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M. Katherine Bing, Clerk  
Supreme Court of Kentucky

No. 2022-SC-0139

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**In the Kentucky Supreme Court**

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DERRICK GRAHAM, JILL ROBINSON, MARY LYNN COLLINS,  
KATIMA SMITH-WILLIS, JOSEPH SMITH, and THE KENTUCKY  
DEMOCRATIC PARTY,

*Plaintiffs-Appellants,*

v.

MICHAEL ADAMS, in his official capacity of Secretary of State, and  
KENTUCKY STATE BOARD OF ELECTIONS,

*Defendants-Appellees.*

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APPEAL FROM FRANKLIN CIRCUIT COURT  
CASE NO. 22-CI-00047

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**APPELLANTS' RESPONSE TO CROSS APPEAL BRIEF**

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**CERTIFICATE OF SERVICE**

In accordance with RAP 30(B), on September 14, 2023, the undersigned filed this brief with the Court's electronic filing system which caused a copy to be served on all counsel of record. The undersigned also served copies of the brief via U.S. Mail on (1) Hon. Thomas Wingate, Franklin Circuit Court, 222 St. Clair St., Frankfort, KY 40601; (2) Victor Maddox, Heather Becker, Alex Magera, Aaron Silletto, Office of Attorney General, 700 Capital Avenue, Suite 118, Frankfort, KY 40601; (3) Taylor Brown, Kentucky State Board of Elections, 140 Walnut Street, Frankfort, KY 40601; (4) Jennifer Scutchfield, Office of the Secretary of State, 700 Capital Avenue, Suite 152, Frankfort, KY 40601. Undersigned counsel further certifies that it did not retrieve the appellate record from the Franklin Circuit Clerk.

*s/ Michael P. Abate*

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## INTRODUCTION

As required by this Court's June 27, 2023 Order Expediting Briefing, this submission responds to the Commonwealth's arguments as Cross-Appellant. Because the Commonwealth's brief essentially ignored its own cross-appeal, spending all 88 pages on its Appellee arguments, the Commonwealth has effectively abandoned its cross-appeal. *See, e.g., Milby v. Mears*, 580 S.W.2d 724, (Ky. App. 1979); *Continental Cas. Co. v. Skaggs*, 436 S.W.2d 510, 512 (Ky. App. 1969).

The cross-appeal lacked merit in any event. The trial court correctly held that the Commonwealth's request to enjoin use of pre-2020 maps for the State House and Congress, and declare them invalid, is not yet ripe and/or already moot, unless and until some party asks the court to order the Commonwealth to use those maps in a future election. Appellants do not seek that relief in this case (and have not done so since the trial court denied their motion for a Temporary Injunction in February 2022). Thus, the Commonwealth's cross-appeal is purely academic, and the trial court correctly declined to address it.

Finally, Appellants note a recent development this Court should be aware of prior to argument. Recently, another state Supreme Court held that partisan gerrymandering claims are justiciable under its state constitution and set forth a test for evaluating them. *See, e.g., Grisham v. Van Soelen et al.*, No S-1-SC-39481 (N.M. Sup. Ct. July 5, 2023). That Order is briefly summarized below.

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## ARGUMENT

### I. The Commonwealth Has Abandoned Its Cross-Appeal

This case consists of cross-appeals from the Franklin Circuit Court’s orders and judgment. Appellants challenged the circuit court’s conclusions that The Kentucky Constitution allows the General Assembly to: 1) unnecessarily split and combine Kentucky’s counties in ways prohibited by the plain text of Section 33 of Kentucky’s Constitution, so long as it divides the fewest number of counties possible while maintaining population equivalence and 2) engage in partisan gerrymandering when drawing State House and Congressional districts. The Commonwealth, conversely, appealed from the portions of the judgment denying as moot its request for an injunction against further use of the pre-2020 State House and Congressional maps to conduct future elections. *See* Appellee Br., p. 5 & n.2 (noting the cross-appeal was from the portion of the judgment that “mooted the Commonwealth’s counterclaim and cross-claim”).

In its scheduling order, this Court ordered Appellants to “file a *response* brief (not a *combined response/reply brief*) to the combined response brief/initial brief” prior to oral argument. Order Expediting Briefing ¶ 3 (emphasis in original). This Court was clear that “[t]he response brief of the Appellants/Cross-Appellees shall be limited in scope, responding only to the initial arguments presented by the Office of Attorney General as Cross-Appellants in the combined brief.” *Id.* Appellants’ reply arguments are to be included in a post-argument reply brief. *Id.* ¶ 5.

Essentially all of the Commonwealth’s 90-page brief was devoted to attacking Appellants’ arguments. Only a single footnote concerned the cross-appeal, and that footnote concedes that the arguments regarding use of the pre-2020 maps are moot because Appellants do not seek “reinstatement of the old Congressional and State House plans.” Appellee Br., p.5 n.2. That much has been clear since the trial court denied Appellants’ request for a temporary injunction in February 2022. After that point, Appellants only sought to have the court declare the maps invalid and order the legislature to try again. (This history suggests that the real purpose of the cross-appeal was gamesmanship: to expand the number of pages that the Commonwealth had to attack Appellants’ arguments, and to give it the “last word” in briefing).

By failing to address the merits of its cross-appeal in the brief, the Commonwealth has effectively abandoned that challenge. After all, “[a]n appellant’s failure to discuss particular errors in his brief is the same as if no brief at all had been filed on those issues.” *Milby v. Mears*, 580 S.W.2d 724, (Ky. App. 1979); *see also Roe v. Commonwealth*, No. 2020-SC-0150-MR, 2022 WL 4397746, at \*8 (Ky. Sept. 22, 2022) (“Even when briefs have been filed, a reviewing court will generally confine itself to errors pointed out in the briefs and will not search the record for errors.”); *Continental Cas. Co. v. Skaggs*, 436 S.W.2d 510, 512 (Ky. 1969) (“[T]he appellee filed notice of cross-appeal but has abandoned it by failing to present any brief to support it...”). In such cases, appellate courts appropriately decline even to address cross-appeal arguments.

The cross-appeal would lack merit even if it were properly preserved. The trial court was right to conclude that the Commonwealth's request for an injunction against use of the pre-2020 State House maps is not ripe, and/or is moot, absent a request that they be used for a future election. *See* R. 1894-1900. After all, "[t]his Court has repeatedly reaffirmed the proposition that it has no jurisdiction to decide issues which do not derive from an actual case or controversy." *Commonwealth v. Hughes*, 873 S.W.2d 828, 829 (Ky. 1994) (citing Ky. Const. § 110).

## **II. Appellants Expressly Reserve their Reply Arguments**

In light of the waiver principles just discussed, Appellants would normally present all their arguments in a single response/reply brief responding to the Commonwealth's filing. Appellants strongly disagree with the Appellee arguments advanced in the Commonwealth's brief, and look forward to addressing those issues at an appropriate time.

However, Appellants take seriously this Court's admonition that this brief must "limited in scope, responding only to the initial arguments presented by the Office of Attorney General *as Cross-Appellants in the combined brief.*" Order Expediting Briefing ¶ 3 (emphasis added). In light of that instruction, Appellants are not including their reply arguments in this filing. Appellants expressly reserve those arguments, which they will present at oral argument and in the separate brief contemplated by this Court's briefing order. Appellants further note that if they have misinterpreted this

Court’s order, they respectfully request the right to supplement this brief to include their reply arguments.

**III. New Authority Supports Appellants’ Partisan Gerrymandering Claims.**

Given the unique structure of the briefing schedule in this case—with reply briefs due after argument—Appellants wish to make this Court aware of a recent development that bears on the parties’ arguments. After Appellants filed their opening brief, another state Supreme Court issued a decision interpreting its state constitution to allow partisan gerrymandering claims like the one Appellants raise here.

In *Grisham v. Van Soelen et al.*, No S-1-SC-39481 (N.M. July 5, 2023) (attached as **Tab 1**), the New Mexico Supreme Court held that “a partisan gerrymandering claim is justiciable under Article II, Section 18 of the New Mexico Constitution” (Tab 1 ¶ 1), which provides generalized guarantees of due process and equal protection. *See* N.M. Const., Art. II, § 18 (“No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws. Equality of rights under law shall not be denied on account of the sex of any person.”).

The court then proceeded to give guidance to a state trial court considering a partisan gerrymandering claim. It acknowledged that “some degree of partisan gerrymandering is permissible . . . so long as the degree is not egregious in intent and effect.” Tab 1, ¶ 3. However, the court found it

“unnecessary to determine the precise degree that is permissible” in all instances. *Id.*

The court also made clear that it would apply intermediate scrutiny to such claims. Tab 1, ¶ 4. The court further directed that “[i]n evaluating the degree of partisan gerrymandering . . . [a] court shall consider and address evidence comparing the relevant . . . district’s voter registration percentage/data, regarding the individual plaintiff’s party affiliation under the challenged . . . maps, as well as the same source of data under the prior maps.” *Id.* ¶ 6. It also ordered the trial court to consider “any other evidence relevant to” the test it adopted for determining whether an impermissible partisan gerrymander has occurred.

The governing analytical framework adopted by the New Mexico Supreme Court is “the three-part test articulated by Justice Kagan in her dissent in *Rucho v. Common Cause*, 139 S. Ct. 2484, 2516 (2019).” *Id.* ¶ 2. “As many legal standards do, that test has three parts: (1) intent; (2) effects; and (3) causation.” *Rucho*, 139 S. Ct. at 2516 (Kagan, J.). “First, the plaintiffs challenging a districting plan must prove that state officials’ ‘predominant purpose’ in drawing a district’s lines was to ‘entrench [their party] in power’ by diluting the votes of citizens favoring its rival.” *Id.* (citations omitted). “Second, the plaintiffs must establish that the lines drawn in fact have the intended effect by ‘substantially’ diluting their votes.” *Id.* “And third, if the plaintiffs



make those showings, the State must come up with a legitimate, non-partisan justification to save its map.” *Id.*

### CONCLUSION

There is no serious dispute that the Commonwealth’s crossclaim and counterclaim seeking to enjoin use of the pre-2020 maps is not ripe and/or is moot. This Court should summarily reject the Commonwealth’s cross-appeal for that reason.

Respectfully Submitted,



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**WORD COUNT CERTIFICATE**

This document complies with the word limit of RAP 31(G)(3)(c) because, excluding the parts of the document exempted by RAP 15(E), it contains 1,271 words according to the count of Microsoft Word software.

/s/ Michael P. Abate

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**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**July 5, 2023**



**NO. S-1-SC-39481**

**MICHELLE LUJAN GRISHAM in her  
official capacity as Governor of the New Mexico,  
HOWIE MORALES, in his official capacity as New  
Mexico Lieutenant Governor and President of  
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,**

Petitioners,

v.

**HON. FRED VAN SOELEN,  
District Court Judge,  
Fifth Judicial District Court,**

Respondent,

and

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

Real Parties in Interest,

and

**MAGGIE TOULOUSE OLIVER,  
Defendant-Real Party in Interest.**

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**ORDER**

WHEREAS, this matter initially came on for consideration by the Court upon *verified petition for writ of superintending control and request for stay* and responses thereto;

WHEREAS, this Court granted the request for stay in D-506-CV-2022-00041 on October 14, 2022, and ordered the parties to file briefs on the issues presented in the *verified petition for writ of superintending control*;

WHEREAS, this Court heard arguments in this matter on January 9, 2023, and thereafter ordered the parties to file supplemental briefs addressing the issue of whether the New Mexico Constitution provides greater protection than the United States Constitution against partisan gerrymandering;

WHEREAS, this matter now comes before the Court upon the parties' supplemental briefs and motion to substitute public officer and amend caption;

WHEREAS, the Court having considered the foregoing and being sufficiently advised, Chief Justice C. Shannon Bacon, Justice Michael E. Vigil, Justice David K. Thomson, Justice Julie J. Vargas, and Justice Briana H. Zamora concurring;

NOW, THEREFORE, IT IS ORDERED that the motion to substitute is GRANTED, and Javier Martinez shall be substituted for Brian Egolf as Speaker of the House;

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1 IT IS FURTHER ORDERED that the caption on any further pleadings filed  
 2 in this proceeding, if any, shall conform to the caption of this order;

3 IT IS FURTHER ORDERED that the *verified petition for writ of*  
 4 *superintending control* is GRANTED with respect to Petitioners’ request that this  
 5 Court provide the district court guidance for resolving a partisan gerrymandering  
 6 claim;

7 IT IS FURTHER ORDERED that the stay in D-506-CV-2022-00041 is  
 8 hereby VACATED, and the district court shall take all actions necessary to resolve  
 9 this matter **no later than October 1, 2023**;

10 IT IS FURTHER ORDERED that as a threshold matter, the district court  
 11 shall conduct a standing analysis for all parties;

12 IT IS FURTHER ORDERED that in resolving this matter, the district court  
 13 shall act in accordance with and apply the following holdings and standards as  
 14 determined herein:

- 15 1. A partisan gerrymandering claim is justiciable under Article II,  
 16 Section 18 of the New Mexico Constitution;
- 17 2. A partisan gerrymandering claim under the New Mexico Constitution  
 18 is subject to the three-part test articulated by Justice Kagan in her  
 19 dissent in *Rucho v. Common Cause*, 139 S.Ct. 2484, 2516 (2019);
- 20 3. Clearly, a district drawn without taking partisan interests into account  
 21 would not present a partisan gerrymander. *Cf.* N.M. Const. art. II, §§  
 22 2, 3, 4. However, as with partisan gerrymandering under the  
 23 Fourteenth Amendment, some degree of partisan gerrymandering is  
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permissible under Article II, Section 18 of the New Mexico Constitution. *Accord Rucho*, 139 S.Ct. at 2497. At this stage in the proceedings, it is unnecessary to determine the precise degree that is permissible so long as the degree is not egregious in intent and effect;

4. Intermediate scrutiny is the proper level of scrutiny for adjudication of a partisan gerrymandering claim under Article II, Section 18 of the New Mexico Constitution. *See Breen v. Carlsbad Municipal Schools*, 2005-NMSC-028, ¶¶ 11-15, 30-32, 138 N.M. 331, 120 P.3d 413;
5. Under one-person, one-vote jurisprudence, some mathematical deviation from an ideal district population may be permissible as “practicable.” *Cf. Harris v. Ariz. Indep. Redistricting Comm’n*, 578 U.S. 253, 258-59 (2016) (quoting *Reynolds v. Sims*, 377 U.S. 533, 579 (1964)) (“The Constitution . . . does not demand mathematical perfection. In determining what is ‘practicable,’ we have recognized that the Constitution permits deviation when it is justified by ‘legitimate considerations incident to the effectuation of a rational state policy.’”);
6. In the context of a partisan gerrymandering claim, a reasonable degree of partisan gerrymandering—taking into account the inherently political nature of redistricting—is likewise permissible under Article II, Section 18 and the Fourteenth Amendment;
7. In evaluating the degree of partisan gerrymandering in this case, if any, the district court shall consider and address evidence comparing the relevant congressional district’s voter registration percentage/data, regarding the individual plaintiffs’ party affiliation under the challenged congressional maps, as well as the same source of data under the prior maps. The district court shall also consider any other evidence relevant to the district court’s application of the test referenced in paragraph 2 of this order.

IT IS FURTHER ORDERED that a writ of superintending control shall issue contemporaneously with this order; and

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IT IS FURTHER ORDERED that an opinion in this matter shall follow.

IT IS SO ORDERED.



WITNESS, the Honorable C. Shannon Bacon, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 5th day of July, 2023.

Elizabeth A. Garcia, Clerk of Court  
Supreme Court of New Mexico

By \_\_\_\_\_

A handwritten signature in cursive script that reads "Leonora Vidora".

Chief Deputy Clerk of Court

**I CERTIFY AND ATTEST:**

A true copy was served on all parties or their counsel of record on date filed.

Lezette Strasser Cordeiro

Chief Deputy Clerk of the Supreme Court of the State of New Mexico