



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,

No. S-1-SC-40146

Plaintiffs-Appellants,

v.

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.

**DEMOCRATIC PARTY OF NEW MEXICO'S EXPEDITED MOTION
FOR LEAVE TO PARTICIPATE AS AMICUS CURIAE**

The Democratic Party of New Mexico (“DPNM”) respectfully moves for leave to file an *amicus* brief in support of Defendants and conditionally file the brief with this Motion as Exhibit A under Rule 12-320(A) NMRA. DPNM is filing this motion on an expedited basis prior to the oral argument scheduled for November 20, 2023.¹

INTEREST OF *AMICUS*

DPNM has a substantial interest in this high-profile dispute over New Mexico election law. When DPNM sought to intervene in district court, Plaintiffs did not dispute that DPNM’s interest in this litigation is substantial enough for intervention—which imposes a far higher bar than that for *amicus* participation. *See, e.g., Thriftway Mktg. Corp. v. State*, 1990-NMCA-115, ¶ 3, 111 N.M. 763, 810 P.2d 349, 351 (noting differences between bases for intervention and *amicus* participation). Nor did any party dispute below that New Mexico courts routinely include the state’s political parties in major election litigation. *See State ex rel. Riddle v. Oliver*, 2021-NMSC-018, ¶ 2, 487 P.3d 815, 818 (granting

¹ Counsel for DPNM conferred with counsel for Plaintiffs and Defendants regarding their position on this motion as required by Rule 12-309(C) NMRA. Plaintiffs object, the Secretary of State does not object, and Legislative Defendants take no position.

intervention of Republican Party of New Mexico in election dispute and “request[ing] responses” from other major parties); *see also Crum v. Duran*, 2017-NMSC-013, ¶ 3, 390 P.3d 971 (ordering that “the Democratic Party of New Mexico (DPNM) and the Republican Party of New Mexico (RPNM), New Mexico’s two major political parties, should be joined as party defendants” in challenge to primary election eligibility rules); *Johnson v. Vigil-Giron*, 2006-NMSC-051, 140 N.M. 667, 146 P.3d 312 (DPNM intervening as defendant in challenge to 2006 general election ballot).

DPNM has four distinct interests at stake in this litigation. First, a victory for Plaintiffs in this case would harm the electoral prospects of DPNM’s candidates. *See Mecinas v. Hobbs*, 30 F.4th 890, 897-99 (9th Cir. 2022) (finding this interest sufficient for Article III standing). Second, a decision in Plaintiffs’ favor would require DPNM to expend critical resources redesigning its electoral strategy for 2024 based on a newly-configured congressional map issued, at best, just months before the upcoming June 2024 primary. *See Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007), *aff’d*, 553 U.S. 181, 189 n.7 (2008) (finding Article III standing due to diversion of resources). Third, a

decision in Plaintiffs' favor would deprive DPNM of a congressional map which it has supported before and since its enactment in December 2021. *See WildEarth Guardians v. Nat'l Park Serv.*, 604 F.3d 1192, 1200 (10th Cir. 2010) (finding organization that had supported enacted policy and stood to lose from its elimination had interest sufficient for intervention as of right). Fourth, Plaintiffs' lawsuit threatens to dilute the voting power of DPNM's voters and constituents. *See Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 573-74 (6th Cir. 2004) (holding that risk of member disenfranchisement conferred Article III standing).

All of these interests support DPNM's participation as *amicus* in this case.

ARGUMENT

I. DPNM's Proposed *Amicus* Brief brings an unrepresented perspective and fills a gap in the existing expert reports.

DPNM's Proposed *Amicus* Brief would assist the Court by providing a perspective otherwise missing from this litigation. Plaintiffs include the Republican Party of New Mexico, DPNM's partisan opposition, and DPNM can provide a balancing point of view that the government defendants, by virtue of their status as state actors, cannot provide "while

acting in good faith.” *La Union del Pueblo Entero v. Abbott*, 29 F.4th 299, 309 (5th Cir. 2022) (holding that government defendants could not represent interests of political party); *see also Utah Ass’n of Cntys. v. Clinton*, 255 F.3d 1246, 1250-51 (10th Cir. 2001) (recognizing that government defendants necessarily represent different interests than private parties). This Court’s evaluation of the partisan fairness of New Mexico’s congressional map can only benefit from hearing the perspective of *both* of New Mexico’s major political parties.

In addition, in its decision in *Grisham*, decided just a few months ago, this Court held that partisan gerrymandering claims must be evaluated using the test articulated by Justice Kagan in her dissent in *Rucho v. Common Cause*, 139 S. Ct. 2484, 2509 (2019) (Kagan, J., dissenting)). DPNM’s proposed amicus brief offers this Court the insights of a recognized partisan gerrymandering expert using statistical partisan fairness analyses not replicated in the existing record, which demonstrate that Plaintiffs cannot succeed under the applicable test. Dr. Christopher Warshaw is a Professor of Political Science at George Washington University who regularly participates in redistricting cases and publishes about partisan gerrymandering. As his proposed report

itself explains, “[t]his analysis speaks to the second prong of Justice Kagan’s test in her dissenting opinion in *Rucho v. Common Cause*, which asks whether a plan leads to ‘substantial’ partisan vote dilution, as well as this Court’s ‘egregious effect’ standard.” Ex. A-1 at 3. In addition, both the brief and the report’s treatment of competitiveness provide a “legitimate, non-partisan justification” for the enacted map under the third prong of Justice Kagan’s test. *Rucho*, 139 S. Ct. at 2517 (Kagan, J. dissenting).

Dr. Warshaw’s analysis of partisan fairness metrics is not duplicated in any of the existing expert reports. Plaintiffs’ expert, Sean P. Trende, by his own admission “does not rely upon various ‘partisan fairness’ metrics.” **[5 RP 1100]** Neither do the Legislative Defendants’ experts. Dr. Jowei Chen relies primarily on simulated district maps, and although both the reports of Kimball Brace and Brian Sanderoff touch on the competitiveness of New Mexico’s enacted map, neither utilizes partisan fairness metrics like those in Dr. Warshaw’s report. Therefore, Dr. Warshaw’s analysis—which addresses partisan fairness head-on as instructed by Justice Kagan’s *Rucho* dissent—can only assist this Court

in adjudicating whether the enacted map constitutes an “egregious” partisan gerrymander.

II. DPNM’s Proposed *Amicus* Brief will not prejudice the parties.

DPNM was not served with this Court’s order accepting certification from the Court of Appeals but reached out to all counsel regarding its intent to seek *amicus* participation as soon as it learned of the court-ordered deadlines. Although DPNM was not able to provide 14 days’ notice to the parties as required by Rule 12-320(D)(1) NMRA, the parties are not prejudiced by the late notice, particularly where the submission of the present motion and Proposed *Amicus* Brief is timely. *See* Rule 12-320(D)(2)(a) NMRA (“a prospective amicus curiae shall file its motion and brief within seven (7) days after the due date of the principal brief of the party whose position it supports”); Scheduling Order (Oct. 13, 2023) (“the answer brief shall be timely if filed on or before Sunday, November 12, 2023”).

The parties have had notice as of July 2023 that DPNM sought to intervene in district court. **[3 RP 713-45]** And as of September 2023, the parties have had notice that DPNM sought to participate as an *amicus curiae* in district court. **[18 RP 4870]** The parties have also had ample

notice of the existence and contents of Dr. Warshaw's report. DPNM first disclosed Dr. Warshaw as an expert witness in its Proposed Witness List, filed on August 10. **[5 RP 1040]** DPNM then filed Dr. Warshaw's complete report alongside its Proposed Expert Disclosure on August 28. **[9 RP 2111]** And DPNM moved in the district court to submit a similar amicus brief, again attaching Dr. Warshaw's report. **[18 RP 4870, 4877, 4892]** All of these filings gave the parties an opportunity to respond to the report and DPNM's argument and analysis if they so chose.

DPNM does not seek to participate in oral argument. DPNM is filing this motion for leave prior to the deadline according to Rule 12-320(D)(2)(a) NMRA and this Court's scheduling order entered on October 13, 2023, and prior to oral argument in this case. DPNM, like the existing parties, has a strong interest in the expeditious resolution of this matter.

DPNM understands that under Rules 12-320(D)(3) and 12-318(F)(4) NMRA, documents may not be attached to a brief. DPNM hereby seeks leave to file the report of Dr. Warshaw as Exhibit A-1 to its conditionally filed *amicus* brief.

CONCLUSION

DPNM respectfully requests that the Court grant its motion for leave to participate as *amicus*, file on the record DPNM's attached *Amicus* Brief and attachment, and take these filings into consideration when deciding the merits.

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Respectfully submitted,

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