

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

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

Plaintiffs,

v.

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

MAGGIE TOULOUSE OLIVER as New
Mexico Secretary of State, MICHELLE
LUJAN GRISHAM as Governor of New
Mexico, HOWIE MORALES as New Mexico
Lieutenant Governor and President of the
New Mexico Senate, MIMI STEWART as
President Pro Tempore of the New Mexico
Senate, and JAVIER MARTINEZ as Speaker
of the House of Representatives,

Defendants.

**REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS JENNINGS,
VARGAS AND GARCIA FOR LACK OF STANDING**

“[A]s far back as the early part of the twentieth century, ...this Court has required allegations of direct injury to the complaining party for that party to properly seek an injunction or challenge the constitutionality of legislative acts.”

ACLU of New Mexico v. City of Albuquerque, 2008-NMSC-045, ¶ 10.

In their Motion, Legislative Defendants showed that Plaintiffs Jennings, Vargas and Garcia cannot satisfy the “injury in fact” or “redressability” elements of standing. Under SB-1, each of these Plaintiffs were drawn into congressional districts where they now have a *better* opportunity to elect a candidate of their choice than they did under the previous congressional map. And the relief Plaintiffs seek in their Verified Complaint—court imposition of the “Concept E” map—would do nothing to address the alleged harm that these Plaintiffs claim. In their Response,

Plaintiffs do nothing to rebut or respond to those dispositive facts. Instead, Plaintiffs urge the Court to apply an “associational harms” theory of standing—a theory which has never been adopted in New Mexico (or, it seems, by any majority of the U.S. Supreme Court). That theory runs contrary to New Mexico courts’ standing jurisprudence, and would mean that any member of a political party anywhere in the state could bring a partisan gerrymandering claim if he could show that his party’s political performance is decreased by any amount under the challenged map. The Court should reject this attempt to sidestep established standing analysis and should dismiss these three Plaintiffs from this action.

I. Plaintiffs Jennings, Vargas and Garcia Cannot Show Injury in Fact or Redressability.

Plaintiffs cannot and do not dispute that under SB-1 each of these Plaintiffs was moved into a congressional district in which a candidate belonging to his or her same political party has a stronger likelihood of winning than in each Plaintiff’s previous district. Motion at 4-7. Nor do they dispute that under Plaintiffs’ favored map, Concept E, Plaintiffs Vargas and Garcia would still reside in CD-2 (not CD-1 as they previously did under the 2011 map) and Plaintiff Jennings would reside in a more Republican-leaning congressional district where he would have *less* opportunity to elect a candidate of his choice (a Democrat). *Id.* While Plaintiffs appear to backtrack from the relief sought in their Verified Complaint (court imposition of the Concept E map),¹ they cannot escape the fact that under the sole form of relief sought in the Verified Complaint, none of these Plaintiffs’ alleged harms would be remedied. Having failed to satisfy

¹ *Compare* Response at 15 (“Plaintiffs do not know specifically what redistricting map will replace the unconstitutional Senate Bill 1”), *with* Verified Complaint at p. 27 (Prayer for Relief seeking “Adoption of a partisan-neutral congressional map consistent with Congressional Concept E (Justice Chavez’s map)”).

the injury-in-fact and redressability prongs of the standing analysis, these Plaintiffs should be dismissed.

II. Plaintiffs’ Proposed “Associational Harms” Theory Has Never Been Adopted in New Mexico and Offends our Standing Jurisprudence.

Recognizing that these three Plaintiffs cannot establish that their votes were “diluted” under SB1, Plaintiffs urge the Court to instead apply an “associational harms” theory of standing—a theory that would essentially render the standing analysis meaningless. Plaintiffs cite to portions of Justice Kagan’s dissent in *Rucho v. Common Cause*² and her concurrence in *Gill v. Whitford*³ as authority for this theory, but tellingly never point this Court to any majority opinion or holding of the U.S. Supreme Court—or any New Mexico court—adopting or applying it.

Under this “associational harms” theory, “members of the disfavored party” suffer “statewide harm” under any map that reduces their party’s political performance because it “deprives them of their ‘natural political strength’” and subjects them to “difficulties fundraising, registering voters, and eventually accomplishing their policy objectives.” Response at 8 (quoting *Rucho*, 139 S. Ct. at 2514 (Kagan, J., dissenting)). None of those “deprivations” or “difficulties” are presented here. And, in any event, by this metric, any voter anywhere in the state who belongs to a political party whose anticipated performance decreases by any amount under a redistricting plan would have standing to challenge that plan as an unconstitutional partisan gerrymander. As recognized by the Supreme Court’s remand order, the political nature of redistricting necessarily and legitimately alters the political performance of both parties in some way. The grossly expansive approach of Plaintiffs’ “associational harms” theory runs afoul of established New Mexico case law and the prudential underpinnings of our courts’ approach to the standing doctrine.

² 139 S. Ct. 2484.

³ 138 S. Ct. 1916.

See, e.g., ACLU of New Mexico, 2008-NMSC-045, ¶¶ 10-11 (reaffirming importance of injury-in-fact element of standing and noting that “It is not enough that the community in which [Plaintiff] resides will be injuriously affected by some governmental or legislative action.”) (quoting *Asplund v. Hamnett*, 31 N.M. 641, 656, 249 P. 1074, 1079 (1926)).

The Court should decline Plaintiffs’ invitation to depart from and drastically expand the test for standing in New Mexico courts. When the New Mexico Supreme Court on July 5, 2023, directed the district court to conduct a standing analysis in this matter, the Court said nothing about an “associational harms” theory of standing or any attempt to create a new exception to the standing test for parties asserting a partisan gerrymandering claim.

III. Plaintiffs Misapprehend Defendants’ Position as to the Remaining Plaintiffs.

In their Response, Plaintiffs take an oddly inconsistent approach with respect to the standing of the remaining Plaintiffs: on the one hand, because Defendants have not challenged the standing of other Plaintiffs, they contend that Legislative Defendants have somehow “conceded” they have standing. Nonetheless, Plaintiffs then find it necessary to devote several pages of their Response to argue that those Plaintiffs do have standing.

To be clear, Legislative Defendants have not “conceded” that the remaining Plaintiffs have standing to sue. Rather, they have not challenged those Plaintiffs’ standing on the pleadings, at this juncture of the proceedings. Because it is Plaintiffs who bear the burden of establishing their standing to bring suit, the Legislative Defendants reserve the right to challenge the standing of the remaining Plaintiffs if the evidence developed in this case does not ultimately support their standing to sue. “Since they are not mere pleading requirements but rather an indispensable part of the plaintiff’s case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required

at the successive stages of the litigation.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Therefore, the Legislative Defendants do not waive their right to challenge any of the remaining Plaintiffs’ standing based on information developed in discovery or presented to the Court in the evidentiary record.

CONCLUSION

Plaintiffs Timothy Jennings, Pearl Garcia and Dinah Vargas have failed to demonstrate that SB-1 caused them any injury in fact, nor that the relief sought by Plaintiffs would remedy any alleged harm to these Plaintiffs. Accordingly, the Legislative Defendants respectfully move the Court to dismiss Plaintiffs Timothy Jennings, Dinah Vargas and Pearl Garcia for lack of standing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was submitted for e-filing and service through the District Court's "Odyssey File & Serve" filing system this 23rd day of August 2023, which caused all counsel of record to be served by electronic means or as otherwise stated, as more fully reflected on the Notification of Service.

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