substantially diluting their votes." *Id.* (citation omitted). "And third, if the plaintiffs make those showings, the State must come up with a legitimate, non-partisan justification to save its map." *Id.* (citation omitted).

The partisan-gerrymandering litigation over Maryland's 2011 map provides a useful analogue, including because this Court stated that

Benisek and *Rucho* are "useful evidentiary template[s]" for a successful Article II, Section 18 claim, *id.* at *17. In 2011, Maryland comprised eight congressional districts, reliably electing six Democrats and two Republicans, including from its Sixth District. *Benisek*, 348 F. Supp. 3d at 497–98; *Rucho*, 139 S. Ct. at 2510, 2519 (Kagan, J., dissenting); *see Grisham*, 2023 WL 6209573, at *16–17. Yet, the Democrat officials overseeing the map-drawing process determined to "press their advantage"—although, notably, not to maximize their advantage—and flip only the Sixth District to a Democrat-majority district, while still protecting existing Democrat majorities in adjoining districts. *Rucho*, 139 S. Ct. at 2510–11 (Kagan, J., dissenting); *see Grisham*, 2023 WL 6209573, at *16–17. Their "reconfigur[ing]" of the "entire" Sixth District left Republicans with "little or no chance to elect their preferred candidate" in "what was once a party stronghold." *Rucho*, 139 S. Ct. at 2519 (Kagan, J., dissenting); *see Grisham*, 2023 WL 6209573, at *16–17. Nevertheless, there was one election under the new Sixth District map where the Republican challenger lost by a narrow margin in a favorable Republican year. *See* Md. State Bd. of Elections, *Official 2014*

Gubernatorial General Election Results for Representative in Congress (last updated Dec. 2, 2014).[3]

Justice Kagan concluded that Maryland's Sixth District map was an impermissible partisan gerrymander, finding impermissible partisan intent to entrench Democrats, *Rucho,* 139 S. Ct. at 2517 (Kagan, J., dissenting); *see also id.* at 2510–11; the intended entrenching effect, since the mapmakers "reconfigured the entire district," *id.* at 2518–19; and no justification, given that Maryland did not "offer[ ] much of an alternative explanation for the evidence that the plaintiffs put forward," *id.* at 2516 n.2; *see Grisham*, 2023 WL 6209573, at *16–17.

Plaintiffs' trial evidence satisfies Justice Kagan's three-part test, as explained in detail below.

A. As The District Court Correctly Found, The Legislature Passed SB1 With Egregious Partisan Intent

1. Courts consider "many forms of evidence to prove [map drawers'] predominant intent" to entrench their favored party in power. *Grisham*,

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[3]   Available   at   https://elections.maryland.gov/elections/2014/results/ General/gen_results_2014_2_008X.html. This Court may take judicial notice of facts that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned," including from official government websites, at any stage of a proceeding. N.M. R. Evid. 11-201(B)(2), (D); *see Grisham v. Reeb*, 2021-NMSC-006, ¶¶ 22–23, 480 P.3d 852.

2023 WL 6209573, at *17; *see Rucho*, 139 S. Ct. at 2520–21 (Kagan, J., dissenting); *see also, e.g.*, *Benisek v. Lamone,* 241 F. Supp. 3d 566, 575 (D. Md. 2017). These factors include whether the "map-drawing process" itself was partisan, *see League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, 192 N.E.3d 379, 410 (Ohio 2022), which may be demonstrated by, for example, "proof of a partisan process excluding participation by the minority party," *Harkenrider v. Hochul,* 197 N.E.3d 437, 452 (N.Y. 2022), "correspondence" and "contemporaneous statements" from mapdrawers, the "specific sequence of events leading up to the challenged decisions," and the like, *Ohio A. Philip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978, 1096 (S.D. Ohio 2019) (citation omitted), *vacated and remanded sub nom. Chabot v. Ohio A. Philip Randolph Inst.*, 140 S. Ct. 102 (2019); *see also, e.g.*, *Rucho*, 139 S. Ct. at 2510–11, 20–21 (Kagan, J., dissenting); *accord Grisham*, 2023 WL 6209573, at *17 ("We find a useful evidentiary template in *Rucho*[.]"). The relevant factors also include the overall partisan impact or effect of the map—that is, whether the map "diminish[es] or dilut[es]" a "voter's voting power on the basis of his or her [political] views," *e.g.*, *Harper v. Hall*, 867 S.E.2d 554, 557 (N.C. 2022), or produces "discriminatory

results," *Harkenrider*, 197 N.E.3d at 452. And the relevant factors include whether mapdrawers subordinated traditional redistricting criteria for partisan reasons. *Rucho*, 139 S. Ct. at 2521 (Kagan, J., dissenting) ("override . . . districting criteria"); *see also League of Women Voters of Pa. v. Pennsylvania,* 178 A.3d 737, 816–21 (Pa. 2018); *accord Grisham*, 2023 WL 6209573, at *17 ("We find a useful evidentiary template in *Rucho*[.]"). The State of New Mexico itself has endorsed these or closely related factors when gauging partisan intent for partisan-gerrymandering purposes, in the amicus brief it joined before the U.S. Supreme Court in *Rucho*. *See* R.P.4509–12.

2. Here, the Legislature drew SB1 with clear partisan intent to entrench the Democrats in power, based upon all of these considerations, as the district court found as a factual matter. R.P.5978–79.

First, direct evidence shows that the Legislature enacted SB1 with the partisan intent of maximizing a Democrat gerrymander by ensuring that all three congressional districts were above a DPI of 53%, thereby entrenching their party in power. *Supra* pp.8–13; *accord Rucho*, 139 S. Ct. at 2510–11, 2517 (Kagan, J., dissenting); *Grisham*, 2023 WL 6209573, at *17 (*Rucho* is "useful evidentiary template"); R.P.5978–79.

Indeed, the statements from key Legislators and legislative staffers detailing the Legislature's partisan intent are as close to smoking-gun evidence as has ever been seen in partisan-gerrymandering litigation.

Senator Stewart bragged that, with SB1, the Legislature had "improved the peoples map [the Concept H Map] and now have CD 2 at 53% dpi [Democratic Performance Index]!" R.P.5768; *Rucho*, 139 S. Ct. at 2510–11, 2517 (Kagan, J., dissenting) (Maryland officials "openly admitted to a single driving purpose: flip [a single] District"). Further, in response to the question, "Who takes the hit? . . . There's only so much dpi to go around, you know," Senator Stewart explained how the Legislature had carefully drafted SB1 to provide safe Democrat-majorities in District 1 and District 3, while still flipping District 2 from a Republican-majority to a Democrat-majority district: "Sanderoff's dpi for your map H is 51.8% [for District 2]. That's not enough for a mid term election so we adjusted some edges, scooped up more of abq [Albuquerque] *and are now at 53%. CD 1 is 54%, CD 3 is 55.4%.*" R.P.5768 (emphasis added); *compare Rucho*, 139 S. Ct. at 2510–11, 2517 (Kagan, J., dissenting) (Maryland officials desiring to "press their advantage" while still protecting existing Democrat majorities in other

districts); *see also* R.P.4189 (tweet from Senator Stewart, similarly expressing desire to use redistricting to flip District 2); R.P.4180 (similar statement from Speaker Egolf); R.P.4186–87 (similar statement from Senator Cervantes, a sponsor of SB1).
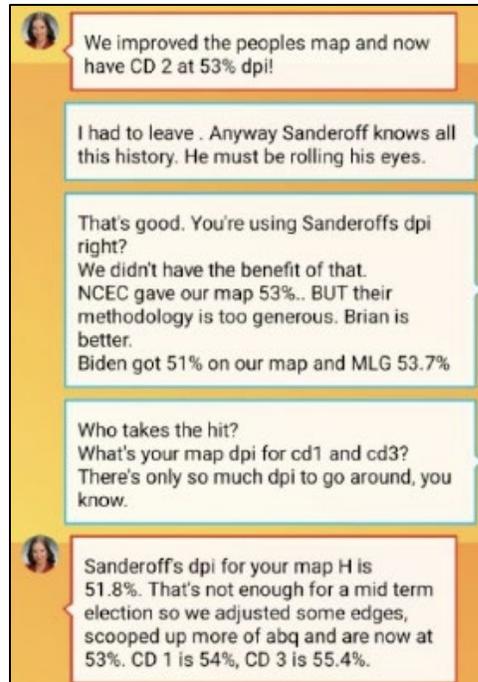
R.P.5768; R.P.5978–79.

The Legislature applied a consistent policy during the map-drawing process of no district falling below 53% DPI. R.P.5861, 5868–69; *see also* R.P.5877. In debating various "options" for New Mexico's congressional redistricting map, the lead staffer for the New Mexico Senate Democrats, Mr. Quinn-Quesada, explained that "all three [districts] should be above

53% Sanderoff DPI," in response to a question whether legislative leadership "require[s]" that result. R.P.5861, 5868–69; *see also* R.P.5877.

Second, Democrats controlled the entire map-drawing process for SB1, affording Republicans with no meaningful input or role, as the district court found. R.P.5972. For example, Democrat legislative leadership took charge of drafting SB1 and, while accepting only *pro forma* meetings with Republican legislators, did not incorporate *any* Republican input. App.74–82, 98–106, 133; R.P.3960–63; R.P.4546–47; R.P.5972; *see, e.g.*, *Rucho*, 139 S. Ct. at 2510–11, 2520–21 (Kagan, J., dissenting); *Harkenrider*, 197 N.E.3d at 453; *accord Grisham*, 2023 WL 6209573, at *17 (*Rucho* is "useful evidentiary template"). Further, when the Legislature presented SB1 to the floor—after drafting it out of the public eye—only Democrats voted in support, with all present and voting Republicans (joined by a single Democrat holdout and an independent holdout) voting against it. *Supra* pp.8–9; App.74–77; R.P.3960–61, 3963; R.P.4546–49. Then, the Democrat Governor signed SB1. *Supra* p.9. In all, SB1 was a single-party-drafted map, crafted to further that single party's ends, supported only by that single party. *See, e.g.*, *Rucho*, 139 S. Ct. at 2511 (Kagan, J., dissenting) ("party-line vote"); *Harkenrider v.*

Hochul, 167 N.Y.S.3d 659, 664 (N.Y. App. Div.), *aff'd as modified,* 197 N.E.3d 437 (N.Y. 2022); R.P.5972; *accord Grisham,* 2023 WL 6209573, at *17 (*Rucho* is "useful evidentiary template").

Third, the Legislature's decision to produce SB1 by turning the Concept H Map, *see* R.P.5768; R.P.5972—which already favored Democrats—into a near-perfect Democrat gerrymander, provides additional evidence of partisan intent, *see Householder,* 373 F. Supp. 3d at 1096. To create SB1, legislative leadership began with the Concept H Map and then either "retained" or "swapped" certain precincts among the three districts that the Concept H Map had created. R.P.3681–83; App.264–67; *supra* pp.8–9. The choices to retain or swap these precincts follow a partisan pattern: retaining a sufficient number of Democrat precincts from the Concept H Map districts in each SB1 district; swapping Democrat-leaning precincts from the Concept H Map's District 1 for Republican-leaning precincts in District 2, thus making the latter more Democrat; and swapping Democrat-leaning precincts from the Concept H Map's District 3 for Republican-leaning precincts in District 2, again making the latter more Democrat. R.P.3681–83; App.264–67, 270–71; R.P.5972.

Fourth, SB1's objective features further show that the Legislature acted with partisan intent, *e.g.*, *Rucho*, 139 S. Ct. at 2517–18 (Kagan, J., dissenting); R.P.5978–79; *accord Grisham*, 2023 WL 6209573, at *17 (*Rucho* is "useful evidentiary template"), which objective features Plaintiffs describe fully immediately below, *infra* Part I.B.

B.   SB1 Has An Egregious Partisan Effect

1.   The Evidence At Trial Established That SB1 Has An Egregious Partisan Effect

a. The second prong of Justice Kagan's test considers the "effects" of the redistricting map alleged to be a partisan gerrymander, asking whether "the lines drawn in fact have the intended [partisan] effect by substantially diluting [the plaintiffs'] votes." *Grisham*, 2023 WL 6209573, at *13 (quoting *Rucho*, 139 S. Ct. at 2516 (Kagan, J., dissenting)). "[M]any forms of evidence may be relevant to prove" the "substantial effect" element, including, for example, the various forms of evidence at issue in *Rucho* and *Benisek* and a comparison of voter-registration data. *Id.*

Five categories of evidence of impermissible partisan effects are particularly relevant in this case. First, plaintiffs may "compar[e] 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.* at *16–17. Second, plaintiffs can present aggregated election data showing that the map balances the partisan composition of the districts to create a near-perfect gerrymander. *See id.* at *16. Third, plaintiffs can show mapdrawers made "substantial" shifts in a district's "partisan composition" through unnecessary cracking and packing. *Rucho*, 139 S. Ct. at 2519, 2522 (Kagan, J., dissenting); *Grisham*, 2023 WL 6209573, at *17. Fourth, plaintiffs can present a sophisticated social-science analysis, such as the "extreme outlier approach," which compares the map to randomly generated maps drawn without partisan considerations. *Rucho,* 139 S. Ct. at 2517–18 (Kagan, J., dissenting); *Grisham*, 2023 WL 6209573, at *17. Finally, plaintiffs may show that a map disregards traditional redistricting principles, *see Grisham*, 2023 WL 6209573, at *16, although Justice Kagan in *Rucho* did not consider this evidence probative, and this consideration is less weighty as a result, *see Rucho*, 139 S. Ct. at 2513, 2521, 2523 (Kagan, J., dissenting).

To establish that a gerrymandered map "entrench[es]" a party in power, *Grisham*, 2023 WL 6209573, at *13–14, the challenger must show

that the map makes it "difficult" for the disfavored political party to win in the gerrymandered district or districts under all the circumstances. "Entrenchment," *Oxford English Dictionary Online* (July 2023).[4] That flows from the ordinary meaning of "entrenchment," recommended by Legislative Defendant's expert Mr. Sanderoff below, as "establishing something firmly, especially so that change is *difficult or impossible.*" R.P.5938 (quoting Oxford English Dictionary) (emphasis added). This understanding of "entrenchment" also comports with Justice Kagan's application of her test in her *Rucho* dissent. *Rucho*, 139 S. Ct. at 2519 (Kagan, J., dissenting). Thus, to establish that a gerrymandered map entrenches a favored party in power, the challenger need only show that the map makes it hard for the challengers' party to win *under all the circumstances*—including whether the map is a max-partisan plan under the State's political constraints. *See* R.P.5938 (citing Oxford English Dictionary); *Rucho*, 139 S. Ct. at 2519 (Kagan, J., dissenting).

2. Here, SB1 has an egregious partisan effect since, as the district court expressly found, SB1 "substantially dilut[es]" Republican votes in

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[4] Accessed at https://doi.org/10.1093/OED/6528990932 (subscription required).

District 2, R.P.5980—cracking Republicans out of District 2 and into the State's two other districts, with a 53% DPI or higher—as seen with the five categories of evidence of partisan effect described above.

   a. Voter-Registration Changes. To begin, Plaintiffs have established SB1's impermissible partisan effect through SB1's change in the voter registration in each of the three districts, *Grisham*, 2023 WL 6209573, at *16–17, supporting the conclusion that it is "difficult" for Republicans to win in any district under SB1, R.P.5938 (quoting Oxford English Dictionary); *Rucho*, 139 S. Ct. at 2519 (Kagan, J., dissenting)—including District 2. Under SB1, District 1 "gained 10,078 registered Democrats, 47,789 registered Republicans and 13,708 registered Independents," dropping the Democrat advantage here from 18.7% to 9.1%. R.P.3652; App.240. In District 3, Democrat registration "dropped by 19,810, while the number of registered Republicans increased by 2,261," decreasing the Democratic advantage "from 21.4% to 17.6%." R.P.3652; App.241. So, "[w]ith the Democrats' advantage declining in two of the state's congressional districts, these voters could only go into the 2nd District." R.P.3652; App.241. Thus, under SB1, District 2 "added 21,615 Democratic registrants, while giving up 31,483 Republican registrants,"

providing the Democrats with "a 13% registration advantage in the district," R.P.3652, even though District 2 had roughly even registration between Republicans and Democrats immediately prior to SB1, R.P.3651; App.241. And while this change in registration may not be as dramatic as the change in Maryland's Sixth District in *Benisek*, *see Rucho*, 139 S.Ct. at 2511 (Kagan, J., dissenting), that is *only* because an even more significant change in District 2 would have pushed the Democrats' voter-registration numbers in District 1 and/or District 3 *below* the Democrats voter registration edge in District 2, thus undermining Democrats' max-Democrat gerrymander strategy, *see* R.P.3627–30, 3655–56; App.222–26.

b. *Election-Data Aggregation/Partisan Balancing*. Plaintiffs have also established SB1's impermissible partisan effect by using election-data aggregation to show that the Democrat-controlled Legislature balanced the Democrat composition of each of SB1's three districts to make it "difficult," R.P.5938 (quoting Oxford English Dictionary); *Rucho*, 139 S. Ct. at 2519 (Kagan, J., dissenting), for Republicans to win any of those districts by making each district at least 53% DPI, *see Grisham*, 2023 WL 6209573, at *16–17.

Calculations prepared by all four experts in this case each provide the same evidence of partisan balancing to achieve maximum partisan effect in favor of Democrats—namely, that no district fell below 53% DPI. *Supra* pp.13–14. Mr. Sanderoff calculated District 2's DPI to be 53% Democrat, R.P.5938; District 1 to be 54% Democrat; and District 3 to be 55.4% Democrat, *see* R.P.5768—while agreeing that the statewide DPI was 54.2%, R.P.4403. Mr. Trende calculated that, under the *prior* map, District 1 was 61.7% Democrat; District 2 was 44.0% Democrat; and District 3 was 59.0% Democrat. R.P.3656 (using 2020 presidential election vote data); App.244–45. But under *SB1*, District 1 was 57.4% Democrat; District 2 was 53.0% Democrat; and District 3 was 55.5% Democrat. R.P.3656; App.244–45; *see also* R.P.3656–57; App.245 (similar results using Mr. Trende's Democratic Index). Mr. Brace, for his part, calculated that, under the *prior* map, District 1 was 57.70% Democrat; District 2 was 44.75% Democrat; and District 3 was 58.25% Democrat, R.P.3753, while under *SB1*, District 1 is 53.57% Democrat, District 2 is 52.73% Democrat, and District 3 is 55.97% Democrat, R.P.3775. Finally, Dr. Chen calculated that, under *SB1*, District 1 was 46.5% Republican

(53.5% Democrat); District 2 was 47.0% Republican (53% Democrat); and District 3 was 44.0% Republican (56% Democrat). R.P.5909.

Further, the Legislature's meticulous allocation of Democratic-party voters in each of SB1's three districts makes SB1 a near-perfect gerrymander—which is an additional egregiousness factor here that was not present in *Benisek*, where the Maryland mapdrawers targeted only one of two Republican districts only. *See Rucho,* 139 S. Ct. at 2510–11, 2516–17 (Kagan, J., dissenting). New Mexico is "a small, competitive state," and this "limits what a would-be gerrymanderer may accomplish" here. R.P.3627–30, 3655–56; App.222–26. Because "[t]here's only so much dpi to go around," R.P.5768, a gerrymandering Legislature bent on winning all three seats must be careful not to "make District 2 even more Democratic" than SB1 does, as that would automatically make District 3 or District 1 more Republican, threatening the Democrats' control there, R.P.3655–56; App.222–26. Rather, "the best-case scenario for a gerrymanderer" in New Mexico who wants to sweep the congressional races "would be drawing three districts" with a Democratic-party composition of "54.29%." R.P.3628 (using 2020 presidential election vote data).

SB1 obtains nearly that result, meaning that it is a near perfect gerrymander that entrenches Democrats in power. In other words, when New Mexico achieves an "extreme gerrymander" like SB1, its districts' partisan-composition margins "appear much closer" than those of a more populous State with many districts, R.P.3627–30, 3655; App.223–24, even as those margins "remain[ ] an outlier with respect to [New Mexico's] partisanship," R.P.3630; App.225–27.

c. Substantial And Unnecessary Shifts In Population. Plaintiffs have shown SB1's impermissible partisan effects because the SB1 mapdrawers made substantial and unnecessary shifts in the population—that is, cracking and packing that is unnecessary to achieve population equality—for the partisan gain of flipping District 2 for the Democrats while keeping District 1 and 3 reliably Democrat districts, including as to individual Plaintiffs. *Grisham*, 2023 WL 6209573, at *17 (*Rucho* is "useful evidentiary template"); *Rucho*, 139 S. Ct. at 2519, 2522 (Kagan, J., dissenting). Rather than making the minimal changes necessary to achieve population equality in the State after the 2020 census, the SB1 mapdrawers "substantially altered the map for the first time in decades," R.P.3646; *see Rucho*, 139 S. Ct. at 2519, 2522 (Kagan,

J., dissenting), shifting 505,952 residents between districts—more than 20 times what was needed to meet equal-population requirements, R.P.3647; App.235–38. "[T]hese shifts were not politically neutral," R.P.3649–55, as the Legislature focused its cracking and packing to dilute Republican votes in just two parts of the State to flip District 2— the Southeastern region in District 2, which is the most heavily Republican region of the State, and the Central region in District 1 and District 2, which is significantly Democrat, R.P.3648–49.

These shifts, moreover, also packed and cracked individual Plaintiffs for partisan gain, thus substantially diluting these Plaintiffs' votes, in particular. *Grisham*, 2023 WL 6209573, at *16–17; R.P.5974, 5979. Specifically, SB1 packed Plaintiff Galelgos, Plaintiff Gonzales, and Plaintiffs the Kimbros. R.P.5974. SB1 cracked Plaintiffs Jennings, Vargas, and Garcia. R.P.5974.

The comparison between this evidence of partisan effect and the evidence that Justice Kagan found overwhelming as to Maryland's 2011 map in *Benisek* is telling. *See Rucho*, 139 S. Ct. at 2518–19 (Kagan, J., dissenting). Like New Mexico, Maryland is a smaller State with relatively few congressional districts. *Id.* at 2519, 2521–22. Similar to

New Mexico's districts after the 2020 census, which districts required only minor adjustments to reach population equality, Maryland's Sixth District required only small changes—the removal of 10,000 people—to comply with the one person, one vote principle. *Id.* at 2519. Nevertheless, like New Mexico's Legislature—which moved "more than twenty times the number of residents" necessary in SB1 than the law required, R.P.3645–57; App.235–36—the Democrat mapdrawers of Maryland's Sixth District "reconfigured the entire district" by "mov[ing] 360,000 residents out and another 350,000 in, while splitting some counties for the first time in almost two centuries," *Rucho*, 139 S. Ct. at 2519 (Kagan, J., dissenting). For both New Mexico and Maryland, the result was the same: the flipping of a Republican district to a Democrat district, without jeopardizing incumbent Democrats in the State. *Id.*; R.P.3648–50, 36586–57; App.246–49.

Indeed, the gerrymander here is even *worse* than Maryland's 2011 gerrymander in *Benisek* in a critical respect: here, the Legislature attempted a near-perfect gerrymander with SB1, while the 2011 Maryland mapmakers did not attempt to achieve such total results. *Benisek*, 348 F. Supp. 3d at 502. In particular, the Maryland Democrats
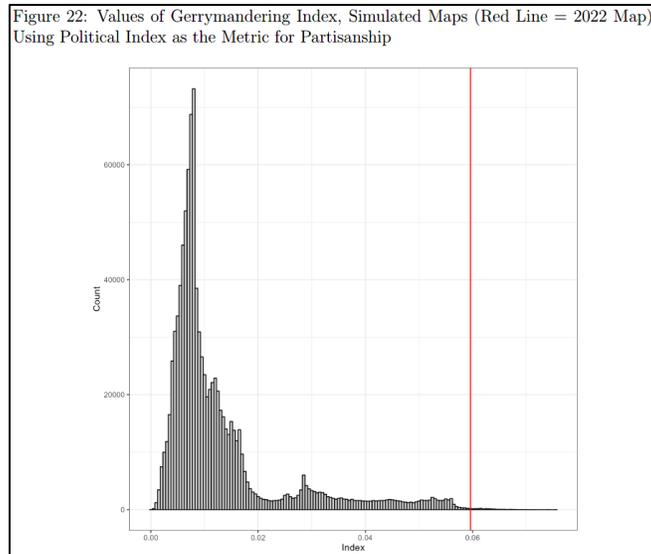
in 2011 allowed Republicans to retain a strong chance to win one of the State's eight congressional districts. *See Rucho*, 139 S. Ct. at 2510–11 (Kagan, J., dissenting). It was not until 2021 that the Maryland Democrats sought to maximize their partisan advantage by gerrymandering to eliminate every Republican seat—just as New Mexico Democrats did with SB1—after which a Maryland court struck down that map as an impermissible partisan gerrymander under the Maryland Constitution. *Szeliga v. Lamone*, No. C-02-CV-21-001816, 2022 WL 2132194, at *1, *46 (Anne Arundel Cnty. Md. Cir. Ct. Mar. 25, 2022).

d. Sophisticated Social-Science Analysis (Extreme Outlier Approach). The sophisticated social-science analysis presented by Plaintiffs confirms that SB1 is an extreme partisan gerrymander, independently establishing SB1's impermissible partisan effect, *see* R.P.3657–89; App.258–67, of making it "difficult" for Republicans to win in District 2, R.P.5938 (quoting Oxford English Dictionary); *Rucho*, 139 S. Ct. at 2519 (Kagan, J., dissenting); *Grisham*, 2023 WL 6209573, at *17 (*Rucho* is "useful evidentiary template").

In his expert report, Mr. Trende used sophisticated social-science analyses to evaluate SB1. R.P.3631–36. This approach applies a state-

of-the-art simulation methodology, which is both more current and more sophisticated than the earlier methodology that Justice Kagan had endorsed in her *Rucho* dissent. *See* R.P.3631–36; *Grisham*, 2023 WL 6209573, at *17 (*Rucho* is "useful evidentiary template"); *Rucho*, 139 S. Ct. at 2517–18 (Kagan, J., dissenting). Mr. Trende randomly generated one million maps that "incorporate the State's physical and political geography and meet its declared districting criteria, except for partisan gain." *Rucho*, 139 S. Ct. at 2518 (Kagan, J., dissenting) (emphasis omitted); *Grisham*, 2023 WL 6209573, at *17 (*Rucho* is "useful evidentiary template"); *see* R.P.3657–58; App.249–50. Mr. Trende then used the simulations to calculate the "gerrymandering index," showing the expected percentage of Democrat vote shares across the maps from the most heavily Democrat district to the least. R.P.3658; App.257–59. The ensemble of one million simulated maps has an average gerrymandering index of around 1.3%. R.P.3660; App.258–61. When Mr. Trende placed SB1 on this continuum, it fell on the far end of the distribution's tail, with a gerrymandering index of 6.4%—over four standard deviations from the mean. R.P.3660; App.260–62. Thus, it "was an out-out-out-outlier." *Rucho*, 139 S. Ct. at 2518 (Kagan, J.,

dissenting); *Grisham*, 2023 WL 6209573, at *17 (*Rucho* is "useful evidentiary template"). SB1 is therefore more favorable for Democrats than 99.89% of the one-million ensemble maps (or 998,897 maps). R.P.3660; App.260–62.

Figure 22: Values of Gerrymandering Index, Simulated Maps (Red Line = 2022 Map), Using Political Index as the Metric for Partisanship

R.P.3665 (red line = SB1).

Since "New Mexico has a history of relatively small changes to its districts," Mr. Trende performed "a second set of analyses," generating an additional million simulated maps that only moved the precincts that the SB1 mapmakers also swapped between districts, while keeping the remaining precincts locked in place. R.P.3668–74. This, in essence, concedes "90% of the map . . . to the mapmaker." R.P.3668. This additional ensemble of simulations has an average Gerrymandering Index of 0.62%, while SB1 "is not on the tails, it is beyond them," with a

Gerrymandering Index of at 2.95%—over seven standard deviations from the mean. R.P.3668. Mr. Trende's additional simulations only confirm that SB1 is "an extreme partisan gerrymander." R.P.3675–89.

e. Disregard Of Traditional Redistricting Principles.   Although Justice Kagan does not consider this criterion probative, *see Rucho*, 139 S. Ct. at 2513, 2521, 2523 (Kagan, J., dissenting), Plaintiffs have also nevertheless shown SB1's impermissible partisan effects through its disregard of traditional redistricting principles. Specifically, SB1 "splits nine" counties, which is "the most in New Mexico's history." R.P.3689–90. Further, by "any metric" of compactness, "the districts produced [by SB1] are some of the least compact districts in New Mexico history." R.P.3690–91; *see also* R.P.4193–94 (explaining how SB1 cracked the agricultural industry and the oil and gas industry); R.P.3956–57.

> **2.   The District Court Erred As A Matter Of Law When It Held That Even Though SB1 Has The Effect Of "Substantially Diluting" Plaintiffs' Votes, That Is Somehow Insufficiently Egregious**

The district court correctly found that the Democrats "succeeded in substantially diluting their opponents' votes" with SB1, R.P.5980–81, including the "substantial" "dilution" of Plaintiffs' votes, in particular, R.P.5978.   Nevertheless, the court ruled against Plaintiffs on the

partisan-effect element solely because the district court concluded—as a legal matter—that this "degree" of gerrymandering was "permissible," not sufficiently "egregious." R.P.5980–81. Specifically, the court held that the Democrat-controlled Legislature's gerrymander in SB1 was not sufficiently egregious in degree because, in its view, it was still conceivably possible for Republicans to win in District 2—although Republicans lost this district in 2022 with an incumbent candidate in a nationally favorable Republican year, making this candidate one of the only two Republican incumbents to lose the district in the entire Nation in 2022, as the district court found. R.P.5977, 5980–81.

The district court's holding rests solely on two legal errors, each requiring reversal. *See* R.P.5979–81.

First, the district court adopted a legally erroneous definition of "entrenchment," which impermissibly ratcheted up Plaintiffs' burden to a level that would render Article II, Section 18's prohibition on partisan gerrymander in New Mexico a dead letter. According to the district court, "entrenchment" requires a showing that the challenged map "effectively predetermine[s]" elections—meaning that it makes it impossible for the disfavored party to win. R.P.5980. But as explained above, a challenger

may also demonstrate that a map "entrenches" a party in power where the map makes it "*difficult*" for the disfavored political party to win in the gerrymandered district under all the circumstances. R.P.5938 (quoting Oxford English Dictionary) (emphasis added); *Rucho*, 139 S. Ct. at 2519 (Kagan, J., dissenting). Indeed, Maryland's Sixth Congressional District—condemned by Justice Kagan in her *Rucho* dissent, under her own test—would have cleared the district court's impossible-to-win entrenchment standard, *given that a Republican almost won an election in that gerrymandered district with an incumbent Democrat in 2014. See supra* pp.24–25. Given that an incumbent Democrat nearly lost the gerrymandered seat in 2014, it is likely that, if the incumbent had been a Republican, Republicans would have won the seat in 2014. *See* App.533–34; *see also* R.P.4412–13.

For the same reason, the district court was wrong when it applied its impossible-to-win standard in light of the 2022 election in District 2. *See* R.P.5980. Although the Democratic candidate in District 2 "won by only 0.7% of the vote over the Republican [candidate]," R.P.5980, this ignores both the realities of gerrymandering in New Mexico and the context surrounding the 2022 election. As explained above, "the best-

case scenario" for a gerrymandering, Democrat-controlled Legislature bent on flipping District 2 and sweeping the congressional races "would be drawing three districts" with a Democratic-party composition of "54.29%" —otherwise the Legislature would risk losing control of District 1 or District 3 in the course of flipping District 2. R.P.3628; *supra* pp.39–40. Thus, it is entirely expected that an "extreme gerrymander" like SB1 would nevertheless produce races that "appear much closer" in District 2 in a pro-Republican year with a Republican incumbent. R.P.3627–30, 3656; App.223–24. Yet, those margins still "remain[] an outlier with respect to [New Mexico's] partisanship," R.P.3630; App.225–27, and pose a difficult barrier to victory for Republicans in District 2.

The 2022 election in District 2 actually well-illustrates the difficulty that Republicans have with winning any of New Mexico's three congressional seats under SB1, *meaning that the large political minority in New Mexicans that support Republicans for Congress are likely to be shutout entirely for the entire decade.* The 2022 election cycle favored Republicans across the country, and Republican congressional candidates in New Mexico garnered 44.9% of the vote statewide. R.P.3657. Further, the Republican candidate in District 2 in 2022 was

the *incumbent,* and—as Mr. Sanderoff admitted—incumbents are "[o]ftentimes" "hard to beat" given that they "enjoy an advantage at the polls." R.P.4412–13; App.533–54. Yet, the Democrat challenger still prevailed in SB1's redrawn District 2, demonstrating that—after SB1—Democrats will win District 2 even in very difficult circumstances, while they also continue to win District 1 and District 3. R.P.3656–57. Highlighting the difficulty that SB1 imposes on Republicans, only one other Republican incumbent lost reelection in 2022, as the district court found. R.P.5977.

This Court should emphatically reject the district court's approach to the legal definition of "entrenchment," as it would make partisan-gerrymandering claims a dead-letter in New Mexico, as this very case shows. Under the district court's impossible-to-win definition of "entrenchment," a max-Democrat gerrymander survives, simply because New Mexico is a relatively small, closely divided State. *See* R.P.3627–30, 3655–56; App.222–26. Yet, given those political realities, there is no way for Democrats to draw three impossible-to-win districts—as would be needed to satisfy the district court's legal definition of "entrenchment"—given the size of the State, its political makeup, and the U.S.

Constitution's one-person, one-vote requirement. So, if Article II, Section 18 does not outlaw this near-perfect gerrymander, its promises of elections free from "egregious" partisan gerrymandering will be empty. *See Grisham*, 2023 WL 6209573, at *9.

Second, the district court gave no weight in its egregious-effects inquiry to the extent to which the gerrymanders maximized their partisan advantage. *See generally* R.P.5979–81 (failing to discuss this consideration). As explained, with SB1, the Democratic-controlled Legislature sought to flip District 2 for the Democrats *while also* maintaining their secure majorities in District 1 and District 3. *See supra* pp.39–40. Given that desire for a "max-[Democrat]" gerrymander, *Gill* Tr.7, the Democrat-controlled Legislature had to be careful not to "make District 2 even more Democratic" than SB1 does, as that would automatically make District 1 or District 3 more Republican and threaten the Democrats' control there, R.P.3655–56; App.222–26, because "[t]here's only so much dpi to go around," R.P.5768. This partisan desire for total victory across the State—resulting in Republicans winning none of the State's districts, even as they secured "44.9% of the statewide vote for Congress" in 2022, R.P.3657; *see* App.248—also shows the egregious

effects of SB1. Nevertheless, the district court gave no consideration to this additional egregiousness factor, *see generally* R.P.5979–81, which is a legal error.

C. **As The District Court Correctly Held, Defendants Could Not Possibly Justify SB1, Including Because They Based Their "Justification" On The Plainly Partisan, Post-Hoc Oil-Industry Consideration**

1. The third element of Justice Kagan's controlling test considers whether the state defenders of a prima facie partisan-gerrymandered map can "come up with a legitimate, non-partisan justification to save [the] map." *Rucho*, 139 S. Ct. at 2516 (Kagan, J., dissenting); *see also, e.g.*, *Common Cause*, 318 F. Supp. 3d at 896–99; *Householder,* 373 F. Supp. 3d at 1135–50. That is, under this third element, the State must show that the "districts' discriminatory partisan effects are justified by a legitimate state districting interest or neutral explanation." *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 867 (M.D.N.C. 2018), *vacated and remanded*, 139 S. Ct. 2484 (2019); *accord Davis v. Bandemer*, 478 U.S. 109, 141 (1986), *abrogated by Rucho*, 139 S. Ct. 2484 ("If there were a discriminatory effect and a discriminatory intent, then the legislation would be examined for valid underpinnings."). Defendants may only satisfy their burden to establish this third element if they clear

"[i]ntermediate scrutiny," *Grisham*, 2023 WL 6209573, at *15–16 (citing

Breen v. Carlsbad Mun. Schools, 2005-NMSC-028, ¶¶ 11–15, 30–32, 120

P.3d 413)—meaning both that their proffered justification for SB1 is "an

important government interest" and that SB1 is "substantially related

to" that interest, *Breen*, 2005-NMSC-028, ¶ 13 (citation omitted).

2. This Court should be able to "pass quickly over this part of the

test," *Rucho*, 139 S. Ct. at 2516 & n.2 (Kagan, J., dissenting), since there

could be no possible justification for what the Legislature did with SB1

here: take the Concept H Map and turn it into a near-perfect Democrat

gerrymander, *e.g. supra* pp.8–9, based upon the criterion that each

district must be at least DPI 53%, R.P.5868–69; *see also* R.P.5877.

Legislative Defendants' lead justification for SB1 was their

purported policy of spreading New Mexico's oil wells across multiple

districts. *See* R.P.5974, 5976, 5979. Legislative Defendants claimed that

"the oil extraction industry," which is "so heavily concentrated in

southeastern New Mexico," R.P.5979—the most heavily Republican

region of the State, *see* R.P.5978—"would benefit from having multiple

voices at the federal level," R.P.5979. Thus, the Legislature resolved to

divide this industry across the State's three districts with SB1. *See* R.P.5974, 5976, 5979.

As the district court correctly found, this oil-industry consideration is not a nonpartisan policy for SB1, thus it cannot justify SB1's egregious gerrymander. R.P.5974, 5976, 5979. "The great majority of active oil wells are in southeastern New Mexico," so "the only way" to meet the oil-industry consideration "is by splitting up southeastern New Mexico." R.P.5976. Further, "this justification was contradicted by testimony from legislators at trial from the affected area, who stated that it would not be beneficial." R.P.5979; App.84–86; *accord* R.P.4193–94. "[I]mportantly, no evidence was presented that anybody from the industry or the affected area made such a request of the Legislature in passage of [SB1]," R.P.5979; rather, trial testimony established that no one in the oil industry itself desired a redistricting map that adhered to this consideration, App.84–86; *see* App.527–28. And Legislative Defendants did not identify any meaningful number of voters below (or, indeed, any voters) who endorsed this consideration. Finally, the oil-industry consideration is not a traditional redistricting criterion, as Legislative Defendants' expert Dr. Chen admitted, *see* App.432–33; this

consideration was unheard of in New Mexico, consistent with the testimony of Legislative Defendants' own expert Mr. Sanderoof at trial, *see* App.527–28; *see also* R.P.4422; and it conflicts with how legislators traditionally take industry interests into account when redistricting, which is by uniting those interests, not cracking them, *see Miller v. Johnson*, 515 U.S. 900, 916, 920 (1995).

Legislative Defendants' various other purported justifications presented in the district court below likewise fail. Legislative Defendants attempted to justify SB1 with reference to "unique issues" concerning the "proximity of the U.S./Mexico border," R.P.2444, but that is perplexing, given that only District 2 borders Mexico, even under SB1. They argued that SB1 furthered the policy interest of incorporating urban and rural constituencies in all of the State's congressional districts, R.P.2424–26, but that has been held to be pretext for partisan gerrymandering, *see Hellar v. Cenarrusa*, 682 P.2d 539, 544 (Idaho 1984) (citing *Reynolds v. Sims*, 377 U.S. 533, 578 (1964)). Legislative Defendants also suggested that this Court's favorable reference to "competitive districts" in *Maestas v. Hall*, 2012-NMSC-006, ¶ 41, 274 P.3d 66, supports SB1 here, *see* R.P.2409, 2427–28, 2444; however, SB1 does not render the State's

districts "more competitive," *see Maestas*, 2012-NMSC-006, ¶ 41, but

instead makes the State a near-perfect Democrat gerrymander,[5] *see*

R.P.5768; R.P.4405; R.P.3628, 3655–57; App.223, 246.

Further, Legislative Defendants claimed that SB1 is "very similar"

to the Concept H Map—meaning that the Committee's conclusion that

the Concept H Map was fair should also apply to SB1, R.P.2444–45—but

that is self-defeating, given the Legislature's targeted edits to that map

to render SB1 a "max-[Democrat]" gerrymander, *Gill* Tr.7; *see* R.P.3682;

R.P.5768. Finally, Legislative Defendants briefly argued that Dr. Chen's

simulation analysis supported their position that SB1 is not an extreme

partisan gerrymander, R.P.2445, but those maps are entirely unhelpful

because they are based upon the partisan oil well consideration, *supra*

pp.53–55; *see Rucho*, 139 S. Ct. at 2518 (Kagan, J., dissenting), and

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[5] It should also be noted that, while there is nothing wrong with competitive districts, "competitiveness[ ] has never been a [traditional redistricting] criteri[on] in New Mexico," App.660:12-13 (Justice Chávez's description of how the Committee viewed the southeast as a community of interest, and how the Legislature failed to "articulate[ ] a basis for the decision" to split it up); App.689:17-21, so even if District 2 were deemed to satisfy some abstraction of sufficient competitiveness, this would not itself justify—as an "important government interest" in the intermediate-scrutiny analysis—the substantial vote dilution effected by SB1. Further, competitiveness was in fact not a goal of the Defendants in this process, as their numerous private statements about 52% DPI being "not enough for a mid term election," the need to avoid districts being put on target lists, etc., attest.

Dr. Chen did not opine on whether the Legislature's purportedly nonpartisan policies with SB1 were "important" or whether SB1 was "substantially related" to them, *Trujillo v. City of Albuquerque*, 1998-NMSC-031, ¶ 15, 965 P.2d 305.

CONCLUSION

This Court should reverse the judgment of the district court, declare that SB1 is an egregious partisan gerrymander and remand to the district court for immediate proceedings to adopt a remedial congressional district map for New Mexico.

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STATEMENT OF COMPLIANCE

Pursuant to Rule 12-318(G) NMRA, Plaintiffs-Appellants state that the body of the foregoing Brief-in-Chief is 10,889 words in Century School Book font, 14-point font, a proportionally spaced typeface, as calculated by Microsoft Word, and is therefore within the limits permitted under Rule 12-318(F)(3).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing

brief was electronically served on all counsel of record through the New

Mexico Supreme Court's Odyssey filing system on October 28, 2023

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