

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT

No. D-101-CV-2011-02942

BRIAN F. EGOLF, JR., *et al.*,

Plaintiffs,

vs.

DIANNA J. DURAN, *et al.*,

Defendants.

- Consolidated with -

CAUSE NO. D-101-CV-2011-02944
CAUSE NO. D-101-CV-2011-02945
CAUSE NO. D-101-CV-2011-03016
CAUSE NO. D-101-CV-2011-03099
CAUSE NO. D-101-CV-2011-03107
CAUSE NO. D-202-CV-2011-09600
CAUSE NO. D-506-CV-2011-00913

**THE EXECUTIVE DEFENDANTS' CLOSING BRIEF REGARDING THE
REDISTRICTING OF THE NEW MEXICO PUBLIC REGULATION COMMISSION**

In the interests of eliminating unnecessary competition among various constitutionally acceptable plans and respecting this Court's prior findings and conclusions regarding redistricting both the United States Congressional and the State House of Representatives and Senate districts, the Executive Defendants have withdrawn their Least Changed Plan and County Restoration Plan from consideration by the Court, to unequivocally support the plan presented by the Navajo Intervenors (hereinafter the "Navajo Plan"). For those same reasons, the Executive Defendants also make no objection to the James 3 Plan. As discussed below, of the remaining

plans, the Navajo Plan presents the best option to achieve the constitutionally and statutorily required goals of *de minimis* population equality and protection of minority voting strength, while adhering to traditional redistricting principles.

Specifically, the Navajo Plan, which used as its foundation the current districts, achieves the low deviations advocated by the Executive Defendants during all stages of this redistricting litigation. In addition, as this Court has acknowledged, the Navajo Intervenors are in the best position to evaluate the communities of interest concerns of the Navajo Nation that should be addressed in the PRC districts. *See* House Findings and Conclusions (1/3/12) at FOF ¶ 48; Senate Findings and Conclusions (1/16/12) at FOF ¶ 37. The Navajo Intervenors have created a map that addresses their concerns regarding Navajo communities of interest by increasing non-Hispanic Native American voting age population in PRC District 4, providing greater access to the political process for Navajo politicians, and ensuring that all Navajo Nation trust lands within the state of New Mexico are included in a single district. TR (1/12/12) at 17:17-19:8. Likewise, the James 3 Plan addresses the above concerns, while maintaining the lowest population deviations of the plans presented to the Court. *Id.* at 59:1-13; Summary Table 1 (Gov. Ex. 28).

I. The Navajo Plan and the James 3 Plan Contain the Lowest Population Deviations Among the Remaining Plans.

The primary goal of redistricting is to correct population deviations of the current districts and correct any violation of the Voting Rights Act. *See* House Findings and Conclusions (1/3/12) at FOF ¶ 13; Senate Findings and Conclusions (1/16/12) at FOF ¶ 11 (“Because large population deviations exist between the current electoral districts, significant changes are necessary to bring the districts into compliance with law.”). This Court’s role in creating a court-ordered redistricting plan is held to a higher standard than a legislatively drawn plan, because it “must ordinarily achieve the goal of population equality with little more than *de*

minimis variation.” *Id.* at COL ¶¶ 6-9. “[A]ny deviation from approximate population equality must be supported by enunciation of historically significant state policy or unique features. *Chapman v. Meier*, 420 U.S. 1, 26-27 (1975); see House Findings and Conclusions (1/3/12) at COL ¶ 17. In addition, there are no technical or policy barriers to achieving near-zero population deviations for the PRC districts. TR (1/12/12) at 171:14-21. As it did with the House and Senate trials, this Court should find that the Legislative Defendants’ Plan, Senate Bill 24, contains significant population deviations between districts which are not justified by historically significant state policy or unique features. House Findings and Conclusions (1/3/12) at COL ¶ 27; Senate Findings and Conclusions (1/16/12) at COL ¶ 31. To the contrary, the Navajo Plan and the James 3 Plan each contain low and, particularly for the James 3 Plan, near-zero population deviations. Importantly, and as discussed in the sections below, the Navajo Plan and the James 3 Plan achieve *de minimis* population deviations, while promoting minority voting strength and traditional redistricting criteria.

Both the Navajo Plan and the James 3 Plan were created to accommodate specific minority voting strength concerns expressed by the Navajo Intervenors and to promote traditional redistricting criteria, all while maintaining constitutionally required *de minimis* population deviations. Specifically, the Navajo Plan has an overall population deviation range of less than two percent. Gov. Ex. 28; TR (1/12/12) at 173:3-4. The James 3 Plan reduces the overall population deviation further and provides the lowest population deviation of the plans presented to the Court, at 0.01 percent. *See* Gov. Ex. 28.

By contrast, the Legislative Defendants’ Plan contains population deviations that are not mandated by any consistently applied neutral state interest. Specifically, unlike any other plan presented to this Court, the Legislative Defendants’ Plan proposes districts with an overall

population deviation range of 8.56 percent. Gov. Ex. 28. That deviation range far exceeds any other plan presented to the Court. *Id.*; TR (1/12/12) at 123:20-25. For example, the Legislative Defendants' average deviation is about 700 times larger than the deviations proposed by the James 3 Plan. TR (1/12/12) at 173:5-14. This deviation range equates to a population imbalance of 62,765 people. *See* Gov. Ex. 14. Again, the Legislative Defendants' proposed deviations arise from the erroneous belief that a plan with an overall range of population deviation that was less than, but close to, 10 percent could pass constitutional scrutiny. For the PRC, this Court should find, as it did in the House and Senate trials, that there is no presumption of constitutionality for plans that contain deviations less than ten percent. *See* House Findings and Conclusions (1/3/12) at COL ¶ 13; Senate Findings and Conclusions (1/16/12) at COL ¶ 13. In short, there is no reason the Court should adopt the Legislative Defendants' plan because of its inappropriately high deviations.

II. The Navajo Plan Best Addresses Minority Voting Strength Concerns.

With regarding to redistricting the House of Representatives and the Senate, this Court previously concluded that population deviations may be justified by the need to comply with the Voting Rights Act in creating a plan that does not dilute Native American voting strength and to further significant state policies, such as maintaining reservation lands within a district and respecting tribal self-determination. House Findings and Conclusions (1/3/12) at COL ¶ 24; Senate Findings and Conclusions (1/16/12) at COL ¶ 27. While no party has argued that there are any Voting Rights Act concerns or violations that require the creation of a majority Native American district,¹ the Navajo Intervenors have demonstrated at trial that the PRC districts should be drawn to create a influence district in the PRC to ensure that the Navajo Nation is

¹ In fact, it is statically and geographically impossible to create a single majority Native American voting age population district. Specifically, each district must have approximately 400,000 people. TR (1/12/12) at 50:19-23.

presented with the best opportunity to influence PRC elections and, potentially, to serve as an avenue for electing Navajo politicians. TR (1/12/12) at 17:1-13; TR (1/11/12) at 48:17-49:13.

To address these concerns, the Navajo Intervenors have argued that PRC District 4 should be drawn to meet or exceed a threshold non-Hispanic Native American voting age population of 29 percent and should include all of Navajo Nation trust lands within New Mexico and certain sacred sites, such as Mount Taylor. TR (1/12/12) at 12:21-13:22, 14:20-15:10. To fulfill this goal, the Navajo Nation Plan's PRC District 4 incorporates all of the trust lands of the Navajo Nation, including all of the remote chapters of the Navajo Nation. TR (1/12/12) at 17:21-18:5. As such, the Navajo Plan improves the non-Hispanic Native American voting age population to 31.3 percent, creating a stronger influence district for Native Americans. TR (1/12/12) at 19:7-11. While the Navajo Plan does not have the lowest population deviations of the plans presented to the Court, its attempt to bolster the Native American voting strength in PRC District 4 is a legitimate reason for containing overall population deviation of less than two percent. TR 176:14-177:2; House Findings and Conclusions (1/3/12) at COL ¶ 24; Senate Findings and Conclusions (1/16/12) at COL ¶ 27.

The James 3 Plan's proposed PRC District 4 provides similar results and has been supported by the Navajo Intervenors. TR (1/12/12) at 22:11-19. In fact, the James 3 Plan contains a slightly larger non-Hispanic Native American voting age population in PRC District 4, with a 31.6 percent non-Hispanic Native American voting age population, and is the only plan that exceeds the Navajo Plan in this category. TR (1/11/12) at 48:8-12. Like the Navajo Plan, the James 3 Plan also includes all of the Navajo Nation reservation lands, including remote chapters, in PRC District 4. TR (1/12/12) at 34:24-35:16.

To the contrary, the Legislative Defendants' Plan does not incorporate all of the concerns of the Navajo Nation. TR (1/12/12) at 25:7-15, 57:11-58:6. Specifically, it fails to include all Navajo Nation trust land in a single district. *Id.* It also contains a lower non-Hispanic voting age population than the Navajo Plan and the James 3 Plan. *Id.*

Accordingly, the Navajo Plan not only ensures that Native American voting strength is increased, it also reflects the particular interests of the Navajo Nation to ensure that its lands and sacred sites are all included within a strong Native American influence district. While the James 3 Plan provides similar results, the Legislative Defendants' Plan fails to address all of the concerns expressed by the Navajo Intervenors and contains the highest population deviations. Accordingly, the Navajo Plan and the James 3 Plan accomplish the dual goals of population equality and maintenance of tribal communities of interest and voting strength. *See* House Findings and Conclusions (1/3/12) at COL ¶ 34; Senate Findings and Conclusions (1/16/12) at COL ¶ 33.

III. The Navajo Plan Proposes the Least Change from Current Districts and Promotes Political Fairness.

Where population equality and minority voting rights are concerned, the Legislative Defendants' Plan fails to pass muster. Admittedly, however, the Maestas 2 Plan does not share these same weaknesses, as it contains both low deviations and respects Native American voting strength in District 4. *See* Gov. Ex. 28; TR (1/12/12) at 21:21-22:1. Yet the Maestas 2 Plan remains insufficient, for two reasons.

First, unlike the Navajo Plan, the Maestas 2 Plan started with the Legislative map. *See* TR (1/11/12) at 17:5-7, TR (1/12/12) at 105:18-22. The Legislative Defendants' Plan, Senate Bill 24, while surviving bipartisan opposition in both houses of the legislature, failed to survive the full legislative process. Like a computer virus, the Maestas 2 Plan is infected with the same

flaws inherent in the Legislative map, no matter how many times or ways it is modified. By contrast, the Navajo plan used as a starting point the current PRC districts, which constitute the last clear expression of state policy. It is appropriate for this Court to favor plans that resemble, as closely as is possible, the current PRC districts. *See White v. Weiser*, 412 U.S. 783, 795 (1973) (stating that a federal court, “in the context of legislative reapportionment, should follow the policies and preferences of the State[.]”). As previously acknowledged by this Court in the Congressional redistricting trial, a plan can be “superior” to another “because it maintains respect for existing Congressional boundaries and because it places the fewest number of voters in new Congressional districts.” Congress Findings and Conclusions (12/29/11) at COL ¶ 16. By following previous enacted redistricting law, a redistricting plan will automatically accommodate several traditional districting criteria, such as the compactness, preservation of district cores, and the avoidance of incumbent pairings.² The Navajo Plan and the similarly drawn James 3 Plan promote the least change of any other plans presented to the Court and, as a consequence of doing so, promote the secondary traditional redistricting criteria and, as discussed above, respect the communities of interest that are best determined by the Navajo Nation.³

The current PRC districts were the result of legislation passed in 2001 by a Democrat-controlled Legislature and signed into law by a Republican Governor. *See* NMSA 1978, §§ 8-7-6 to 8-7-10 (2001). Thus, the current districts embody the last clear expression of New Mexico

² As demonstrated in trial, by offering the least change, the Navajo Plan scores best in advancing traditional redistricting criteria. Specifically, the Navajo Plan scores as the most compact of all plans presented to the Court under both statistical analyses. *See* Gov. Ex. 28 (the Navajo Plan scores best in both the Reock and Polsby-Popper scores). The Navajo Plan also contains the highest core retention rate of the plans submitted to the Court, at 94.5 percent. *Id.*; TR (1/12/12) at 177:17-178:6. In addition, the Navajo Plan does not pair any incumbents. Gov. Ex. 28.

³ Critically, the Navajo Plan best reflects the communities of interests concerns expressed by the Navajo Nation. As discussed above, the Navajo Plan increases non-Hispanic Native American voting age population in PRC District 4, thereby providing greater access to the political process for Navajo politicians, and ensuring that all Navajo Nation trust lands within the state of New Mexico are including in a single district. TR (1/12/12) at 17:17-19:8. Likewise, the James 3 Plan addresses the above concerns, while maintaining the lowest population deviations of the plans presented to the Court. TR (12/11/12) at 59:1-13.

state policies regarding the PRC districts and best represent what a successful legislative process can produce with regard to how New Mexico's PRC districts should be drawn. The Navajo Plan began by following the current PRC districts as much as possible while adjusting populations necessary to correct the current malapportionment and to promote Navajo Nation voting strength and self-determination. TR (1/12/12) at 32: 12-16.

Second, the Navajo Plan is more politically fair than either the Maestas 2 Plan or the Legislative Defendants' Plan. In particular, the districts proposed in the Navajo Plan maintain one safe Republican district, two safe Democratic districts, and promote political competitiveness in the two remaining districts, without favoring either party. Gov. Ex. 28. To the contrary, the Legislative Defendants' Plan and the Maestas 2 Plan shift the two competitive districts in favor of Democratic candidates. Specifically, the Legislative Defendants' Plan provides for four out of the five PRC districts with Democratic political performance greater than 51.4 percent. *See* Gov. Ex. 28; TR (1/12/12) 190:10-19. Likewise, the James 3 Plan and the Sena Plan shift the competitive districts in favor of Republican candidates. TR (1/12/12) at 189:16-22; *see* Gov. Ex. 28. The Navajo Plan, therefore, is the most politically fair of the plans presented to the Court because it is the closest to the current political *status quo* and fits with the objective measure of providing the least political change. The other plans propose to involve this Court in an unnecessary shift away from the current political *status quo* of the PRC districts.

By utilizing the last clear expression of state policy on PRC districts and offering the least change to that policy, the Navajo Plan performs best in the categories of traditional redistricting criteria. In addition, the Navajo Plan, by definition, promotes the communities of interest as expressed by the Navajo Nation and best maintains political fairness within the PRC.

CONCLUSION

The Executive Defendants unequivocally support the adoption of the Navajo Plan because it achieves the constitutionally and statutorily required goals of *de minimis* population equality, while adhering to traditional redistricting principles and promoting the voting strength of Native Americans in the PRC.

Respectfully submitted,

By: /s/ Jessica Hernandez
Jessica M. Hernandez
Matthew J. Stackpole
Office of the Governor
490 Old Santa Fe Trail #400
Santa Fe, NM 87401-2704
Telephone: (505) 476-2200

-and-

Paul J. Kennedy
201 12th Street NW
Albuquerque NM 87102-1815
Telephone: (505) 842-0653

Attorneys for Susana Martinez, in her official capacity as New Mexico Governor

PEIFER, HANSON & MULLINS, P.A.

By: approved by email 1/17/12
Charles R. Peifer
Robert E. Hanson
Matthew R. Hoyt
PO Box 25245
Albuquerque NM 87125-5245
(505) 247-4800

Attorneys for Defendant John A. Sanchez, in his official capacity as New Mexico Lieutenant Governor and presiding officer of the New Mexico Senate

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17th day of January 2012, I served via electronic mail and filed the foregoing pleading electronically, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

The Honorable James A. Hall
James A. Hall LLC
505 Don Gaspar Ave
Santa Fe, NM 87505-4463
(505) 988-9988
jhall@jhall-law.com

Robert M. Doughty, III
Judd C. West
Doughty & West, P.A.
20 First Plaza NW, Suite 412
Albuquerque, NM 87102
(505) 242-7070
rob@doughtywest.com
susan@doughtywest.com
yolanda@doughtywest.com
Attorneys for Defendant Dianna J. Duran, in her official capacity as New Mexico Secretary of State

Jessica M. Hernandez
Matthew J. Stackpole
Office of the Governor
490 Old Santa Fe Trail #400
Santa Fe, NM 87401-2704
(505) 476-2200
jessica.hernandez@state.nm.us
matthew.stackpole@state.nm.us

Paul J. Kennedy
201 12th Street NW
Albuquerque NM 87102-1815
(505) 842-8662
pkennedy@kennedyhan.com
Attorneys for Defendant Susana Martinez, in her official capacity as New Mexico Governor

Ray M. Vargas, II
David P. Garcia
Erin B. O'Connell
Garcia & Vargas, LLC
303 Paseo del Peralta
Santa Fe, NM 87501
(505) 982-1873
ray@garcia-vargas.com
david@garcia-vargas.com
erin@garcia-vargas.com

Joseph Goldberg
John W. Boyd
David H. Urias
Sara K. Berger
Freedman Boyd Hollander
Goldberg & Ives
20 First Plaza Ctr. NW, #700
Albuquerque, NM 87102
(505) 842-9960
jg@fbdlaw.com
jwb@fbdlaw.com
dhu@fbdlaw.com
skb@fbdlaw.com

Attorneys for Plaintiffs in Egolf v. Duran, D-101-CV-2011-02942; Holguin v. Duran, D-101-CV-2011-0944; and Castro v. Duran, D-101-CV -2011-02945

Patrick J. Rogers
Modrall, Sperling, Roehl, Harris & Sisk P A
P.O. Box 2168
Albuquerque, NM 87103
(505) 848-1849
pjr@modrall.com

Duncan Scott
Paul Kienzle
Paul Spear
Scott & Kienzle, P.A.
1011 Las Lomas NE
Albuquerque, NM 87103
(505) 246-8600
duncan@DScottlaw.com
paul@kienzlelaw.com
spear@kienzlelaw.com

Attorneys for Plaintiffs in Sena v. Duran, D-506-CV-2011-00913

Casey Douma
Attorney at Law
PO Box 812
Laguna NM 87026-0812
(505) 552-5776
cdouma@lagunatribe.org

Teresa Leger
Cynthia Kiersnowski
Nordhaus Law Firm LLP
1239 Paseo de Peralta
Santa Fe NM 87501-2758
(505) 982-3622
tleger@nordhauslaw.com
ckiersnowski@nordhauslaw.com
Attorneys for Plaintiffs in Pueblo of Laguna v. Duran, D-101-CV-2011-03016

David K. Thomson
Thomason Law Firm
303 Paseo de Peralta
Santa Fe NM 87501-1860
(505) 982-1873
david@thomsonlawfirm.net
Attorney for Plaintiffs in Maestas v. Duran, D-101-CV-2011-03099 and Maestas v. Duran, D-101-CV -2011-03107

Stephen G. Durkovich
Law Office of Stephen Durkovich
534 Old Santa Fe Trail
Santa Fe, NM 87505-0372
(505) 986-1800
sonya@durkovichlaw.com

John V. Wertheim
Jones, Snead, Wertheim & Wentworth, P.A.
PO Box 2228
Santa Fe, NM 87505-2228
(505) 982-0011
johnv@thejonesfirm.com
todd@thejonesform.com
Attorneys for Plaintiffs in Maestas v. Duran, D-101-CV-2011-03107

Henry M. Bohnhoff
Rodey, Dickason, Sloan, Akin & Robb, P.A.
PO Box 1888
Albuquerque NM 87103
(505) 765-5900
hbohnhoff@rodey.com

Christopher T. Saucedo
Iris L. Marshall
Saucedo Chavez P.C.
100 Gold Ave. SW, Suite 206
Albuquerque NM 87102
(505) 338-3945
csaucedo@saucedochavez.com
imarshall@saucedochavez.com

David A. Garcia
David A. Garcia, LLC
1905 Wyoming Blvd. NE
Albuquerque NM 87112
(505) 275-3200
lowthorpe@msn.com

Attorneys for Plaintiffs in Representative Conrad James v. Duran, D-202-CV-2011-09600

Luis G. Stelzner
Sara N. Sanchez
Stelzner, Winter, Warburton, Flores, Sanchez & Dawes, P.A.
PO Box 528
Albuquerque NM 87103
(505) 988-7770
lgs@stelznerlaw.com
ssanchez@stelznerlaw.com

Richard E. Olson
Jennifer M. Heim
Hinkle, Hensley, Shanor & Martin, LLP
PO Box 10
Roswell NM 88202-0010
(575) 622-6510
rolson@hinklelawfirm.com
jheim@hinklelawfirm.com

Attorneys for Defendants Timothy J. Jennings, in his official capacity as President Pro-Tempore of the New Mexico Senate and Ben Lujan, Sr., in his official capacity as Speaker of the New Mexico House of Representatives

Patricia G. Williams
Jenny J. Dumas
Wiggins, Williams & Wiggins
PO Box 1308
Albuquerque NM 87103-1308
(505) 764-8585
pwilliams@wwlaw.us
jdumas@wwlaw.us

Dana L. Bobroff, Deputy Attorney General
Navajo National Department of Justice
PO Box 2010
Window Rock AZ 86515
dbobroff@nndoj.org
Attorneys for Navajo Intervenors

Santiago E. Juarez, Esq.
1822 Lomas Blvd., NW
Albuquerque, NM 87104
(505) 246-8499
santiagojuarezlaw@gmail.com
Attorneys for Plaintiff Intervenors New Mexico League of United Latin American Citizens (NM LULAC), Paul A. Martinez, J. Paul Taylor, Peter Ossorio, Christy L. French, Matt Runnels, and Rae Fortunato in Holguin v. Duran, D-101-CV-2011-02944

OFFICE OF THE GOVERNOR

By: /S/ Jessica Hernandez
 Jessica Hernandez