

FILED
5th JUDICIAL DISTRICT COURT
Lea County
10/6/2023 3:01 PM
NELDA CUELLAR
CLERK OF THE COURT
Cory Hagedoorn

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 DEANN KIMBRO, and
PEARL GARCIA,

Plaintiffs,

vs.

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

Defendants.

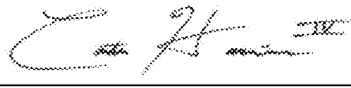
NOTICE OF APPEAL

The Plaintiffs hereby appeal — to the New Mexico Court of Appeals, which has been instructed to certify the matter to the New Mexico Supreme Court immediately — the final judgment of the District Court embodied in its Findings of Fact and Conclusions of Law (filed Oct. 6, 2023) (Exhibit A to this Notice). This appeal is taken against Defendants Mimi Stewart and Javier Martinez (collectively, the “Legislative Defendants”) and Defendant Maggie Toulouse Oliver. Appellate counsel may include Harrison & Hart, LLC (Carter B. Harrison IV), whose address is 924 Park Avenue SW, Albuquerque, New Mexico 87102, and Troutman Pepper

Hamilton Sanders LLP (Misha Tseytlin and Kevin LeRoy), whose address is 227 W Monroe St
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Respectfully submitted,

HARRISON & HART, LLC

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Attorneys for the Plaintiffs

Exhibit

Ex. A: Findings of Fact and Conclusions of Law (13 pages)

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of October 2023, I submitted the foregoing Notice of Appeal electronically via the Court's Odyssey filing system, and when doing so I selected the option for automated electronic service of the certified document, which will occur on the date the clerk's office formally files the document.

HARRISON & HART, LLC

By: /s/ Carter B. Harrison IV
Carter B. Harrison IV

STATE OF NEW MEXICO
COUNTY OF LEA
FIFTH JUDICIAL DISTRICT COURT

REPUBLICAN PARTY OF NEW MEXICO, *ET AL.*,
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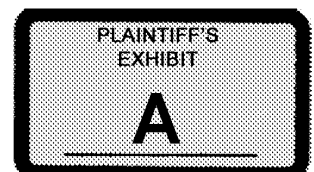
FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS MATTER came before the Court on the 27th and 28th of September, 2023, for trial. The Court heard testimony and received exhibits, and heard argument by the parties. The parties have submitted proposed findings of fact and conclusions of law and by stipulation have submitted attachments and addendums to the proposals, which the parties agree will be part of the record before the Court. The Court being sufficiently advised makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

A. Congressional Redistricting Law and History.

1. The United States Constitution requires each state to redraws its congressional-district map every decade after the federal census to reapportion equally its districts' populations. *See* U.S. Const. art. I, § 2.
2. Since the 1980 census, New Mexico has had three (3) congressional seats.
3. For the past two redistricting cycles, New Mexico's congressional district maps have ultimately been drawn by courts. In 2000, the State's political branches failed to adopt



a map. Due to this impasse, the District Court adopted a congressional map for the State. (See *Jepsen v. Vigil-Giron*, No. D-101-CV-200102177.) The *Jepsen* court-drawn congressional plan adopted a “least change” approach, and shifted just eight (8) precincts to equalize population.

4. After the 2010 census, the Legislature and the executive again reached an impasse on redistricting plans for the legislative and congressional districts. See *Maestas v. Hall*, 2012-NMSC-006, ¶ 2 n.1, 274 P.3d 66, 70. Numerous lawsuits challenged the resulting malapportionment. The Honorable James Hall presided over the redistricting litigation, which was consolidated under Cause No. D-101-CV-201102942, and led to the *Maestas* appeal.
5. With respect to New Mexico’s congressional map, Judge Hall employed the same approach as the *Jepsen* court a decade earlier by adopting a “least change” map which moved the smallest number of voters.
6. In *Maestas*, the New Mexico Supreme Court addressed state plans and advised that a court tasked with drawing districting maps should look to previous plans and policies to give effect to the will and voice of the people through their elected representatives. *Maestas*, 2012-NMSC-006, ¶¶ 31 & 32. The Court also endorsed the creation of more competitive districts whenever practicable as “healthy” for a representative democracy by allowing “voters to express changed political opinions and preferences.” *Maestas*, 2012-NMSC-006, ¶41.

7. Congressional districts in New Mexico have generally remained consistent from 1990 through 2020, with only small changes made by courts through a “least change” approach.
8. As a result, prior to 2021 the last time congressional districts in New Mexico reflected the policy choices of elected representatives rather than constrained least change line-drawing by the judiciary in response to litigation was in 1991.

B. Citizens Redistricting Committee.

9. In April 2021, the State Legislature adopted the Redistricting Act of 2021 (“Redistricting Act”), NMSA 1978, § 1-3A-1 to -9 (2021), which created the New Mexico Citizen Redistricting Committee (“Redistricting Committee”).
10. The Redistricting Committee’s purpose is to adopt district plans for New Mexico’s congressional districts, along with other districts, and submit those plans to the State Legislature. *See* § 1-3A-5.
11. The Redistricting Committee is designed to be bipartisan, *see* § 1-3A-3, and not have as members anyone who may have a political interest in the outcome of the redistricting process, *see* § 1-3A-4.
12. Section 1-3A-7 requires the Redistricting Committee to develop redistricting plans in accordance with several standards.
13. Section 1-3A-7 also prohibits the Redistricting Committee from relying upon or referencing partisan data, such as voting history or party registration data, with an exception based on compliance with federal law.

14. The plans approved by the Redistricting Committee and submitted to the State Legislature are to be treated in the same manner as legislation recommended by interim legislative committees. *See* § 1-3A-9(B).
 15. The Redistricting Committee held several hearings around the state, as required, formulated and published maps for further consideration, and held several more hearings around the state.
 16. The Redistricting Committee heard from several groups and citizens, including certain Native American nations, namely Zuni Pueblo and the Mescalero Apache Nation, who stated a desire to be split between two congressional districts to increase the amount and opportunity of available, responsive representation. It also heard from certain South Valley and Southern New Mexico residents who expressed a desire to combine with communities in the Rio Grande Valley - from the South Valley of Albuquerque down to the border with the State of Texas - into a single district due to affinities, culture, lifestyle, immigration status, access to services, and other common concerns.
 17. No evidence was presented to the Court that any person or group representing the oil extraction industry or southeastern New Mexico asked the Redistricting Committee to split southeastern New Mexico into multiple congressional districts.
 18. The Redistricting Committee approved three (3) proposed maps and submitted them to the Legislature as required by law. The maps were Concept A, Concept E – Revised, and Concept H.
- C. 2021 Legislative Special Session and Senate Bill 1 (“SB 1”).

19. The New Mexico Legislature met in special session in December of 2021 for the purpose of redistricting.
20. Democrats controlled both houses of the New Mexico Legislature at the time. In addition, both the Governor and Lieutenant Governor were Democrats.
21. SB 1, sponsored by Democratic Senators Joseph Cervantes and Daniel Ivey-Soto used Concept H of the Redistricting Committee's proposals as a basis, and modified it after several committee hearings.
22. During the special session, Republicans were effectively shut out of meaningful participation in the construction and passage of SB 1. (See testimony of Rep. Jim Townsend, Sen. David Gallegos, and Sen. William Sharar.)
23. During the process of drafting and passing SB 1, Sen. Mimi Stewart, President of the Senate, (and a Defendant in this case), exchanged texts with a representative of the Center for Civic Policy ("CCP"), an advocacy group. She stated, "[w]e improved [the Concept H Map] and now have CD 2 [Congressional District 2] at 53% dpi [Democratic Performance Index]!" The representative from Center for Civic Policy then asks Senator Stewart, "Who takes the hit? . . . There's only so much dpi to go around, you know." Senator Stewart replies that "[Legislative Defendant's expert] Sanderoff's dpi for your map H is 51.8% [for District 2]. That's not enough for a mid term election so we adjusted some edges, scooped up more of abq [Albuquerque] and are now at 53%. CD 1 is 54%, CD 3 is 55.4%." Plaintiffs' Trial Exhibit 1.
24. SB 1 altered the previous congressional districts, adding all of Lincoln and De Baca

counties and part of Otero County to CD 1. It added part of Eddy and Lea counties to CD 3. It split Chaves County, previously exclusively in CD 2, into all three (3) congressional districts. It also made changes in and around Albuquerque in Bernalillo County, and parts of Valencia, Sandoval, and Santa Fe counties.

25. While the 2020 census required only minor population adjustments to reapportion New Mexico's districts, "mapmakers substantially altered the map for the first time in decades," diluting Republican votes through cracking and packing. *Trende Rep.*26, 32, 50, 78; *Tr. Day 1* at 233–37.
26. SB 1 shifted "more than twenty times the number of residents that had to be shifted to meet equal population requirements," *Trende Rep.*33, moving 505,952 residents instead of only about 23,000 as required, *id.* at 33, 36. After the 2020 census, New Mexico's districts were less than two percentage points away from the ideal population—District 1 only needed to gain 11,264 residents; District 2 only needed to lose 8,181; and District 3 only needed to lose 3,082. *Trende Rep.*32; *Tr. Day 1* at 234. Yet, under SB 1, District 1 shifted 166,485 residents to District 2, although District 1 was underpopulated. *Trende Rep.*33; *Tr. Day 1* at 235. District 3 gave 21,292 residents to District 2 and 122,222 residents to District 1, although it only had to give up 3,082 residents. *Trende Rep.*33; *Tr. Day 1* at 235–36. And while District 2 was only overpopulated by 8,181 residents, it lost over 195,000 residents, giving 55,518 residents to District 1 and 140,435 residents to District 3, even as District 3 had to lose population. *Trende Rep.*33; *Tr. Day 1* at 234–36; *see also* *Trende Rep.*34 (quantifying

these changes in chart form).

27. The shifting of these residents focused on the southeastern and central regions of the state. The former is highly Republican while the latter is highly Democrat, resulting in a packing of a net “approximately 40,000 Democratic votes” into District 2 and flipping District 2’s partisan makeup. *Trende Rep.* at 35–36 (relying on presidential-vote data); *see also id.* at 36–43 (reaching same conclusion after relying on an “index of [ten] elections,” “party registration data,” “actual vote results,” and the “ten statewide races included in [the] index individually”).
28. SB 1 places Plaintiffs Gallegos and Gonzales into a district (CD 2) with a 53% Democratic Performance Index (“DPI”) or higher. Plaintiff Gallegos, a Republican and New Mexico State Senator resides in Lea County, which is now split, or “cracked” under the new map. Likewise, Plaintiff Gonzales, a registered Republican voter, resides in Otero County, which is also now split. Plaintiffs Bobby and Dee Ann Kimbro, registered Republican voters who live in Lea County, are now moved from District 2 into District 3.
29. SB 1 also put Plaintiffs Jennings, Vargas, and Garcia into districts with a 53% DPI or higher. Plaintiffs Vargas’ and Garcia’s residences moved from District 3 into District 2. Plaintiff Jennings’ residence moved from District 2 to District 3.
30. SB 1 splits nine (9) counties, the most in New Mexico’s history.
31. SP 1 splits southeastern New Mexico, where a very high percentage (as much ninety-five percent (95 %)) of New Mexico’s oil extraction industry exists.

32. Before redistricting, Democrat and Republican party registrations in CD 2 were almost even, with Republicans having a very slim lead, 155,608 to 155,432 (2021). After redistricting under SB 1, Democrats had a registration advantage of 177,047 to 124,125 (Jan. 2022), a thirteen percent (13%) swing. As of November 2022, Democrats had a registration advantage of twelve percent (12%): 177,638 to 128,006.
33. Before redistricting, in CD 2, in four out of five elections, the Republican candidate won. The average margin of victory was 16.4%. After redistricting, in 2022, the Democratic candidate won by less than .7%. In addition, in the other two districts, for the same elections, the Democratic candidates won, but their average margin of victory in the five previous elections went from 21% to 11.5% in CD 1, and from 24.7% to 16.4% in CD 3.
34. Political registration in New Mexico has shifted over the years, with Democratic registration numbers declining, Republican numbers staying mostly even, and many more people not registering as either Democrat or Republican, therefore making party registration a less meaningful predictor of partisan performance and election outcomes.
35. Mr. Trende's expert report shows the change in performance indexes between the three congressional districts before and after SB 1's enactment. His opinion is that the changes make CD 2 a district that favors Democratic candidates, and entrenches that party in the district.
36. Mr. Trende's simulation analysis shows that SB 1 is an extreme outlier compared to millions of maps created without using partisan considerations. The Court finds Mr.

40. Mr. Sanderhoff's expert opinion is that the enactment of SB 1 does not entrench the Democratic Party in power in CD 2. He says that CD 2 went from a strong leaning Republican district, where a Democratic candidate could win an occasional race in certain circumstances, to a competitive district where either a Democratic or a Republican candidate could win.
41. To raise the number of Democrats in CD 2 to reach the 53% performance index, the Legislature lowered the number of Democrats in CD 1 and CD 3 (measured either in terms of registration or performance index), but still kept their numbers above the 54% performance index level that marks a district as "competitive".
42. In the only congressional election conducted after SB 1 was enacted, the Democratic candidate beat the Republican candidate, a one-term incumbent, by 1,350 votes (96,986 to 95,636), a 0.7% spread. The Republican incumbent was one of only two Republican incumbents who lost that year. Nationally, Republicans gained a majority in the House of Representatives that year, although with lower numbers than many experts had predicted.

CONCLUSIONS OF LAW

1. As a threshold question, the Court finds that SB 1 created a class of similarly situated individuals treated dissimilarly. *See Grisham v. Van Soelen*, 2023 WL 6209573 (S-1-SC-39481), ¶ 51. Congressional District 2 has been "cracked" and Republican voters moved to other congressional districts, with Democratic voters moved into the district.
2. The intent of legislators in passing legislation is shown primarily by the effect of the

legislation, and can also be shown by contemporaneous statements made by legislators when the legislation was under consideration. See *U.S. Brewers Ass'n, Inc. v. Director of the New Mexico Dept. of Alcoholic Beverage Control*, 1983-NMSC-059 ¶¶ 9-10.

3. The Court finds that the Plaintiffs' predominant purpose in redrawing CD 2 in SB 1 was to entrench the Democratic Party in power by diluting the votes of citizens favoring Republicans. In so finding, the Court notes sufficient evidence was provided by the Plaintiffs of the "cracking" of CD 2, shown by the significant swings in voters who were moved out and other voters moved into the district, and the partisan difference in these voters, as noted above. Further, the evidence of the splitting of significant areas of southeastern New Mexico, a heavily Republican area, into separate districts, including Lea and Eddy counties being split into two districts, and Chaves County being split into three districts shows Plaintiffs' intent to "crack" the district. The "scooping" of Democratic areas in Bernalillo County and adding them to CD 2 also shows the Plaintiffs' intent.
4. The Court also notes the public statements made by Defendants and other elected officials about their plans for redistricting and the outcomes they hoped to accomplish made contemporaneously during this legislative process was clear evidence of their intent to dilute the votes of the Plaintiffs as Republican voters in CD 2 in southeastern New Mexico.
5. The Court finds that the objective evidence presented shows the resulting dilution of the Plaintiff's vote was substantial. Relevant to the Court's finding is the wide swing

in voter registration percentages and the partisan performance index changes between the prior map and the new map for CD 2 under SB 1. Also noted is the large number and partisan makeup of voters moved in and out of CD 2 to effect numerically compliant districts when only a small number was necessary. Finally, the evidence that the SB 1 map was an extreme outlier when compared to other simulated maps made without partisan criteria is indicative of the legislators' intent in creating and enacting a partisan gerrymander. All of this evidence is similar to the type of evidence Justice Kagan says is relevant in her *Rucho* dissent.

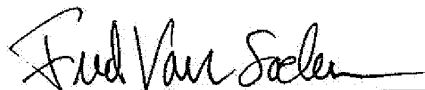
6. The Court finds that the Defendants in this case have not demonstrated a legitimate, nonpartisan justification for the challenged map. The Defendants have offered as nonpartisan justification for the map that the oil extraction industry that is so heavily concentrated in southeastern New Mexico would benefit from having multiple voices at the federal level. They note that other groups, including the Mescalero Apache Nation and Zuni Pueblo, requested to be split between more than one districts. They point to testimony from legislators during the consideration of SB 1 that the industry would benefit from such a split. However, this justification was contradicted by testimony from legislators at trial from the affected area, who stated that it would not be beneficial, and importantly, no evidence was presented that anybody from the industry or the affected area made such a request of the Legislature in passage of this bill, in contrast to the Native American requests.
7. The Court does not find that the disparate treatment of vote dilution rises to the level

of an egregious gerrymander. The New Mexico Supreme Court, adopting the three-part Kagan test in the her dissent in *Rucho v. Common Cause*, 139 S.Ct. 2484 at 2516 (2019), says “the touchstone of an egregious partisan gerrymander under Article II, Section 18 is political entrenchment through intentional dilution of individual’s votes(.)” See *Grisham v. Van Soelen*, *supra* at ¶ 67. Experts for both the Plaintiffs and Defendants gave conflicting testimony as to whether future congressional races in CD 2 are effectively predetermined by the map, or if either Republicans or Democrats have a competitive chance to win. However, the only actual election evidence we have is from 2022, in which the winner, a Democrat, won by only 0.7% of the vote over the Republican.

8. The Defendants’ intentions were to entrench their party in CD 2, and they succeeded in substantially diluting their opponents’ votes. However, given the variables that go into predicting future election outcomes, coupled with the competitive outcome of the only actual election held so far under the SB 1 map, the Court finds that the Plaintiffs have not provided sufficient evidence that the Defendants were successful in their attempt to entrench their party in Congressional District 2.
9. As stated by the New Mexico Supreme Court in *Grisham v. Van Soelen*, *supra* at ¶ 30, some degree of a partisan gerrymander is permissible. It is only when partisan gerrymanders are “egregious” that constitutional protections are indicated. Because “entrenchment” is the touchstone of an egregious partisan gerrymander which the New Mexico Constitution prohibits, the Court finds that the congressional redistricting map

enacted under Senate Bill 1 does not violate the Plaintiffs' equal protection rights under Article II, Section 18 of the Constitution of the State of New Mexico.

IT IS SO ORDERED.

A handwritten signature in black ink, reading "Fred Van Soelen". The signature is written in a cursive style with a long horizontal flourish extending to the right.

HON. FRED T. VAN SOELEN
DISTRICT JUDGE