

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

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

Plaintiffs,

v.

No. D-506-CV-2022-00041

**MAGGIE TOULOUSE 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.

EXECUTIVE DEFENDANTS' MOTION TO DISMISS

Come now Defendants Governor Michelle Lujan Grisham and Lieutenant Governor Howie Morales (collectively, "Executive Defendants"), by and through their counsel of record in this matter, and hereby move to dismiss the instant action under Rule 1-012(B)(1), (6) NMRA. As grounds for this Motion, the Executive Defendants state as follows.

INTRODUCTION

In late 2021, the Legislature approved, and the Governor signed into law, a new Congressional district map which would ensure that each district contained both rural and urban constituencies. Now that important candidate filing deadlines have passed and the election process

is underway, Plaintiffs seek to overturn the duly enacted map on the basis of alleged partisan gerrymandering. But, as the U.S. Supreme Court has concluded, there are “no discernible and manageable standards” to settle such the dispute of how much partisanship is too much. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2501 (2019). Nor does New Mexico law provide any standards by which this Court could reach a different conclusion. Accordingly, the Court should dismiss Plaintiffs’ claims as nonjusticiable.

BACKGROUND

I. The redistricting process

New Mexico, like all states, must regularly reapportion its Congressional districts to ensure compliance with the constitutional mandate of “equal representation for equal numbers of people.” *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964). To aid in the redistricting process, the Legislature enacted the Redistricting Act of 2021, NMSA 1978, §§ 1-3A-1 to -10 (2021). That Act created the Citizen Redistricting Committee, composed of seven members appointed by legislative leadership and the State Ethics Commission and chaired by a retired Justice of the New Mexico Supreme Court. Section 1-3A-3. In 2021, the Committee was required to adopt, and deliver to the Legislature, three district plans for New Mexico’s congressional districts “no later than October 30, 2021, or as soon thereafter as practicable.” Section 1-3A-5(A). Each plan was to be developed in accordance with an enumerated list of requirements and adopted following public input. Section 1-3A-7. However, the Committee’s proposals are not binding on the Legislature, which chose to retain the ultimate authority to redistrict Congressional and state legislative districts. *See* § 1-3A-9.

Consistent with the Redistricting Act, the Committee submitted three proposed Congressional maps to the Legislature in early November 2021: (1) Congressional Concept A,

which largely maintained the boundaries of the then-current Congressional districts, (2) Congressional Concept E, a map proposed by former Justice Edward Chavez, and (3) Congressional Concept H, a map based on feedback from a coalition of community-based organizations throughout the State.¹ Shortly thereafter, the Governor called the Legislature into a special session to adopt new Congressional and legislative maps.² The Legislature introduced several bills proposing different Congressional district maps—some of which were those recommended by the Committee. One such map was introduced by Senators Joseph Cervantes and Georgene Louis as Senate Bill 1 (“SB 1”).³ SB 1—based largely on Congressional Concept H—proposed three Congressional districts which combined both rural and urban voters in each district.⁴ Senator Cervantes described his motivation for the map as follows:

This congressional map is unique in that it includes both significant urban and rural populations within each of our three congressional districts. Having our entire congressional delegation represent both urban and rural constituencies and communities will assure advocacy on behalf of every New Mexican from our entire

¹ *CRC District Plans and Evaluations for New Mexico Congress, State Senate, State House of Representatives, & Public Education Commission: 2020 Redistricting Cycle*, 29-42, Citizen Redistricting Comm. (Nov. 2, 2021), <https://www.nmredistricting.org/wp-content/uploads/2021/11/2021-11-2-CRC-Map-Evaluations-Report-Reissued-1.pdf> [hereinafter “Committee Report”]; *Adopted Maps*, N.M. Citizen Redistricting Comm., <https://www.nmredistricting.org/adopted-maps/> (last visited Feb. 8, 2022).

² *Gov. Lujan Grisham to formally call Legislature into special session on redistricting*, Office of Gov. Michelle Lujan Grisham (Dec. 2, 2021), <https://www.governor.state.nm.us/2021/12/02/gov-lujan-grisham-to-formally-call-legislature-into-special-session-on-redistricting/>.

³ *2021 2nd Special Session – SB 1*, N.M. Legislature, <https://www.nmlegis.gov/Legislation/Legislation?chamber=S&legType=B&legNo=1&year=21s2> (last visited Feb. 9, 2022).

⁴ *Senate Meeting*, N.M. Legislature (Dec. 10, 2021), <https://sg001-harmony.sliq.net/00293/Harmony/en/PowerBrowser/PowerBrowserV2/20220208/-1/68211> at 3:38:00-42:00 (describing proposed map).

delegation. This is a great opportunity for us to focus on creating unified priorities rather than exacerbating our divisions and differences.⁵

SB 1 achieved this primarily by: (1) extending the northern 3rd Congressional district down into the southeastern part of the State, including parts of the cities of Hobbs, Artesia, and Roswell; extending the southern 2nd Congressional district into the northwestern part of the state, including parts of southwest/west Albuquerque, Los Lunas, and Belen; and (3) expanding the central Congressional district 1 to the southeast, including Santa Rosa and Ruidoso.⁶ A majority of both chambers of the Legislature voted in favor of SB 1—sending it to the Governor’s desk for signature or veto.⁷

While SB 1 deviated from the Committee’s maps, it was the Legislature’s prerogative to go its own way. The Governor still found it to be a good faith effort to comply with federal and New Mexico law. Additionally, vetoing SB 1 would have left the State with an indisputably unconstitutional map mere weeks before important election deadlines—assuredly subjecting the State to a whirlwind of expensive litigation. *See, e.g.*, NMSA 1978, § 1-8-26(A) (requiring declarations of candidacy by preprimary convention designation for United States representative to be filed on February 1, 2022); NMSA 1978, § 1-8-30 (2011) (requiring filing of nominating

⁵ Carol A. Clark, *New Mexico Senate Passes CD Map Proposal*, Los Alamos Daily Post (Dec. 11, 2021), <https://ladailypost.com/new-mexico-senate-passes-cd-map-proposal/>.

⁶ *See* Districttr, <https://districttr.org/plan/66395> (select “Data Layers”; then select “US House”) (showing current Congressional map shaded in different colors with previous Congressional districts indicated with black outlines) (last visited Feb 9, 2022).

⁷ Technically, the Legislature passed Senate Judiciary Substitute for Senate Bill 1. *See Official Roll Call*, N.M. Legislature (Dec. 11, 2021), <https://www.nmlegis.gov/Sessions/21%20Special2/votes/SB0001HVOTE.pdf> (House of Representatives); *Official Roll Call*, N.M. Legislature (Dec. 10, 2021), <https://www.nmlegis.gov/Sessions/21%20Special2/votes/SB0001SVOTE.pdf> (Senate). The Governor refers to this bill interchangeably with Senate Bill 1 for ease of reference.

petitions); NMSA 1978, § 1-8-33(B) (requiring candidates to file petitions at the time of filing declarations of candidacy); *see generally* *Maestas v. Hall*, 2012-NMSC-006, 274 P.3d 66 (addressing litigation following the Legislature’s failure to enact new maps over the Governor’s veto). Thus, the Governor declined to exercise her discretionary veto power and signed the Legislature’s chosen map into law on December 17, 2021.⁸

II. The instant action

Despite being well aware of the impending election deadlines, Plaintiffs—the Republican Party of New Mexico and several individuals residing in different parts of the State—waited over a month to challenge SB 1. *Compare id.*, with Verified Complaint for Violation of New Mexico Constitution Article II, Section 18 (“Complaint”), filed Jan 21, 2022. In addition to the Executive Defendants, the Complaint names President Pro Tempore Mimi Stewart and Speaker Brian Egolf (collectively, the “Legislative Defendants”) and Secretary of State Maggie Toulouse Oliver. *Id.* at 1. Plaintiffs challenge SB 1 solely on the basis that it allegedly constitutes improper partisan gerrymandering, in violation of the State equal protection clause in Article II, Section 18 of the New Mexico Constitution. Complaint at ¶¶ 15-16, 24, 78, 96, 98. Specifically, Plaintiffs allege that SB 1 intentionally “cracked” Republican voters in southeastern New Mexico—including parts of Chaves, Eddy, Lea, and Otero counties—and “cracked” parts of Albuquerque to weaken that party’s political strength in the 2nd Congressional district. *Id.* at ¶¶ 2-7. In so doing, the drafters of SB 1 allegedly relied on “illegitimate reasons” rather than traditional redistricting principles of preserving communities of interest, considering political and geographic boundaries, and

⁸ Gov. Michelle Lujan Grisham, *Senate Executive Message No. 3* (Dec. 17, 2021), <https://www.governor.state.nm.us/wp-content/uploads/2021/12/Senate-Executive-Message-No.-3-1.pdf>.

preserving the core of existing districts. *Id.* at ¶ 77-98. Plaintiffs ultimately seek to have SB 1 declared unconstitutional and replaced with another map. *Id.* at 27.

DISCUSSION

I. Standard of review

“A motion to dismiss under Rule 1-012(B)(6) merely tests the legal sufficiency of the complaint, by inquiring whether the complaint alleges facts sufficient to establish the elements of the claims asserted.” *Schmidt v. Tavenner’s Towing & Recovery, LLC*, 2019-NMCA-050, ¶ 5, 448 P.3d 605 (alteration, internal quotation marks, and citation omitted). Thus, courts “accept as true all material allegations of the complaint and construe the complaint in favor of the complaining party.” *South v. Lujan*, 2014-NMCA-109, ¶ 7, 336 P.3d 1000. Courts need not, however, accept the complaint’s conclusions of law or “unwarranted deductions of fact.” *Schmidt v. Tavenner’s Towing & Recovery, LLC*, 2019-NMCA-050, ¶ 5, 448 P.3d 605 (internal quotation marks and citation omitted). Courts apply the same review to motions to dismiss under Rule 1-012(B)(1) when, like here, they mount a facial attack on subject matter jurisdiction. *See South*, 2014-NMCA-109, ¶¶ 7-8; *see also Muscogee Nation v. Okla. Tax Comm’n*, 611 F.3d 1222, 1227 n.1 (10th Cir. 2010) (“In reviewing a facial attack on the complaint, a district court “appl[ies] the same standards under Rule 12(b)(1) that are applicable to a Rule 12(b)(6) motion to dismiss for failure to state a cause of action.”).

II. Plaintiffs’ claim of political gerrymandering is a nonjusticiable political question

The Executive Defendants agree with the Legislative Defendants’ Motion to Dismiss in their discussion of Plaintiffs’ failure to state a justiciable claim. As the U.S. Supreme Court recently recognized in *Rucho*, 139 S. Ct. at 2498, “Any standard for resolving [partisan gerrymandering] claims must be grounded in a limited and precise rationale and be clear,

manageable, and politically neutral.” (Internal quotation marks and citation omitted). This is primarily because “[t]he opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States[,]” *id.*, which has always encompassed as least some measure of “constitutional political gerrymandering.” *Id.* at 2499 (internal quotation marks and citation omitted). At bottom, the decisive question in partisan gerrymandering claims boils down to “how much partisan dominance is too much?” *Id.* at 2496 (internal quotation marks and citation omitted). After thoroughly reviewing the history of partisan gerrymandering (and the courts’ difficulty addressing the phenomenon), the Court concluded the Constitution provided no “principled, rational, and based upon reasoned distinctions” to adjudicate partisan gerrymandering claims. *Id.* at 2507. In other words, partisan gerrymandering claims are political questions for which the federal judiciary can provide no answer.

State courts have reached the same conclusion based on their state constitutions. For instance, in *Johnson v. Wis. Elections Comm’n*, 2021 WI 87, 399 Wis. 2d 623, the Wisconsin Supreme Court addressed whether a court tasked with adopting a redistricting map (after the legislature failed to enact one) should consider the partisan makeup of the districts. *Id.* ¶ 39. The court answered in the negative, recognizing that [a]djudicating claims of ‘too much’ partisanship in the redistricting process would recast this court as a policymaking body rather than a law-declaring one.” *Id.* ¶ 52. “Whether a map is ‘fair’ to the two major political parties is quintessentially a political question[,]” the Court concluded, because “(1) [the state constitution provided] no ‘judicially discoverable and manageable standards’ by which to judge partisan fairness; and (2) the Wisconsin Constitution explicitly assigns the task of redistricting to the legislature—a political body.” *Id.* In so holding, the Court refused to read its state constitution “as

a reservoir of additional requirements [that] would violate axiomatic principles of interpretation” and “plung[e] this court into the political thicket lurking beyond its constitutional boundaries.” *Id.* ¶ 63 (citations omitted).

This Court should reach the same result. True, the U.S. Supreme Court did not foreclose the possibility that state courts could address such claims. *See id.* However, the Court suggested state courts could do so only when state statutes or constitutions provided a standard to apply. *See id.* (“Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply.”). New Mexico (like Wisconsin) does not have a statutory or constitutional provision that could give this Court the necessary guidance that the U.S. Supreme Court found lacking. The only statute arguably on point is Section 1-3A-7 of the Redistricting Act of 2021. But Section 1-3A-7’s redistricting standards are inapplicable, as they have no binding effect on the Legislature. *See* § 1-3A-9. To hold otherwise would clearly contradict the Legislature’s intent to retain ultimate control over the redistricting process without regard to the same standards. *See Jordan v. Allstate Ins. Co.*, 2010-NMSC-051, ¶ 15, 149 N.M. 162, 245 P.3d 1214 (“This Court’s primary goal when interpreting statutes is to further legislative intent.”).

Nor does New Mexico’s constitution provide the Court with the necessary guidance. Plaintiffs rely solely on the State’s equal protection clause in Article II, Section 18, which provides, in pertinent part that “nor shall any person be denied equal protection of the laws.” Complaint at ¶¶ 15-16, 24, 78, 96, 98. But New Mexico courts have interpreted this clause “as providing the same protections” as its federal counterpart that was insufficient to provide guidance to the nation’s highest court. *See Valdez v. Wal-Mart Stores, Inc.*, 1998-NMCA-030, ¶ 6, 124 N.M. 655, 954 P.2d 87. Plaintiffs give the Court no reason to reach a contrary conclusion. *See State v. Gomez*, 1997-NMSC-006, ¶ 19, 122 N.M. 777, 932 P.2d 1 (“A state court [using the interstitial] approach may

diverge from federal precedent for three reasons: a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics.”). Indeed, our Supreme Court has previously cautioned against wading into the “political thicket” of redistricting unless absolutely necessary. *Maestas*, 2012-NMSC-006, ¶ 46. And while it is true the *Maestas* Court required the district court to take into account partisan considerations, *id.* ¶ 45, it “emphasize[d] that the principles articulated herein apply only to court-drawn maps.” *Id.* ¶ 46. In contrast to the situation the Court was confronted with in *Maestas*, the judiciary’s sister branches *have* enacted a new map. Accordingly, there is no need for the Court to take up politics.

CONCLUSION

In sum, New Mexico law (like federal and Wisconsin law) does not provide any standards necessary for the Court to determine the question Plaintiffs essentially raise: “how much partisan dominance is too much?” *Rucho*, 139 S. Ct. at 2498 (internal quotation marks and citation omitted). Without such standards, the courts should refrain from diving into the political thicket. *Cf. Mutz v. Mun. Boundary Comm’n*, 1984-NMSC-070, ¶ 19, 101 N.M. 694, 688 P.2d 12 (recognizing that courts should not decide political questions). Therefore, this Court should dismiss the Complaint.

Respectfully submitted,

/s/ Holly Agajanian
Holly Agajanian
Chief General Counsel to
Governor Michelle Lujan Grisham
490 Old Santa Fe Trail, Suite 400
Santa Fe, New Mexico 87501
holly.agajanian@state.nm.us
505-476-2210

Kyle P. Duffy
*Deputy General Counsel to
Governor Michelle Lujan Grisham*
490 Old Santa Fe Trail, Suite 400
Santa Fe, New Mexico 87501
kyle.duffy@state.nm.us
505-476-2210

Maria S. Dudley
*Deputy General Counsel to
Governor Michelle Lujan Grisham*
490 Old Santa Fe Trail, Suite 400
Santa Fe, New Mexico 87501
maria.dudley@state.nm.us
505-476-2210

*Counsel for Governor Michelle Lujan Grisham and
Lieutenant Governor Howie Morales*

CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2022, I filed the foregoing through the New Mexico Electronic Filing System, which caused all counsel of record to be served by electronic means.

Respectfully submitted,

/s/ Holly Agajanian _____
Holly Agajanian