

STATE OF NEW MEXICO  
COUNTY OF LEA  
FIFTH JUDICIAL DISTRICT

REPUBLICAN PARTY OF NEW MEXICO,  
et al,

Plaintiffs,

v.

Cause No. D-506-CV-2022-00041

MAGGIE TOLOUSE OLIVER, et al,

Defendants.

**LEGISLATIVE DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS  
PLAINTIFFS' VERIFIED COMPLAINT**

Although Plaintiffs invite this Court to put the proverbial cart before the horse, at least they get the question right.<sup>1</sup> Whether challenged by a party or raised *sua sponte* by the Court, there must first be jurisdiction to decide the matter, *i.e.* a claim for relief that is redressable by the Court. Here, Plaintiffs' claims of partisan gerrymandering are doubly nonjusticiable because (1) the matter is committed to the Legislature, N.M. Const. art. IV, §3, and (2) the Court lacks judicially manageable standards to determine, as Justice Kennedy and Chief Justice Roberts forewarned, what *degree* of partisanship spurs a Court to action. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 420 (2006), (Kennedy, J.) (identifying the problem as "providing a standard for deciding how much partisan dominance is too much"); *Rucho v. Common Cause*, 139 S. Ct. 2484, 2498 (2019). Lacking jurisdiction, the Court must dismiss Plaintiff's Verified Complaint and

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<sup>1</sup> See *Response* at 10 ("The relevant question therefore is whether New Mexico has adopted or otherwise developed the sort of statutory or constitutional standards for determining... an unconstitutional political gerrymander.")

refrain from considering Plaintiffs' claim under the New Mexico Equal Protection Clause, N.M. Const. art. II, § 18, because to weigh in on matters without jurisdiction runs afoul of the fundamental prohibition against advisory opinions.

***A. No New Mexico Law Governs or Proscribes Partisanship in the Legislative Redistricting Process.***

Plaintiffs paint a morbid picture of political parties “forever destined” to complain “into a void” of the injuries worked by redistricting. *Response* at 2. Dramatics aside, Plaintiffs rely on the Redistricting Act, NMSA 1978, § 1-3A-7 (2021), which governs only the Citizen Redistricting Committee, and the holdings of *Maestas v. Hall*, 2012-NMSC-0006, 274 P.3d 66, setting forth standards for *judicially-drawn* maps, as providing clear, manageable criteria for this Court to employ in determining the unacceptable degree of unconstitutional partisanship in legislatively-drawn maps. *See Response* at 10-11. Plaintiffs artfully avoid putting their finger on the exact standard for the Court to use, instead gesturing generally to “traditional districting principles,” *id.* at 11-12 and remaining noticeably silent as to the exact statutory language or constitutional provision that provides meaningful direction and an applicable standard. Unfortunately for Plaintiffs, the One Person, One Vote doctrine does not apply to Majority Party, Majority Vote, or extend to vindicate the rights of political parties.<sup>2</sup> Nor do racial vote dilution cases provide a framework that can be re-worked to evaluate and decide partisan challenges.<sup>3</sup> Finally, that the

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<sup>2</sup> *See Rucho*, 139 S. Ct. at 2501 (“It hardly follows from the principle that each person must have an equal say in the election of representatives that a person is entitled to have his political party achieve representation in some way commensurate to its share of statewide support... [One-person, one-vote] does not extend to political parties.”)

<sup>3</sup> *See id.* at 2502 (where racial gerrymandering claim asks for Court to eliminate racial classification and discrimination, “a partisan gerrymandering claim cannot ask for the elimination of partisanship.”)

Court in *Maestas* was forced to intervene, reluctantly, in the redistricting process by action necessitated out of legislative gridlock does not stand for the general proposition that New Mexico Courts should wade willy-nilly into the political thicket.

***B. Neither North Carolina nor Ohio Decisions Provide Guidance to this Court.***

The Legislative Defendants omitted citation to recent redistricting decisions out of North Carolina and Ohio courts because neither provide footing for this Court to decide matters of New Mexico law. First, the North Carolina redistricting process remains markedly different from New Mexico, lacking an executive veto. Therefore, in North Carolina, “the only way that partisan gerrymandering can be addressed is through the courts.” *Harper v. Hall*, 2022-NCSC-17, ¶ 4, 2022 WL 496215, at \*2 (N.C. Feb. 14, 2022). Additionally, North Carolina has interpreted its state Equal Protection Clause to provide far greater protections than the federal analog, guaranteeing not only “substantially equal voting power” but also “substantially equal legislative representation,” “equal representational influence” in the aggregate, and political equality. *Id.* at ¶¶ 143–149 (citing *Blankenship v. Bartlett*, 363 N.C. 518, 681 S.E.2d 759 (2009) and *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002)).

Second, Ohio’s citizens initiated and adopted constitutional amendments in 2015 and 2018 to address partisanship in redistricting. *See* Ohio Const. art. XI & art. XIX. Thus, the Ohio Supreme Court in *Adams v. DeWine*, 2022-Ohio-89, applied Article XIX, Section 1(C)(3)(a), which provides that “The general assembly shall not pass a plan that unduly favors or disfavors a political party or its incumbents,” in conjunction with other constitutional mandates regarding district requirements and process to ascertain favoritism unwarranted by the application of “specific line-drawing requirements to Ohio’s natural political geography.” *Adams v. DeWine*, 2022-Ohio-89, ¶40; 2022 WL 129092, at \*9. No such guidance appears in Article IV, Section 3 of

the New Mexico Constitution, much less at the granular detail compelled by Ohio’s state-wide constitutional reforms. Plaintiffs complain that unless this Court takes up its judicial sword to eradicate partisanship from redistricting, they are doomed to endure an everlasting injury. Not so—Ohio’s citizenry has already drafted the road map to remedy.

***C. New Mexico’s Equal Protection Clause Does Not Recognize “Partisan Vote Dilution” Claims.***

Plaintiffs assert—without direct authority—that because New Mexico’s Equal Protection Clause “is at least as broad” as its federal counterpart, *Response* at 1, it necessarily encompasses political gerrymandering claims. Plaintiffs’ argument somewhat defies logic by relying on an outdated and abrogated plurality federal opinion<sup>4</sup> as their claimed basis for current state constitutional injury. By overlooking intervening opinions and *Rucho*, Plaintiffs’ stance is akin to citing *Plessy v. Ferguson*, 163 U.S. 537 (1896) while ignoring *Brown v. Board of Education*, 347 U.S. 483 (1954).

Further, Plaintiffs have failed to carry their burden in mounting an Equal Protection claim. As the party challenging the legislation, Plaintiffs must first prove that they are similarly situated, but treated dissimilarly—that SB-1 discriminates against Plaintiffs. Second, Plaintiffs must also show that SB-1 is not rationally related to a legitimate governmental purpose. The Court is not without precedent in this arena of voting challenges as violative of the equal protection clauses, both state

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<sup>4</sup> Compare *Response* at 6 (citing *Davis v. Bandemer*, 478 U.S. 109, 116-117 (1986) as recognizing injury for partisan gerrymandering), with *Davis*, 478 U.S. at 134 (holding plaintiffs’ claims did not state or prove a cause of action under the federal equal protection clause), and *id.* at 139 (disagreeing that partisan intent violates equal protection clause); see also *Rucho v. Common Cause*, 139 S. Ct. at 2807-11 (mere fact that map makes it more difficult for a political party to elect a representative of its choice does not make the map unconstitutional).

and federal.<sup>5</sup> Under the proper standards, Plaintiffs' allegations of discriminatory intent are hyperbolic in the extreme and cannot substitute as actual evidence of dissimilar and irrational treatment in delivering on the burden of proof. Indeed, Plaintiff's citation of authority from *Davis v. Bandemer*, 478 U.S. 109, 164 (1986) that "[a]n intent to discriminate" in the sense that Plaintiffs assert "may be present whenever redistricting occurs," ignores the abrogation of that case by *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

In conclusion, for the reasons set forth in their *Motion to Dismiss* and as supported above, the Legislative Defendants ask this Court dismiss Plaintiffs' Verified Complaint and for such other and further relief as this Court deems proper.

Respectfully,

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<sup>5</sup> See, e.g., *Montano v. Los Alamos County*, 1996-NMCA-108, ¶¶ 8 & 9, 122 N.M. 454, 457 (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 vote is "subjected to severe restrictions") (citing *Burdick v. Takushi*, 504 U.S. 428, 433 & 443 (1992)); *Pinnell v. Bd. of County Com'rs of Santa Fe County*, 1999-NMCA-074, ¶ 24, 127 N.M. 452, 458, 982 P.2d 503, 509 (noting the Court of Appeals "has similarly declined to hold previously challenged voting regulations to strict scrutiny" and citing *Montano*, supra, and *Lower Valley Water & Sanitation Dist. v. Public Serv. Co.*, 96 N.M. 532, 537, 632 P.2d 1170, 1175 (1981), which applied rational-basis review to alleged equal protection violation that was "a step removed from the actual voting process"); *Prince v. Bd. of Ed. of Cent. Consol. Indep. Sch. Dist. No. 22*, 1975-NMSC-068, 88 N.M. 548, 550, 543 P.2d 1176, 1178

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 23, 2022, I caused the foregoing Reply along with this Certificate of Service, to be served and filed electronically through the Tyler Technologies Odyssey File & Serve electronic filing system, which caused all parties or counsel of record to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

~~HINKLE SHANOR LLP~~