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5th JUDICIAL DISTRICT COURT
Lea County
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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 DEE ANN KIMBRO, and PEARL GARCIA,

Plaintiffs,

v. **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 BRIAN EGOLF in his official capacity as Speaker of the New Mexico House of Representatives,

Defendants.

EXECUTIVE DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS

Come now Defendants Governor Michelle Lujan Grisham and Lieutenant Governor Howie Morales (collectively, "Executive Defendants"), by and through their counsel of record in this matter, and hereby provides their reply in support of their motion to dismiss. As grounds for this reply, the Executive Defendants state as follows.

INTRODUCTION

Plaintiffs cast the Executive Defendants' argument as an "invitation" to "disavow the state of political-gerrymander claims one and for all." Plaintiffs' Combined Response to Defendants' Motions to Dismiss ("Response") at 9, filed Mar. 10, 2022. Quite the contrary. It is Plaintiffs who

now invite the Court to enter into uncharted territory no New Mexico court has ever entered before and decide a question the United States Supreme Court has already determined is unanswerable: "How much political motivation and effect [in redistricting] is too much?" *Rucho v. Common Cause*, 139 S. Ct. 2484, 2505 (2019) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 296 (2004)). Defendants, on the other hand, merely urge this Court to heed the cautions of the United States Supreme Court, other state courts, and our Supreme Court that "[c]ourts ought not to enter this political thicket" until they have a plausible constitutional or statutory grant of authority and legal standards to limit and direct their decisions. *Maestas v. Hall*, 2012-NMSC-006, ¶ 27, 274 P.3d 66 (quoting *Colegrove v. Green*, 328 U.S. 549, 554 (1946)). But that does not mean complaints about partisan gerrymandering are "condemn[ed] . . . to echo into a void," *Rucho*, 139 S. Ct. at 2507, as the citizenry of New Mexico have the initiative process and may exert pressure to adopt legislation or a constitutional amendment requiring politically neutral maps (as other states have). Until that time, however, the Court must steer clear of this thicket.

DISCUSSION

I. Partisan considerations are inherent in the redistricting process and therefore do not necessarily violate equal protection

Plaintiffs would have this Court believe that "political gerrymanders necessarily violate the New Mexico Constitution's Equal Protection Clause." Response at 6. To arrive at this conclusion, Plaintiffs claim the United States Supreme Court has "held that gerrymanders based on political discrimination violate the Equal Protection Clause." *Id.* (citing *Davis v. Bandemer*, 478 U.S. 109, 116-117 (1986)). Not so. Contrary to Plaintiffs' assertions, the splintered Court in *Davis* merely "decline[d] to hold that [political] claims are never justiciable"—that is, they could potentially be decided by a court. *Id.* at 143. However, the Court went on to reject the redistricting challenge in that case without agreeing on a standard to apply. *Id.* Indeed, the Court recognized that "[p]olitics

and political considerations are inseparable from districting and apportionment." *Davis*, 478 U.S. at 128. Moreover, when the Court overruled *Davis* in 2019, it never once mentioned that partisan gerrymanders violate the Equal Protection Clause. *See generally Rucho*, 139 S. Ct. 2484. To the contrary, it observed that "*a jurisdiction may engage in constitutional political gerrymandering*." *Id.* at 2497 (quoting *Hunt v. Cromartie*, 526 U. S. 541, 551 (1999)) (emphasis added). Thus, Plaintiffs' argument finds no support in federal law.

Nor has any New Mexico court held that political gerrymandering violates the state constitution or presents a justiciable question. Defendants continue to seize on snippets in *Maestas*, 2012-NMSC-006, but completely ignore the entire context of that case. The *Maestas* Court was merely providing guidance on "the legal principles that would govern our courts when *they draw* reapportionment maps." *Id.* ¶ 4 (emphasis added). The Court—foreseeing that litigants (like Defendants) would misread its holding—"emphasize[d] that the principles articulated herein *apply only to court-drawn maps*." *Id.* ¶ 46 (emphasis added). This is because courts tasked with redistricting must do so "with both the appearance and fact of scrupulous neutrality." *Id.* ¶ 28 (internal quotation marks and citations omitted). In contrast, the Legislature is under no such obligation. *Compare id.* ¶ 31 ("The courts should not select a plan that seeks partisan advantage."), *with Rucho*, 139 S. Ct. at 2497 (observing that "a jurisdiction may engage in constitutional political gerrymandering" (quoting *Hunt*, 526 U. S. at 551).

Again, the question is not (as Plaintiffs suggest) whether the Legislature "used illegitimate reasons for population disparities and created the deviations solely to benefit certain regions at the expense of others," Response at 7 (quoting *Maestas*, 2012-NMSC-006, ¶ 25); the question is whether there was "too much" political motivation and effect in the redistricting. *Maestas* is silent on this point, and therefore, the Court should not be led astray by Plaintiffs' misplaced reliance on

that case. Indeed, *Maestas* actually cuts against Plaintiffs' position. Plaintiffs again gloss over the Court's recognition that the redistricting process is "fundamentally a political dispute" and emphasis of Justice Frankfurter's sage wisdom that "[c]ourts ought not to enter this political thicket." *Id.* ¶ 27 (quoting *Colegrove v. Green*, 328 U.S. 549, 554, (1946)). While the Supreme Court was required to look past its "discomfort with political considerations" and dive into the thicket a decade ago, *id.* ¶ 31—the Court here need not, and "ought not," do so here given the political branches' ability to implement a map.

II. New Mexico law does not currently provide any clear, manageable, and politically neutral standards for the Court to apply to partisan gerrymandering claims

As explained in the Executive Defendant's Motion, neither the State's equal protection clause, nor any statute, provide the standards necessary to adjudicate the ultimate question Plaintiffs ask this Court to resolve. Plaintiffs rely heavily on the State's equal protection clause but tellingly fail to elucidate what manageable standard it provides. *See generally* Response. Nor is Plaintiffs' discussion of *Maestas* helpful, as that case only dealt with what considerations courts should take into account when adopting a map of their own. *See* 2012-NMSC-006, ¶ 46. Moreover, while the *Maestas* Court incorporated the Legislature's self-imposed policy guidelines for redistricting, that is all they are: guidelines. *See id.* ¶ 34 (describing these as "guidelines set[ting] forth policies"). Applying discretionary policy considerations to a *legislatively* approved map to determine its constitutionality would effectively transform the Court into a super legislature, approving or disapproving of all redistricting based on its own weighing of various policies. This is unacceptable. *See State v. Mabry*, 1981-NMSC-067, ¶ 17, 96 N.M. 317, 630 P.2d 269 ("[T]his Court does not sit as a superlegislature with the power to uphold or strike down the laws of the state based upon our own judgment as to the wisdom and propriety of such laws.").

Moreover, as the United States Supreme Court observed, it is illogical to ground a *constitutional* analysis on mere legislative policies that may very well change from year to year. *Cf. Rucho*, 139 S. Ct. at 2505 ("[I]t does not make sense to use criteria that will vary from . . . year to year as the baseline for determining whether a gerrymander violates the Federal Constitution."). Not only would it be illogical, it would be improper. As former Justice Sosa put it, "The Legislature cannot change the Constitution by legislative enactments and neither should [the Court], by interpretation of legislative intent or by our own fiat, be allowed to do so." *State v. Ball*, 1986-NMSC-030, ¶ 45, 104 N.M. 176, 718 P.2d 686 (Sosa, J., dissenting). This concept is widely recognized by the courts. *See, e.g.*, *City of Forth Worth v. Rylie*, 602 S.W.3d 459, 468, 63 Tex. Sup. Ct. J. 1036 (2020) ("The legislature cannot change or ignore the meaning of the constitution's text."); *State v. Tenaska Ala. Ptnrs., L.P.*, 847 So. 2d 962, 970 (Ala. Civ. App. 2002) ("[A] legislative act cannot change the meaning of a constitutional provision." (internal quotation marks and citation omitted).

Plaintiffs' reliance on NMSA 1978, Section 1-3A-7 (2021), is even more misplaced. The Legislature purposely cabined these requirements to the Citizen Redistricting Committee. *See* § 1-3A-7(A) ("*The committee* shall develop district plans in accordance with the following provisions . . ."). Unlike the Committee, the legislators gave themselves the freedom to reject the Committee's maps and adopt their own without any statutory limitation. *See* NMSA 1978, § 1-3A-9 (2021). While the wisdom of the Legislature's decision is not immune from criticism, it was their prerogative to make, and the Court may not contravene it by importing Section 1-3A-7 requirements to the Legislature's chosen map. *See Jordan v. Allstate Ins. Co.*, 2010-NMSC-051, ¶ 15, 149 N.M. 162, 245 P.3d 1214 ("This Court's primary goal when interpreting statutes is to further legislative intent."); *cf. Bounds v. State ex rel. D'Antonio*, 2013-NMSC-037, 306 P.3d 457,

461 (stating that courts do not "inquire into the wisdom or policy of an act of the Legislature" (internal quotation marks and citation omitted)).

In sum, Plaintiffs' claims that New Mexico law provides the standards for addressing political gerrymandering—standards the United States Supreme Court could not discern in *Rucho*—are without merit.

III. The out-of-state cases Plaintiffs rely on are distinguishable

The Court should not be led astray by the recent decisions out of Ohio and North Carolina that Plaintiffs discuss. In *Adams v. DeWine*, 2022-Ohio-89, 2022 Ohio LEXIS 27 (Ohio 2022), the Ohio Supreme Court focused *solely* on a recently passed constitutional amendment guiding the redistricting process that explicitly provided that their general assembly "shall not pass a plan that unduly favors or disfavors a political party." Oh. Const. Art. XIX, § 1(C)(3)(a). This is exactly the type of constitutional provision the United States Supreme Court envisioned when it suggested that "[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply." *Rucho*, 139 S. Ct. at 2507; *see id.* ("We do not understand how the dissent can maintain that a provision saying that no districting plan 'shall be drawn with the intent to favor or disfavor a political party' provides little guidance on the question."). New Mexico, in contrast, has no such constitution amendment. Accordingly, *Adams* provides absolutely no support for Plaintiffs' position that New Mexico law provides manageable standards to address political gerrymandering claims.

Plaintiffs find little more solace in North Carolina. True, the North Carolina Supreme Court recently held that partisan gerrymandering claims were justiciable under its state constitution. *See Harper v. Hall*, No. 413PA21, 2022 N.C. LEXIS 166 (Feb. 14, 2022). Key to that decision,

however, was the citizens' lack of a meaningful way to address extreme partisan gerrymandering. As the court recognized,

> In North Carolina, a state without a citizen referendum process and where only a supermajority of the legislature can propose constitutional amendments, it is no answer to say that responsibility for addressing partisan gerrymandering is in the hands of the people, when they are represented by legislators who are able to entrench themselves by manipulating the very democratic process from which they derive their constitutional authority. Accordingly, the only way that partisan gerrymandering can be addressed is through the courts[.]

Harper, 2022 N.C. LEXIS 166, at *5. In other words, the decision to dive into the political thicket was born out of necessity.

In contrast to North Carolina, the people of New Mexico have the "power to disapprove, suspend and annul any law enacted by the legislature." N.M. Const. Art. IV, § 1.[1] If ten percent of the qualified electors of three-fourths of the counties and the State file a petition disapproving of a bill's reapportionment, the bill may be repealed by a majority of voters in the next general election; if twenty-five percent of the qualified electors of three-fourths of the counties and the State file a petition disapproving of a bill's reapportionment, the bill's effect is *immediately suspended* until the voters approve it at the next general election. *See id.* Moreover, it only takes a simple majority (as opposed to North Carolina's supermajority) of each house of the Legislature to send a proposed constitutional amendment to the people. *See* N.M. Const. Art. XIX, § 1. Given the foregoing, there is no necessity for the Court to embroil itself in the politics of redistricting. *Cf. Hartford Ins. Co. v. Cline*, 2006-NMSC-033, ¶ 15, 140 N.M. 16, 139 P.3d 176 "It is the duty

[1] The only exceptions to this are "general appropriation laws; laws providing for the preservation of the public peace, health or safety; for the payment of the public debt or interest thereon, or the creation or funding of the same, except as in this constitution otherwise provided; for the maintenance of the public schools or state institutions, and local or special laws." *Id.* Laws providing for the redistricting of voting districts do not appear to fall within one of these exceptions.

of the Legislature to make laws and of the court to expound them, the subjects in which the court undertakes to make the law by mere declaration (of public policy) should not be increased in number without the clearest reasons and the most pressing necessity." (alterations, internal quotation marks, and citation omitted)).

Harper is also distinguishable in that the North Carolina constitution has considerably different structure and history than our State's constitution. For instance, the North Carolina declaration of rights was passed before its state constitution—thus "manifesting the primacy of the Declaration in the minds of the framers." *Harper*, 2022 N.C. LEXIS 166, at **91-92 (internal quotation marks and citation omitted). The court found this significant in concluding that its equal protection clause encompassed claims of political gerrymandering. *See id.* at **91-104, 123-26. Moreover, North Carolina had a long history of applying its equal protection clause more expansively than its federal counterpart in redistricting cases. *See id.* at **113-118. In contrast, Defendants point this Court to no such divergence from federal equal protection case law in this context. *See generally* Response.

If the above were not enough, the Court should be wary of following North Carolina's lead in light of their supreme court's "fail[ure] to articulate a manageable standard" for the lower courts to "reliably differentiate unconstitutional from constitutional political gerrymandering." *Harper*, 2022 N.C. LEXIS 166, at *257 (Newby, J., dissenting) (quoting *Rucho*, 139 S. Ct. at 2499). Rather than agree on such a standard, the court "[b]as[ed] [its] constitutional holdings on unstable ground outside judicial expertise"—effectively creating "a redistricting commission comprised of selected political scientists and judges. *Id.* at *193 (quoting *Rucho*, 139 S. Ct. at 2504). This is exactly what the United States Supreme Court wisely sought to avoid. While the courts in North Carolina are now doomed to forever deciding perhaps the most highly political issue of them all without any

clear, neutral, and manageable standards—jeopardizing the public's faith in their judiciary's political impartiality—this Court should chart a different path. *See id.* at *137 (Newby, J., dissenting) ("A recent opinion poll found that 76% of North Carolinians believe judges decide cases based on partisan considerations. Today's decision, which dramatically departs from our time-honored standard of requiring proof that an explicit provision of the constitution is violated beyond a reasonable doubt, will solidify this belief." (citation omitted)).

The Court should look to the Wisconsin Supreme Court's decision in *Johnson v. Wis. Elections Comm'n*, 2021 WI 87, 399 Wis. 2d 623, for guidance. True, as Plaintiffs point out, *Johnson* was decided in the context of determining what the Wisconsin state courts should consider when selecting a redistricting map. *See* Response at 12. However, Plaintiffs fail to explain why *Johnson*'s logic should not apply to the instant situation. After undergoing an in-depth analysis of the Wisconsin constitution (including the state equal protection clause)—the *Johnson* court held that it did have a plausible grant of authority or legal standards to limit and direct their analysis of whether maps are fair to the political parties. *Id.* ¶¶ 39-63. The court aptly concluded,

> This case illustrates the extraordinary danger of asking the judiciary to exercise 'FORCE' and 'WILL' instead of legal 'judgment.' Manufacturing a standard of political 'fairness' by which to draw legislative maps in accordance with the subjective preferences of judges would refashion this court as a committee of oligarchs with political power superior to both the legislature and the governor.

Id. ¶ 80 (quoting *The Federalist No. 78*, at 465 (Alexander Hamilton)).

Plaintiffs are also quick to point out that the *Johnson* court reached a conclusion contrary to our Supreme Court in *Maestas* (i.e., whether a court selecting a redistricting map should take political considerations into account), and therefore this Court should not be persuaded by its reasoning. *See* Response at 12. This divergence of opinion is of no moment here, as we are not dealing with a court drawn map. While our Supreme Court decided to consider partisan symmetry

to ensure the *courts* created a truly neutral map, the Legislature is under no such obligation. *Compare Maestas*, 2012-NMSC-006, ¶ 31 ("The courts should not select a plan that seeks partisan advantage."), *with Rucho*, 139 S. Ct. at 2497 (observing that "a jurisdiction may engage in constitutional political gerrymandering" (quoting *Hunt*, 526 U. S. at 551). Thus, the question remains: how much partisan motivation and effect is "too much"? Respectfully, this Court is ill equipped to answer that question and should refrain from attempting to do so at this time.

CONCLUSION

In sum, New Mexico law (like federal and Wisconsin law) does not provide any authority and standards necessary for the Court to determine whether a map is fair to the political parties. Without such authority or standards, the courts should refrain from diving into the political thicket. *Cf. Mutz v. Mun. Boundary Comm'n*, 1984-NMSC-070, ¶ 19, 101 N.M. 694, 688 P.2d 12 (recognizing that courts should not decide political questions). Therefore, this Court should dismiss the Complaint.

Respectfully submitted,

/s/ Holly Agajanian

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CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2022, I filed the foregoing through the New Mexico Electronic Filing System, which caused all counsel of record to be served by electronic means.

Respectfully submitted,

/s/ Holly Agajanian
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