

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT**

Docket No. 2022-0629

Miles Brown, et al.

v.

Secretary of State, et al.

**DEFENDANTS' OBJECTION TO
PLAINTIFFS' MOTION FOR LEAVE
TO FILE SUPPLEMENTAL AUTHORITY**

The Defendants, by and through the Office of the Attorney General, object to the Plaintiffs' July 10, 2023, Motion for Leave to File Supplemental Authority.

On July 10, 2023, the Plaintiffs moved for leave to file a recent unpublished order of the New Mexico Supreme Court as a supplemental authority (*Grisham v. Van Soelen*, No. S-1-SC-39481 (N.M., July 5, 2023)). In doing so, the Plaintiffs assert that the New Mexico Supreme Court's "holdings are directly relevant to the arguments in this appeal."

The Defendants disagree. There are substantial differences between New Mexico's and this State's constitutional and statutory framework regarding redistricting and the use of partisan data during the redistricting process.

Unlike this State, which constitutionally commits redistricting authority to the State's Legislature, New Mexico has adopted a redistricting process whereby an independent "citizen redistricting committee" must adopt redistricting plans for submission to the legislature. *See* N.M. Stat.

Ann. §1-3A-8 (requiring the committee to adopt at least three district plans for submission to the legislature, and to provide a written evaluation that addresses “a measure of partisan fairness and the preservation of communities of interest”); *see also* N.M. Stat. Ann. §1-3A-3 (2021) (providing for a seven-member committee, with the power to appoint members split among the state ethics commission, the speaker of the house of representatives, the minority floor leader of the house of representatives, the president of the senate, and the minority floor leader of the senate); N.M. Stat. Ann. §1-3A-3(C) (providing that no more than three members of the seven-member committee can be members of the same political party). The New Mexico legislature receives those plans in the same manner as legislation recommended by interim legislative committees, N.M. Stat. Ann. §1-3A-9, and enacts a redistricting plan through the legislative process. N.M. Stat. Ann. §1-3A-9(B) (“The legislature shall receive the adopted district plans for consideration in the same manner as for legislation recommended by interim legislative committees.”).

Unlike this State, which does not have any Constitutional or statutory provision prohibiting, regulating, or otherwise providing whether, how, or to what extent partisanship or partisan data may be considered during the redistricting process, New Mexico expressly provides that its nonpartisan redistricting committee “shall not ... use, rely upon or reference partisan data, such as voting history or party registration data.” N.M. Stat. Ann. §1-3A-7(C)(1) (2021).

Unlike this State, which does not have any Constitutional or statutory redistricting requirements regarding district compactness, use of “traditional districting principles,” preservation of communities of interest,

preservation of existing districts, and geographic boundaries,¹ New Mexico's Legislature has adopted express redistricting criteria to which its redistricting committee must adhere. *See* N.M. Stat. Ann. §1-3A-7(A).

In sum, New Mexico provides a different constitutional and statutory redistricting process (adoption of proposed plans by an independent redistricting committee, which the legislature is required to receive and consider before enacting a redistricting plan), express prohibitions on the redistricting committee using partisan data during the redistricting process, and numerous additional express redistricting requirements unrelated to partisanship that the redistricting committee must follow.

Because of these fundamental differences between New Mexico's redistricting laws and the New Hampshire Constitution, New Mexico's unpublished order is certainly not "directly relevant to the arguments in this appeal." Put differently, New Mexico's decision regarding justiciability cannot be "directly relevant" to this matter because, unlike New Hampshire, New Mexico has a different redistricting process that involves an independent citizen redistricting committee; New Mexico's statutory framework provides express discoverable and manageable standards regarding redistricting; and New Mexico's Legislature enacted a law that provides an initial policy determination regarding the role that partisan data may play in redistricting. *See Richard v. Speaker of the House of Representatives*, 175 N.H. 262, 267 (2022) (explaining that cases that raise nonjusticiable political questions involve: "(1) a textually demonstrable

¹ N.M. Stat. Ann. §1-3A-7(A) requires the redistricting committee to draw district to preserve both "political and geographic boundaries," whereas Part II, Article 26 of the State Constitution only requires Senate districts to be contiguous and not divide any town, city ward, or unincorporated place (i.e., to preserve political boundaries).

constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards for resolving it; (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion” (quotations omitted)).

Therefore, the Defendants respectfully request this Court deny the Plaintiffs’ motion for leave to submit the unpublished *Grisham* order two months after the close of briefing and oral argument because the *Grisham* order is not, as the Plaintiffs assert, “directly relevant to the arguments in this appeal.” If this Court chooses to grant the motion, the Defendants respectfully request that this Court also consider the arguments advanced in this objection regarding why the New Mexico case presents a scenario materially distinguishable from New Hampshire’s circumstances.

Respectfully Submitted,

THE STATE OF NEW HAMPSHIRE
AND THE NEW HAMPSHIRE
SECRETARY OF STATE

By its Attorneys,

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Date: July 20, 2023

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this pleading was served on all parties of record through the Court's electronic filing system.

Date: July 20, 2023

/s/ Brendan A. O'Donnell
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