

STATE OF NEW MEXICO
COUNTY OF LEA
FIFTH JUDICIAL DISTRICT

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

Plaintiffs,

LARRY MARKER,

Putative Intervenor-Plaintiff,

v.

No. D-506-CV-2022-00041

MAGGIE TOLOUSE OLIVER in her official capacity as New Mexico Secretary of State, MICHELLE LUJAN GRISHAM in her official capacity as Governor of New Mexico, HOWIE MORALES in his official capacity as New Mexico Lieutenant Governor and President of the New Mexico Senate, MIMI STEWART in her official capacity as President Pro Tempore of the New Mexico Senate, and BRIAN EGOLF in his official capacity as Speaker of the New Mexico House of Representatives,

Defendants.

**PLAINTIFFS' COMBINED RESPONSE TO
DEFENDANTS' MOTIONS TO DISMISS**

Defendants would have this Court declare it open season for discriminatory gerrymandering in New Mexico. Defendants Stewart and Egolf (“Legislative Defendants”) and Defendants Grisham and Morales (“Executive Defendants”) together pushed through a shameless gerrymander focused on southeastern New Mexico to crack and dilute Republican votes. Now, these Defendants in their Motions to Dismiss argue that despite the fact that New Mexico’s state Equal Protection Clause is at least as broad as the federal Equal Protection Clause, and despite the U.S. Supreme Court’s recognition that politically discriminatory

gerrymanders present an injury under the Equal Protection Clause, New Mexicans’ injured by Defendants’ politically discriminatory gerrymander are forever destined to have their complaints echo into a void. This Court should follow the example of tribunals in other states and find that New Mexico’s Equal Protection Clause protects New Mexicans’ right to choose their Member of Congress rather than having their Member decided for them by those drawing district lines.

FACTUAL BACKGROUND

1. Plaintiffs in this case include the Republican Party of New Mexico and a bipartisan group of New Mexico voters injured by the New Mexico State Legislature’s (“State Legislature”) unlawful gerrymander of the state’s congressional map. *See* Verified Compl. for Violation of N.M. Constitution Article II, Section 18 (“Verified Compl.”) ¶¶ 1-7.

2. In April 2021, the State Legislature adopted the Redistricting Act of 2021 (“Act”), Laws 2021, ch. 79, § 2 (codified at NMSA 1978, § 1-3A-1, *et seq.*). The Act created the New Mexico Citizen Redistricting Committee (“Committee”), which is comprised of seven members appointed by State Senate and State House leadership (four members) and the State Ethics Commission (three members, one whom must be a retired justice of the New Mexico Supreme Court or a retired judge of the New Mexico Court of Appeals). NMSA 1978, § 1-3A-3 (2021).

3. The Committee must be bipartisan, § 1-3A-3(C) (no more than three of seven members may be of the same political party); persons particularly interested in the redistricting process (i.e., current or former public officials, candidates for public office, lobbyists, or family members of officer holders) are prohibited from serving on the Committee, § 1-3A-4; the Committee must perform its work in an open forum, including holding public meetings and publishing reports and proposed maps, §§ 1-3A-5 and -6; the Committee must adhere to traditional redistricting principles outlined in the Act, § 1-3A-7(A); and the Committee is barred from using, relying on, or referencing “partisan data,” § 1-3A-7(C).

4. The Committee for the 2021 redistricting cycle began its work in July 2021. Verified Compl. ¶ 51. Former New Mexico Supreme Court Justice Edward Chávez served as Chair of the Committee. *Id.* ¶ 50. In all, before issuing its report, the Committee held 16 public

meetings, heard testimony from over 350 New Mexicans, and considered volumes of written comments submitted through the Committee’s online portal. *See id.* ¶¶ 52-53, 57.

5. On November 2, 2021, the Committee submitted its report to the State Legislature proposing three congressional map concepts: Concepts A, E, and H. *Id.* ¶ 71. Concept A was mostly a “status quo map” that largely maintained the existing districts drawn by the courts in 2012. *Id.* ¶ 60. Concept E (known as Justice Chávez’s map) emphasized compactness by creating a single urban district centered on the greater-Albuquerque area and maintained the core of CD 2 and CD 3. *Id.* ¶¶ 61-66. All but one Committee member supported Concept E. *Id.* ¶ 64. Concept H, developed by a group of liberal community organizations, split much of southeastern New Mexico purportedly to create a solid Hispanic-majority district in CD 2. *Id.* ¶¶ 66-69.

6. The State Legislature did not adopt any of the proposed maps developed by the Committee. *Id.* ¶ 72. Instead, the Democratic-controlled State Legislature introduced and adopted Senate Bill 1 in just four legislative days. *Id.* ¶¶ 72-73.

7. Senate Bill 1 significantly redrew the core of the state’s congressional districts. *Id.* ¶¶ 72-73. For instance, **CD 1** (which previously was a relatively compact area encompassing most of Albuquerque and Bernalillo and Tarrant Counties) now covers a 10-county area that sprawls south to Roswell and includes all or parts of Lincoln, Otero, Chaves, De Baca, and Guadalupe Counties, *see id.* ¶ 95.a; **CD 2** (which previously included southern New Mexico) cedes nearly all the southeastern part of the state, such as Roswell, half of Hobbs, and all or parts of Eddy, Lea, Chaves, Otero, Roosevelt, De Baca, and Guadalupe Counties, and now includes the southwestern part of the state and the western suburbs of Albuquerque, *see id.* ¶ 95.b; and **CD 3** (which previously included northern New Mexico) now includes the northwest part of the state and stretches eastward to the state’s boundary and as far southeast as Hobbs, *see id.*

8. Researchers agree that Senate Bill 1 will result in a severe partisan swing. The Princeton Gerrymandering Project predicts that, under Senate Bill 1, Democrats will control all three congressional seats and rates none of the districts as “competitive.” *New Mexico Redistricting Report Card*, Princeton Gerrymandering Project (Dec. 13, 2021),

<https://bit.ly/3u4EVKm>. This compares to states like Arkansas and Utah, which the Princeton Gerrymandering Project predicts Republicans will control all four congressional seats in each state, none of which are classified as competitive. See *Arkansas Redistricting Report Card*, Princeton Gerrymandering Project (Nov. 6, 2021), <https://bit.ly/3AF2QRX>; *Utah Redistricting Report Card*, Princeton Gerrymandering Project (Nov. 10, 2021), <https://bit.ly/3rgjm89>. The Brennan Center, discussing “extreme partisan gerrymandering” in 2021, describes New Mexico as a state where Democrats “are pushing back, drawing maps favorable to their party.” Michael C. Li, et al., *Redistricting: A Mid-Cycle Assessment*, at 5, Brennan Center for Justice (Jan. 19, 2022), <https://bit.ly/3g5gGnm>. And the Cook Political Report has designated New Mexico’s congressional map as “one of the most aggressive Democratic gerrymanders yet . . .[,] dilut[ing] GOP votes in the southeastern portion of the state in a brazen bid to oust . . . the only remaining Republican office holder in the state.” David Wasserman, *New Map and 2022 Ratings: New Mexico*, The Cook Political Report (Dec. 21, 2021), <https://bit.ly/3o4AvQ4>.

9. The Cook Political Report’s observation about the political gerrymander of the southeastern corner of the state is supported by voter registration data. As of December 30, 2021, CD 2 (which prior to Senate Bill 1 covered a 17-county area) had 413,795 registered voters, 155,608 (or 38%) of whom were registered Republicans. N.M. Voter Registration Statistics by Congressional District, N.M. Sec’y of State (Dec. 30, 2021), <https://bit.ly/3Kjzf4Z>. The four-county area, including Chaves, Eddy, Lea, and Otero Counties, accounted for approximately 45% of the registered Republicans in CD 2 and represented 34% of the total registered voters in the entire district. Compare *id.*, with N.M. Voter Registration Statistics by County Precinct, N.M. Sec’y of State (Dec. 30, 2021), <https://bit.ly/3GEyjFX>. In other words, this four-county area in New Mexico contains a highly concentrated block of registered Republicans—indeed, almost one-half of the registered Republicans in all of CD 2.

10. Senate Bill 1 cracked this Republican bloc, fracturing cities, counties, and a universally recognized community of interest to do so. While southeastern New Mexico has always been in one congressional district, under Senate Bill 1, it is split between **all three**

districts. See Verified Compl. ¶ 91. The Cities of Hobbs and Roswell are split between two districts; Chaves, Eddy, Lea, and Otero Counties are split as well, with Chaves split three ways; and the greater-Albuquerque is treated as a hub, with its more-Democratic population disbursed among the three constituent parts of the wheel. *Id.* ¶¶ 92-94.

11. The result is a politically gerrymandered congressional map. Under the previous congressional map, the community of interest in southeastern New Mexico had a real opportunity to elect a Republican member of Congress—and had done so in all but one term since 2012. *Id.* ¶ 91. Under Senate Bill 1, however, the registered Republicans in southeastern New Mexico are split between all three congressional districts thereby cracking their votes. *Id.*

12. Plaintiffs have been, and continue to be, injured by Senate Bill 1’s political gerrymander, including the dilution of Plaintiffs’ votes by severely cracking a community of interest in southeastern New Mexico based on the State Legislature’s political and regional preference. Senate Bill 1 accomplishes this cracking by shifting voters (including Plaintiffs Vargas and Garcia) from the greater-Albuquerque area to outlying districts.

13. On January 24, 2022, Plaintiffs filed their Verified Complaint to redress these constitutional injuries. Plaintiffs named New Mexico Secretary of State Maggie Tolouse Oliver (“Secretary”); Governor Michelle Lujan Grisham and Lieutenant Governor Howie Morales; and Senator Mimi Stewart and Representative Egolf, all in their official capacities. On February 18, 2022, the Legislative Defendants and Executive Defendants each moved to dismiss (respectively, “Legislative Defendants Motion” and “Executive Defendants Motion”) the Verified Complaint for failure to state a claim and lack of jurisdiction. Plaintiffs now respond.

STANDARD OF REVIEW

Dismissal under Rule 12(B)(6) is appropriate only if plaintiffs are “not entitled to recover under any theory of the facts alleged in their complaint.” *Delfino v. Griffo*, 2011-NMSC-015, ¶ 12, 150 N.M. 97, 257 P.3d 917 (quoting *Callahan v. N.M. Fed’n of Teachers–TVI*, 2006-NMSC-010, ¶ 4, 139 N.M. 201, 131 P.3d 51). In reviewing a motion dismiss, the Court must “accept all well-pleaded factual allegations in the complaint as true and resolve all doubts in

favor of sufficiency of the complaint.” *Id.* ¶ 9. The same standards apply for facial jurisdictional attacks at the pre-answer phase. *South v. Lujan*, 2014-NMCA-109, ¶ 8, 336 P.3d 1000.

ARGUMENT

I. Plaintiffs State a Claim for Politically Discriminatory Gerrymander Under the New Mexico Constitution.

A. Political Gerrymanders Necessarily Violate the New Mexico Constitution’s Equal Protection Clause

Defendants profess confusion over Plaintiffs’ political-gerrymander claim. *See generally* Legis. Defs. Mot. at 8-9. But Plaintiffs’ constitutional claim is straightforward: Senate Bill 1 enacted a discriminatory political gerrymander in violation of the New Mexico Constitution (specifically, Article II, Section 18, the Equal Protection Clause) by severely cracking Republicans in southeastern New Mexico for raw political gain, thereby diluting their votes and causing constitutional injury.

As a starting point, politically discriminatory gerrymanders impose recognized injuries under the U.S. Constitution, particularly as violations of the Fourteenth Amendment’s Equal Protection Clause. In *Davis v. Bandemer*, the Supreme Court held that gerrymanders based on political discrimination violate the Equal Protection Clause. 478 U.S. 109, 116-117 (1986). Notwithstanding this constitutional injury, the Court split on the standard by which to determine the existence of such a gerrymander. And the Supreme Court was never able to settle on a nationwide standard to adjudicate these injuries. As a result, the Supreme Court later held in *Rucho v. Common Cause*, that claims to vindicate the constitutional injury caused by a political gerrymander are nonjusticiable in federal court. 139 S. Ct. 2484, 2500 (2019). Thus, contrary to Defendants’ arguments, politically discriminatory gerrymanders **do impose** recognized federal constitutional injuries; these injuries just cannot be redressed in a federal courthouse.

For this reason, politically discriminatory gerrymanders impose injuries under the New Mexico Constitution. The New Mexico Constitution includes an Equal Protection Clause that mirrors (and is in some ways broader than) the U.S. Constitution’s Equal Protection Clause. *See*

N.M. Const. art. II, § 18. Given New Mexico’s Equal Protection Clause is at least co-extensive with its federal analogue, and that federal courts recognize political gerrymandering presents an injury under the federal Equal Protection Clause, political gerrymandering necessarily offends the New Mexico Constitution. The New Mexico Supreme Court recognized as much in its seminal redistricting case, *Maestas v. Hall*, 2012-NMSC-006, 274 P.3d 66. There, the supreme court found that “an equal protection challenge will lie” if the drafters of legislative or congressional maps “use[] illegitimate reasons for population disparities and create[] the deviations *solely* to benefit certain regions at the expense of others.” *See* 2012-NMSC-006, ¶ 25 (emphasis in original) (quoting *Legislative Redistricting Cases*, 629 A.2d 646, 657 (Md. 1993)).

Defendants avoid this conclusion by recasting *Maestas* as only recognizing “standards for New Mexico’s courts to follow” when forced to draw district maps. Legis. Defs. Mot. at 7. But the constitutional injury is the same no matter which branch of state government draws the unconstitutional map. For this reason, Defendants’ attempt to immunize themselves from the state Equal Protection Clause fails. Both the U.S. Supreme Court and the New Mexico Supreme Court have held that the injury resulting from a political gerrymander is cognizable. Defendants cannot avoid responsibility for this injury by fashioning a limitation that protects citizens from constitutional harm caused by one branch of government (judges) and not another (legislators).

B. Even If the Court Applies Rational-Basis Review, Plaintiffs Have Stated a Claim for Political Gerrymander.

In passing, Defendants urge that Plaintiffs’ political-gerrymander claim is subject to rational-basis review and that Senate Bill 1 serves a “legitimate government purpose” because it “achieves the exacting population standard required for congressional districts.” Legis. Defs. at 10. While Senate Bill 1 may indeed meet the population standards for congressional districts, that is irrelevant to the Court’s political-gerrymander analysis.

New Mexico has adopted a “modern articulation” of the rational-basis test, which differs from the federal rational-basis test. *Rodriguez v. Brand W. Dairy*, 2016-NMSC-029, ¶ 25, 378 P.3d 13. The New Mexico Supreme Court has described the state’s rational-basis test as “similar

to the federal heightened rational basis test.” *Id.* Under this heightened standard, a plaintiff need only “bring forward record evidence, legislative facts, judicially noticeable materials, case law, or legal argument” to show arbitrariness in the law such that it is “not rationally related to the articulated legitimate government purposes.” *Id.* ¶ 28. That is, “that the relationship between the classification and its purpose is too attenuated to be rational, and instead amounts to arbitrary discrimination.” *Id.* ¶ 29.

Drawing congressional lines for naked political gain—i.e., for illegitimate reasons—is both arbitrary and not in furtherance of a legitimate government purpose. The Court need only look at statements by State Legislative leadership to appreciate the Legislature’s motivation in drawing the congressional lines it did. Strikingly, Defendant Speaker Egolf promised this gerrymander in November 2020, **over a year before the State Legislature adopted Senate Bill 1**. Verified Compl. ¶ 95.b (citing to statements in *Gov. ’s Legacy Just Got More Partisan With Redistricting Maps*, Albuquerque Journal (Dec. 28, 2021, 5:02 A.M.), <https://bit.ly/3rnxiR>). After Republican Yvette Herrell defeated incumbent Democrat Xochitl Torres Small, Speaker Egolf “warned [CD 2] would be redrawn in such a way that ‘we’ll have to see what that means for Republican chances to hold it.’” *Id.* Additionally, **after this lawsuit was filed** Defendant Stewart confirmed that State Legislature’s purpose in adopting Senate Bill 1 was to gerrymander CD 2 in the southeastern part of the state for Democratic gain.



@Sen_MimiStewart, Twitter (Feb. 19, 2022). This is direct evidence of overt discriminatory intent in understanding the State Legislature’s purpose for adopting Senate Bill 1. Perhaps the existence of such evidence is explained by Defendants’ belief that their actions are beyond the reach of the courts under the political question doctrine, which is addressed next.

In sum, Plaintiffs have stated a claim for discriminatory political gerrymander in violation of New Mexico’s Equal Protection Clause. The Court should reject Defendants’ argument that Plaintiffs failed to state claim for relief.

II. Plaintiffs’ Political-Gerrymander Claim Under New Mexico’s Equal Protection Clause is Justiciable.

Defendants’ primary argument in support of dismissal is that Plaintiffs’ political-gerrymander claim is a nonjusticiable political question. *See* Legis. Defs. at 4-7, 9-13; Exec. Defs. at 6-9. In essence, Defendants encourage New Mexico courts to disavow the state of political-gerrymander claims once and for all. The Court should reject this invitation.

A. Defendants Misconstrue *Rucho v. Common Cause*’s Applicability.

As previously explained, the U.S. Supreme Court held that discriminatory political gerrymanders violate the Equal Protection Clause, *Davis v. Bandemer*, 478 U.S. 109, 116-117

(1986), and New Mexico’s Equal Protection Clause is co-extensive with its federal analogue. In *Rucho*, the Supreme Court held that claims to vindicate the constitutional injury caused by a political gerrymander are nonjusticiable in federal court because the Court was unable to discern a federal constitutional standard that would reliably allow the adjudication of these cases in all 50 states. 139 S. Ct. 2484, 2500 (2019). Defendants claim *Rucho*’s holding means that unless the Court interprets New Mexico’s Equal Protection Clause to provide broader protections than its federal counterpart, *Rucho* forecloses Plaintiffs’ claim. Legis. Defs. Mot. at 12-13. Defendants’ argument conflates the existence of a constitutional injury with the ability to redress that injury in federal court. *Rucho* confirmed that political gerrymandering presents an injury under the federal Equal Protection Clause, *see Rucho*, 139 S. Ct. at 2498, but that lawsuits to redress this constitutional injury are nonjusticiable in federal court as a prudential matter, *id.* at 2508.

The Supreme Court’s inability to divine a nationwide standard to decide political-gerrymander claims is irrelevant to whether such a standard exists under New Mexico law. The Supreme Court stated as much, promising that its decision would not “condemn complaints about districting to echo into a void.” *Id.* at 2507. In fact, the Court approvingly observed that, “Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply.” *Id.* In effect, the Supreme Court held that the constitutional injury resulting from a political gerrymander may only be found in state court. Thus, *Rucho* presents no bar to state courts redressing political-gerrymandering claims.

The relevant question therefore is whether New Mexico has adopted or otherwise developed the sort of statutory or constitutional standards for determining when illegitimate reasons for line drawing results in an unconstitutional political gerrymander. It has.

B. New Mexico Has Developed Standards and Guidance for Determining Political-Gerrymandering Claims.

New Mexico has developed standards that guide judicial review of a redistricting plan. Indeed, these standards were developed in response to the history of partisan redistricting fights in New Mexico and have been deemed constitutionally legitimate by the New Mexico Supreme

Court. And—just months before its passage of Senate Bill 1—the State Legislature strengthened these standards, for the first time enshrining them in statute. The state judiciary is competent to interpret and apply these standards in this case.

Maestas v. Hall marked the first systematic articulation of the “legal principles that should govern redistricting litigation in New Mexico.” 2012-NMSC-006, ¶ 4, 274 P.3d 66. These principles were laid out by the supreme court in concern that “[d]istricts should be drawn to promote fair and effective representation for all, not to undercut electoral competition and protect incumbents.” *Id.* ¶ 31. The court noted that, in New Mexico, “[i]t is preferable to allow the voters to choose their representatives through the election process, as opposed to having their representative chosen for them through the art of drawing redistricting maps.” *Id.* Of course, the court in *Maestas* was not starting from a blank slate: since at least 1991 (the last time the State Legislature adopted a map without litigation) a set of seven guidelines have been used to safeguard the electorate’s right to fair and constitutional district maps. *See id.* ¶ 34. Among these guidelines is the requirement that:

Districts shall be drawn consistent with traditional districting principles. Districts shall be composed of contiguous precincts, and shall be reasonably compact. To the extent feasible, districts shall be drawn in an attempt to preserve communities of interest and shall take into consideration political and geographic boundaries. In addition, and to the extent feasible, the legislature may seek to preserve the core of existing districts, and may consider the residence of incumbents.

Id. The court incorporated these guidelines into the state’s redistricting framework, noting they track similar policies “recognized as legitimate by numerous courts.” *Id.*

The reason for hewing to traditional districting principles was not lost on the supreme court: “[these considerations] greatly reduce, although they do not eliminate, the possibilities of gerrymandering,” *id.* ¶ 35, and further the interests of representative government because “[m]inimizing fragmentation of political subdivisions, counties, towns, villages, wards, precincts, and neighborhoods allows constituencies to organize effectively” *Id.* ¶ 36.

The New Mexico Supreme Court is not alone in finding that traditional districting principles protect against political gerrymandering. Less than a year ago, the State Legislature

adopted the Redistricting Act and made the traditional redistricting principles part of state statute. The Act requires the Committee—itsself created by the Restricting Act—to develop district plans in accordance with 10 provisions, including the requirement that they observe the traditional districting principles approved in *Maestas*. See NMSA 1978, § 1-3A-7(A) (2021). The State Legislature went further in protecting against political gerrymanders, forbidding the Committee from using, relying on, or referencing partisan data, such as voting history or party registration data in preparing redistricting plans. § 1-3A-7(C).

In this state, traditional districting principles provide a framework against which state courts can, when confronted with a claim that a redistricting plan effects a constitutional injury, measure whether the plan is presumptively based upon legitimate considerations or not. And this framework provides a basis for New Mexico state courts to accept the challenge left open to them by the U.S. Supreme Court in *Rucho*: to use state statutes and constitutions to prevent “complaints about districting [from echoing] into a void.” 139 S. Ct. at 2507.

C. The Court Should Reject the Legislative and Executive Defendants’ Invitation to Bypass Unconstitutional Political Gerrymanders.

Both the Legislative and Executive Defendants implore the Court to stamp out political-gerrymander claims in New Mexico. To do so, they almost exclusively rely on the Wisconsin Supreme Court’s decision in *Johnson v. Wis. Elections Comm’n*, 2021 WI 87, 2021 WL 5578395 (Nov. 30, 2021). Legis. Defs. Mot. at 6; Exec. Defs. Mot. at 7-8. But *Johnson* is of no help. First, the Wisconsin Supreme Court addressed an entirely different issue—namely, whether **the court** should consider partisan fairness in selecting political maps after the governor vetoed the state legislature’s proposed maps. See generally *id.* ¶¶ 40-63. Not only does *Johnson* address a different issue, but the decision is also squarely at odds with the New Mexico Supreme Court’s decision in *Maestas*. Contrary to *Johnson*, the court in *Maestas* stated, “Despite our discomfort with political considerations, we conclude that when New Mexico courts are required to draw a redistricting map, they must do so with the appearance of and actual neutrality.” 2012-NMSC-006, ¶ 31. This includes considering “partisan symmetry” and “maintaining the political ratios as

close to the status quo as is practicable, accounting for any changes in statewide trends, will honor the neutrality required in such a politically-charged case.” *Id.*

Second, Defendants omit the state court cases that **have rejected** similar justiciability challenges. Just last month, the North Carolina Supreme Court “emphatically disagree[d]” with a lower court’s conclusion that allowing politically gerrymandered maps to stand “‘would be usurping the political power and prerogatives’ of the General Assembly.” *Harper v. Hall*, 2022-NCSC-17, ¶¶ 5, 6, 2022 WL 496215 (N.C. Feb. 14, 2022) (quoting lower court’s decision). The court recognized that, “[a]lthough the task of redistricting is primarily delegated to the legislature, it must be performed ‘in conformity with the State Constitution.’ It is thus the solemn duty of this Court to review the legislature’s work to ensure such conformity using the available judicially manageable standards. We will not abdicate this duty by “condemn[ing] complaints about districting to echo into a void.”” *Id.* ¶ 6 (quoting *Rucho*, 139 S. Ct. at 2507). The court described the legislature’s justiciability argument as “essentially, an effort to turn back the clock to the time before courts entered the political thicket to review districting claims in *Baker v. Carr*. Yet, as the facts of this case demonstrate, the need for this Court to continue to enforce North Carolinians’ constitutional rights has certainly not diminished in the intervening years.” *Id.* ¶ 113. The court continued, “This case does not ask us to remove all discretion from the redistricting process. The General Assembly will still be required to make choices regarding how to reapportion state legislative and congressional districts **in accordance with traditional neutral districting criteria . . .**” *Id.* ¶ 117 (emphasis added).

The Ohio Supreme Court also rejected a justiciability argument by the state senate president and speaker of the house (both Republicans), concluding that a state constitutional provision that simply prohibited the state legislature from “unduly favor[ing] or disfavor[ing] a political party or its incumbents” in drawing political maps was clear and manageable enough. *Adams v. DeWine*, 2022-Ohio-89, ¶ 34, 2022 WL 129092 (Jan. 14, 2022). Like here, the petitioners in *Adams* claimed the state general assembly’s maps were unconstitutional because “the General Assembly passed a plan with a partisan advantage that ‘is *unwarranted by valid*

considerations, namely, the redistricting criteria set forth in Article XIX.” *Id.* ¶ 37. While redistricting criteria did not prohibit a map “from favoring or disfavoring a political party or its incumbents to the degree that inherently results **from the application of neutral criteria**, . . . it does bar plans that embody partisan favoritism or disfavoritism in excess of that degree—i.e., favoritism not warranted by legitimate, neutral criteria.” *Id.* ¶ 40 (emphasis added).

* * *

At bottom, Plaintiffs’ claim is based on an unconstitutional political gerrymander evidenced by the State Legislature’s use of illegitimate reasons to redraw New Mexico’s congressional districts for partisan gain. It is the duty of the courts to review the State Legislature’s work to ensure conformity with the New Mexico Constitution and traditional districting principles.

CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that the Court deny the Legislative and Executive Defendants Motions to Dismiss.

Dated: March 10, 2022.

Respectfully submitted,

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By /s/ Eric R. Burris

Eric R. Burris
Harold D. Stratton, Jr.
201 Third Street NW, Suite 1800
Albuquerque, New Mexico 87102-4386
Email: eburris@bhfs.com; hstratton@bhfs.com
Telephone: (505) 244-0770
Facsimile: (505) 244-9266

Christopher O. Murray (*pro hac vice*)
Julian R. Ellis, Jr. (*pro hac vice*)
410 Seventeenth Street, Suite 2200
Denver, Colorado 80202-4432
Emails: cmurray@bhfs.com; jellis@bhfs.com
Telephone: (303) 223-1100
Facsimile: (303) 223-1111

Carter B. Harrison, IV
HARRISON & HART, LLC
924 Park Avenue SW, Suite E
Albuquerque, New Mexico 87102
Email: carter@harrisonhartlaw.com
Telephone: (505) 312-4245
Facsimile: (505) 341-9340

Attorneys for Plaintiffs

I HEREBY CERTIFY that on March 10, 2022, a true and correct copy of the foregoing **PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTIONS TO DISMISS** was filed electronically through Odyssey File & Serve system, which caused all counsel of record to be served by electronic means. The Motion will be emailed to Putative Intervenor-Plaintiff Larry Marker.

/s/ Eric R. Burris

Eric R. Burris