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APPELLATE ATTORNEYS

July 14, 2023

VIA EMAIL

Nicole Gray, Clerk of Court
Utah Supreme Court
supremecourt@utcourts.gov
nicoleg@utcourts.gov

Re: *League of Women Voters, et al. v. Utah State Legislature, et al.*,
No. 20220991-SC
Rule 24(j) notice of supplemental authority

Dear Ms. Gray:

Plaintiffs-Appellees submit as supplemental authority the New Mexico Supreme Court's recent Order in *Republican Party of New Mexico v. Oliver*, No. S-1-SC-39481 (N.M. July 5, 2023) (opinion forthcoming) (Ex.A).

The *Oliver* Court held that partisan gerrymandering claims – there challenging the congressional plan – are justiciable under New Mexico's Equal Protection Clause. Ex.A at 3-4 (citing N.M. Const. art. II, § 18). The Court adopted the standard articulated in Justice Kagan's *Rucho v. Common Cause* dissent, examining "(1) intent; (2) effects; and (3) causation." 139 S. Ct. 2484, 2516 (2019). Plaintiffs must demonstrate first that "state officials' predominant purpose ... was to entrench their party in power by diluting the votes of citizens favoring its rival," and, second, that "the lines drawn in fact have the intended effect by substantially diluting their votes." *Id.* (quotation simplified). The third step shifts the burden to defendants to establish "a legitimate, non-partisan justification." *Id.* This standard is manageable and akin to Plaintiffs' proposed analyses, which similarly examine substantial partisan effects and the purported state interests, including scrutinizing partisan intent. Pls.-Appellees' Resp. Br. at 30-31, 35-42, 60-65.

In response to Justice Hagen's questions concerning redistricting criteria, New Mexico is like Utah because it has criteria for an advisory citizen commission, but there are few formalized criteria concerning the Legislature

selecting legislative districts and seemingly none for congressional redistricting. Compare N.M. Stat. §§ 1-3A-7 (listing commission criteria); 2-8F-2 (state senate districts must be “contiguous and ... compact as is practicable”); 2-7F-2 (same for state house); with R.27-28 (listing Prop 4 criteria); R.42 (Utah Legislative Redistricting Committee adopting contiguity and compactness for 2021 redistricting); Pls.-Appellees’ Resp. Br. at 40-41 & Add.V (discussing same). While departing from such criteria may be evidence of partisan gerrymandering (see R.27-28, 64-71), nothing in the *Oliver* Court’s Order suggests the criteria are necessary to the justiciability analysis. Ex.A at 3-4. This is consistent with other states that evaluate gerrymanders against traditional redistricting criteria – including but not limited to criteria articulated somewhere in state law – while also applying measures of partisan bias. *Carter v. Chapman*, 270 A.3d 444, 461-62, 470-71 (Pa. 2022).

Respectfully submitted,

/s/ Mark P. Gaber

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Certificate of Service

I certify that on this 14th day of July, 2023, I caused the foregoing notice of supplemental authority to be served on the following via email:

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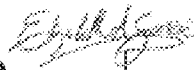
Attorneys for Cross-appellee Lt. Gov. Deidre Henderson

/s/ Caroline A. Olsen



Exhibit A

Republican Party of New Mexico v. Oliver, No. S 1-SC-39481,
July 5, 2023, Order



1 **IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

2 **July 5, 2023**

3 **NO. S-1-SC-39481**

4 **MICHELLE LUJAN GRISHAM** in her
5 **official capacity as Governor of the New Mexico,**
6 **HOWIE MORALES, in his official capacity as New**
7 **Mexico Lieutenant Governor and President of**
8 **New Mexico Senate, MIMI STEWART, in her**
9 **official capacity as President Pro Tempore of**
10 **the New Mexico Senate, and JAVIER MARTINEZ,**
11 **in his official capacity as Speaker of**
12 **the New Mexico House of Representatives,**

13 Petitioners,

14 v.

15 **HON. FRED VAN SOELEN,**
16 **District Court Judge,**
17 **Fifth Judicial District Court,**

18 Respondent,

19 and

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

25 Real Parties in Interest,

26 and

27 **MAGGIE TOULOUSE OLIVER,**

28 Defendant-Real Party in Interest.

29
30

1 **ORDER**

2 WHEREAS, this matter initially came on for consideration by the Court
3 upon *verified petition for writ of superintending control and request for stay* and
4 responses thereto;

5 WHEREAS, this Court granted the request for stay in D-506-CV-2022-
6 00041 on October 14, 2022, and ordered the parties to file briefs on the issues
7 presented in the *verified petition for writ of superintending control*;

8 WHEREAS, this Court heard arguments in this matter on January 9, 2023,
9 and thereafter ordered the parties to file supplemental briefs addressing the issue of
10 whether the New Mexico Constitution provides greater protection than the United
11 States Constitution against partisan gerrymandering;

12 WHEREAS, this matter now comes before the Court upon the parties’
13 supplemental briefs and motion to substitute public officer and amend caption;

14 WHEREAS, the Court having considered the foregoing and being
15 sufficiently advised, Chief Justice C. Shannon Bacon, Justice Michael E. Vigil,
16 Justice David K. Thomson, Justice Julie J. Vargas, and Justice Briana H. Zamora
17 concurring;

18 NOW, THEREFORE, IT IS ORDERED that the motion to substitute is
19 GRANTED, and Javier Martinez shall be substituted for Brian Egolf as Speaker of
20 the House;

1 IT IS FURTHER ORDERED that the caption on any further pleadings filed
2 in this proceeding, if any, shall conform to the caption of this order;

3 IT IS FURTHER ORDERED that the *verified petition for writ of*
4 *superintending control* is GRANTED with respect to Petitioners' request that this
5 Court provide the district court guidance for resolving a partisan gerrymandering
6 claim;

7 IT IS FURTHER ORDERED that the stay in D-506-CV-2022-00041 is
8 hereby VACATED, and the district court shall take all actions necessary to resolve
9 this matter **no later than October 1, 2023**;

10 IT IS FURTHER ORDERED that as a threshold matter, the district court
11 shall conduct a standing analysis for all parties;

12 IT IS FURTHER ORDERED that in resolving this matter, the district court
13 shall act in accordance with and apply the following holdings and standards as
14 determined herein:

- 15 1. A partisan gerrymandering claim is justiciable under Article II,
16 Section 18 of the New Mexico Constitution;
- 17
18 2. A partisan gerrymandering claim under the New Mexico Constitution
19 is subject to the three-part test articulated by Justice Kagan in her
20 dissent in *Rucho v. Common Cause*, 139 S.Ct. 2484, 2516 (2019);
21
- 22 3. Clearly, a district drawn without taking partisan interests into account
23 would not present a partisan gerrymander. *Cf.* N.M. Const. art. II, §§
24 2, 3, 4. However, as with partisan gerrymandering under the
25 Fourteenth Amendment, some degree of partisan gerrymandering is

1 permissible under Article II, Section 18 of the New Mexico
2 Constitution. *Accord Rucho*, 139 S.Ct. at 2497. At this stage in the
3 proceedings, it is unnecessary to determine the precise degree that is
4 permissible so long as the degree is not egregious in intent and effect;
5

- 6 4. Intermediate scrutiny is the proper level of scrutiny for adjudication of
7 a partisan gerrymandering claim under Article II, Section 18 of the
8 New Mexico Constitution. *See Breen v. Carlsbad Municipal Schools*,
9 2005-NMSC-028, ¶¶ 11-15, 30-32, 138 N.M. 331, 120 P.3d 413;
- 10
11 5. Under one-person, one-vote jurisprudence, some mathematical
12 deviation from an ideal district population may be permissible as
13 “practicable.” *Cf. Harris v. Ariz. Indep. Redistricting Comm’n*, 578
14 U.S. 253, 258-59 (2016) (quoting *Reynolds v. Sims*, 377 U.S. 533, 579
15 (1964)) (“The Constitution . . . does not demand mathematical
16 perfection. In determining what is ‘practicable,’ we have recognized
17 that the Constitution permits deviation when it is justified by
18 ‘legitimate considerations incident to the effectuation of a rational
19 state policy.’”);
- 20
21 6. In the context of a partisan gerrymandering claim, a reasonable degree
22 of partisan gerrymandering—taking into account the inherently
23 political nature of redistricting—is likewise permissible under Article
24 II, Section 18 and the Fourteenth Amendment;
- 25
26 7. In evaluating the degree of partisan gerrymandering in this case, if
27 any, the district court shall consider and address evidence comparing
28 the relevant congressional district’s voter registration percentage/data,
29 regarding the individual plaintiffs’ party affiliation under the
30 challenged congressional maps, as well as the same source of data
31 under the prior maps. The district court shall also consider any other
32 evidence relevant to the district court’s application of the test
33 referenced in paragraph 2 of this order.
34

35 IT IS FURTHER ORDERED that a writ of superintending control shall
36 issue contemporaneously with this order; and
37

1
2

IT IS FURTHER ORDERED that an opinion in this matter shall follow.

IT IS SO ORDERED.



WITNESS, the Honorable C. Shannon Bacon, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 5th day of July, 2023.

Elizabeth A. Garcia, Clerk of Court
Supreme Court of New Mexico

By _____

A handwritten signature in cursive script, reading "Luzette Serrano Cortez", written over a horizontal line.

Chief Deputy Clerk of Court

I CERTIFY AND ATTEST:

A true copy was served on all parties
or their counsel of record on date filed.

Luzette Serrano Cortez

Chief Deputy Clerk of the Supreme Court
of the State of New Mexico

Exhibit B

New Mexico Constitution Article 2, § 18

West's New Mexico Statutes Annotated
Constitution of the State of New Mexico
Article II. Bill of Rights (Refs & Annos)

Const. Art. 2, § 18

§ 18. Due process; equal protection; sex discrimination

Currentness

No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws. Equality of rights under law shall not be denied on account of the sex of any person. The effective date of this amendment shall be July 1, 1973.

Credits

1972 H.J.R. 2, adopted at election Nov. 7, 1972, eff. July 1, 1973.

Const. Art. 2, § 18, NM CONST Art. 2, § 18

Current with amendments approved through the November 2020 general election.

End of Document

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Exhibit C

New Mexico Constitution Article 4, § 3

West's New Mexico Statutes Annotated
Constitution of the State of New Mexico
Article IV. Legislative Department

Const. Art. 4, § 3

§ 3. Composition of legislature; qualifications of members

Currentness

A. Senators shall not be less than twenty-five years of age and representatives not less than twenty-one years of age at the time of their election. If any senator or representative permanently removes his residence from or maintains no residence in the district from which he was elected, then he shall be deemed to have resigned and his successor shall be selected as provided in Section 4 of this article. No person shall be eligible to serve in the legislature who, at the time of qualifying, holds any office of trust or profit with the state, county or national governments, except notaries public and officers of the militia who receive no salary.

B. The senate shall be composed of no more than forty-two members elected from single-member districts.

C. The house of representatives shall be composed of no more than seventy members elected from single-member districts.

D. Once following publication of the official report of each federal decennial census hereafter conducted, the legislature may by statute reapportion its membership.

Credits

1976 S.J.R. 4, adopted at election Nov. 2, 1976.

Const. Art. 4, § 3, NM CONST Art. 4, § 3

Current with amendments approved through the November 2020 general election.

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