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IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

MICHELLE LUJAN GRISHAM, et al.,

Petitioners-Defendants,

vs.

No. S-1-SC-39481
D-506-CV-2022-00041

THE 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.

PLAINTIFFS' SUPPLEMENTAL REPLY BRIEF

Carter B. Harrison IV
Daniel J. Gallegos
HARRISON, HART & DAVIS, LLC
924 Park Ave SW, Suite E
Albuquerque, NM 87102
(505) 295-3261
carter@harrisonhartlaw.com
daniel@harrisonhartlaw.com

Counsel for Plaintiffs-Real Parties in Interest

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STATEMENT OF COMPLIANCE

Pursuant to Rule 12-318(G) & (A)(1)(c) NMRA, I certify that this Supplemental Brief complies with the limitations of Rule 12-318(F)(3), which limits such briefs to 11,000 words (when a proportionally spaced font is used, such as Times New Roman, which is what has been used here) or 35 pages, whichever is longer. The body of this brief contains 5,259 words as measured by the Word Count function on Microsoft Word 365.

HARRISON, HART & DAVIS, LLC

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

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ARGUMENT

I. The New Mexico Equal Protection Clause is broader than its federal analogue in ways that speak directly to partisan gerrymandering.

"A grave threat to independent state constitutions, and a key impediment to the role of state courts in contributing to the dialogue of American constitutional law, is lockstepping: the tendency of some state courts to diminish their constitutions by interpreting them in reflexive imitation of the federal courts' interpretation of the Federal Constitution." Hon. Jeffrey S. Sutton (6th Cir.), *51 Imperfect Solutions: States and the Making of American Constitutional Law* 174 (2018).

> There is no reason to think, as an interpretive matter, that constitutional guarantees of independent sovereigns, even guarantees with the same or similar words, must be construed in the same way. Still less is there reason to think that a highly generalized guarantee . . . would have just one meaning over a range of differently situated sovereigns.

Id.

The Fourteenth Amendment to the U.S. Constitution was ratified in 1868, and crafted with special attention to considerations specific to that time: for example, the threat of recurring rebellion by the formerly slave-holding states that had just lost the Civil War. Ratification in many statehouses was only obtained under the statutorily-codified threat of never regaining congressional representation. *See* 14 Stat. at 429 ("[W]hen said State . . . shall have adopted [the Fourteenth Amendment] and when said article shall become a part of the Constitution of the

United States, said State shall be declared entitled to representation in Congress."). The amendment reflects these considerations and, more generally, was designed to be flexible (*i.e.*, governmentally unconstraining) enough for nationwide application to state governments so recently in conflict.

In contrast, New Mexico's Equal Protection Clause was adopted in 1910, against the backdrop of a preordained-successful constitutional convention whose leading political objective was to assuage concerns about that the territory's Anglo and Hispanic populations would be treated with fairness and equal dignity. Far from the scenes that unfolded at southern state capitols during the ratification of the Federal Reconstruction Amendments, a celebratory mood followed the New Mexico convention's conclusion; immediately afterward, Convention President Speiss praised the new constitution's "guarantee[of] equal protection of the law to every citizen of New Mexico." *Proceedings of the Constitutional Convention of the Proposed State of New Mexico* at 288 (Oct. 3 to Nov. 21, 1910) ("*Proceedings*"). Viewed in this light, the suggestion that the federal and state clauses are so identical as to be uselessly redundant of one another seems especially unsupportable.[1]

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[1] The Petitioners cite a federal magistrate judge's opinion in *E. Spire Communications, Inc. v. Baca*, 269 F. Supp. 2d 1310 (D.N.M. 2003) (Smith, M.J.), for the proposition that the federal and state equal-protection clauses are "co-extensive" and offer "the same protections." Supp. Response at 3 & n.3. Judge Smith's statement was made in passing, after both parties to the case apparently agreed that the clauses were indistinguishable; no arguments about the distinctions were made or even alluded to. *See* Complaint ¶¶ 134-35(2), at 22 (Doc. 2) (filed

The Petitioners largely do not respond to two of the Plaintiffs' arguments. First, the Plaintiffs pointed out clear markers in the case law demonstrating that the state Equal Protection Clause is more rights-protective than its federal counterpart.[2] *See* Plfs' Supp. Brief at 31-32. For example, state law affords much more robust rational-basis review, as extensively discussed in *Trujillo v. City of Albuquerque*,

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May 3, 2002); Defendant PRC's Motion for Summary Judgment (Doc. 23) (filed Oct. 15, 2002); Plf E. Spire Communications, Inc.'s Response to the MSJ at (Doc. 32) (filed Jan. 14, 2003). The cases cited to by Judge Smith (and the Petitioners) all predate the major cases cited in the Plaintiffs' Supplemental Brief establishing the independent content of the state Equal Protection Clause.

[2] The New Mexico Constitution is one of the very strictest in the nation regarding sex discrimination. *See* 1 Jennifer Friesen, *State Constitutional Law* § 3.02[5][a], at 3-23 (4th ed. 2006 & 2015 supp.). Justice Pamela B. Minzer outlined New Mexico's history of increased gender equality beginning in the territorial period, "view[ing] New Mexico's Equal Rights Amendment as the culmination of a series of state constitutional amendments that reflect an evolving concept of gender equality in this state." *N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-005, ¶ 31, 126 N.M. 788, 975 P.2d 841. New Mexico's searching sex-discrimination doctrine cannot be viewed in a vacuum separate from its larger equal-protection jurisprudence: the most pro-women's-rights feature of the 1910 Constitution (limited suffrage) was itself a concession made in return for more protection for the Spanish-speaking population, illustrating the interrelatedness of different facets of equal protection. *See*, *e.g.*, Robert W. Larson, *New Mexico's Quest for Statehood: 1846-1912*, 279 (UNM 1968) ("One delegate described the inclusion of such clauses [protecting Spanish speakers from discrimination] as being part of a compromise. In return for the Spanish-speaking delegates' agreement to permit women to vote in school elections — a provision contrary to the traditional role of women in their culture — these safeguards were enacted." (footnote omitted)); Delegate Edward D. Tittman, *New Mexico Constitutional Convention: Recollections*, 27 N.M. Hist. Rev. 177, 182 (1952) ("The Spanish speaking delegates, faithfully representing the then prevailing ideas of their people, were opposed to the theory that it was a good thing to let women vote. If you will read the first Section of Article VII on Elective Franchise, and use your imagination, you will see the kind of compromise that had to be made by the opposing parties in order to get the idea of votes for women in school elections into the Constitution.").

1998-NMSC-031, 125 N.M. 721, 965 P.2d 305 ("*Trujillo III*"). The Plaintiffs also noted that this Court "maint[ains] a strong 'fundamental-rights strand' (in contrast to the now-moribund federal doctrine)," Plfs' Supp. Brief at 31; this Court's articulation of the fundamental-rights strand has been consistently more concrete and less muddled by overlapping analyses of other rights than the federal doctrine, with this Court erecting a three-tiered review scheme mirroring the classification-based scheme. *See* Plfs' Supp. Brief at 31-35. The federal courts have never been so clear, *see*, *e.g.*, 1 William J. Rich, *Modern Constitutional Law* § 11:8, at 433 (3d ed. 2011) ("The formalism of the Supreme Court's approach to suspect categories may be contrasted with these relatively fluid standards applied to classifications burdening fundamental interests."), and even at their clearest appear to endorse a *two*-tiered scheme — with no apparent equivalent to this Court's recognition of "important rights" — in which strict scrutiny is usually the applicable level of review, but intermediate scrutiny is sometimes applied on an unpredictable basis, *see*, *e.g.*, *State v. Druktenis*, 2004-NMCA-032, ¶ 89 n.10, 135 N.M. 223, 86 P.3d 1050 ("'[T]he standard of review the [U.S.] Supreme Court uses in fundamental rights cases is unclear.'" (brackets omitted) (citation omitted)); *Hope v. Comm'r of Ind. Dep't of Corr.*, 9 F.4th 513, 529 (7th Cir. 2021) ("We apply strict scrutiny to a law if the plaintiffs' unequal treatment [involves] . . . denial of a fundamental right." (citation omitted)); *Contest Promotions, LLC v. City & Cnty. of San Francisco*, 704

F. App'x 665, 669 (9th Cir. 2017) ("[T]o the extent that Plaintiff advances a more general equal protection theory grounded in a claimed abridgement of its fundamental rights, . . . the ordinance is subject to intermediate scrutiny . . . ."); *Kwong v. Bloomberg*, 723 F.3d 160, 175 (2d Cir. 2013) (Walker, J., concurring) ("[S]trict scrutiny does not appear warranted when, as here, an Equal Protection Claim is based on a burdening of a fundamental right that demands only intermediate scrutiny under that right's jurisprudence."); *Schleifer by Schleifer v. City of Charlottesville*, 159 F.3d 843, 860 (4th Cir. 1998) (Michael, J., dissenting) ("[B]ecause this case involves the fundamental rights of minors, and not those of adults, the majority concludes that equal protection requires only intermediate scrutiny.").

Far from not recognizing any unique content in the state Equal Protection Clause, *cf.* Petitioners' Supp. Response at 7, this Court has in fact staked out an impressively independent line of analysis — even *before* the Legislature enacted the New Mexico Civil Rights Act, NMSA 1978, §§ 41-4A-1 to -13 ("CRA"), thereby acknowledging that the State Constitution provides distinct, stronger protections for civil rights than does federal law. *See* NMSA 1978, §§ 41-4A-4 (referring exclusively to "the bill of rights of the constitution *of New Mexico*" (emphasis

added)).[3] This Court's sustained interest in maintaining a trans-contextually coherent and predictable fundamental-rights strand is directly relevant to this case, as "partisan gerrymandering is a more obvious fit for the fundamental-rights strand" than anything else. Plfs' Supp. Brief at 33. In short, the intermediate-scrutiny tier of the fundamental-rights strand is a New Mexican doctrinal innovation, and depending upon the level of abstraction at which the right to not have one's vote deliberately wasted by the Legislature is defined, it may be the applicable level of scrutiny here.[4]

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[3] The CRA also created the first regularly recurring incentive for parties outside the criminal context to litigate the state Bill of Rights, meaning that interstitial analyses of these guarantees is likely to accelerate in the coming years. *See* NMSA 1978, §§ 41-4A-4 & -5 (creating a fee-shifting claim not subject to qualified immunity).

[4] This Court has not comprehensively defined what makes a right either fundamental or important; its most important rulings on the topic arise in a tetralogy of cases on the Tort Claims Act's damages caps. *See Richardson v. Carnegie Library Rest., Inc.*, 1988-NMSC-084, ¶¶ 28-36, 107 N.M. 688, 763 P.2d 1153 (stating that "[a] fundamental right is that which the Constitution explicitly or implicitly guarantees," and holding that the right to tort recovery against the government is important, but not fundamental), *Trujillo I*, 1990-NMSC-083, ¶ 8, 110 N.M. 621, 798 P.2d 571 (holding that intermediate scrutiny applies to "the right of access to the courts," and basing this right's "important" status in part on the fact that "[t]he right to recover monetary damages for tortious injury has played a vital role in New Mexico since before the time of statehood as one aspect of the individual right to petition for redress of grievances"), and *Trujillo III*, 1998-NMSC-031, ¶ 37 (subjecting TCA-cap challenges to rational-basis review going forward, in large part because "implementation of intermediate scrutiny in assessing challenges to the TCA cap is unduly burdensome so as to be intolerable"). The Court declined to find a fundamental right to physician-assisted suicide in *Morris v. Brandenburg*, 2016-NMSC-027, ¶¶ 39-51, 376 P.3d 836, based primarily on a lack of any historical basis for the right, although it did not separately analyze whether the putative right was fundamental or important. The *Morris* Court also took very seriously arguments that

Second, the Petitioners largely overlook the Plaintiffs' contention that the Court should construe the Equal Protection Clause's application here *in para materia* or through the "prism" of three other Bill of Rights provisions that also speak directly to the right to fair electoral representation: Article II, §§ 2, 3, and 4. Importantly for the interstitial analysis, these three provisions have no federal-constitutional counterparts. *See* Plfs' Supp. Brief at 16-17 & 36.[5] Long before constitutionally-mandated redistricting existed at all, the New Mexico Constitution provided expressly that "[t]he people of the state have the sole and exclusive right to govern themselves," and "all government of right originates with the people, is founded upon their will and is instituted solely for their good" — as close to an

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Article II, § 4 established a fundamental right, but ultimately decided that "the Inherent Rights Clause has never been interpreted to be the *exclusive* source for a fundamental or important constitutional right, and *on its own* has always been subject to reasonable regulation." *Id.* ¶ 51 (emphases added). Other states have held that, for example, that burdens on the right to run for office are subject to intermediate scrutiny. *See*, *e.g.*, *Bolin v. State Dep't of Pub. Safety*, 313 N.W.2d 381, 382-84 (Minn. 1981).

[5] This proposed interpretive scheme closely resembles the means by which federal courts apply one-person-one-vote principles across different contexts: using the "prism" of Article I, § 2 of the Constitution (which describes the election of U.S. Representatives), the U.S. Supreme Court has concluded that congressional districts' apportionment must be virtually equal, while state-legislative districts are entitled to a +/- 10% population discrepancy. *See Wesberry v. Sanders*, 376 U.S. 1 (1964); Nat'l Conf. of State Legs., *Redistricting Law 2020*, 23-31 (2019) (describing the separate congressional and state-legislative standards).

exhortation that 'voters should select their representatives rather than representatives selecting their voters' as one could expect to find in 1910.[6]

II. The democratic imprimatur of New Mexico's elected judiciary makes it structurally better situated than the unelected federal judiciary to police partisan gerrymandering in New Mexico.

Federal courts frequently observe that "state judgments are best made by the States, not unelected federal judges." *Daunt v. Benson*, 956 F.3d 396, 430 (6th Cir. 2020); *see also, e.g.*, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985) ("Any rule of state immunity that looks to the 'traditional,' 'integral,' or 'necessary' nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes."); *United States v. Smith*, 756 F.3d 1179, 1187 (10th Cir. 2014) ("Respect

[6] For the purposes of this briefing, the Plaintiffs assume that §§ 2, 3, and 4 of the Bill of Rights are not self-executing provisions but rather are "declaration[s] of principle or policy." *Bounds v. State*, 2011-NMCA-011, ¶ 37, 149 N.M. 484, 252 P.3d 708 ("'A constitutional provision may be said to be self-executing when it takes immediate effect and ancillary legislation is not necessary to the enjoyment of the right given, or the enforcement of the duty imposed. In short, if a constitutional provision is complete in itself, it executes itself.'" (quoting *Lanigan v. Town of Gallup*, 1913-NMSC-024, ¶ 10, 17 N.M. 627, 131 P. 997)). The national trend in 1910 was to view nearly all new constitutional language as self-executing, *see*, *e.g.*, *Winchester v. Howard*, 69 P. 77, 78-79 (Cal. 1902) (describing "the presumption" in 1902 that "[r]ecently adopted state constitutions" are self-executing because they "contain extensive codes of laws, intended to operate directly upon the people as statutes do"); but what matters here is simply that the provisions mean more than *nothing*. Whether the Court "construe[s] Article II, Section[s 2, 3, or] 4 as an enforceable independent source of individual rights, [or] rather as an overarching principle which inform[s] the equal protection guarantee of our Constitution," the same result obtains. *Morris*, 2016-NMSC-027, ¶ 49.

for democratic authority requires unelected federal judges to exercise great caution . . . "). This Court, however, differs from the federal judiciary in that it *is* elected: its Justices run in statewide elections that are not only impervious to gerrymandering, but collectively reflect greater democratic input than any other decisionmaking entity in state government.[7]

The elected nature of this Court has significant implications for its institutional legitimacy in fulfilling certain roles, most especially in the realms of policy creation and the refereeing of political questions. *See* Robert F. Williams, *The Law of American State Constitutions* §§ III.10.I & III.10.VIII, at 285 & 298-99 (2009) ("A large majority of state judges face the electorate in either partisan, nonpartisan, or merit-retention elections. . . . The relationship between state supreme courts and state legislatures, therefore, is different from the Supreme

[7] While governors get more unique voters than any one Justice, across the multiple elections in which the Court's Members at any given time were selected, far more unique voters participated. The Legislature, even collectively, gets far fewer. To that end, the Legislature derives its supreme policymaking legitimacy "as the voice of the people" not from its democratic-ness so much as its *representativeness*: its members come from everywhere in the state where there are people, and they are closer to their constituents physically, communicationally (where a constituent might get a phone call with a staffer in Santa Fe vis-a-vis the governor, she may get an in-person meeting with her legislator in her hometown), numerically (lower constituent-to-official ratio), and yes, demographically — all of which increase accountability and the efficacy of petitioning one's government, and create a government that better reflects the people. *Torres v. State*, 1995-NMSC-025, ¶ 9, 119 N.M. 609, 894 P.2d 386. It is precisely this characteristic feature of the Legislature that partisan gerrymandering destroys.

Court's relationship to Congress. . . . [S]tate courts are often deeply involved in the state's congoing policy-making processes (constitutional and nonconstitutional)." (footnote omitted)); Hon. Hans A. Linde (Ore. S.C.), *E. Pluribus – Constitutional Theory and State Courts*, 18 Ga. L. Rev. 165, 189-90 (1984) ("If a 'political question doctrine' exists in a state court, I have not heard of it."). Manifestations of this more-expansive legitimacy include the *Ammerman* doctrine,[8] the purely prudential role of justiciability doctrines,[9] and the characteristically state-court function of developing the common law.[10]

This Court does not appear to have ever expressly addressed whether or how its elective nature affects its structural or jurisprudential role, but it again bears repeating that no one, including the Plaintiffs, is asking the Court to act as, or even assert primacy over, the Legislature. *Cf. Torres v. State*, 1995-NMSC-025, ¶ 9, 119 N.M. 609, 894 P.2d 386. When the task of redistricting has been committed to the Legislature, it has not been because of any institutional competence (it has a poor

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[8] *Compare Ammerman v. Hubbard Broad., Inc.*, 1976-NMSC-031, 89 N.M. 307, 551 P.2d 1354 (resolving conflicts between the Court and the Legislature that relate to procedure in favor of the Courts' rules), *with Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 5 (1987) (observing that federal rulemaking authority belongs to Congress).

[9] This Court's greatest IPRA opinion and one of its greatest opinions of the 21st Century overall was issued at a point when the case had become moot. *See Republican Party of N.M. v. N.M. Tax & Rev. Dep't*, 2012-NMSC-026, ¶¶ 8-11, 283 P.3d 853.

[10] There is some question whether a true 'federal common law' exists at all, but even if it does, it is certainly a much-smaller body of law than state-level common law.

track record of even complying with federal rules against racial gerrymandering and malapportionment) or disinterest (indeed, it is the *least* disinterested body in state government); the Constitution gives initial responsibility for legislative redistricting[11] to the Legislature, *see* N.M. Const. art. IV, § 3(D), but it also recognizes the special need for all three branches to be involved in the administration of elections, *see*, *e.g.*, N.M. Const. art. V, § 2 (creating a state canvassing board comprised of the governor, chief justice, and secretary of state). That division of labor is fully consistent with what the Plaintiffs request here. The Court, which has no purse and no sword, does not draw maps unless forced to by the Legislature's inaction; it conducts judicial review and, whenever practical, sends a constitutionally infirm map back to the legislative drawing board for revision by the Legislature.[12]

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[11] The Constitution does give the Legislature the power to "regulate the manner, time and places of voting, . . . [and to] enact [] laws [to] secure the secrecy of the ballot and the purity of elections and guard against the abuse of elective franchise," but it is doubtful that any of these provisions actually cover congressional-redistricting bills, which are likely passed pursuant to the Legislature's general lawmaking authority. N.M. Const. art. VII, § 1(B).

[12] To be clear, as there were a couple of questions about this asked at oral argument and the nomenclature may have been confusing, the Plaintiffs are requesting both immediate "remand" to the District Court to determine whether the congressional map is unconstitutional and, if the map is ruled unconstitutional, the judicial remedy of (what one could call a) 'remand' to the Legislature. The Plaintiffs' preliminary-injunction motion only requested a court-drawn map because of the lack of timing for the Legislature to act — something that should only happen at this point if the Legislative passes one or more replacement maps ruled to be similarly unconstitutional, and in doing so runs out of time before the 2024 election cycle.

This conceptualization of the state judiciary's role is not just derived from its structure, but from its history. The 1910 Constitution deviated remarkably from its 1889 counterpart (used as a model by the 1910 convention[13]) on both the selection and jurisdiction of judicial officers, including especially the Justices of this Court. The 1889 constitution provided that "[t]he justices of the supreme court [would] be appointed by the governor" with senate approval, with only district judges subject to popular election. 1889 N.M. Constitution art. VI, §§ 6 & 12, at 7-8. By 1910, "the overwhelming majority in both parties favored electing all judges," Thomas J. Mabry, *New Mexico's Constitution in the Making – Reminiscences of 1910*, N.M. Hist. Rev. 168, 173 (1944), with the major debate being between non-partisan elections (including nomination by petition rather than by party convention) and the prevailing Republican proposal of full partisan elections following purely convention-based nominations,[14] *see Proceedings* at 135-45; Thomas C. Donnelly, *The Making of the New Mexico Constitution, Part II*, 12 N.M. Quarterly 435, 444-

[13] In addition to the heavy overlap in authorship, the 1889 constitution was distributed at the 1910 convention, which also adopted wholesale the rules of the 1889 convention. *See Proceedings* at 9 & 19. The differences between the two constitutions should thus be afforded some significance when interpreting the extant provisions of the 1910 Constitution. *See, e.g.*, *State v. Lynch*, 2003-NMSC-020, ¶¶ 32-34, 134 N.M. 139, 74 P.3d 73 (Maes, C.J., dissenting) (noting that "[t]he drafters of the 1889 constitution used very similar language in their double jeopardy clause," and according significance to the fact that "the delegates to the [1910] Constitutional Convention significantly departed from" that language); *City of Farmington v. Fawcett*, 1992-NMCA-075, ¶ 19, 114 N.M. 537, 843 P.2d 839.

[14] New Mexico did not have primary elections until 1938.

45 (1942). The two constitutions also reveal differences in jurisdiction; the 1889 constitution proposed a swath of authority for this Court that was both narrower in substance than what exists today, and subject to further limitation by the Legislature:

> The supreme court, except as otherwise provided in this constitution, shall have only appellate jurisdiction in all actions, suits and other proceedings. It shall have a general supervisory control over all inferior courts, *under such regulations and limitations as may be prescribed by law*.

1889 Const. art. VI, § 2 (emphasis added). This provision, along with the absence of any reference to "superintending control" in the following provision (§ 3) covering this Court's original jurisdiction — and that provision's reference to how "the exercise of such jurisdiction shall be regulated by law" — outline a legislative superiority over the judiciary's jurisdiction that mirrors the federal system's. 1810 Constitution art. VI, § 3. As Article VI of the 1910 Constitution rather closely resembles its 1889 counterpart otherwise, special significance should be afforded the modifications made in 1910. *See* note 13, *supra*.

One thing that was widely agreed upon at the 1910 convention was that judges should be exempt from the recall. *See* Donnelly, *supra* at 444. The judges' initial selection would reflect popular values, but their retention would assure their independence. These priorities were only further solidified by the merit-selection reforms of 1988 (with follow-up in 1994), which left intact partisan elections. *See* N.M. Const. art. VI, §§ 33-35.

All of this means that this Court has a legitimate role in answering some of our State's political questions that has no parallel in the federal judiciary. *See generally* David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 Colum. L. Rev. 2047 (2010); Hon. William J. Brennan Jr. (U.S.), *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977); Hon. Jeffrey S. Sutton (6th Cir.), *Who Decides?: States as Laboratories of Constitutional Experimentation* 299 (2022) ("The people in a state, a court may opt to assume, trust judges more than legislatures to fix new societal problems such as extreme gerrymandering. . . . It may support the election of judges."). The limiting principles on this legitimacy may best be seen in the Court's incremental movement forward into new areas of law, its "meaning gain[ing] content from the long sweep of our history and from successive judicial precedents — each looking to the last and each seeking to apply the Constitution's most fundamental commitments to new conditions." *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2326 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting). These principles sometimes compel moves backward to correct a perceived overreach,[15] or in

[15] For example, while thought of today as judicially activist decision, *Miranda v. Arizona*, 384 U.S. 436 (1966), was actually a cut-back from *Escobedo v. Illinois*, 378 U.S. 478 (1964), whose rule — that once "the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect," Sixth Amendment counsel rights attach — if taken seriously, would seem to preclude police practices like the use of undercover agents. *Id.* at 490-91.

recognition that the public does not accept the Court's direction,[16] but also contribute to and earn greater public acceptance when courts make principled decisions that are out ahead advance of popular opinion, as in *Brown v. Board of Education* and *Griego v. Oliver*.[17] In addition to creating good law, these decisions, far from eroding the legitimacy of the courts, enhance their public esteem and credibility in the long run.

Here, the Petitioners and the Plaintiffs agree that "[p]artisan gerrymandering existed long before New Mexico gained statehood, persisted at the time of our State's founding, and will continue" into perpetuity absent intervention, *see* Petitioners' Supp. Resp. Brief at 11-12, but the two sides attach different significance to that fact: the Petitioners cite it as proof that the Constitution does not restrict it, while the Plaintiffs cast it as exactly the sort of pernicious and persistent problem — akin to myriad other federal and state equal-protection violations that were widespread at the time of ratification of the clause in question and only later widely rejected — that offends "the Constitution's most fundamental commitments." That persistence and perniciousness is in fact part of what merits

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[16] *See, e.g., Lochner v. New York*, 198 U.S. 45 (1905) (striking down wage-and-hour law for "interfer[ing] with the right and liberty of the individual to contract").

[17] *Brown v. Board of Educ. of Topeka, Kan.*, 347 U.S. 483 (1954) (federal equal-protection right to integrated schools); *Griego v. Oliver*, 2014-NMSC-003, 316 P.3d 865 (state equal-protection right to same-sex marriage).

the intervention of this Court, as its solution has repeatedly eluded the political branches.

It is also true that this Court likely cannot issue a single opinion that will anticipate and solve all the complexities and nuances of partisan gerrymandering at once and forever. Neither Justice Kagan's test from *Rucho*, nor "intermediate scrutiny," nor anything else this Court is apt to say will answer all the questions that may be raised on this issue. That is not to say that the Court's involvement is not "workable." Allowing this claim virtually assures that this Court will have to come back to it, probably repeatedly, and over time to create and refine a doctrine that adds clarity, predictability, and fairness. This effort would be novel; there really has been no "six-decade struggle to define a standard." Petitioners' Supp. Response Brief at 6. As Judge Sutton notes,

> *Davis v. Bendemer* was decided in *1986*. That left plenty of time to develop the right method, the perfect algorithm, or some other insight suitable for national resolution of these claims. By 2019, however, just one court, the Pennsylvania Supreme Court, had attempted to articulate a general standard for assessing such claims — and it developed an approach better suited for one state than for the whole country. No one in *Rucho*, best I can tell, proposed that the U.S. Supreme Court adopt the Pennsylvania approach as the national solution for these claims.
>
> . . . . No state, notably, has yet tried the approach suggested in *Rucho* . . . for identifying outlier and unconstitutional re-districting plans. The claimants still seem stuck on [threshold/justiciability issues].

Sutton, *Who Decides?*, *supra* at 293 (emphasis in original). So the Petitioners' excoriation of the Plaintiffs for not having a ready-made workable standard — equivalent to several successive judicial opinions formed from the wisdom of several rounds of new facts, evidence, argument, and lower- and coordinate-court action — does not answer the question of whether the enormity of the countervailing interests makes *creating* a workable standard an effort worth undertaking. The Plaintiffs propose that there is nothing more important for a supreme court than protecting the basic integrity of its state's democracy.

And this Court has a huge advantage over the courts deciding such cases as *Brown* and *Griego*, in that, unlike segregated schools in 1954 and same-sex marriage bans in 2013, "*[n]o one defends gerrymandering as a matter of policy in its most far-reaching forms today.* All agree that it has been poisonous for American government." Sutton, *Who Decides?*, *supra* at 18 (emphasis in original). When the co-chair of a redistricting committee of a state whose major parties are within 2% of each other in both registration and performance explains that he approved a map designed to elect 10 Members of Congress from one party and 3 from the other only because he did "not believe it [would be] possible to draw a map with *11* [from one party] and *2*" from the other,[18] this deeply demoralizes the populace — not just the

[18] *Rucho v. Common Cause*, 139 S. Ct. 2484, 2491 (2019) (emphasis added). In another state (with the identity of the parties reversed), "[t]he Governor [] testified that his aim was to

obvious political losers of this *autogolpe*, but everyone who sees it and realizes that the most base and cynical descriptions of American democracy are descriptively correct.[19]

CONCLUSION

If this Court accepts the basic premise that partisan gerrymandering violates New Mexico's Equal Protection Clause, it embarks down a path toward apolitical districting — an outcome virtually everyone recognizes as desirable and healthy for our body politic. Almost by definition, it is no harder for the judiciary to fashion a workable partisan-gerrymandering standard than it is one for racial-gerrymandering:

'use the redistricting process to change the overall composition of [the state]'s congressional delegation to 7 Democrats and 1 Republican by flipping' one district." *Id.* at 2493. Here in New Mexico, the leaders of the state House and Senate — literally the named Defendants — responded to an opposing-party congressional candidate's win by "warn[ing that CD2] would be redrawn in such a way that 'we'll have to see what that means for [the then-congresswoman's party's] chances to hold it,'" and to that same congresswoman's vote on a bill by tweeting: "We are sorry we've sent her to DC. Our redistricting session is offering a way out of her chaotic and divisive politics." Complaint ¶ 95(b), at 26 (filed Jan. 21, 2022) (quoting the *Albuquerque Journal*); Plfs' Combined Reply ISO Mtn. for Prelim. Inj. at 13 (filed Mar. 10, 2022) (quoting Senate President Pro Tempore's Twitter).

[19] It has been repeatedly insinuated that the "highly competitive 2022 Midterm Election" in CD2 is somehow evidence that the districts were not gerrymandered. Petitioners' Supp. Resp. Brief at 18 & n.43. Mathematically, when a gerrymander seeks to win *all* of a state's districts — *i.e.*, all 'cracking' and no 'packing' — there must be at least one (and ideally for the gerrymanderers, just one) district that is close: if every district is a landslide win for one party, that is less indicative of a gerrymander than it is of a state with strong head-to-toe support for one party. The fact that the New Mexico gerrymanderers in fact *won* (by no means a foregone conclusion, nor one necessary to prove gerrymandering) just underscored that they were not lying when they bragged publicly about their actions.

the arguments that courts should undertake the latter task but not the former are based on beliefs that that some degree of partisan gerrymandering, unlike racial gerrymandering, is either normatively acceptable or, stranger still, "inherent" in the redistricting process. These are excuses arising from inertia and resignation, not from well-reasoned assessment.

This Court should recognize a claim under the state Equal Protection Clause for partisan gerrymandering, set forth a flexible standard that recognizes the right of the electorate to districts that are based on legitimate representational factors — equal population, "traditional redistricting principles," compactness, preservation of the core of existing districts (and thus continuity of representation), and the other factors recognized by the Legislature itself in § 1-3A-7(A) — with the employment of unrecognized factors being required to either be justified by and proportionate to an important government interest or to have been immaterial to the final district(s) drawn. A proper construction of our state's Equal Protection Clause compels this result, the U.S. Supreme Court — both the *Rucho* dissent *and* the majority — welcomes it, and the people of New Mexico deserve it.

Respectfully submitted,

HARRISON, HART & DAVIS, LLC

By: 

Carter B. Harrison IV
Daniel J. Gallegos
924 Park Avenue SW, Suite E
Albuquerque, NM 87102
Tel: (505) 295-3261
Fax: (505) 341-9340
carter@harrisonhartlaw.com

Attorneys for the Plaintiffs–Real Parties in Interest

This Brief Has No Exhibits

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of March 2023, I submitted the foregoing Supplemental Reply Brief electronically via the Court's Odyssey filing system and selected the option for electronic service, which will, on the date that the clerk's office formally accepts the document for filing, cause a certified copy of the document to be served via email upon all counsel of record.

HARRISON, HART & DAVIS, LLC

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