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-Petitioners,

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-Respondents.

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-PETITIONERS' REPLY BRIEF

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INTRODUCTION

Plaintiffs explained in their Brief-In-Chief ("Br.") that the district court's factual findings resolved this case in Plaintiffs' favor, under Justice Kagan's test from *Rucho v. Common Cause,* 139 S. Ct. 2484 (2019). The district court found as follows: (1) Legislative Defendants' "predominant purpose in redrawing CD2 in [Senate Bill 1 ('SB1')] was to entrench the Democratic Party in power by diluting the votes of citizens favoring Republicans," Record Proper ("R.P.") at 5978; (2) the Legislative Defendants "succeeded in *substantially* diluting the[ ] [Republican] votes," including Plaintiffs' votes, R.P.5980–81 (emphasis added); (3) Legislative Defendants "have not demonstrated a legitimate, nonpartisan justification for the challenged map," R.P.5979. In their Answering Brief ("Leg.Br."), Legislative Defendants now concede by silence that all of these factual findings are correct, challenging none of them on appeal. ***That means that Legislative Defendants now admit that they acted with partisan intent, substantially diluted Plaintiffs' votes, and had no justification for doing*** **so**.

Legislative Defendants base their entire defense on their claim that Plaintiffs did *not* show that SB1 "entrenched" Democrats, treating

"entrenchment" as an additional sub-element of the partisan-effects test *above and beyond showing substantial vote dilution*. Yet, Legislative Defendants' (and the district court's) understanding of "entrenchment" finds no support in *Grisham v. Van Soelen*, ___ P.3d___, 2023 WL 6209573 (N.M. Sept. 22, 2023), or Justice Kagan's test from *Rucho*, which both make clear that "entrenchment" is another way of saying that plaintiffs' votes were substantially diluted, making it hard from them to win the relevant district. Legislative Defendants' understanding of "entrenchment" as making it impossible for the minority party to win would render partisan-gerrymandering claims a dead letter, since gerrymanderers seek to *maximize* their partisan advantage across a map, rather than heedlessly making one seat impossible for opponents to win, at the expense of losing other seats. Indeed, that is what Legislative Defendants now concede that they did, creating a near-perfect gerrymander by ensuring that all three districts were as pro-Democrat as possible, such that—absent extraordinary circumstances—Plaintiffs in all three districts will have no Republican Representative this decade. If such a max-Democrat plan is not an egregious partisan gerrymander, no gerrymander ever will be.

ARGUMENT

I. As Legislative Defendants Concede, Plaintiffs Have Proven Their Case Under Justice Kagan's Three Elements, Given That Legislative Defendants Do Not Dispute *Any* Of The District Court's Factual Findings

Justice Kagan's test from *Rucho* comprises three elements: "*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*, 139 S. Ct. at 2516 (Kagan, J., dissenting) (citations omitted); *see Grisham*, 2023 WL 6209573, at *13. Under this controlling test, and as Plaintiffs explained in their Brief-In-Chief, the district court's factual findings below compel the conclusion that Plaintiffs have prevailed on their claim that SB1 is an egregious, unconstitutional partisan gerrymander. Br.25–58.

A. Intent: Legislative Defendants Concede That They Intended To Enact An Egregious Gerrymander By Substantially Diluting Plaintiffs' Votes

1. Beginning with the first prong of Justice Kagan's controlling test—partisan intent—the district court properly found that Plaintiffs satisfied this element. Br.27–34. Plaintiffs' evidence of partisan intent was overwhelming and irrefutable. First, Plaintiffs submitted direct evidence in the form of statements from key Legislators and legislative staffers showing that Legislative Democrats drew all three congressional districts in SB1 above a Democratic Performance Index ("DPI") of 53%, thereby entrenching their party in power. Br.29–33. Defendant Senator and President of the Senate Mimi Stewart bragged that "[w]e improved [the Concept H Map] and now have CD 2 at 53% dpi [Democratic Performance Index]!," R.P.5768, and explained how Legislative Defendants "adjusted some edges [of the Concept H map], scooped up more of abq [Albuquerque] and are now at 53% [for CD 2,] CD 1 is 54%, CD 3 is 55.4%," *id.*; Br.29–31 (detailing multiple other statements). Second, Plaintiffs showed that the Democrats controlled the entirety of the SB1 map-drawing process, giving Republicans no meaningful input or role. Br.32–33. Third, Legislative Defendants crafted SB1 by

transforming the already Democrat-favorable Concept H Map into a near-perfect Democrat gerrymander, as Plaintiffs demonstrated. Br.33. Finally, objective features of SB1 further show Legislative Defendants' intent. Br.34.

2. Legislative Defendants do not dispute any of the district court's findings on the intent element. Thus, Legislative Defendants concede that, with SB1, they "inten[ded] to entrench themselves in power" by seeking to substantially dilute the votes of Republicans, including Plaintiffs. Leg.Br.7. Or, as the district court stated in a conclusion that Legislative Defendants reproduce in their Answering Brief, without challenging it in any way, "[t]he Defendants' intentions were to entrench their party in CD 2, and they succeeded in substantially diluting their opponents' votes." Leg.Br.13 (quoting R.P.5980). So, given the district court's findings and Legislative Defendants' concession here, Plaintiffs have proven that Legislative Defendants' "predominant purpose in drawing [SB1] was to entrench [Democrats] in power by diluting the votes of citizens favoring [Republicans]." *Grisham,* 2023 WL 6209573, at *13 (citation omitted).

B. Effect: Legislative Defendants Concede That They Substantially Diluted Plaintiffs' Votes

1. Plaintiffs also explained that they satisfy the second element of Justice Kagan's test—that "the lines drawn in fact have the intended [partisan] effect by *substantially diluting* [the plaintiffs'] votes," *Grisham,* 2023 WL 6209573, at *13 (emphasis added) (quoting *Rucho,* 139 S. Ct. at 2516 (Kagan, J., dissenting)); Br.34–53. Plaintiffs submitted substantial-vote-dilution evidence in five categories, powerfully demonstrating that SB1 substantially diluted their votes, to the maximum extent possible. First, Plaintiffs submitted voter-registration evidence, *Grisham,* 2023 WL 6209573, at *16–17, demonstrating that, while District 2 had roughly even registration between Republicans and Democrats prior to SB1, after SB1, District 2 added 21,615 Democratic registrants and gave up 31,483 Republican registrants, providing the Democrats with a 13% registration advantage in the district, Br.37–38. Second, Plaintiffs presented aggregations of election data—from all four experts in this case, including Legislative Defendants' own experts—to show that the Legislature balanced the Democrat composition of each of SB1's three districts to at least 53% DPI, meaning that SB1 effectively made each district as Democratic as possible, maximizing this pro-

Democrat gerrymander. Br.38–41. Third, Plaintiffs explained how SB1 cracked and packed substantial numbers of voters—including Plaintiffs—to flip District 2 for the Democrats while retaining reliable Democrat majorities in Districts 1 and 3, although only minimal population shifts were required to obtain population equality. Br.41–44. Fourth, Plaintiffs presented the sophisticated social-science analysis of Mr. Trende showing that SB1 is more favorable to Democrats than 99.89% of one-million randomly generated nonpartisan maps (or 998,897 maps). Br.44–47. Finally, SB1 disregards traditional redistricting principles. Br.47.

2. Legislative Defendants do not dispute the district court's finding that, based on the powerful partisan-effect evidence that Plaintiffs presented, SB1 "'succeeded in *substantially diluting* [Legislative Defendants'] opponents' votes.'" Leg.Br.13 (emphasis added) (approvingly quoting district court's findings at R.P.5980). Nor do Legislative Defendants refute Plaintiffs' explanation, repeated throughout their Brief-In-Chief, *e.g.*, Br.2–3, that SB1 achieved a *maximum* Democrat gerrymander, given that it balanced each district to make them as Democrat as possible. So, Legislative Defendants concede

that, based on Plaintiffs' evidence, the district court found "that SB 1 resulted in 'substantial vote dilution'" of Plaintiffs' and Republicans' votes, Leg.Br.12, and that it is a max-Democrat gerrymander. This is sufficient to establish Plaintiffs' showing on the partisan-effects element, given that Justice Kagan articulated this standard as requiring only that "the lines drawn in fact have the intended [partisan] effect by *substantially diluting* [the plaintiffs'] votes." *Grisham,* 2023 WL 6209573, at *13 (citations omitted).

While Legislative Defendants attempt at various points in their brief to recast the district court's finding of substantial vote dilution as merely a finding of "some degree of vote dilution," Leg.Br.12 (quoting *Grisham*, 2023 WL 6209573, at *8); *see also id.* at 7, 26—which degree "is permissible" under *Grisham*, 2023 WL 6209573, at *8—that cannot hide the district court's outcome-determinative observation that SB1 "'succeeded in *substantially diluting* [Legislative Defendants'] opponents votes,'" R.P.5980 (emphasis added); *see also* R.P.5996.

Notwithstanding their concession that they did substantially dilute Plaintiffs' votes, Legislative Defendants make a couple of points about Plaintiffs' effects evidence, but those points fall flat. Legislative

Defendants criticize Plaintiffs' reliance on voter-registration data as "not a very meaningful predictor" of an impermissible partisan effect. Leg.Br.17. Yet, this Court specifically and repeatedly identified a "compari[son] [of] voter registration percentage or data . . . under the prior districting map against parallel percentages or data under the challenged districting map" as relevant evidence to the partisan-effects inquiry. *Grisham*, 2023 WL 6209573, at *16; *Order* at 4, Grisham v. Van Soelen, No.S-1-SC-39481 (N.M. July 5, 2023) (similar). Legislative Defendants also claim that Plaintiffs' sophisticated social-science analysis evidence "may reflect intent but do[es] not shed light on whether the map ultimately entrenches the dominant party," Leg.Br.18; *see also id.* at 19–20, but Justice Kagan's *Rucho* dissent explicitly identified this category of evidence when discussing the North Carolina map as one way to "prove that the districting plan substantially dilutes [the plaintiffs'] votes" under "the second step of the analysis," *Rucho*, 139 S. Ct. at 2517–18 (Kagan, J., dissenting). Legislative Defendants similarly claim that Plaintiffs' evidence showing "substantial[ ] partisan shifts in population" in SB1 "may speak [only] to the map drawers' intent," Leg.Br.17, but Justice Kagan's *Rucho* dissent forecloses this argument as well, given

that she endorsed this evidence when discussing the Maryland map as one method to show that the "map substantially dilutes [ ] votes." *Rucho*, 139 S. Ct. at 2519 (Kagan, J., dissenting); *see Grisham*, 2023 WL 6209573, at *17 ("useful evidentiary template").

C. Justification: Legislative Defendants Concede That They Had No Justification For Intentionally And Substantially Diluting Plaintiffs' Votes

1. Plaintiffs showed that Legislative Defendants could not carry their burden on the third element of Justice Kagan's controlling test, which element considers whether the state defenders of a map enacted with partisan intent and with partisan effects can "come up with a legitimate, non-partisan justification to save [the] map," as the district court found. *Grisham*, 2023 WL 6209573, at *13 (citation omitted); *see id.* at *14 (explaining that "intermediate scrutiny is the proper level of scrutiny"); Br.53–58 (citing district-court finding at R.P.5976, 5979). As Plaintiffs explained, Legislative Defendants' lead justification for SB1 was the alleged policy of spreading New Mexico's oil wells across multiple districts, Br.54, but the district court correctly found as a factual matter that this consideration is itself a partisan sham, meaning that it cannot possibly justify SB1 with reference to any nonpartisan criteria. Br.55

(citing R.P.5974, 5976, 5979 and discussing multiple pieces of evidence supporting this factual finding). Legislative Defendants' other purported justifications for SB1—such as the "unique issues" with the U.S./Mexico border, the supposedly nonpartisan policy of combining urban and rural voters in each district, the desire to create competitive districts, and the claim that SB1 is similar to the Concept H Map—also fail, especially under the governing intermediate-scrutiny standard. Br.56–58.

2. Legislative Defendants do not dispute Plaintiffs' powerful evidence on the justification element or the district court's explicit finding that Legislative Defendants could not carry their burden on this element. Indeed, Legislative Defendants only address the justification element in a perfunctory footnote, claiming that "the district court's finding overlooked extensive nonpartisan, legitimate policy bases underlying SB 1 that were in the trial record." Leg.Br.15 n.4. That conclusory assertion does not sufficiently develop the argument to preserve it for appeal. *See Perez v. Gallegos*, 1974-NMSC-102, ¶¶ 2–4, 87 N.M. 161, 530 P.2d 1155; *Petty v. Williams*, 1963-NMSC-018, ¶ 3, 71 N.M. 338, 378 P.2d 376. In any event, Legislative Defendants' assertion that the record includes "extensive" evidence of "non-partisan" justifications

for SB1 is simply false, given Plaintiffs' methodical refutation of all of the supposedly neutral justifications for this map. *Compare* Leg.Br.15 n.4, *with* Br.54–58.

II. *Grisham* Did Not Render Partisan Gerrymandering Claims A Dead Letter By Forcing Plaintiffs To Show Not Only That Their Votes Were Substantially Diluted, But Also That It Is Impossible For Them To Win The Gerrymandered District

Despite conceding through their failure to challenge any of the district court's outcome-determinative factual findings that Plaintiffs have made their case under Justice Kagan's controlling test, *supra* Part I, Legislative Defendants claim that Plaintiffs did not prove the partisan-effects element because Plaintiffs did not show that SB1 "entrenched" the Democrats in power, given that it is possible for a Republican to win in SB1's District 2. *See* Leg.Br.4–15. That is, Legislative Defendants, like the district court, incorrectly understood *Grisham*'s discussion of "entrenchment" *not* as an alternative description of the "substantial vote dilution" concept—requiring only that Plaintiffs show that it is difficult for Republicans to win in District 2—but rather as requiring plaintiffs to show that it is *impossible* for them to win a particular gerrymandered district. *See* Leg.Br.4–15; R.P.5979–81.

Legislative Defendants misunderstand both this Court's decision in *Grisham* and Justice Kagan's test that *Grisham* adopted. As Plaintiffs explained, *see* Br.35–36, 47–52, "entrenchment" is simply an alternative formulation of the substantial-vote-dilution concept, requiring that the challenged map make it "difficult" for the disfavored political party to win in the gerrymandered district or districts, after considering all the circumstances, "Entrenchment," *Oxford English Dictionary Online* (July 2023).[1] That is the ordinary meaning of "entrenchment"—which meaning Legislative Defendants' own expert Mr. Sanderoff employed in his testimony—as "establishing something firmly, especially so that change is *difficult or impossible."* R.P.5938 (quoting Oxford English Dictionary) (emphasis added). So, under this definition of "entrenchment," a challenger shows that a gerrymandered map has entrenched a favored party in power if that challenger demonstrates that the map substantially dilutes the challenger's vote, making it difficult for the challengers' party to win under all the circumstances. *See* R.P.5938; *Rucho,* 139 S. Ct. at 2519 (Kagan, J., dissenting); Br.35–36. A *maximally*

[1] Accessed at https://doi.org/10.1093/OED/6528990932 (subscription required) (all websites last visited Nov. 17, 2023).

entrenching partisan gerrymander, therefore, is a gerrymander that dilutes the minority party's vote as much as possible, making it difficult for the minority party to win in as many districts as possible, thus harming the most minority-party voters. That maximum gerrymander is the most "egregious" kind of gerrymander. *Grisham*, 2023 WL 6209573, at *13.

Legislative Defendants misread *Grisham* as imposing an impossible-to-win entrenchment standard, rather than as employing "entrenchment" as a different phrasing of the same "substantial vote dilution" concept. Leg.Br.4–7. *Grisham* straightforwardly shows that the Court understands "entrenchment" simply as another way to phrase the "substantial vote dilution" concept lying at the heart of the partisan-effects prong of Justice Kagan's test. *Grisham*, 2023 WL 6209573, at *16. So, in Paragraph 50, this Court quoted the second element of Justice Kagan's test as requiring plaintiffs to "establish that the lines drawn in fact have the intended [partisan] effect by *substantially diluting* [plaintiffs'] votes." *Id.* at *13 (citations omitted; emphasis added). The Court then, in Paragraph 51, equated "entrenchment" and "substantial dilution," explaining that "political entrenchment *through* intentional

dilution of individuals' votes" is "the touchstone of an egregious partisan gerrymander." *Id.* (emphasis added). Finally, the Court then twice reiterated that "entrenchment" and "substantial vote dilution" are, despite the difference in phrasing, the same thing: in Paragraph 64, the Court first explained that, "[i]n applying the Kagan test," the "district court may consider all evidence relevant to whether the challenged legislation seeks to effect *political entrenchment through intentional and substantial vote dilution*," *id.* at *16 (emphasis added); and in Paragraph 67, the Court "concluded" its opinion "by emphasizing that the touchstone of an egregious partisan gerrymander . . . is *political entrenchment through intentional dilution of individuals' votes*," *id.* at *17 (emphasis added).

Legislative Defendants' contrary reading is wrong. Leg.Br.4–7. Legislative Defendants ignore the language of *Grisham* recited immediately above through painfully obvious, selective quotations of this opinion. Leg.Br.5. Specifically, Legislative Defendants partially quote Paragraphs 51 and 67's discussions of "entrenchment" in *Grisham*, Leg.Br.5, omitting through ellipses the key phrases: "political entrenchment *through intentional and substantial vote dilution,*"

Grisham, 2023 WL 6209573, at *13 (emphasis added), and "political entrenchment *through intentional dilution of individuals' votes*," *id.* at *17 (emphasis added). Legislative Defendants' exclusively focus on *Grisham*'s statements that "[t]he consequences of such entrenchment . . . are that ensuing elections are *effectively predetermined*, essentially removing the remedy of the franchise from a class of individuals whose votes have been diluted." Leg.Br.5–6 (quoting *Grisham*, 2023 WL 6209573, at *8); *see also id.* at 1, 4, 8. Yet, "*effectively* predetermined" does not mean "*actually* predetermined." Rather, it means "virtually" or "*substantially*" predetermined, under the plain meaning of "effectively." "Effectively," *Oxford English Dictionary Online* (July 2023) (emphasis added).[2] Thus, this language too supports the conclusion that, in *Grisham*, this Court understood "entrenchment" to be an alternative phrasing of the "substantial vote dilution" concept.

Under the proper understanding of "entrenchment," a majority party seeking to maximize its partisan advantage in a redistricting map by substantially diluting the votes of the minority party, and doing so to

[2] Accessible at https://doi.org/10.1093/OED/1194435293 (subscription required).

the maximum extent possible, has enacted the most "egregious," entrenching partisan gerrymander. *Grisham*, 2023 WL 6209573, at *8; Br.51–52. This kind of gerrymander is a "max-[Democrat]" plan, in the words of Justice Ruth Bader Ginsburg, Tr. of Oral Argument, *Gill v. Whitford,* No.16-1161 (U.S. Oct. 3, 2017); Br.3, 5, which seeks to harm as many voters of the minority party as possibly by depriving them of any representation through a candidate of their choice, no matter how strong their showing is at the polls, *see* Br.51–53. Further, this is how gerrymanderers operate in the real world, seeking to maximize the majority party's advantage over the minority party by winning as many new seats as possible *without* jeopardizing previously secured seats—and, in the process, harming as many voters for the minority party as possible. *See, e.g.*, Br.44 (discussing Maryland Democrats' most recent gerrymandering effort to eliminate every Republican congressional seat in the State). It would be illogical as a matter of the constitutional right-to-vote principles here, *see generally Grisham*, 2023 WL 6209573, at *6, to hold that a plaintiff would only have a valid partisan-gerrymandering claim against SB1 if the Democrat-controlled Legislature made it impossible for Republicans to win District 2 by packing more Democrat

voters into that district, at the expense of allowing Republicans to win District 1 and/or District 3. Indeed, that would have been a less egregious gerrymander, from any sensible or consistent perspective, as it would have allowed Plaintiffs a fair opportunity to elect a representative of their choice in at least one district, rather than being shutout 3-0 for an entire decade, absent extraordinary electoral circumstances. Br.4, 20, 48.

Legislative Defendants extensively discuss the close election results in District 2 in the 2022 congressional race, as their entire claim that SB1 lacks egregious partisan effects depends on the competitiveness of District 2, given their position that Plaintiffs had to show that it was impossible for Republicans to win District 2 to establish "entrenchment." Leg.Br.10–12. However, Legislative Defendants' efforts to cast District 2 as a competitive district all fail.

To begin, Legislative Defendants' claim that District 2 is competitive relies entirely upon the single 2022 election, which election was held under pro-Republican conditions. Leg.Br.11, 16. Specifically, in that election, the Republican candidate was an incumbent—meaning that she enjoyed the incumbency advantage at the polls—who had won the prior election with about 54% of the vote, *see* N.M. Sec'y of State, 2020

General Election Candidate Summary Results Report at 1,[3] and Republicans also had a strong year nationally, Br.20. Nevertheless, the gerrymandered District 2 *still* elected the Democrat challenger, despite these difficult electoral circumstances for Democrats, making the Republican candidate one of only two Republican incumbent Representatives to lose nationwide in 2022. Br.20. ***Indeed, Legislative Defendants do not even mention that the incumbent Republican Representative who lost reelection from District 2 in 2022 was one of only two incumbent Republicans to lose that year nationwide***. Br.4, 20, 48. So, far from demonstrating the competitiveness of District 2, this single election just shows how difficult it is for Republicans to win in this district under this gerrymandered map. Br.20.

This single election in District 2 parallels the experience of Maryland's gerrymandered Sixth District in 2014, which was at issue in *Benisek v. Lamone*, 348 F. Supp. 3d 493 (D. Md. 2018), which was

[3] Available at https://klvg4oyd4j.execute-api.us-west-2.amazonaws.com/prod/PublicFiles/ee3072ab0d43456cb15a51f7d82c77a2/067ee04f-38ad-4484-871b-8776afc09e37/2020%20General%20Candidate%20Summary%20Results%20Report.PDF. This Court may take judicial notice of these official election results. N.M. R. Evid. 11-201(B)(2), (D); *Grisham v. Reeb,* 2021-NMSC-006, ¶¶ 22–23, 480 P.3d 852.

consolidated with *Rucho*. In that district, as Plaintiffs explained, Maryland also saw a close election in its gerrymandered Sixth District, with a Republican challenger losing by a narrow margin in the 2014 election against a Democrat incumbent in a favorable Republican year. Br.26–27, 49. Yet, Justice Kagan still concluded that the Sixth District had impermissible partisan effects, although, based on the 2014 results, it was conceivably *possible* for a Republican to win that Democrat-gerrymandered district. *Rucho*, 139 S. Ct. at 2519 (Kagan, J., dissenting). Nor does anything in Justice Kagan's *Rucho* dissent suggest that, had the challengers brought their partisan-gerrymandering claim against the Sixth District in an earlier election cycle, her conclusion that this district had impermissible partisan effects would have changed. *See generally id.*

Legislative Defendants criticize Plaintiffs' reliance on *Benisek*, but those criticisms are deeply confused. This Court's statement in *Grisham* that its holding relied solely on state constitutional law, not federal law, 2023 WL 6209573, at *9, did not "foreclose[ ]" reliance on *Benisek*, Leg.Br.20–21. Indeed, this Court held in *Grisham* that *Benisek* (identified as "the districting plan[ ] in . . . Maryland) was "a useful

evidentiary template." *Grisham*, 2023 WL 6209573, at *17. Further, while the *Benisek* challengers articulated their partisan-gerrymandering claim as a First Amendment injury, Leg.Br.21–22, that did not affect in any way how Justice Kagan articulated and applied her test to the Maryland map at issue there, *Rucho*, 139 S. Ct. at 2516–19. Finally, in attempting to distinguish *Benisek* "on the facts," Leg.Br.21–22, Legislative Defendants again just ignore that Republicans lost in District 2 despite running an incumbent candidate in a strong Republican year nationwide, making the incumbent there one of only two Republican incumbents to lose in 2022 across the country, Br.4, 20, 48.

Legislative Defendants rely on the testimony of their expert Mr. Sanderoff regarding the supposed competitiveness of District 2 under SB1, Leg.Br.9–12, 16–17, and specifically his claim that any district with a DPI between 54% and 46% is competitive in New Mexico, Leg.Br.10. While Mr. Sanderoff explained that District 2 had a DPI of 53% and so was competitive in his view, Br.14; Leg.Br.10, ***he provided only four examples of any Republican winning any type of race (state or federal) with a 53%-type DPI in his almost half-a-century experience in New Mexico redistricting***. App.508–09. Three of those

examples, moreover, came from the same state-house district. App.508–09. That SB2 entrenches District 2 to such an extent that Republicans would need to achieve something they have only achieved four times in four decades, in any race that Mr. Sanderoff is aware of is his nearly 50 years of experience is, in fact, powerful proof that Democrats entrenched themselves in power in District 2.

Further, the Democrat-controlled Legislature only drew District 2 with a 53% DPI because a higher, "safe"-Democrat DPI would have jeopardized the Democratic Party's prospects in Districts 1 and/or 3. New Mexico is as "a small, competitive state," which "limits what a would-be gerrymanderer may accomplish" here. R.P.3627–30, 3655–56; App.222–26. So, given that "[t]here's only so much dpi to go around," R.P.5768, the Legislature could not make District 2 a safe Democrat district by making it "even more Democratic" than SB1 does, as that would simultaneously make Districts 1 and/or 3 vulnerable, Br.40. Thus, what the Democrat-controlled Legislature did here was "the best-case scenario," maximizing their partisan advantage across all three of the State's districts by maximally diluting Plaintiffs' votes and thus causing them maximum harm. Legislative Defendants have no answer for

Plaintiffs' argument on this score—demonstrating that the Democrat-controlled Legislature here gerrymandered District 2 with as much partisan effect as possible, without jeopardizing Districts 1 or 3. *See* Br.49–53.

Legislative Defendants' remaining evidence does not support their position. Legislative Defendants cite a poll from September 13, 2023, showing that Yvette Herrell is leading Representative Gabe Vasquez in the 2024 race for District 2, at 46% to 45%, with 9% of voters undecided, but this does not demonstrate District 2's competitiveness either. Leg.Br.17 n.7. As Mr. Trende testified, this poll also showed that Representative Vasquez at a 28% unfavorability rating, and, "generally, incumbent[s] with 28 percent unfavorables don't lose," as the "undecideds are people who don't have unfavorable opinions of the Congressman and are unlikely to throw him out." App.358–59. Legislative Defendants had no response to this straightforward point at trial, *see generally id.*, and they have no response in their briefing now, *see generally* Leg.Br.17 n.7, 19. And, more broadly, such early polling does not provide reliable information; for example, a recent poll shows former President Trump leading President Biden by nine points for the 2024 presidential election.

See Sept. 15–20, 2023, Washington Post-ABC News poll at 10.[4] Legislative defendants also point to testimony from Plaintiff Senator David Gallegos, Leg.Br.22–23, but he testified that a Republican in District 2 would have a "very hard, uphill battle" to win election in District 2, because of "what the maps did to us," App.149.

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.

[4] Available at https://www.washingtonpost.com/documents/0cc7a4b2-8e80-46f3-9c78-3ff36f7a08ee.pdf?itid=lk_inline_manual_4; *see also* Washington Post Staff, *Sept. 15–20, 2023 Washington Post-ABC News poll* (Sept. 24, 2023) https://www.washingtonpost.com/tablet/2023/09/24/sept-15-20-2023-washington-post-abc-news-poll/; N.M. R. Evid. 11-201(B)(2), (D); *Grisham,* 2021-NMSC-006, ¶¶ 22–23.

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STATEMENT OF COMPLIANCE

Pursuant to Rule 12-318(G) NMRA, Plaintiffs-Petitioners state that the body of the foregoing Reply is 4,399 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 November 17, 2023

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