

---

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

CASE NO. 2022-0629

---

*Miles Brown & a.,*

*Plaintiffs-Appellants,*

v.

*Secretary of State & a.,*

*Defendants-Appellees.*

---

Rule 7 Appeal from Final Judgment of Hillsborough County  
Superior Court, Southern District

---

**PLAINTIFFS-APPELLANTS' MOTION FOR LEAVE TO  
FILE SUPPLEMENTAL AUTHORITY**

---

Steven J. Dutton (17101)  
MCLANE MIDDLETON, P.A.  
900 Elm St.  
Manchester, NH 03101

Paul Twomey (2589)  
P.O. Box 623  
Epsom, NH 03234

Abha Khanna\*  
Jonathan P. Hawley\*  
ELIAS LAW GROUP LLP  
1700 Seventh Ave.  
Suite 2100  
Seattle, WA 98101

Aaron M. Mukerjee\*  
ELIAS LAW GROUP LLP  
250 Massachusetts Ave. NW  
Suite 400  
Washington, DC 20001

\*Admitted *pro hac vice*

---

Pursuant to Rule 16(7) of this Court, Appellants Miles Brown, Elizabeth Crooker, Christine Fajardo, Kent Hackmann, Bill Hay, Prescott Herzog, Palana Hunt-Hawkins, Matt Mooshian, Theresa Norelli, Natalie Quevedo, and James Ward, by and through their attorneys, hereby move for leave to file the enclosed supplemental authority (attached as Exhibit 1). In support of their motion, Appellants state as follows:

1. On July 5, 2023, the New Mexico Supreme Court issued an order in the case of *Grisham v. Van Soelen*, No. S-1-SC-39481 (N.M. July 5, 2023).
2. The New Mexico Supreme Court's holdings are directly relevant to the arguments in this appeal.
3. In its order, the court held that partisan-gerrymandering claims under the New Mexico Constitution's equal-protection clause are justiciable. *Grisham*, slip. op. at 3.

WHEREFORE, Appellants respectfully request that this Court grant their motion for leave to file the enclosed supplemental authority.

July 10, 2023

Respectfully submitted,

MILES BROWN,  
ELIZABETH CROOKER,  
CHRISTINE FAJARDO,  
KENT HACKMANN,  
BILL HAY,  
PRESCOTT HERZOG,  
PALANA HUNT-HAWKINS,  
MATT MOOSHIAN,  
THERESA NORELLI,  
NATALIE QUEVEDO, and  
JAMES WARD

By: /s/ Steven J. Dutton  
Steven J. Dutton (17101)  
McLANE MIDDLETON, P.A.  
900 Elm Street  
Manchester, NH 03101  
(603) 628-1377

Abha Khanna\*  
Jonathan P. Hawley\*  
ELIAS LAW GROUP LLP  
1700 Seventh Ave  
Suite 2100  
Seattle, WA 98101  
(206) 656-0177

Paul Twomey (2589)  
P.O. Box 623  
Epsom, NH 03234  
(603) 568-3254

Aaron M. Mukerjee\*  
ELIAS LAW GROUP LLP  
250 Massachusetts Ave. NW  
Suite 400  
Washington, DC 20001  
(202) 968-4654

\*Admitted *pro hac vice*

### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Plaintiffs-Appellants' Motion for Leave to File Supplemental Authority shall be served to the following parties of record through the New Hampshire Supreme Court's electronic filing system:

Matthew G. Conley, Esq., and Myles B. Matteson, Esq.,  
counsel for Defendant-Appellee David Scanlan, New  
Hampshire Secretary of State.

Samuel R.V. Garland, Esq., and Brendan. A. O'Donnell, Esq.,  
counsel for Defendant-Appellee State of New Hampshire.

/s/ Steven J. Dutton  
Steven J. Dutton

## **EXHIBIT 1**

Defendant-Real Party in Interest.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20

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

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;

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
- 18 2. A partisan gerrymandering claim under the New Mexico Constitution  
19 is subject to the three-part test articulated by Justice Kagan in her  
20 dissent in *Rucho v. Common Cause*, 139 S.Ct. 2484, 2516 (2019);  
21
- 22 3. Clearly, a district drawn without taking partisan interests into account  
23 would not present a partisan gerrymander. *Cf.* N.M. Const. art. II, §§  
24 2, 3, 4. However, as with partisan gerrymandering under the  
25 Fourteenth Amendment, some degree of partisan gerrymandering is



1 permissible under Article II, Section 18 of the New Mexico  
2 Constitution. *Accord Rucho*, 139 S.Ct. at 2497. At this stage in the  
3 proceedings, it is unnecessary to determine the precise degree that is  
4 permissible so long as the degree is not egregious in intent and effect;  
5

- 6 4. Intermediate scrutiny is the proper level of scrutiny for adjudication of  
7 a partisan gerrymandering claim under Article II, Section 18 of the  
8 New Mexico Constitution. *See Breen v. Carlsbad Municipal Schools*,  
9 2005-NMSC-028, ¶¶ 11-15, 30-32, 138 N.M. 331, 120 P.3d 413;  
10
- 11 5. Under one-person, one-vote jurisprudence, some mathematical  
12 deviation from an ideal district population may be permissible as  
13 “practicable.” *Cf. Harris v. Ariz. Indep. Redistricting Comm’n*, 578  
14 U.S. 253, 258-59 (2016) (quoting *Reynolds v. Sims*, 377 U.S. 533, 579  
15 (1964)) (“The Constitution . . . does not demand mathematical  
16 perfection. In determining what is ‘practicable,’ we have recognized  
17 that the Constitution permits deviation when it is justified by  
18 ‘legitimate considerations incident to the effectuation of a rational  
19 state policy.’”);  
20
- 21 6. In the context of a partisan gerrymandering claim, a reasonable degree  
22 of partisan gerrymandering—taking into account the inherently  
23 political nature of redistricting—is likewise permissible under Article  
24 II, Section 18 and the Fourteenth Amendment;  
25
- 26 7. In evaluating the degree of partisan gerrymandering in this case, if  
27 any, the district court shall consider and address evidence comparing  
28 the relevant congressional district’s voter registration percentage/data,  
29 regarding the individual plaintiffs’ party affiliation under the  
30 challenged congressional maps, as well as the same source of data  
31 under the prior maps. The district court shall also consider any other  
32 evidence relevant to the district court’s application of the test  
33 referenced in paragraph 2 of this order.  
34

35 IT IS FURTHER ORDERED that a writ of superintending control shall  
36 issue contemporaneously with this order; and  
37

1

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

2

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, reading "L. Pamela Bidora", written over a horizontal line.

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.

L. Pamela Bidora

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