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IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

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,
JAVIER MARTINEZ,
in his official capacity as Speaker of the New Mexico House of Representatives,

Petitioners-Defendants,

vs. Case No. S-1-SC-39481

HONORABLE FRED VAN SOELEN,

Respondent,

and

REPUBLICAN PARTY OF NEW MEXICO, *et al.*,

Plaintiffs-Real Parties in Interest, and

MAGGIE TOULOUSE OLIVER,

Defendant-Real Party in Interest.

ON PETITION FOR WRIT OF SUPERINTENDING CONTROL
FROM THE FIFTH JUDICIAL DISTRICT COURT IN LEA COUNTY
BEFORE JUDGE FRED VAN SOELEN

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STATEMENT OF COMPLIANCE

I hereby certify that the body of the Petitioners' Response to the Respondent's Supplemental Brief-in-Chief is twenty-one (21) pages long and consists of approximately 5,426 words and that Microsoft Word Version 2212 indicates that that the body of the Brief-in-Chief uses the proportionally spaced typeface of Century Schoolbook 14.

I. QUESTION PRESENTED AND BRIEF ANSWER

Does the New Mexico Constitution provide greater protection than the United States Constitution against partisan gerrymandering?

No, the New Mexico Constitution does not provide greater protection than the United States Constitution against partisan gerrymandering. New Mexico Courts interpret the Equal Protection Clause of Article II, Section 18 of the New Mexico Constitution as coextensive with the Fourteenth Amendment of the U.S. Constitution, "providing the same protections." *Valdez v. Walmart Stores*, 1998-NMCA-030, ¶ 6, 124 N.M. 655. Only in matters affecting the civil rights of vulnerable, oppressed minorities has this Court expanded the State's Equal Protection Clause, which accords with New Mexico's constitutional history and interstitial approach to interpretation. *See, e.g., Breen v. Carlsbad Mun. Schools*, 2005-NMSC-028, 138 N.M. 331; *Griego v. Oliver*, 2014-NMSC-003, 316 P.3d 865; Plaintiffs' Supplemental Brief ("Plfs. Supp. Brief"), at 30-31 (filed Feb. 2, 2023) (quoting CONNOR & HAMMONS, THE CONSTITUTIONALISM OF STATES 755 (2008)).

II. STANDARD OF REVIEW

Constitutional questions are reviewed *de novo*. *Rodriguez v. Brand West Dairy*, 2016-NMSC-029, ¶ 10, 378 P.3d 13; *State v. Ortiz*, 2021-NMSC-029, ¶ 27, 498 P.3d 264.

III. ARGUMENT

A. NEW MEXICO'S ARTICLE II, § 18 MIRRORS THE FOURTEENTH AMENDMENT.

New Mexico's 1911 Constitution, approved by an overwhelming majority of New Mexico citizens,[1] incorporated the language of the U.S. Constitution's Fourteenth Amendment, Section 1 nearly verbatim.[2]

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[1] January 12, 1911, vote on New Mexico Constitution: 31,742 in favor, 13,399 against. Thomas C. Donnelly, *The Making of the New Mexico Constitution Part II*, 12 N.M. Q. 435, 448 (1941).

[2] *Compare* N.M. Const. art. II, § 18 ("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."), *with* U.S. Const. amend. XIV, § 1 ("[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."). Article II, Section 18 of the New Mexico constitution finds no direct parallel in its neighboring state constitutions or in a survey of state constitutions at the time the Fourteenth Amendment was ratified. *See* Steven G. Calabresi & Sara E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment was Ratified in 1868*, 87 Tex. L. Rev. 7, 94 (2008) (reporting that while 19 states guaranteed "equality," equal protection under the laws varied considerably); *cf.* Colo. Const. art. II, §§ 1, 6 & 3; Wyo. Const. art. I, § 34, N.D. Const. art. I, § 22, S.D. Const art. 6, § 18, Wash. Const. art. I, § 12, Idaho Const. art. I, § 1, Utah

Thus, New Mexico and federal courts interpret and apply the exact same phrasing to adjudge claims of discrimination and fundamental rights violations. Unsurprisingly, New Mexico courts have repeatedly held that the State and Federal Equal Protection Clauses are coextensive, providing "the same protections."[3] While New Mexico has expanded search and seizure protections in criminal matters beyond that of federal minimums[4] and on occasion weighed in on New Mexico's Inherent Rights clause,[5] the New Mexico Supreme Court has invoked Article II, Section

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Const. art. I, §§ 2, 11 & 24; Okla. Const. art. II, § 1, Ariz. Const. art. II, § 2.

[3] *See, e.g.*, *E. Spire Commc'ns, Inc. v. Baca,* 269 F. Supp. 2d 1310, 1323 (D.N.M. 2003) ("The equal protection clauses in the United States and New Mexico Constitutions are co-extensive." (citing *Valdez*, 1998-NMCA-030, ¶ 6), *aff'd sub nom. E. Spire Commc'ns, Inc. v. N.M. Pub. Regulation Comm'n,* 392 F.3d 1204 (10th Cir. 2004); *Mieras v. Dyncorp*, 1996-NMCA-095, ¶ 16, 122 N.M. 401 ("The Equal Protection Clauses contained in the United States and the New Mexico Constitutions are substantially identical and have been interpreted as providing the same protections."); *Garcia v. Albuquerque Pub. Sch. Bd. of Ed.*, 1980-NMCA-081, ¶ 4, 95 N.M. 391 ("The standards for violation of the equal protection clauses of the United States and New Mexican Constitutions **are the same.**" (emphasis added)).

[4] *See, e.g.*, *Serna v. Hodges*, 1976-NMSC-033, 89 N.M. 351; *State v. Ochoa*, 2009-NMCA-002, 206 P.3d 143; *Montoya v. Ulibarri*, 2007-NMSC-035, 142 N.M. 89; *State v.* Crane, 2014-NMSC-026, 329 P.3d 689; *State v. Rowell*, 2008-NMSC-041, ¶¶ 20-23, 25, 144 N.M. 371.

[5] *See, e.g.*, *NARAL v. Johnson*, 1999-NMSC-005, 126 N.M. 788; *Cal. First Bank v. State*, 1990-NMSC-106, ¶¶ 44-45, 111 N.M. 64.

18's Equal Protection Clause as providing greater protection of civil rights only to protect against historical, invidious and purposeful discrimination against a discrete group of vulnerable plaintiffs.[6] In both *Griego* and *Breen*—although not explicitly under the arm of the interstitial approach searching for distinct state characteristics[7]—the Court pointed to the enaction of legislation protecting the very same class of plaintiffs.[8] In contrast, while the Redistricting Act promulgates guidelines, it falls far short of establishing an enforceable right upon

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[6] *See Griego*, 2014-NMSC-003, ¶¶ 48, 53 ("[T]he LGBT community is a discrete group that has been subjected to a history of purposeful discrimination, and it has not had sufficient political strength to protect itself from such discrimination."); *Breen*, 2005-NMSC-028, ¶¶ 22, 28 (holding mentally disabled to be a sensitive class requiring intermediate scrutiny because "[p]ersons with mental disabilities have also suffered a history replete with societal discrimination and political exclusion based on a characteristic beyond their control").

[7] *Compare id., with Morris v. Brandenburg*, 2016-NMSC-027, ¶¶ 31-38, 376 P.3d 836 (examining scientific studies, legal literature, decisions, and statutes under interstitial analysis but concluding "that there are no distinctive state characteristics with respect to the due process protections of Article II, Section 18 that warrant a departure from the federal analysis").

[8] *Breen*, 2005-NMSC-028, ¶ 27; *Griego*, 2014-NMSC-003, ¶ 48; *cf. State v. Adame,* 2020-NMSC-015, ¶¶ 21-28, 476 P.3d 872 (finding defendants had not demonstrated a flawed federal analysis or distinctive state characteristics justifying departure from federal precedent regarding claim of protected privacy interest under N.M. Const. art. II, § 10 in financial information voluntarily shared with their banks).

which Plaintiffs can stake or append their claim of partisan vote dilution.[9] From these cases, the Court can ascertain a common through-line: New Mexico's Equal Protection Clause provides no "greater protection than its federal counterpart."[10] Further, as explained below, no justifications outlined in *State v. Gomez*, 1997-NMSC-006, ¶¶ 18-20, 122 N.M. 777, are present here or compel departure from federal equal protection jurisprudence regarding partisan gerrymandering.

1. Federal Jurisprudence is Neither Flawed Nor Undeveloped.

Contrary to Plaintiffs' assertion, the U.S. Supreme Court has *never* held that partisan gerrymandering violates the federal equal protection clause.[11] Instead, the U.S. Supreme Court acknowledges that legislatures

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[9] *Rivera v. Schwab*, 512 P.3d 168, 186-87 (Kan. 2022) (rejecting use of guidelines because neither rule nor law which could provide "binding authority that can give rise to a legal challenge that courts can adjudicate"); *cf. Morris*, ¶¶ 49 & 51 (stating that the Inherent Rights Clause is neither an "enforceable independent source of individual rights" nor an "exclusive source for a fundamental or important constitutional right"); Plfs. Supp. Br. at 16-17.

[10] *State v. Martinez*, 2021-NMSC-002, ¶ 34, 478 P.3d 880 ("This Court has not yet held that Article II, Section 18 generally provides greater due process protection than its federal counterpart.").

[11] *See* Plfs. Supp. Br. at 1-2 (relying on concurrences and plurality opinions to contrive injury); *Maryland v. Wilson*, 519 U.S. 408, 413 (1997) (statements in a concurrence are not binding precedent); *State v.*

"may engage in constitutional political gerrymandering."[12] The question, under *Gomez*, is whether federal jurisprudence on this issue is flawed or undeveloped. It is not.

Plaintiffs do not argue federal caselaw on gerrymandering is flawed, but only "undeveloped." Plfs. Supp. Br. at 3. However, the U.S. Supreme Court spent decades trying to address political gerrymandering claims without success, leading to its decision in *Rucho*.[13] Given the Court's six-decade struggle to define a standard under serial plurality opinions, federal law cannot be fairly characterized as "undeveloped."[14] Thus, under *Gomez*, grounds to deviate from the federal analysis must be

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Toney, 2002-NMSC-003, ¶ 11, 131 N.M. 558 (plurality opinions are not binding).

[12] *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2497 (2019) (quoting *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999)).

[13] *Rucho*, 139 S. Ct. at 2497-98 (discussing history of the Court's political gerrymandering jurisprudence and its ultimate rejection in that case).

[14] *State v. Gomez*, 1997-NMSC-006, ¶ 20 (citing the "knock-and-announce" standard under *State v. Attaway*, 1994-NMSC-011, 117 N.M. 141, as an "undeveloped" area of law, where federal constitution did not provide until later); *but see State v. Attaway*, 1994-NMSC-011, ¶¶ 14-19, 24, & 35-36 (detailed discussion of federal law regarding reasonableness and announcement requirement).

found—if at all— in distinctive state characteristics bearing on the issue of partisan gerrymandering. None exists.

2. No Structural or Special State Characteristics Warrant Expansion or Justify Departure.

New Mexico has no specific statute or constitutional provision that lends this Court a yardstick against which to measure the constitutionality of political redistricting plans.[15] Sections 2, 3, and 4 of Article II of the New Mexico constitution do not deliver a different result.[16] Plaintiffs fail to link the drawing of congressional district lines to individual deprivations of life, liberty, property or happiness.[17]

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[15] Plfs. Supp. Br. at 5 (quoting *Rucho*, 139 S. Ct. at 2507); *see State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 1, 125 N.M. 343 ("[This case] concerns only the sanctity of the New Mexico Constitution and the judiciary's obligation to uphold the principles therein. It is the function of the judiciary to measure the acts of the executive and legislative branch solely by the yardstick of the Constitution. It is with this yardstick that we take the measure of this case." (alterations, internal quotation marks, and citation omitted)).

[16] *Compare id.*, *with* THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776). Notably, the Declaration was insufficient to overcome the fundamental separation of powers issue confronting the Supreme Court in *Rucho*. *See Rucho*, 139 S. Ct. at 2511 (Kagan, J., dissenting) (pointing to the Declaration of Independence ideal of popular sovereignty).

[17] *See generally* Plfs. Supp. Br.; *see also Rivera*, 512 P.3d at 179 ("Any line drawing, even one that violates equal protection guarantees, does

Nor do structural differences command departure from *Rucho*'s federal analysis.[18] Separation of powers—whether vertical or horizontal—constrains state and federal courts alike.[19] The political question doctrine developed out of these same constitutional and prudential concerns. *See Baker v. Carr*, 369 U.S. 186, 210 (1962) ("[N]onjusticiability of a political question is primarily a function of the separation of powers.")As commanded by Article III, Section 1 of the New

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not infringe on a stand-alone right to vote, the right to free speech, or the right to peaceful assembly.").

[18] Plaintiffs name five structural "differences," none of which hold water: (1) federalism, (2) Article III's Case or Controversy Clause, (3) federal judicial workload, (4) geographic knowledge or "state expertise," and (5) New Mexico's square shape. Plf. Supp. Br. at 5-11. To answer the Court's question directly, Petitioners address only material arguments on federalism and Article III's Case or Controversy Clause.

As to Plaintiffs' argument that state courts are better at addressing political gerrymandering claims than federal courts because they reside in the state, Plaintiffs ignore reality. *See* 28 U.S.C. § 2284(b)(1) (three-judge panel in redistricting includes a local federal district judge); *Maestas v. Hall*, 2012-NMSC-006, ¶ 20, 274 P.3d 66 (observing that "[a] federal three-judge panel had previously found a detailed history of racial and ethnic discrimination affecting the Clovis minority population"). Plaintiffs' argument rings all the more hollow when juxtaposed against the highly localized concerns federal courts address in racial gerrymandering and Voting Rights Act challenges. *See, e.g.*, *Miller v. Johnson*, 515 U.S. 900 (1995).

[19] Plfs. Supp. Br. at 6 (acknowledging that this Court should have just as much respect for "horizontal" separation of powers).

Mexico Constitution,[20] New Mexico's courts adhere to and abide by this doctrine.[21]

Respect for separation of powers is precisely why the Court should not interject itself into this fundamentally political dispute to impose its own policy preference as to just how "fair" maps need to be.[22] Putting

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[20] N.M. Const. art. III, § 1 ("The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted.").

[21] *Compare State ex rel. Coll v. Johnson*, 1999-NMSC-036, ¶ 22, 128 N.M. 154 (dismissing claim on standing grounds because nonjusticiable political question with no "judicially manageable standards" that Court could employ to determine lawfulness of challenged governmental conduct), *with* Plfs. Supp. Br. at 2 (incorrectly asserting that "this Court has never **once** embraced the political question doctrine" (emphasis added)); *compare also State ex rel. Coll*, 1999-NMSC-036, ¶ 24 ("Plaintiffs' oblique references to the Magna Carta and the people's right of self-government do not provide judicially manageable standards which the Court can utilize in order to determine the lawfulness of HB 399."), *with* Plfs. Supp. Br. at 16 & 30 (suggesting that the Court, by viewing equal protection through "prism" of N.M. Const. art. II, §§ 2, 3, & 4, is "clearly counsel[ed]" to adjudicate claims of gerrymandering, yet without suggesting or setting forth a single standard to employ in doing so).

[22] *See Rucho*, 139 S. Ct. at 2500 (2019) ("Deciding among just these different visions of fairness…poses basic questions that are political, not legal."); *Cockrell v. Bd. of Regents of N.M. State Univ.*, 2002-NMSC-009, ¶ 13, 132 N.M. 156 (stating that policy decisions of great magnitude that go to "New Mexico's most fundamental political processes," are "particularly unsuited for judicial resolution as a matter of state

appointed and elected judges and justices in the position of deciding maps which **will**—not maybe—favor one political party over the other jeopardizes the judiciary's independence and neutrality.[23] The mere presence or absence of a "Case or Controversy" clause does not overwrite these binding principles and grave concerns.[24]

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constitutional law," and rest within the "particular domain of the legislature, as the voice of the people").

[23] *See Maestas*, 2012-NMSC-006, ¶ 29 ("A court's adoption of a plan that represents one political party's idea of how district boundaries should be drawn does not conform to the principle of judicial independence and neutrality."); *see also* Levi A. Monagle, *Undermining Checks and Balances: the Fallout of* Maestas v. Hall, 44 N.M. L. Rev. 277, 290 (2014) ("However lines are drawn, with or without partisan intent, they have partisan impact.").

[24] *See* Plfs. Supp. Br. at 4 (quoting *New Energy Economy Inc. v. Shoobridge,* 2010-NMSC-049, 149 N.M. 42); *cf. New Energy Economy Inc.*, 2010-NMSC-049, ¶ 16 (addressing ripeness and stating, "We agree that the New Mexico Constitution does not expressly impose a 'cases or controversies' limitation on state courts like that imposed upon the federal judiciary by Article III, Section 2 of the United States Constitution. However, we have also held that the judicial power to resolve disputes in a government built upon a foundation separating the legislative, executive, and judicial functions should be guided by prudential considerations. Indeed, prudential rules of judicial self-governance, like standing, ripeness, and mootness, are founded in concern about the proper—and properly limited—role of courts in a democratic society and are always relevant concerns."); *cf. also id.* ¶ 19 (holding that judicial action intruded on "substantial separation of powers concerns").

B. NEW MEXICO'S HISTORY COMPELS THE CONCLUSION THAT ITS PEOPLE AND THEIR ELECTED REPRESENTATIVES ANSWER POLITICAL QUESTIONS AT THE HEART OF REPRESENTATIVE DEMOCRACY.

1. Partisanship has Been at the Core of New Mexico Politics and Governance from Day One.

Partisan outcomes of political procedures necessarily result from a democratic republic form of government. Partisan gerrymandering existed long before New Mexico gained statehood,[25] persisted at the time of our State's founding,[26] and will continue to be a by-product of

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[25] *See Rucho*, 139 S. Ct. at 2494-96 (discussing how the U.S. Constitution's framers were familiar with, and sometimes engaged in, political gerrymandering but "[a]t no point was there a suggestion that the federal courts had a role to play [in addressing the issue]").

[26] Public expressions of the political machinations surrounding early days of our history were quite striking. *See, e.g., Gerrymandering Bill introduced in House but not yet agreed to*, THE LAS VEGAS DAILY OPTIC, (Mar. 12, 1903) ("In redistricting the Territory for the election of the house and council the republicans are resorting to a spicies [sic] of Gerrymandering."); *Floyd C. Field Adviser Extraordinaire*, at 5, CLAYTON NEWS (Oct. 30, 1920) (commenting on Republican nominee "who gave his unqualified support to the crookedest gerrymander ever made in America," a "gerrymander that was calculated to disenfranchise every democrat in Union County," and who "acknowledged his full complicity in the politically dirty, stealing and thieving legislative gerrymander"); *To the Voters*, at 2-3, ESTANCIA NEWS-HERALD (Oct. 28, 1920) (reporting 1910 apportionment as "vicious" and the "crookedest gerrymander that ever cursed a state"); *see generally* Plfs. Supp. Br. at 11-18; *cf.* Edward D. Tittman, *New*

representative government until and unless the People decide to change it.[27] Lines must be drawn because districts must have boundaries for a functioning government. There are no neutral lines.[28] Partisan outcomes in redistricting were both known and familiar to the federal and state framers,[29] and are part of the history and governmental practice that

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Mexico Constitutional Convention: Recollections, 27 N.M. Hist. Rev. 3, 177 (1952) (commenting "why anyone hold believe that a convention to achieve a political end, could be organized on non-political lines is not clear.").

[27] *See Maestas*, 2012-NMSC-006, ¶ 27 (observing that "judicial independence…particularly important in this area, which is fundamentally a political dispute").

[28] Robert G. Dixon, Jr., *Fair Criteria and Procedures for Establishing Legislative Districts in Representation and Redistricting Issues* 7 (B. Grofman, A. Lijphart, R. McKay & H. Scarrow eds., 1982) ("[T]here are no neutral lines for legislative districts.")

[29] *See supra* notes 26 and 27. Eldridge Gerry, the much-maligned name bearer, signed the Declaration of Independence, the Articles of Confederation, and was one of only three delegates who refused to sign the U.S. Constitution over the absence of a Bill of Rights. Of note here, when Gerry, who also served as James Madison's Vice President, was presented with the Massachusetts redistricting plan that generated the portmanteau of "gerrymander," while hesitant, did not find the plan to offend his understanding of equality or the underlying democratic principles of the U.S. Constitution. *See* Greg Bradsher, *A Founding Father in Dissent*, 38 Prologue Magazine 2 (Summer 2006), available at https://www.archives.gov/publications/prologue/2006/spring/gerry.html (last visited February 22, 2023); Paul V. Niemeyer, *The Gerrymander: a Journalistic Catch-word or Constitutional Principle? the Case in Maryland*, 54 Md. L. Rev. 242, 253 n.63 (1995).

demands "unqualified deference" in guiding a court's interpretation of constitutional provisions.[30]

2. History of Equal Protection Clause and Redistricting in New Mexico Does Not Advance Plaintiffs Claim.

Petitioners mostly agree with Plaintiffs' exposition on the history of New Mexico's Constitution, apportionment, and redistricting. To summarize that discussion to the salient points for the Court's question:

- There was little to no debate or discussion of any individual rights under Article II,[31] much less the Equal

[30] *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2131 & 2136-28 (2022); *see Clark v. Mitchell*, 2016-NMSC-005, ¶ 14, 363 P.3d 1213; *Humana of N.M., Inc. v. Bd. of Cnty. Comm'rs of Lea Cnty.*, 1978-NMSC-036, ¶ 14, 92 N.M. 34 (stating that "a contemporaneous construction of a constitutional provision by the legislature, continued and followed, is a safe guide as to its proper interpretation" (citation omitted)); *State v. Ball*, 1986-NMSC-030, ¶ 40, 104 N.M. 176 ("unbroken history of unchallenged" statutes evidences accord with framer's intent); see generally *New Mexicans for Free Enter. v. City of Santa Fe*, 2006-NMCA-007, ¶ 11, 138 N.M. 785 (court "may consider history and context…to ascertain the will of the people"); Thomas J. Mabry, *New Mexico's Constitution in the Making-Reminiscences of 1910,* 19 N.M. Hist. Rev. New Mexico 172, 184 (1944) (N.M. Supreme Court Justice Mabry considered that 1910 Constitution not revised by convention "would represent a record of general approval" by New Mexico's citizens).

[31] This dearth of record continues beyond ratification to the national level, as the Joint Committee on Territories, on H.J.R. 14, continued debate in an extraordinary session, conducting an additional two weeks of hearings, but none of which touched on rights outside of referendum or amendment. *Hearings Before the Committee on Territories of the*

Protection Clause,[32] the primary contests of the Convention being progressive initiative and referendum measures, and amendment.[33]

House of Representatives on House Joint Resolution No. 14: Approving the Constitutions Formed by the Constitutional Conventions of Territories of New Mexico and Arizona. 61st Congress, 3rd Special Session (1911). The Republican apportionment plan was addressed during the hearings, but the addition of the Blue Ballot amendment countenanced in favor of admission under the plan. 61 CONG. REC. 1234-94 (1911); *id.* at 1235 (committee report to whole house stating that with increasing population along eastern border, "apportionment…suggests the denial of adequate representation…unless the constitution is made more easy of amendment.").

[32] Plaintiffs exceedingly unhelpful speculation that the Equal Protection clause "may have been borrowed from any number of sources, or none at all," Plfs. Supp. Br. at 14, ignores the near-verbatim adoption of the U.S. Const. Amend XIV, § 1, absent in that form and wording from state constitutions at the time, *see supra* note 2; *Equality under State Constitutions*, in A-113: STATE CONSTITUTIONS IN THE FEDERAL SYSTEM ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS 59-60 (July 1989) ("Most states [constitutions] do not contain an explicit equal protection clause" and "virtually all of these state constitution provisions differ significantly from the federal guarantee of equal protection."), and conspicuously absent from New Mexico's 1850 Constitution, 1889 Constitution, and the 1846 Kearny Bill of Rights. *See, e.g.*, N.M. Const., art. I (adopted July 18, 1850); N.M. Const. art. II (adopted Sept. 30, 1889, amended Aug. 18, 1890); *see generally Proceedings of the Constitutional Convention of the Proposed State of New Mexico*, Albuquerque Morning Journal Press (1910); Thomas C. Donnelly, *The Making of the New Mexico Constitution Part I,* 11 N.M. Q. 435, 455-62 (1941); Robert W. Larson, *Statehood for New Mexico, 1888-1912* 37 N.M. Hist. Rev. 168, (1962).

[33] Plfs. Supp. Br. at 17-22; Larson, *supra* note 34 at 195-96; Donnelly, *supra* note 1 at 449.

- Republican delegates outnumbered Democrats 2-to-1 and the first election resulted in Republican majorities in the state house and senate, but five Democratic state-wide offices, including governor.[34]

- Changes in voting population and ideologies left districts intact for 40 years following statehood,[35] until amended and re-drawn through constitutional amendment as ratified by the people of New Mexico, legislation, and litigation over the next 60 years.[36]

- New Mexico's own legislature recently proposed H.J.R. 1, 56th Leg., 1st Sess. (N.M. 2023), which would make Citizen Redistricting Commission's redistricting maps final.[37]

From the above, one conclusion is inescapable: New Mexico's voters, individually and through their elected representatives, are well-equipped

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[34] Plfs. Supp. Br. at 22

[35] Plfs. Supp. Br. at 23; Dorothy Cline, *New Mexico's State Constitution-Yesterday and Today*, 27 *New Mexico Quarterly* 4, 258 (1957); Tittman, *supra* note 26, at 180 (noting that the change in population and voters "made unnecessary a change in so political a subject").

[36] Plfs. Supp. Br. 23-26; *see also* N.M. Leg. Council Serv., *Piecemeal Amendment of the Constitution of New Mexico* (Dec. 2016), *available at* https://www.nmlegis.gov/Publications/New_Mexico_State_Government/Piecemeal_Amendment_Dec2016.pdf (last visited Feb. 21, 2023) (listing voter approval numbers of 1949 and 1955 amendments to legislative apportionment).

[37] Plfs. Supp. Br. at 27 (discussion of legislative progress of H.J.R. 1). Contrary to Plaintiff's less than gracious, and frankly wrong, assessment of the Legislature's apportionment abilities, H.J.R. 1 is a good example of the Legislature at work.

to answer the political question of redistricting and apportionment through available tools of amendment and legislation.[38]

3. Political Question Doctrine Followed in New Mexico.

As such, this Court has observed and recognized that political questions are best addressed through the political process. Contrary to Plaintiffs' assertions, the Court *has* embraced the political question doctrine.[39] For the Court to intervene at this point, in light of state and constitutional history, would be to impose the Court's idea of partisan

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[38] This is another reason why Plaintiffs' reliance on North Carolina caselaw is misplaced. New Mexico's courts do not face the same power vacuum in redistricting as in North Carolina, where their legislature's apportionment plans are not even subject to veto by the governor. *See Harper v. Hall*, 2022-NCSC-17, ¶ 252, 868 S.E.2d 499 (C.J. Newby, dissenting) (observing that the North Carolina constitution explicitly exempts redistricting legislation from the governor's veto power), *reh'g granted* (Feb. 3, 2023), *cert. granted sub nom. Moore v. Harper*, 142 S. Ct. 2901 (2022).

[39] *Compare* Plfs. Supp. Br. at 2 ("[T]his Court has never once embraced the political question doctrine"), *with State ex rel. Coll*, 1999-NMSC-036, ¶ 24, 128 N.M. 154, 162, 990 P.2d 1277 (refusing to "allow Plaintiffs' invocation of the great public interest doctrine to blind us to traditional standards of justiciability" and citing *Baker*, 369 U.S. 186, for its discussion of "what constitutes a nonjusticiable 'political question'"); *and Mutz v. Mun. Boundary Comm'n*, 1984-NMSC-070, ¶ 25, 101 N.M. 694 ("The wisdom, necessity or advisability of annexation, in the context of economic impact or fairness to the inhabitants of the territory to be annexed, are political questions left to the discretion of the municipality and the legislature.").

fairness[40] on the politically accountable branches, in contravention of the separation of powers.

C. UNDER THE FACTS AND LAW IN THIS CASE, PLAINTIFFS RAISE NO EQUAL PROTECTION CLAIM AND LEAVE THIS COURT WITHOUT A WORKABLE REMEDY.

1. Plaintiffs' Right to Vote Preserved.

Plaintiffs complain about the district in which they vote, as compared to the right to vote, but district placement does not infringe on a fundamental right.[41] Dilution of a political party's performance in the aggregate is not the kind of individual, fundamental right of franchise guaranteed by New Mexico's Constitution.[42] Under the facts alleged by

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[40] *Cf. Bruen*, 142 S. Ct. at 2130 ("[H]istorical analysis can be difficult; it sometimes requires resolving threshold questions, and making nuanced judgments about which evidence to consult and how to interpret it. But reliance on history to inform the meaning of constitutional text…is, in our view, more legitimate, and more administrable, than asking judges to make difficult empirical judgments about the costs and benefits of firearms restrictions, especially given their lack [of] expertise" in the field." (internal quotation marks and citation omitted)).

[41] *See Rivera*, 512 P.3d at 179 ("Any line drawing, even one that violates equal protection guarantees, does not infringe on a stand-alone right to vote, the right to free speech, or the right to peaceful assembly.").

[42] *Montano v. Los Alamos County*, 1996-NMCA-108, ¶¶ 8, 9, 122 N.M. 454 (evaluating equal protection challenge to statute under rational basis because even though plaintiffs' claim "concerns voting" the Court of Appeals recognized that "not every voting regulation is subject to strict scrutiny," and that strict scrutiny only applies when the right to

Plaintiffs, and with the judicially noticeable fact of the highly competitive 2022 Midterm Election results, Plaintiffs have not raised a viable claim of discrimination.[43] Under any standard, which Plaintiffs have still yet to

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vote is "subjected to severe restrictions"); *see also Pinnell v. Bd. of County Com'rs of Santa Fe County*, 1999-NMCA-074, ¶ 24, 127 N.M. 452 (noting the Court of Appeals "has similarly declined to hold previously challenged voting regulations to strict scrutiny"); *Lower Valley Water & Sanitation Dist. v. Pub. Serv. Co.*, 1981-NMSC-088, ¶ 23, 96 N.M. 532 (1981) (applying rational-basis review to alleged equal protection violation that was "a step removed from the actual voting process"); *see also* Reuben W. Hefling, *New Mexico Constitutional Convention,* 21 N.M. Hist. Rev. 60, 62-63 (1946) (recalling that provision of constitution covering "elective franchise took precedence over all else, and the drastic provisions incorporated into the constitution covering the elective franchise are almost impossible of amendment"); N.M. Const. art. XIX (requiring three-fourths approval of house and voting electors to restrict elective franchise).

[43] The outcome of the 2022 Midterm election in Congressional District 2 turned on just 1,350 votes. New Mexico Secretary of State, *Election Results 2022*, https://www.sos.state.nm.us/voting-and-elections/election-results/. Further, voter registration and turnout in CD-2 consistently lag other districts by 5-12%. Turnout for the recent election was even 5% lower than CD-2's showing in 2018, the last off-year cycle. *See* New Mexico Secretary of State, *Voter Registration Statistics*, https://www.sos.nm.gov/voting-and-elections/data-and-maps/voter-registration-statistics/, and *id.* at New Mexico Secretary of State, *Election Results 2018*, https://www.sos.nm.gov/voting-and-elections/election-results/past-election-results-2018. The Court may take judicial notice of these undisputed (and indisputable) facts. *See Lujan Grisham v. Romero*, 2021-NMSC-009, ¶ 7, 483 P.3d 545 (stating that the Court may take judicial notice of "a fact that is not subject to reasonable dispute because it (1) is generally known within the Court's territorial jurisdiction, or (2) can be accurately and readily determined

propose or advocate, SB-1 does not approach "egregious" or "extreme" levels of partisan dominance.

2. Plaintiffs Leave this Court Without a Workable Remedy.

It bears emphasizing that there remain no standards for this Court to adjudge unconstitutional degrees of partisanship in redistricting. As both Plaintiffs and the U.S. Supreme Court observes, "Provisions in state statutes and state constitutions *can* provide standards and guidance for state courts to apply."[44] But New Mexico has no such statute or constitutional provision. The Court is left to ask itself the same question faced in *Rucho*: "How much partisanship is too much?"[45] Aside from

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from sources whose accuracy cannot reasonably be questioned" (alterations, internal quotation marks, and citation omitted)).

[44] Plfs. Supp. Br. at 5 (quoting Rucho, 139 S. Ct. at 2507) (emphasis added); *see also Rucho*, 139 S. Ct. at 2524 n.6 (Kagan, J.) (dissenting) ("Contrary to the majority's suggestion, state courts do not typically have more specific 'standards and guidance' to apply than federal courts have," and in states that do, little guidance to be drawn limiting courts "from intervening too far in the political sphere.").

[45] *See Rucho*, 139 S. Ct. at 2500 (2019) ("Deciding among just these different visions of fairness…poses **basic questions that are political, not legal**.") (emphasis added); *Cockrell*, 2002-NMSC-009, ¶ 13 (stating that policy decisions of great magnitude that go to "New Mexico's most fundamental political processes," are "particularly unsuited for judicial resolution as a matter of state constitutional law,"

pointing to nonbinding redistricting guidelines, irrelevant statutory provisions, and the decision in *Maestas* that this Court was careful to emphasize dealt only with *court-drawn* maps, Plaintiffs have given this Court no basis to craft a judicially manageable standard or workable remedy for New Mexico.[46]

IV. CONCLUSION

In conclusion, New Mexico's equal protection clause has only been interpreted by this Court to reach beyond its federal analog to provide greater protection of historically discriminated, vulnerable and discrete populations without access to political remedy. That population is not present here. Further, were this Court to engage in a search for special structures or distinctive state characteristics, the most striking are (1) New Mexico's outlier status in incorporating of the language of the Fourteenth Amendment nearly wholesale, and (2) its People's active and

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and rest within the "particular domain of the legislature, as the voice of the people").

[46] *Cf. Rucho*, 139 S. Ct. at 2500 ("There are no legal standards discernible in the Constitution for making such judgments [of how politically fair a map must be], let alone limited and precise standards that are clear, manageable, and politically neutral. Any judicial decision on what is 'fair' in this context would be an 'unmoored determination' of the sort characteristic of a political question beyond the competence of the federal courts.").

engaged role in apportionment, amendment, and redistricting since statehood.[47] If the language of New Mexico's Article II, Section 18 is to mean something different today than New Mexico's framers intended or its history supports, that modernization must be addressed through convention or legislative constitutional commission, not by judicial fiat.[48] In short, political questions deserve answers generated by, for, and of the People.

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[47] *See* Cline, *supra* note 36 at 258-59 (noting that not only did voters approve the 1910 Constitution simultaneously with its first amendment making amending more workable, as of 1957, 40 measures had been added, 17 of 25 articles revised, and half of 23 proposed amendments approved by voters).

[48] *Id.* at 261-62; *see also State ex rel. Hughes v. Cleveland,* 1943-NMSC-029, ¶ 35, 47 N.M. 230 (changes in New Mexico's 1910 Constitution worked through amendment, "the remedy is not through the courts, whose only function is to construe the language actually employed").

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CERTIFICATE OF SERVICE

Pursuant to Rules 12-307(C) and 12-307.2(D)(2) NMRA, the foregoing Petitioner's Response to Respondent's Supplemental Brief-in-Chief was served on the following on February 22, 2023, by the method reflected:

Person Served	Method
All parties or counsel of record	E-File/E-Serve
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