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IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

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

Plaintiffs-Appellants,

v.

No. S-1-SC-40146

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-Appellees.

On Appeal from the Fifth Judicial District Court in Lea County,
Cause No. D-506-CV-2022-00041
The Honorable Fred T. Van Soelen, District Judge, Division III

DEFENDANTS-APPELLEES' ANSWER BRIEF

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STATEMENT OF COMPLIANCE

I hereby certify that the body of the Defendants-Appellees' Answer Brief is twenty-six (26) pages long and consists of approximately 6,632 words and that Microsoft Word 2019 indicates that the body of the Answer Brief uses the proportionally spaced typeface of Times New Roman 14.

INTRODUCTION

The question before this Court—as it was before the district court—is whether New Mexico's congressional redistricting map ("SB 1") amounts to an egregious partisan gerrymander that entrenches a political party in power by depriving voters of a meaningful role in the political process when: (1) the map resulted in an election in which a Democrat won Congressional District 2 ("CD 2") by 0.7% of the vote in 2022; and (2) New Mexico's foremost expert on elections testified that CD 2 is a "toss up" under the enacted map. The district court correctly found that Plaintiffs failed to clear the high bar necessary to demonstrate an unconstitutional partisan gerrymander. This Court should affirm that ruling for two reasons.

First, the district court's decision is supported by faithful application of this Court's instructions in *Grisham v. Van Soelen*, ___-NMSC-____, __ P.3d __, 2023 WL 6209573 (S-1-SC-39481, Sept. 22, 2023) to the substantial evidence in the record that shows there is no unconstitutional partisan gerrymander here. In *Grisham*, this Court reserved a limited role for the judiciary under which it will find a constitutional violation only where a map constitutes an egregious partisan gerrymander that entrenches one party in power to the extent that it interferes with voters' right to full and effective participation in the political process. Throughout its opinion, the Court emphasized that the "touchstone" of an egregious gerrymandering claim is "entrenchment," whereby the dominant political party draws district lines to "effectively predetermine" the outcome of ensuing elections.

Grisham, ¶¶ 30, 32, 34, 51, 52, 64, 67. By requiring plaintiffs to prove entrenchment—an intentionally high bar—this Court ensures that New Mexico courts safeguard the right to vote without "becom[ing] omnipresent players in the political process." *Grisham*, ¶ 52 (quoting *Rucho v. Common Cause*, 139 S. Ct. 2484, 2509 (2019) (Kagan, J., dissenting).

Shortly after this Court issued the *Grisham* opinion, this case was tried in the district court. Applying *Grisham* to the evidence in the record, the district court concluded that Plaintiffs-Appellants failed to prove that SB 1 entrenched the Democratic party in power in CD 2.

That result is both logical and unremarkable. The 2022 race in CD 2 was decided by less than a percentage point, and in a district with such close elections, every voter knows that their participation—their vote—absolutely matters. Moreover, the district court also had the uncontroverted testimony and expert report of Brian Sanderoff, who is recognized nationally as a top expert on political polling and New Mexico elections more specifically. Mr. Sanderoff's opinion at trial that CD 2 is a highly competitive "toss-up" district that either party can win—an opinion backed by objective election data and his five decades of experience—precludes any conclusion that SB 1 has the effect of entrenching the Democratic party in power in that district. None of the evidence cited by Plaintiffs-Appellants changes that result or provides a basis for reversal.

Given the difficulty they face under a sufficiency-of-the-evidence standard, Plaintiffs-Appellants predictably attempt to recast their arguments as matters of legal error. But the record shows that the district court applied the exact standard for entrenchment this Court established in *Grisham*; Plaintiffs-Appellants simply disagree that the evidence shows CD 2 is competitive and not entrenched. The district court's findings on that point rest on substantial evidence and are entitled to deference by this Court.

Second, Plaintiffs-Appellants cannot prevail in their effort to water down this Court's standard for entrenchment set forth in *Grisham*. They urge this Court to lower the standard for determining the effect of a map from entrenchment to whether lawmakers from one party "maximized their partisan advantage" to strengthen partisan performance in one district without endangering their electoral prospects in others. This "maximization" argument is at odds with this Court's clear statement of what entrenchment means and why it is the touchstone of an egregious partisan gerrymander that offends equal protection under the New Mexico Constitution. Indeed, accepting Plaintiffs-Appellants' lower standard would put the judiciary right in the middle of the political thicket the Court adopted the "egregiousness" and "entrenchment" standards to avoid. *Grisham*, ¶ 52 (quoting *Rucho*, 139 S. Ct. at 2509) (Kagan, J., dissenting)).

The district court's decision illustrates how well *Grisham* works in practice. The trial court did not impose its "own vision of electoral fairness" and applied the

standards articulated in *Grisham* correctly to conclude that Plaintiffs-Appellants did not prove entrenchment. The map therefore is constitutional.

For all these reasons, the Court should affirm the district court.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY APPLIED THIS COURT'S DEFINITION OF POLICAL ENTRENCHMENT TO THE SUBSTANTIAL EVIDENCE THAT PROVES SB 1 IS NOT AN EGREGIOUS PARTISAN GERRYMANDER

The district court's conclusion that SB 1 does not rise to the level of an egregious partisan gerrymander is based on straightforward application of *Grisham* to the substantial credible evidence in the trial record that demonstrates there is no unconstitutional partisan gerrymander here. **[RP 5979-81 COL 7-9]** The trial court's factual findings are entitled to deference by the reviewing court, and none of the other evidence Plaintiffs-Appellants cite provides a basis for reversal.

A. In *Grisham*, this Court made clear that entrenchment occurs when the dominant political party draws districts that effectively predetermine the outcome of ensuing elections, regardless of the will of the voters.

In *Grisham*, this Court acknowledged the inherently political nature of redistricting and the attendant need to ensure that courts weighing gerrymandering claims avoid "'apportioning political power based on their own vision of electoral fairness, whether proportional representation or any other.'" *Grisham*, ¶ 38 n. 10 (citing to Justice Kagan's dissent in *Rucho*, 139 S. Ct. at 2515). On the other hand, the Court also emphasized the critical role that the judiciary plays in vindicating

New Mexicans' constitutional protections such as the right to vote. *Id.*, ¶¶ 31-34, 39. Given the paramount importance of the franchise to our democratic form of government and the health of our democracy, *id.*, ¶¶ 22-26, the Court concluded that the judiciary must be able to guard against unconstitutional districting plans that deny voters their "inalienable right to full and effective participation in the political process." *Grisham*, ¶ 30 (quoting *Reynolds v. Sims*, 377 U.S. 533, 565 (1964)).

To ensure that New Mexico courts safeguard the right to vote without "becom[ing] omnipresent players in the political process,"[1] this Court emphasized that only the *most egregious* partisan gerrymanders are unconstitutional—and the "touchstone of an egregious partisan gerrymander under Article II, Section 18 is political entrenchment...." *Grisham*, ¶ 51; *see also id.*, ¶ 67 ("We conclude by emphasizing that the touchstone of an egregious partisan gerrymander under Article II, Section 18 is political entrenchment...").

When a dominant political party entrenches itself in power through redistricting, it "supersede[s] the will of New Mexicans," thereby rendering "the fundamental right to vote in a free and open election ... a meaningless exercise." *Grisha*, ¶ 32. "The consequences of such entrenchment under a partisan gerrymander include that ensuing elections are *effectively predetermined*, essentially removing the remedy of the franchise from a class of individuals whose votes have been

[1] *Grisham*, ¶ 52 (quoting *Rucho*, 139 S. Ct. at 2509 (Kagan, J. dissenting)).

diluted." *Grisham*, ¶ 30 (emphasis added). As Justice Kagan observed in her dissent in *Rucho*, entrenchment is not just about winning one election—it shuts the door on the other political party for the next decade or more: "By drawing districts to maximize the power of some voters and minimize the power of others, a party in office at the right time can entrench itself there for a decade or more, no matter what the voters would prefer." *Rucho*, 139 S. Ct. at 2512 (Kagan, J., dissenting).

In other words, when districts are drawn such that the election outcome is predetermined in favor of the dominant political party, the votes of members of the other political party become diluted to the point of being meaningless because there is no chance of electing their party's candidate. This is the constitutional injury inflicted by egregious partisan gerrymandering. As this Court acknowledged, "We find it inconceivable that the framers of our constitution would consider an election in which the entrenched party *effectively predetermined the result* to be an election that is 'free and open.'" *Grisham*, ¶ 51 (emphasis added).

With this touchstone clearly articulated, the Court adopted the three-part test for a partisan gerrymandering claim articulated by United States Supreme Court Justice Elena Kagan in her dissenting opinion in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). Under that test, a plaintiff bringing such a claim must demonstrate that "state officials' predominant purpose in drawing a district's lines was to entrench their party in power" and that the resulting map in fact accomplishes that intended effect. Only if the plaintiff prevails on both the intent and effect prongs,

does the burden shift to the State to "come up with a legitimate, non-partisan justification to save its map." *Id.*, 2516 (Kagan, J., dissenting).

By requiring that plaintiffs asserting a partisan gerrymandering claim demonstrate that the dominant political party had both the intent to entrench themselves in power and that they achieved that effect through the map, the Court admittedly set a high bar. *Grisham*, ¶ 52 (recognizing that the Court is "requiring plaintiffs to make difficult showings relating to both purpose and effects'") (quoting *Rucho* at 2516). That was intentional, as both this Court and Justice Kagan noted that the standard must be tough to ensure courts intervene in only "the worst-of-the-worst cases of democratic subversion, causing blatant constitutional harms." *Grisham*, ¶ 52, quoting *Rucho* at 2509 (Kagan, J., dissenting). In a two-party, winner-take-all political system, every redistricting cycle inevitably alters the political performance of individual districts in some way, to one party or the other's advantage or disadvantage. This is why the Court recognized in *Grisham* that "some degree of vote dilution under a partisan gerrymander" does not offend the constitution, *Grisham*, ¶ 29, such that state courts should not be putting their thumb on the scale every time a map simply makes it more or less difficult for a party's candidate to get elected, short of entrenchment.

B. Substantial evidence proved that SB 1 created a competitive congressional district that does not fall within this Court's definition of entrenchment.

In finding that the Democratic party did not entrench itself in CD 2, the district court applied the exact definition of entrenchment in *Grisham* to the evidence that proved CD 2 is a competitive district. **[RP 5980 COL 7]** In so finding, the Court used the standard and language this Court used in *Grisham* to explain the concept of entrenchment:

> 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.

[RP 5980-81 COL 9]

Because entrenchment occurs when the dominant political party draws districts that effectively predetermine the outcome of future elections by keeping that party in power, a redistricting plan such as SB 1, which creates a competitive district that either party can win, is the antithesis of entrenchment. That competition is the opposite of entrenchment is irrefutable.[2]

[2] Indeed, while entrenchment is contrary to democratic principles, this Court has previously recognized the value of competitive districts: "Competitive districts are healthy in our representative government because competitive districts allow for the

1. Defendants-Appellees presented ample, credible evidence of competitiveness under SB 1.

At trial, Defendants-Appellees presented the testimony of Brian Sanderoff. Mr. Sanderoff has five decades of experience in political polling and demographic analysis in New Mexico, individually and through his nationally recognized company, Research and Polling, Inc., one of only four in the country to earn an "A-plus" rating from FiveThirtyEight, an election and political polling website. **[RP 1859–60; SRP 484–87]**.[3] He has served as the political analyst, pollster and elections expert for multiple New Mexico media outlets for several decades. **[SRP 487]** Mr. Sanderoff has played a critical role in every redistricting cycle in New Mexico since 1981, when he was assigned by the governor to work with the legislature. **[SRP 489–90]** In 1991, 2001, 2011 and 2021, the Legislative Council Service contracted with Research and Polling to provide professional and technical services for the legislature's redistricting efforts and, in 2021, for the Citizens Redistricting Committee, as well. **[SRP 490, 496–97]**

Mr. Sanderoff opined in his expert report and testified at trial that SB1 does not entrench the Democratic Party in power in CD2 because under SB1, CD2 is a competitive district "where either a Democratic or a Republican candidate could

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ability of voters to express changed political opinions and preferences." *Maestas v. Hall*, 2012-NMSC-006, ¶ 41, 274 P.3d 66.

[3] By Order entered October 31, 2023, the September 27 & 28, 2023 trial transcripts in Plaintiffs-Appellants' appendix were admitted to supplement the Record Proper. The appendix page numbers are cited as "SRP ___" herein.

win." **[RP 5977 FOF 40, SRP 510]**; *see also Expert Report of Brian Sanderoff dated August 25, 2023* ("By drawing CD 2 as a competitive, toss-up district that could be won by a candidate of either party, the Legislature did not entrench the Democratic party in power in CD 2"). **[RP 1864 & 3014]** Mr. Sanderoff presented several factual bases for this opinion. First, he testified that based on his extensive experience with elections in New Mexico, a "competitive" district is one in which the average Democratic and Republican performance falls within a 54% to 46% range. **[SRP 506:18–507:10; RP 5976 FOF 39]** With a Democratic performance index of 53% and a Republican performance index of 47%, CD 2 falls within the competitive range. **[SRP 507:2–10; RP 5976 FOF 39]** At trial, Mr. Sanderoff gave several examples of elections in New Mexico within the past 10 years in which the Democratic candidate's performance index was 54% or higher, and the Republican candidate's performance index was 46% or lower, and yet the Republican candidate won the election. **[SRP 507:15-509:20]** Plaintiffs-Appellants offered no evidence to rebut Mr. Sanderoff's testimony on competitiveness.

Second, Mr. Sanderoff testified that even prior to the enactment of SB 1, CD 2 was not a "safe" Republican district. **[RP 5977 FOF 40; SRP 513:6–13]**. Rather, it was a "strong leaning Republican district, where a Democratic candidate could win an occasional race in certain circumstances." *Id.*; *see also* **[SRP 517:22-518:3]** In his expert report and at trial, Mr. Sanderoff explained that in the twenty years prior to the enactment of SB 1, the Republican performance in CD2 had only been

strong in the years that the very popular Steve Pearce ran for that congressional seat. **[RP 1864-65, 3014-15; SRP 515-18]** In the 2008 and 2018 elections, when Mr. Pearce did not run for that seat and the Republican party instead put up lesser-known candidates, the Democratic candidates won CD 2. *Id.* In fact, the Republican candidate who lost the 2018 race under the prior map—Yvette Herrell—was the same Republican candidate who narrowly lost CD 2 to Democrat Gabe Vasquez in 2022 under the new SB 1 map. **[RP 1877, 3028]**

Third, the 2022 congressional election results confirm the highly competitive nature of CD2 under the SB1 map. In that race, Democratic candidate Gabe Vasquez won the seat by just 1,350 votes (96,986 to 95,636) over Republican candidate Yvette Herrell, a margin of only 0.7%. **[RP 5977 FOF 42; RP 1865 & 1877, 3013 & 3028; SRP 510:8-21]** Mr. Sanderoff testified that based on these election results, CD 2 was and will continue to be "a toss-up race." **[SRP 510-511]** When asked on the witness stand if a candidate of either party could win CD 2 under SB 1, Mr. Sanderoff testified "Yes. In 2024, any party, any candidate could win, absolutely." **[SRP 511:6–7]**, *see also* **[SRP 512:20-25]** (Mr. Sanderoff testified that "it would be a big question mark about what would happen in this district in the future. Perhaps it can go back and forth [between the two parties] over the years or what have you. It is no predetermined outcome in future races.").

Finally, at trial Mr. Sanderoff opined about the qualitative characteristics of candidates and campaigns that contribute to competitiveness: name recognition,

favorability, candidate quality, ability to raise campaign funds, and where a candidate is from within a district. **[SRP 548:10-22; RP 1863, 3013]** Based on these qualitative factors, CD 2's competitive political performance index, and the 2022 election outcome, Mr. Sanderoff concluded his testimony by stating, "I believe it is a really competitive district...And so I sincerely believe that this [race] could go either way." **[SRP 549:24-550:5]**

2. The district court grounded its findings and conclusions in the substantial evidence in the trial record.

This overwhelming evidence of competitiveness foreclosed a finding that SB 1 is an unconstitutional partisan gerrymander. Moreover, the district court's conclusion is consistent with its finding that SB 1 resulted in "substantial vote dilution." **[RP 5978-79 COL 5]** As this Court pointed out in *Grisham*, because "some degree of vote dilution under a partisan gerrymander" does not offend the constitution, it is only when the effect of such dilution "enable[s] politicians to entrench themselves in office against voters' preferences," that Article II, Section 18 is violated. *Grisham*, ¶¶ 29-30. Because any vote dilution effectuated by SB 1 resulted in a competitive district, the district court correctly found there was insufficient evidence of entrenchment. **[RP 5980 COL 9]** The district court entered a series of specific findings grounded in the trial record that fully support its decision:

> **Finding 39:** Brian Sanderhoff's [sic] expert report and testimony was that a "competitive" district is one in which the average Democratic and Republican performance falls within a 54% to 46% range, and that

CD 2 under SB 1 is narrower, with a Democratic performance index of 53% and a Republican performance index of 47%. Mr. Sanderhoff's report and testimony was that other factors that are less quantifiable affect competitiveness, including name recognition, favorability, candidate quality, and ability to raise funds, among other factors.

Finding 40: Mr. Sanderhoff's [sic] 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.

Finding 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.

Conclusion 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 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.

Conclusion 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.
>
> **Conclusion 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.

[RP 5976-81]

C. The district court's factual findings are entitled to deference.

This Court has long recognized that a district court's factual findings are entitled to deference:

> [I]t is for the finder of fact, and not for reviewing courts, to weigh conflicting evidence and decide where the truth lies. We defer to the trial court, not because it is convenient, but because the trial court is in a better position than we are to make findings of fact and also because that is one of the responsibilities given to trial courts rather than appellate courts.

McFarland Land and Cattle, Inc. v. Caprock Solar 1, LLC, 2023-NMSC-018, ¶ 8, 533 P.3d 1078 (quoting *State ex. rel. Dep't of Human Servs. v. Williams*, 1989-NMCA-008, ¶ 7, 108 N.M. 332, 772 P.2d 366).

The reviewing court must "not reweigh the evidence nor substitute [its] judgment for that of the fact finder." *Las Cruces Pro. Fire Fighters v. City of Las Cruces*, 1997-NMCA-044, ¶ 12, 123 N.M. 329, 940 P.2d 177. "The question is not

whether substantial evidence would have supported an opposite result; it is whether such evidence supports the result reached." *McFarland Land and Cattle, Inc.*, 2023-NMSC-018, ¶ 23 (quoting *Hernandez v. Mead Foods, Inc.*, 1986-NMCA-020, ¶ 16, 104 N.M. 67, 716 P.2d 645). "Substantial evidence is such relevant evidence that a reasonable mind would find adequate to support a conclusion." *State ex rel. King v. B & B Inv. Grp., Inc.*, 2014-NMSC-024, ¶ 12, 329 P.3d 658 (internal quotation marks and citation omitted). "The appellate court must review the evidence in the light most favorable to the prevailing party, indulging all reasonable inferences in support of the verdict and disregarding all inferences or evidence to the contrary." *Williams*, 1989-NMCA-008, ¶ 7.

As shown above, the district court's conclusion that Plaintiffs-Appellants failed to establish entrenchment was based on the ample, uncontroverted evidence of the highly competitive nature of the 2022 election in CD 2, and the testimony of elections expert Brian Sanderoff.[4]

[4] While not germane to the issues before the Court on appeal, Defendants-Appellees note that the district court included in its decision a finding rejecting the State's non-partisan substantial justification for SB 1. **[RP 5979 COL 6]** However, because the district court found that Plaintiffs-Appellants did not meet their burden on the "effects" prong of the Kagan test, the "substantial justification" prong of the test was never triggered. Moreover, the district court's finding overlooked the extensive non-partisan, legitimate policy bases underlying SB 1that were in the trial record, as reflected in the Citizen Redistricting Committee public hearings and testimony during floor debates and committee hearings during the Legislature's redistricting session. **[RP 3352-80; 2588-2657]**

D. The record includes nothing that would justify overturning the district court.

Plaintiffs-Appellants, of course, could not refute the 2022 election results, nor did they cast any doubt on Mr. Sanderoff's credibility or expert qualifications.[5] Instead they contend that CD 2 is not as competitive as the 2022 results suggest because a Democrat prevailed in CD 2 by 0.7% of the vote when (1) Yvette Herrell ran as an incumbent and thus should have had an advantage, and (2) 2022 was a strong election year nationally for Republicans. **[BIC 50-51]** However, Defendants-Appellees effectively rebutted both those points at trial. First, Mr. Sanderoff pointed out that Ms. Herrell was only a one-term incumbent who had been "beaten up" in her prior loss,[6] and that incumbency can be both an advantage and a disadvantage because the incumbent carries a record that can be attacked in the next campaign. **[SRP 534:5-15; 549:11-550:6]**. Second, as the district court recognized, the 2022 election was less favorable for Republicans than expected. **[RP 5977 FOF 42]**; *see Testimony of Plaintiff Senator Gallegos*, (noting the "wave...did not make it here to

[5] Counsel for Plaintiffs-Appellants asserted no objection to the Court's qualification of Mr. Sanderoff as an expert in New Mexico elections and political performance. **[SRP 502]** Indeed, in her cross-examination of Mr. Sanderoff, counsel for Plaintiffs-Appellants commented, "And by the way, I've talked to people about you, and they all say you're the man, so you know your stuff." **[SRP 537:17-19]**

[6] Rep. Herrell lost the CD 2 race to a Democrat in 2018 under the previous congressional map by 1.8%, then won by 7.5% in 2020. **[RP 3028]**; *see also New Mexico Secretary of State 2018 & 2020 General Election Results*, Legislative Defendants' FOF & COL Exhibit 10. **[RP 3004–05]**

New Mexico")**[SRP 149:22-25]**; *see also Supplemental Declaration of Kimball W. Brace, President of Election Data Services, Inc.* (explaining that nationally the 2022 election "was generally a disappointing one for Republicans, with Republican candidates performing worse than many expected and Democratic candidates performing better than expected, overall.").**[RP 4603-05]**[7]

Nor can Plaintiffs-Appellants rely on the "five categories of evidence" they cite in their Brief in Chief to reverse the district court's decision on the "effect" prong. **[BIC 34-47]** First, experts on both sides of the case opined that voter registration data is not a very meaningful predictor of partisan performance, and the Court credited that testimony. **[RP 5975 FOF 34]** (trial court finding that "party registration [is] a less meaningful predictor of partisan performance and election outcomes"); **[RP 3018-20; 3655-56; SRP 232-34]** Second, Plaintiffs-Appellants' "near perfect gerrymander" argument is at odds with this Court's definition of entrenchment and why it is the touchstone of an egregious partisan gerrymander. *See infra* Section II. Third, substantial, partisan shifts in population may speak to the map drawers' intent, but is not relevant to determining the ultimate effect accomplished by the map. *See Grisham*, ¶ 28 n. 8 (noting that cracking occurs when voters of the non-dominant party are spread "so thin that their candidates will not be

[7] Defendants-Appellants also presented evidence that a poll conducted as recently as September 13, 2023, by the reputable polling firm SurveyUSA, shows Yvette Herrell leading Rep. Gabe Vasquez in CD 2, 46% to 45%, with 9% of voters undecided. **[RP 4605; SRP 358:5-359:3]**

able to win"—something that did not happen here). Similarly, sophisticated social science models showing the map as an extreme outlier may reflect intent but do not shed light on whether the map ultimately entrenches the dominant party.[8] Finally, Plaintiffs-Appellants' focus on SB 1's departures from traditional redistricting principles is inapt because this Court already held that "reliance on traditional redistricting principles...as standards to satisfy *Rucho* is misplaced." *Grisham*, ¶ 46.

1. The testimony of Plaintiffs-Appellants' expert, Sean Trende, fails to provide any basis for reversing the district court.

That leaves Plaintiffs-Appellants relying on the conclusory opinion of their expert, Mr. Sean Trende, that Democrats entrenched themselves in CD 2, as a basis to reverse the district court. **[SRP 249]** That argument must fail. Mr. Trende's opinion about entrenchment is unsupported by any data; incorporates either an erroneous theory of statewide proportionality or a total misunderstanding of the Court's guidance in *Grisham*; and is directly at odds with the objective results of the 2022 election in CD 2.

First, Mr. Trende asserts that because Democrats won 100% of the representation in 2022 with 55% of the vote, the party has entrenched itself. **[SRP**

[8] While effects evidence can be used to infer intent as circumstantial, intent cannot be used to speculate as to effect. *Grisham*, ¶ 65 ("Regarding the effects prong of the Kagan test, we reiterate that evidence of substantial dilution of plaintiffs' votes must rely on objective district-specific evidence.").

247:15-248:18; SRP 286:1-4]; *but see Grisham*, ¶ 38 n. 10 (citing with approval Justice Kagan's rejection of proportional representation). Alternately, Mr. Trende equates a district that favors one party with a district where elections are effectively predetermined because of entrenchment. **[SRP 248:22-249:16]** (Trende testifying that "...this is going to be a district that favors a [sic] Democrats" and concluding that advantage shows the Democratic party entrenched in CD 2). Plans that favor or disfavor a party, without entrenchment, merely align with the idea that some degree of partisanship is constitutionally permissible in an inherently political process. *Cf. Grisham*, ¶¶ 29 & 30. Mr. Trende articulates no other evidence upon which his entrenchment conclusion is based.

Mr. Trende also admitted that while a challenger Democratic candidate unseated a single-term Republican representative, it was possible for CD 2 to elect a candidate from either party, just like in years past. **[SRP 248:22-249:12]** In fact, when questioned regarding the current CD 2 race, Mr. Trende agreed that a reputable polling organization reported the 2024 race as extremely close. **[SRP 358:2-16]** This testimony directly undercuts Mr. Trende's conclusion.

One final note on the "sophisticated social science analysis" Plaintiffs-Appellants trumpet at every opportunity. While such evidence and resulting opinions might be relevant to a court searching for circumstantial evidence of partisan intent under prong one—as anticipated by Justice Kagan in *Rucho*, 139 S. Ct. at 2523—or

as quantitative analysis of the partisan characteristics of a plan, Mr. Trende's "outlier analysis" cannot substitute for objective evidence evaluating entrenchment.

The district court heard, considered, and weighed Mr. Trende's testimony alongside testimony from Mr. Sanderoff and Dr. Jowei Chen, Defendants-Appellees' expert on legislative elections, statistics, and redistricting. **[RP 5976 FOF 37-40]** It found that SB 1 did not run afoul of the constitution by entrenching Democrats in power. **[RP 5980-81 COL 9]** This Court, sitting in review, is not in a position to reweigh conflicting evidence or substitute its own judgment for that of the fact-finder. *McFarland Land and Cattle, Inc.*, 2023-NMSC-018, ¶ 8; *N.M. Taxation & Revenue Dep't v. Casias Trucking*, 2014-NMCA-099, ¶ 20, 336 P.3d 436.

2. *Benisek* is inapposite.

Next, Plaintiffs-Appellants urge that Justice Kagan's discussion of the Maryland redistricting case of *Benisek v. Lamone*[9] in her *Rucho* dissent provides a playbook for New Mexico. **[BIC 2, 22, 26 & 43]** But this Court's position in *Grisham* is crystal clear:

> We reiterate and emphasize that although we refer to federal cases for the purpose of guidance, such cases do not compel our result. Rather, our opinion is separately, adequately, and independently based upon the protections provided by the New Mexico Constitution.

[9] *Benisek v. Lamone*, 348 F. Supp. 3d 493 (D. Md. 2018), *vacated and remanded sub nom. Rucho v. Common Cause*, 139 S. Ct. 2484, 2504 & 2508, 204 L. Ed. 2d 931 (2019); *see also Benisek v. Lamone*, Case 1:13-cv-03233, Doc. 236 *Order* (Aug. 9, 2019) (dismissing case for lack of jurisdiction).

Grisham, ¶ 33 (emphasis added). Thus, to the extent Plaintiffs-Appellants now argue that a dead letter federal opinion compels a different outcome as an "analogue," **[BIC 25]**—that approach is foreclosed. More fundamentally, *Benisek* is far afield factually and legally from SB 1 and its effect here.

In *Benisek*, Maryland Republicans asserted violations of First Amendment association and representation rights, not equal protection. While a federal First Amendment claim is structured somewhat-similarly (intent, effect, causation, justification), the higher bar of proving causation offsets an easier-to-meet effects standard, in which the *Benisek* plaintiffs needed only to show that their "opportunity to elect a candidate of choice—was meaningfully burdened." *Id.* at 519 (emphasis deleted), *cf. Grisham*, ¶¶ 50 & 51 (adopting effects test of political entrenchment achieved by substantial, intentional vote dilution). In fact, the three-judge panel in *Benisek* did not make a specific finding as to vote dilution or entrenchment, only that Maryland's CD 6 "disfavored Republican voters." *Id.* Thus, *Benisek* was neither instructive nor helpful to the district court in deciding *Grisham*'s effect prong, nor is it useful here on appeal. The standard here is egregious gerrymandering that entrenches one political party in power, and the district court correctly found that Plaintiffs-Appellants failed to meet that standard.

Benisek is also readily distinguishable on the facts. First, the incumbent Maryland representative unseated by the map there was no mere one-term

incumbent, but a twenty-year veteran office-holder who last won reelection by a margin of 28%.[10] *Benisek*, 348 F. Supp. 3d at 523. Second, in contrast to the competitive, toss-up 2022 election in New Mexico's CD 2, the *Benisek* panel concluded that "in *absolute* terms, they [Maryland CD 6 plaintiffs] had no real chance of" electing their preferred candidate based on the wide margins achieved by CD 6 Democratic candidates from 2012 to 2018: 20.9%, 1.5%, 15.9%, and 21%. *Id.* at 519–20 (emphasis in original); *compare to* **[RP 5977 FOF 42]** (2022 CD 2 election margin of 0.7% or 1,350 votes), *cf.* **[BIC 26-27, 27 n.3 & 49]** (pointing to the narrower 2014 election outcome, but omitting any reference to prior and subsequent elections in Maryland's CD 6). [11]

3. The only Plaintiff who testified admitted that low voter turnout failed to elect a Republican candidate to CD 2, not entrenchment by Democrats.

Finally, Plaintiffs-Appellants' sufficiency-of-the-evidence argument overlooks additional trial evidence that undercuts their claim of entrenchment. State Senator David Gallegos, the only named Plaintiff to testify at trial, candidly admitted that the real impediment to electing a Republican in CD 2 is low Republican voter turnout: "We had a lot of people that did not come to the polls, for whatever

[10] *See* n. 6, *supra* (Rep. Herrell won election for the first time in 2020 by a margin of 7.5%).

[11] *See also* Md. State. Bd. of Elections, *https://elections.maryland.gov/elections/2024/index.html* ("Official General Election Results" by year available for 2012, 2016, 2018, and 2020).

reason....I think we have a statewide problem of disenchantment by voters, and it just seemed to be in the Republican sector." **[SRP 143:20-144:8; 147:3-7]** (testifying that "I truly believe that if we give [sic] I'm going to say southeast New Mexico hope in a candidate, that our voter numbers will increase and that would be possibly the difference."). Senator Gallegos' testimony is corroborated by the New Mexico Secretary of State's historical turnout numbers for CD 2, which has lagged the rest of the state by 6 to 10% or 50,000 to 88,000 voters. **[RP 2431]** (summarizing district turnout rates for 2018, 2020, and 2022, citing https://electionresults.sos.state.nm.us/).

In sum, the district court faithfully followed this Court's guidance in *Grisham* and never lost sight of the fact that entrenchment is the touchstone of an egregious partisan gerrymander. Because the evidence failed to support a finding of entrenchment, the district court's decision that SB 1 does not offend the New Mexico constitution is sound and should be affirmed by this Court.

II. PLAINTIFFS-APPELLANTS' "MAXIMUM PARTISAN ADVANTAGE" THEORY IS AT ODDS WITH THIS COURT'S CLEAR STATEMENT OF ENTRENCHMENT AND WHY IT SERVES AS THE TOUCHSTONE OF AN EGREGIOUS PARTISAN GERRYMANDER.

Given the record evidence that they cannot change, Plaintiffs-Appellants try to cast their arguments as matters of legal error. Along the way, they attempt to water down the entrenchment standard adopted in *Grisham* to determine when a redistricting map qualifies as an unconstitutional egregious partisan gerrymander.

A common thread in Plaintiffs-Appellants' arguments is that this Court simply cannot have meant what it said in *Grisham*. In their telling, the Court cannot require proof that a party has entrenched itself in power to the extent that it impacts citizens' right to vote because, in New Mexico, Democrats could not entrench themselves in power in all three congressional districts given the state's current demographics. In their telling, the entrenchment standard makes the protections under Article II, Section 18 an "empty promise." **[BIC 51 & 52]** (alleging that required showing of entrenchment under *Grisham* "would make partisan-gerrymandering claims a dead-letter in New Mexico"). From there, Plaintiffs-Appellants insist the Court therefore should replace the entrenchment standard with a new standard that *Grisham* does not support. Specifically, they contend this Court intended to render unconstitutional a map that resulted in three more competitively drawn districts, which Plaintiffs-Appellants try to demonize by referring to the map as a "max-Democrat," "max-partisan," or "near-perfect" gerrymander. According to Plaintiffs-Appellants, the *Grisham* test should apply differently in New Mexico because of the current competitive political performance of the state of New Mexico as a whole, being roughly 54% Democratic to 46% Republican. **[BIC 15, 52]** In their words and curious logic, SB 1 is egregious precisely because it produces closer races in more competitive districts. **[BIC 50]**

Adrift without the landslide elections and grotesque boundaries typically present in gerrymandered districts, Plaintiffs-Appellants now argue that a statewide

"maximized partisan advantage" standard should be sufficient. But that is fundamentally different from a standard under which the judiciary only intervenes where partisan gerrymandering so entrenches a party in power that it deprives voters of the right to meaningfully participate in elections. Plaintiffs-Appellants' position also is irreconcilable with this Court's explicit and reiterated instruction that plaintiffs in partisan gerrymandering cases must demonstrate egregious effect by objective, district-specific evidence. *Compare* **[BIC 49-51]**, *to Grisham*, ¶ 65 ("Regarding the effects prong of the Kagan test, we reiterate that evidence of substantial dilution of plaintiffs' votes must rely on objective district-specific evidence."). Plaintiffs-Appellants' substitute standard runs counter to this Court's rule in *Grisham*, finds no support in New Mexico or federal law, implicitly suggests that the Court should apply a statewide proportionality rule, *cf. Grisham*, ¶ 38 n. 10, and disregards the variable, changing political composition of New Mexico's electorate. **[RP 5975 FOF 34; SRP 230:5-12, 520:25-522:3, & 522:12-523:7]** (both Mr. Trende and Mr. Sanderoff testified regarding changes in voter registration and partisanship in New Mexico over time). Such a standard would require the Court serve as an ever-present referee in future redistricting cycles.

In elevating the injury of the party over that of the individual voter, Plaintiffs-Appellants fail to acknowledge any of *Grisham*'s constitutional context and underlying principles. This Court made thorough examination of precedent in which New Mexico's courts have intervened to protect an individual's right to vote as "the

most precious" and of "paramount importance." *Grisham*, ¶ 22 (quoting *State ex rel. League of Women Voters of N.M. v. Advisory Comm. to N.M. Compilation Comm'n*, 2017-NMSC-025, ¶ 1, 401 P.3d 734, and *State ex rel. League of Woman Voters v. Herrera*, 2009-NMSC-003, ¶ 8, 145 N.M. 563, 203 P.3d 94). Acknowledging that some degree of partisanship and vote dilution is permissible, *Grisham* struck a careful balance in designing a judicial remedy to guard against the dire consequences of entrenchment, where elections are effectively predetermined, *id.* ¶ 30, and the right to vote is "transformed into a meaningless exercise." *Id.* ¶ 31. In other words, the Court's duty to act is triggered by and based on the deleterious effects of entrenchment, not because of the degree—maximum, perfect, or otherwise—of partisan advantage under a redistricting plan.

III. CONCLUSION

The district court correctly applied the law set forth by this Court in *Grisham*, based on the substantial evidence presented at trial, to conclude that Plaintiffs-Appellants failed to satisfy the "effect" prong of the test for an egregious partisan gerrymander. Accordingly, this Court should affirm the district court.

Respectfully Submitted,

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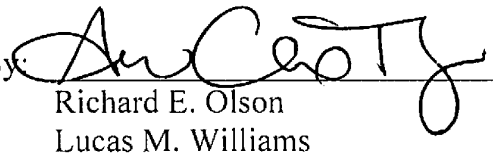
By: 

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CERTIFICATE OF SERVICE

Pursuant to Rules 12-307(C) and 12-307.2(D)(2) NMRA, the foregoing Defendants-Appellees' Answer Brief was served on the following on November 10, 2023, by the method reflected:

Person Served	Method
All parties or counsel of record	E-File/E-Serve

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