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

BRIAN F. EGOLF, JR, HAKIM BELLAMY, MEL HOLGUIN, MAURILIO CASTRO, and ROXANNE SPRUCE BLY,

Plaintiffs,

NO. D-101-CV-2011-02942

v.

DIANNA J. DURAN, in her official capacity as New Mexico Secretary of State, SUSANA MARTINEZ, in her official capacity as New Mexico Governor, JOHN A. SANCHEZ, in his official capacity as New Mexico Lieutenant Governor and presiding officer of the New Mexico Senate, TIMOTHY Z. 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,

CONSOLIDATED WITH
D-101-CV-2011-02944
D-101-CV-2011-02945
D-101-CV-2011-03016
D-101-CV-2011-03099
D-101-CV-2011-03107
D-202-CV-2011-09600
D-506-CV-2011-00913

Defendants.

MULTI-TRIBAL PLAINTIFFS'[1] TRIAL BRIEF FOR REDISTRICTING OF THE NEW MEXICO HOUSE OF REPRESENTATIVES

[1] This Trial Brief is respectfully submitted, through their undersigned counsel, by the Pueblo of Laguna, Pueblo of Acoma, Jicarilla Apache Nation, Pueblo of Zuni, Pueblo of Santa Ana, Pueblo of Isleta, Governor Richard Luarkie, Lt. Governor Harry A. Antonio, Jr., Lt. Governor David F. Garcia, President Levi Pesata, and Leon Reval, who are the named plaintiffs in Case No. D-0101-CV-2011-03016 of these consolidated cases. These plaintiffs will be referred to collectively herein as the "Multi-Tribal Plaintiffs" for convenience.

I. Introduction

The Multi-Tribal Plaintiffs come to this Court seeking a vindication of their Voting Rights Act claims in an unusual position in voting rights litigation. Instead of attacking state drawn, we are asking the Court to adopt a plan that comports with the requirements of Section 2 of the Voting Rights Act. 42 U.S.C. § 1973. We will prove each element of the statutory requirements for making a Section 2 claim and then seek a remedy. ("Unless these points are established, there neither has been a wrong nor can there be a remedy." *Growe v. Emison*, 507 U.S. 25, 40-41 (1993)). Since the Court must adopt a map from among those offered, or alternatively drawn by the Court, the Multi-Tribal Plaintiffs believe the Court must ensure that the map itself be a remedy consistent with Section 2 of the Voting Rights Act.

Five of the plans before the Court for the Multi-Tribal Plaintiffs proposed House Districts, 6, 65 and 69 are virtually identical (Legislative, Egolf, Maestas, Navajo, and Multi-Tribal). They reflect the long process of education, consultation, negotiation and adoption of redistricting plans that was initiated this summer with the convening of the Legislative Redistricting Committee and concluded with the adoption of House Voters and Election Committee Substitute for HB 39 ("HB 39"). The Multi-Tribal Plaintiffs argue for the adoption of one of the five plans reflecting their proposed House Districts 6, 65 and 69, not just because these plans reflect the significant public and tribal input that they do, but also because the other three plans harm Native American voting rights and potential responsiveness of the State Legislature. Two of the plans, the James Plan and the

Executive Plan, we argue, constitute a violation of Section 2 at their worst, and a disregard for tribal communities of interest, a negation of tribal self-determination, an attack on tribal electoral mobilization efforts and subordination of traditional redistricting principles at their best. The Executive Defendants may not have intended to harm tribes and Native American voters in this manner, but their plan has this effect nevertheless. As the Supreme Court has noted, a violation of Section 2 of the Voting Rights Act need not be intentional; it is the result that matters. *Thornburg v. Gingles*, 478 U.S. 30, 70-74 (1986). The Sena Plan raises serious policy considerations for the Court given the plan's disregard for tribal requests in District 69 and because it drastically alters two districts involving Native American pueblos which could eliminate a pro-Native American Legislator.

II. Recap of Tribal Redistricting Efforts that Led to Multi-Tribal Districts 6, 65 and 69 and Tribal Endorsement of HB 33.

For the first time in history, the State's Legislative Redistricting Committee held public hearings on Indian lands at Acoma Pueblo in August, 2011. The fact that such an event did not occur until 2011 demonstrates just how difficult, yet how important, the redistricting process is for Native Americans in this state. Not only did tribal leaders testify at Acoma Pueblo and Santa Fe prior to the Special Session; a Native American Redistricting Workgroup which included 17 pueblos, the Navajo Nation and the Jicarilla Apache Nation, stayed involved throughout the legislative redistricting process. Multi-Tribal Ex. 6, 7, 8, 14, and 15. They worked tirelessly to inform and educate the legislators about the electoral discrimination they have faced, their experiences and frustrations with the electoral process, the issues that are important in their communities, how certain elected

legislators have failed to respond to those concerns, and their efforts to elect legislators of their choice. Why such an effort? Because the Multi-Tribal Plaintiffs and other New Mexico tribal leaders [2] understand that in New Mexico, they do not yet have the legislative voice or legislative opportunities that their numbers show they could have. They continue to suffer from historic and contemporary discrimination and disastrous federal and state policies that have impacted the tribes and their members socio-economic status and electoral participation. The Pueblos and tribal Nations also recognize the importance of the State Legislative process to their own governmental efforts and initiatives which impact directly on the health, economic, education and cultural practices of their members.

The Tribal Consensus House map that the 19 Pueblos and tribal Nations initially submitted to the Legislature changed and evolved. All the changes to the map were compared to the "Principles for Redistricting Native American Voters Consistent with the Voting Rights Act and Respect for Tribal Self-Determination," (Multi-Tribal Ex. 7), and analyzed as to their impact on tribal

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[2] The Native American Redistricting Workgroup ("NARW"), which included representation and input from the All Indian Pueblo Council, Acoma Pueblo, Cochiti Pueblo, Isleta Pueblo, Jemez Pueblo, Laguna Pueblo, Nambe Pueblo, Picuris Pueblo, Pojoaque Pueblo, San Felipe Pueblo, Sandia Pueblo, Santa Ana Pueblo, Santa Clara Pueblo, Santo Domingo Pueblo, Taos Pueblo, Tesuque Pueblo, Ohkay Owingeh, Zuni Pueblo, the Jicarilla Apache Nation, and the Navajo Nation, worked together to develop overarching redistricting principles and consensus maps for redistricting the northwest quadrant of the state early in the redistricting process. The NARW submitted the principles and consensus plans to the Legislative Redistricting Committee, the Legislature, and Governor Susana Martinez ("Governor Martinez") prior to the Special Session on redistricting.

communities of interest and electoral issues before they were once again endorsed by Pueblo and Jicarilla Apache leaders. The tribal leaders testified not just on the majority Native American districts, but on the House districts, especially in the North, that impacted northern New Mexico Pueblos.

The All Indian Pueblo Council and the Multi-Tribal Plaintiffs believed that the redistricting plan passed by the Legislature for the State House comports with the United States and New Mexico Constitutions and the Voting Rights Act regarding House Districts 6, 65 and 69 and the Northern districts. They urged Governor Martinez to sign the legislative redistricting plan into law.

Unfortunately, Governor Martinez vetoed HB 39, making this litigation inevitable. As the Court weighs the different plans submitted in this litigation, the Multi-Tribal Plaintiffs believe that the Court's decision must be guided by and consistent with both the Voting Rights Act and tribal self-determination.

III. Section 2 of The Voting Rights Act Protects Native Americans Against Vote Dilution

Congress extended the protections of the Voting Rights Act to American Indians in 1975 after finding that "a pattern of educational inequity exists with respect to children of Indian . . . origin" and "'substantial' evidence of discriminatory practices that affect the right of Indians to vote". *Windy Boy v. County of Big Horn*, 647 F.Supp. 1002, 1007 (D. Mont. 1986) quoting and citing 1975 U.S. Code Cong. & Ad. News at 774, 795, 797.

"The essence of a § 2 [Voting Rights Act] claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities

enjoyed by minority and white voters to elect their preferred candidates." *Gingles*, 478 U.S. at 47.

Precisely, the statute reads that a state violates § 2:

> if, based on the totality of circumstances, it is shown that the political processes leading to the nomination or election in the State . . . are not equally open to participation by members of [a protected class] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

LULAC v. Perry, 548 U.S. 399, 426 (2006) quoting 42 U.S.C. § 1973(b).

IV. The Multi-Tribal Plaintiffs Meet the *Gingles* Threshold Criteria

Before reviewing the totality of the circumstances surrounding the opportunities of Native Americans to participate in the political process, the Supreme Court requires that plaintiffs satisfy three threshold conditions, first set out in *Gingles*, 478 U.S. at 50-51, and known as the *Gingles* factors.

The three threshold criteria required under *Gingles* to establish a Section 2 violation of the Voting Rights Act that we will establish are: a) the Native American population is large and compact enough to create multiple, compact Native American majority districts; b) the Native American population is politically cohesive; and, c) that racial bloc voting exists to defeat the representatives of the Native Americans' choice. *Id*.

The first *Gingles* prong is proven by the ability to draw six compact majority Native American districts in six[3] of the eight plans and will be corroborated by at least three of the parties' experts.[4]

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[3] The Multi-Tribal Plaintiffs' three districts fit into the six districts of the Navajo, Egolf,

Anticipated Test. R. Engstrom, B. Sanderoff, R. Espino, and T. Arrington. As will be explained below, the Executive Plan also draws six majority Native American districts, but does so by fracturing Pueblo voting communities, splitting tribal political boundaries, ignoring communities of interest, and drastically altering the Native American districts adopted by the Court in *Jepsen v. Vigil-Giron*, No. D-0101-CV-2001-02177 (N.M. 1st Jud. Dist. Jan. 24, 2002) ("*Jepsen*"). In this sense, their plan is not compact as understood in terms of the *Gingles* factor's emphasis on the minority community as opposed to the geographic compactness of a district. As stated in the most recent Supreme Court redistricting case, *LULAC v. Perry*, a Section 2 compactness analysis should "take into account 'traditional districting principles such as maintaining communities of interest and traditional boundaries'." at 433 quoting *Abrams v. Johnson*, 521 U.S. 74, 92 (1997).

The second and third prongs of racial bloc voting and Native American political cohesion cannot be assumed, but must be proven in each case to establish a vote dilution claim. *Growe v. Emison*, 507 U.S. at 40-41 citing *Gingles*, 478 U.S. at 50-51. Indeed, racially polarized voting is the "keystone of a vote dilution case". *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1020. It is proven through expert analysis of preferably endogenous elections, and preferably between candidates who

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Maestas and Legislative plans.

[4] The James Plan creates only five majority Native American districts and is an example of how a map could be adopted by the Court that would then require a remedy, and a new map, if Native American Plaintiffs satisfy the *Gingles* factors and demonstrate that under the totality of the circumstances their members have less electoral opportunities than the non-Native Americans in the state.

are members of the protected class and non-protected class. *Id*. The *Gingles* court went back three election cycles, *Gingles*, at 52, but other cases have simply looked to the most recent elections as the most probative. *Bone Shirt*, 461 F.3d at 1021.

Professor Richard Engstrom ("Engstrom") conducted an analysis of the endogenous elections from 2004 to 2010 in the area comprising House Districts 6, 65 and 69, which also included Senate Districts 4, 22 and 30. Multi-Tribal Ex. 2. He looked only at elections that involved Native Americans running against non-Native Americans in competitive races. His ecological inference procedure demonstrated both political cohesion and racial bloc voting. While "political cohesiveness is implicit in racially polarized voting[,]" *Sanchez v. Colorado*, 97 F. 3d 1303, 1312 (10th Cir. 1996) quoted in *Bone Shirt* 461 F.3d at 1020, Engstrom's analysis specifically highlights the political cohesion of the Native American vote, and separately the bloc voting of the non-Native American voters. In addition, it examines democratic primary as well as general election contests so that there can be no concern that party affiliation explains the polarized voting, as the Executive Defendants attempt to raise in this case, *see* Executive Defendants' Proposed Findings of Fact and Conclusions of Law ("Executive Defendants' Findings and Conclusions") at 9 (Finding No. 33) and *id*. at 23 (Conclusion No. 23)[5], just as state defendants have attempted to raise in other jurisdictions. But, *see* *Gingles* at 63 ("we conclude that under the 'results test' of § 2, only the correlation between race of

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[5] The Executive Defendants rely on *LULAC v. Clements*, 999 F.2d 831 (5th Cir. 1993), older case law from the Fifth Circuit to support their conclusion of law, which is contrary to *Sanchez*, and does not apply in this jurisdiction.

the voter and selection of certain candidates, not the causes of the correlation, matters"); and *Sanchez v. Colorado*, 97 F.3d 1303, 1320 (10th Cir. 1996) ("defendants cannot rebut a showing of racial bloc voting 'by offering evidence that the divergent racial voting patterns may be explained in part by causes other than race'" such as party affiliation), (citing *Gingles*, 478 U.S. at 100).

V. The Totality of Circumstances Analysis Demonstrates That Native Americans, Sadly, Meet Most of the Senate Factors Impairing Their Opportunities to Participate Equally in the Political Process

The *Bone Shirt* case noted that satisfying the three *Gingles* prongs took a plaintiff a "'long way towards showing a § 2 violation,'" *id*. at 1021 (quoting *Hawell w. Blytheville Sch. Dist.*, 71 F.3d 1382, 1390 (8th Cir. 1995) (en banc), but that an analysis of the factors set out in the Senate Committee and legal precedent was the ultimate proof required that Native Americans had "'less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.'" *Bone Shirt* at 1021, quoting 42 U.S.C. § 1973(b).

In evaluating the totality of the circumstances, courts often look to the factors listed in the Senate Report 97-417, 97th Cong. 2nd Sess. 28 (1982) that accompanied the 1982 amendments to the Voting Rights Act. The relevant factors for New Mexico's Native American citizens are:

> (1) the history of voting-related discrimination in the State or political subdivision;
> (2) the extent to which voting in the elections of the State or political subdivision is racially polarized; . . .
> (4) the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; . . . [and]
> (5) the extent to which members of the minority group have been elected to

public office in to which the jurisdiction.

Gingles, 478 U.S. at 44-45 (citations omitted). However, the court in *Gingles* explained that the Senate report stresses that the list of factors "is neither comprehensive nor exclusive[,]" *id*., and that "other factors may also be relevant and may be considered." *Id*. The Court also noted that "'there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other."' *Id*. In that light, the courts have added additional factors such as whether elected officials are unresponsive to the particularized needs of the members of the minority group, *id*., and whether the number of districts in which the minority group forms an effective majority is roughly proportional to its share of the population in the relevant area. *Janson v. De Grandy*, 512 U.S. 997, 1000 (1994), cited in *LULAC v. Perry*, 548 U.S. at 426.

VI. Proportionality

The Supreme Court in *LULAC v. Perry* began their analysis of the totality of the circumstances with the proportionality inquiry, 548 U.S. at 436, and held that the proportionality analysis requires a statewide analysis. *Id*. at 437.

Native American population in the state grew at a rate of 14.7% while the state population grew at a rate of 13.2%. The total Native American percentage in the state is 10.7%. Multi-Tribal Ex. 19. Currently, three of the 70 House Representatives, or 4%, are Native American, instead of the proportionate seven. The six proposed majority Native American districts are one shy of the seven majority Native American districts for proportional representation. *See id*. at 436-38

(computing the proportionality of the Latino districts).

VII. Electoral Discrimination Inflicted On Native Americans

Of even more probative value, is the historic and contemporary electoral discrimination against Native American voters. New Mexico denied Native Americans living on Pueblo and Navajo lands the right to vote until 1948 and 1962, respectively. *Montoya v. Bolack*, 70 N.M. 196, 200 (1962). Although the right to vote was beyond dispute, the *Sanchez v. King* court, writing in 1982 found that there were still regular attempts by "certain legislators to deny that right to Indians." *Sanchez v. King* No. 82-0067M (Consolidated) (D.N.M. 1984), at 25.

As a result of this past discrimination, many Native Americans in this state grew up in households where there was no established practice of voting since their parents came of age before the Courts' decisions allowed them to vote. The young Native Americans did not have the example of voter participation to follow when they reached voting age, thereby perpetuating the cycle.

Unfortunately, electoral discrimination in New Mexico is also quite contemporary and evokes similar circumstances addressed in key Voting Rights Act cases. Former Pueblo of Laguna Governor, Roland Johnson, will relate how, prior to the 2004 election, Laguna Pueblo carried out a vigorous and successful campaign to register 500 pueblo members and mobilize all registered voters to turn out on election day. The Cibola County Clerk failed to enter the names of those newly registered voters onto the voting rolls and as a result, those newly registered voters were not allowed to vote in the 2004 election. The County Clerk also purged other Laguna voters from the lists and failed to

provide sufficient provisional ballots to the Laguna polling sites thereby compounding the problem when the newly registered, or recently purged, voters showed up and found they could not vote regularly. When provisional ballots finally arrived, there were numerous other problems leading to the rejection of votes. Multi-Tribal Exs. 10 and 11.

Similarly, the Crow and Northern Cheyenne Indians in Montana were engaged in major Indian voter registration drives that were thwarted by the county's failure to include them in the voter lists. *Windy Boy*, 647 F. Supp. at 1008. As that court noted, "[f]or Indians who could not register or could not vote, it does not much matter whether there was a specific intent to interfere with their rights or simply an inability or unwillingness on the part of the county to make sure Indians' rights were protected." *Id*. The successful Latino plaintiffs in *LULAC v. Perry* likewise were engaged in voter mobilization efforts that the State was attempting to undermine through the redistricting process. *Id*. at 440.

The counties of both Cibola and Sandoval, which contain between them 12 different tribes and tribal lands, have been under federal court supervision since 1994 for violations of the Voting Rights Act related to Native Americans. The Consent Decree in Sandoval County has been extended until 2013 because the County has continually failed to remedy the violations. Multi-Tribal Ex. 20, Order Granting Joint Mot. for Entry of Limited Consent Decree, *United States v. Sandoval County*, No. 88-CV-1457 (D.N.M. 2011). The Court has found that the County Clerk in Sandoval County is hostile to the Native American efforts and has been threatened with contempt of court if the County

does not comply with the Consent Decree and its obligations under the Voting Rights Act. *Id*. at 11-15. The Cibola County Consent Decree was modified to include the County's stipulation that the electoral irregularities in the 2004 election violated the National Voter Registration Act and the Help America Vote Act. The Cibola County Consent Decree has been extended through the 2012 election. Multi-Tribal Ex. 11, Second Order Extending and Modifying Stipulation and Order Originally Entered April 21, 1994 (March. 19, 2007), *United States v. Cibola County*, No. 93-1134 (D.N.M. 2007).

VIII. Racially Polarized Voting

The third Senate factor, racially polarized voting, is a combination of the second and third *Gingles* preconditions, Native American political cohesion and majority bloc voting. *Gingles*, 478 U.S. at 56.

Engstrom's analysis demonstrates racially polarized voting. Multi-Tribal Ex. 2. The experts for at least two of the other parties will also testify that there is racially polarized voting concerning Native Americans in the state. Anticipated Test. of R. Espino and T. Arrington; Egolf Plaintiffs' Proposed Findings of Fact and Conclusions of Law at 9.

IX. Legislative Responsiveness to Native American Concerns

Historically and up to the present, the New Mexico Legislature has not been as responsive to the needs of the state's Native Americans as it has to other communities. Mr. Conroy Chino will testify about how the lack of Native American voices in the Legislature affects legislative initiatives

proposed or supported by Native Americans. Mr. Alvin Warren, who was the Secretary of Indian Affairs under Governor Bill Richardson, will testify about the disproportionate disparities in capital outlay funding for Native American tribes as compared to both their needs and relative to their percentage of the population. Multi-Tribal Ex. 21.

Of extreme concern to the Native Americans is the lack of responsiveness and outright hostility to their requests for respect for traditional cultural properties. (Anticipated Test. of Governor Luarkie and Lt. Governor Garcia). A 2005 Executive Order of the State of New Mexico's Governor acknowledged that the "State of New Mexico's actions may have the unintended and inadvertent result of disturbing and adversely impacting Native American cultural and historic sites and sacred places, requiring a process of consultation to avoid any irreplaceable loss." Multi-Tribal Ex. 18. The Pueblos of Acoma, Laguna, Zuni, the Hopi Tribe in Arizona and the Navajo Nation submitted a formal application to New Mexico Cultural Properties Review Committee requesting a permanent Traditional Cultural Properties designation for Mt. Taylor that would entitle Mt. Taylor the protections offered by state law. Mt. Taylor is within the aboriginal lands of several of the pueblos and tribes in the area and is central to the nominating tribes' identity, history, traditions, culture and religion. The Traditional Cultural Properties designation was awarded. However, in response several bills were introduced in the New Mexico Legislature which would undermine the Traditional Cultural Properties designation or nomination process. *See, e.g.*, HB 422, 50th Leg. (N.M. 2011) and its companion, SB 421, 50th Leg. (N.M. 2011) (Cultural Property Registration and Acquisition), both

of which died in committee; HB 48, 50th Leg. (N.M. 2011) (Cultural Properties Review Committee Duties), which also died in committee; SJM 10, 48th Leg. (N.M. 2007) (Joint Memorial Recognizing the Importance of Nuclear Energy and the Valuable Uranium Resources in New Mexico), which was tabled; and HB 81, 50th Leg. (N.M. 2011) (No Land Grants as State Lands), which, unfortunately, was passed.

X. Socio-economic Factors

The lack of equal access in the electoral and legislative processes affects the lives of Native Americans in other profound ways. Testimony will be provided that New Mexico's Native American population is significantly poorer than the rest of the State's population and have suffered from an inequitable lack of state-offered education services. The New Mexico Department of Indian Affairs has itself concluded that "New Mexico's tribal communities continue to lack basic infrastructure, including water and wastewater systems, roads, healthcare facilities and electrical service and the lack of such infrastructure directly results in health, economic, educational and other social disparities." Multi-Tribal Ex. 21; Anticipated Test. of Alvin Warren.

The Multi-Tribal Plaintiffs satisfaction of the *Gingles* threshold factors, and the demonstration that under the totality of circumstances the political process provides less opportunity for the Native American minority to participate and elect representatives of their choice necessitates the drawing of the majority minority district if they can be developed without subordinating traditional redistricting so as to raise strict scrutiny. *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (courts will

look to whether the map drawer "subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations."); *Growe*, 507 U.S. at 40; *Shaw v. Reno*, 509 U.S. 630, 655-56 (1993); 42 U.S.C. § 1973(b).

XI. The Redistricting Process Must Honor the Self-Determination of the State's Indian Tribes

In adopting or fashioning a map that would be consistent with Section 2, or conversely, not trigger a Section 2 violation, the Multi-Tribal Plaintiffs believe that the Court must also respect tribal self-determination.

The second case to address Voting Rights Act violations and Native Americans, *Windy Boy*, acknowledged that its decision would have to take into account global issues - including the "dual status of Indians as both United States citizens and as members of sovereign tribes that are self-governed and not subject to full control by state and local government has "long presented conflicts over land, mineral, and fishing rights, taxation and the authority of tribal, state and federal courts." 647 F.Supp. at 1007.

This concern about the unique tribal issues surrounding Native American voting rights cases was addressed specifically by Judge Frank H. Allen in his finding that the map adopted by the *Jepsen* court was consistent with tribal self-determination. *Jepsen*, Conclusion of Law No. 10.

Aside from individual tribal members being recognized as a minority group subject to the protections of the Voting Rights Act, Indian tribes have long been recognized as inherently self-

governing sovereign entities independent of state jurisdiction and control absent congressional authorization. *Worcester v. Georgia*, 31 U.S. 515 (1832). In *Worcester*, Chief Justice John Marshall concluded that, from the commencement of our federal government, Indian nations have been recognized "as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied by the United States." *Id*. at 557.

The recognition of Indian tribes as self-governing political bodies continues to the present day. Since 1960 our federal government has followed a policy of tribal self-determination and self-governance, largely in response to the repudiated and disastrous policy of termination that preceded it. [6] When Congress adopted the Indian Self-Determination Act, it specifically found that after careful review of the "Federal government's historical and special legal relationship with, and resulting responsibilities to, the American Indian people" that (1) Indian people had been denied "an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities; and (2) the Indian people will never surrender their desire to control their relationship both among themselves and with non-Indian governments, organization and persons." 25 U.S.C. § 450(a).

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[6] For a comprehensive discussion of the federal policy of Indian self-determination and self-governance from 1961 to the present, *see* Cohen's Handbook of Federal Indian Law § 1.07 (Nell Jessup Newton et al. eds., 2005 ed.).

The Indian Self-Determination Act became a turning point and rallying cry for tribes' assertion of their historical and inherent sovereign rights to self-govern. Many decades later, the State of New Mexico also recognized and honored the role that self-determination plays in the government to government relationship between tribes and the State. On March 19, 2009, the State of New Mexico enacted the State-Tribal Collaboration Act. The act mandates every state agency develop and implement policies that promote effective communication and collaboration, positive government-to-government relations, and cultural competency. Moreover, the act directs the State Governor to meet with tribal leaders to address issues of mutual concern. The passage of this act codified the State of New Mexico's policy of direct consultation with Pueblos and tribal Nations. Unlike a discretionary policy, under the act the New Mexico Governor, as the head of the Executive Branch, is statutorily mandated to be an active participant in facilitating the government-to-government relationship with tribes when state action affects tribes.

The state action of redistricting will affect the voting rights of tribal members for the next decade. The ability of Native Americans to elect representatives of their choice will impact their ability to develop economically, obtain basic education, protect important cultural properties, protect their people and lands from the adverse impacts of mining, and to pursue other important community interests of individual tribes as well as those common to multiple tribes. It is essential, therefore, that the Pueblos and tribal Nations' exercise of self-determination in identifying the communities of interest that are most important to them, and in asserting a preference for which district or districts

they wish to be in to best protect their communities, and in preserving within a district their political boundaries, be honored.

Three of the proposed plans submitted to the Court for the State House fail to honor the affected tribes' redistricting requests by splitting tribal communities (which is worse than splitting subdivisions) and/or moving tribes from one district to another against their express wishes, which adversely affects the tribes' abilities to protect their community interests. As such, those plans are unacceptable to the Multi-Tribal Plaintiffs. The self-governing tribes are in the best position to determine the issues that are most important to them and how those issues should be addressed. Therefore, the wishes of the tribes in the redistricting process must be honored to the greatest extent possible in order to comport with the policy of self-determination adopted by the federal and state governments. The plan proposed by the Multi-Tribal Plaintiffs honors the self-determination of the Pueblos and tribal Nations and is the best plan for redistricting the State House.

Of particular note is that the State Legislature chose to honor the tribes' self-determination requests. The Legislative Plan reflects intense conversations, negotiations and education of the Legislature on tribal wishes. Interestingly, the other plan that was introduced at the Legislature and also submitted to the Court for consideration approximates the tribal requests. The Sena Plan was introduced as HB 47. The sponsors of the bill, while admirable for attempting to reflect the wishes of the Pueblos and tribal Nations, however, failed to consult with them and therefore failed to incorporate fully the requests for District 65 and District 69, and also, perhaps inadvertently, paired

a Legislator who is married into Ohkay Owingeh, lives on the reservation, and is a champion of Native American issues. Other serious problems with various proposed plans are discussed below as potential violations of Section 2 of the Voting Rights Act.

XII. The House Plan Proposed By the Multi-Tribal Plaintiffs Best Remedies the Section 2 Voting Rights Act Violations Suffered by Native Americans in New Mexico

The Multi-Tribal Plaintiffs believe that their proposed plan for the State House is the best plan to remedy the Section 2 Voting Rights Act violations they have suffered. Their plan:

- builds on the progress made in 2002 in creating Native American majority minority districts;
- does not drastically alter the boundaries of the districts the Court mandated in 2002 thereby maintaining the political cohesion and momentum for electoral engagement that has been building in those districts;
- protects the communities of interest that are most important to the Native American communities, as determined by those Native American communities themselves;
- keeps intact tribal political boundaries within the tribes' lands;
- reflects the number of compact, under *Gingles*, majority Native American districts that can be drawn in the Northwest Quadrant;
- are compact and contiguous, and
- respects tribal self-determination.

The 2002 Court redistricting resulted in six majority House districts with non-Hispanic Native American percentages (not voting age) of 77.3%, 69.6%, 64.8%, 67.2%, 64.0% and 65.0%. *See Jepsen*. The 2010 census shows that the Native American population grew at a rate of 14.7% compared to the 13.2% growth rate for the state as a whole. Since the Native American population growth slightly exceeded the state growth rate, it is possible to maintain the existing majority minority House districts. Because some of the growth was in urban areas, the districts themselves had to expand slightly geographically and the population deviations are within the acceptable range, but on the negative side. Multi-Tribal Ex. 3 and 4.

The plan proposed by the Multi-Tribal Plaintiffs, together with the plans proposed by either the Legislative Defendants, the Egolf Plaintiffs, the Maestas Plaintiffs or the Navajo Intervenors maintain six majority Native American House Districts with non-Hispanic Native American population percentages (not voting age) in the three multi-tribal districts proposed by the Multi-Tribal Plaintiffs of 65.7%, 65.6% and 64.3%. We use these comparisons because the *Jepsen* Court did not state the Voting Age Population ("VAP") of the Native American districts it mandated and was limited to demographic data for only non-Hispanic Native Americans.

Using the more relevant Total Native American VAP, the three Multi-Tribal districts achieve percentages of 65.1%, 65.8% and 65.1%. These percentages are very strong. Multi-Tribal Ex. 3.

The United States Supreme Court has not adopted a bright line formula for determining whether the VAP percentage of a minority group is so low as to constitute dilution of minority voting

rights. *Arbor Hill Concerned Citizens Neighborhood Ass'n. v. Cnty. of Albany*, 289 F.Supp. 2d 269, 274-75 (N.D. N.Y. 2003) (adopted plan with minority concentrations of at least 65%, which in turn ensured a VAP in each district of between 57.54% and 60.79%; *rev'd in part on other grounds*, 357 F.3d 260 (2nd Cir. 2004). However, in assessing the minority percentages required to achieve a viable redistricting plan in one case, the Supreme Court has stated "[w]e think it was reasonable for the Attorney General to conclude in this case that a substantial nonwhite population majority in the vicinity of 65% would be required to achieve a nonwhite majority of eligible voters." *United Jewish Orgs. of Williamsburgh v. Carey*, 430 U.S. 144, 164, (1977).

Since the *United Jewish Organizations* decision by the Supreme Court, lower courts have followed, finding that majorities greater than simple majorities of 51 percent - are required to create 'safe' or effective majority/minority districts. *Arbor Hill*, 289 F.Supp. 2d at 274, *citing Puerto Rican Legal Defense and Educ. Fund, Inc. v. Gantt*, 796 F.Supp. 681, 689 (E.D.N.Y. 1992) (citation omitted). In the case of *African American Voting Rights Legal Defense Fund v. Villa*, 54 F.3d 1345 (8th Cir. 1995), the court noted that a guideline of 65% of total population had achieved general acceptance in redistricting jurisprudence and had been adopted and maintained by the Department of Justice. *Id*. at 1348 n. 4. As the court explained, "[t]his figure is derived by augmenting a simple majority with an additional 5% for young population, 5% for low voter registration and 5% for low voter turn-out, for a total increment of 15%. This leads to a total target figure of 65% of total population." *Id*. The House plan submitted by the Multi-Tribal Plaintiffs comes closest to reaching

the 65% total population target set by the courts to ensure six viable Native American majority districts.

XIII. Potential Violations of Section 2 in the Executive Defendants' and the James' Plans

The Executive Defendants' Plan creates six majority districts, but in the process splits Laguna Pueblo into two districts and moves part of Laguna Pueblo into District 6, and moves Acoma Pueblo from District 69 to District 6. Likewise, the James Plaintiffs' Plan moves Acoma Pueblo from District 69 to District 6 and splits Laguna Pueblo. Worse yet, the James Plaintiffs' Plan includes only five Native American majority districts, which is less than the plan adopted in 2002.

The Executive Defendants and James Plaintiffs would have this Court adopt a finding that the other plans in this litigation "do not create this number of Native American majority districts, or keep the voting age percentages within these districts as high as does the Executive Defendants' plan." Executive Defendants' Findings and Conclusions at 11.[7] (Finding No. 42). It is true that the plan proposed by the James Plaintiffs violates Section 2 of the Voting Rights Act because it provides for only five Native American majority districts when six are possible. However, such an assertion is simply not true as to the plan proposed by the Multi-Tribal Plaintiffs, the Legislative plan, or the Egolf, Maestas and Navajo plans. *See* Multi-Tribal Ex. 3. In the plan proposed by the Multi-Tribal

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[7] The James Plaintiffs did not submit their own Proposed Findings of Fact and Conclusions of Law. Instead, they have joined in some, but not all, of the Proposed Findings and Conclusions submitted by the Executive Defendants, including Finding of Fact No. 42.

Plaintiffs for Districts 6, 65, and 69, the total Native American VAP percentages are higher than in the Executive Defendants' Plan in all three of those districts. In addition, the Executive Defendants' Plan divides Native American pueblos and communities of interest.

Tellingly, the Executive Defendants' Findings and Conclusions stress the importance of preserving political subdivisions, but don't even mention respect for reservation boundaries. *See* Executive Defendants' Findings and Conclusions at 14 (Findings Nos. 57-59). Regarding communities of interest, the Executive Defendants suggest that this Court adopt, without supporting legal authority, a conclusion that would remove any consideration for preserving communities of interest because "[s]uch policy or political decisions are best left to the legislative process. Because the legislative process did not produce a redistricting plan for the New Mexico House of Representatives, this Court will instead employ other, more objective and empirical criteria when selecting a reapportionment plan." Executive Defendants' Findings and Conclusions at 15-16 (Finding No. 65). To the contrary, when courts are seeking to remedy Voting Rights Act Section 2 violations, they are appropriately concerned about injury to and preserving communities of interest. *See, e.g.*, *LULAC v. Perry*. Preserving communities of interest is a traditional redistricting principle in New Mexico that the Executive Defendants try to, but simply can't choose to, ignore. *See* Exec. Defs. Ex. 4, Guidelines for the Development of State and Congressional Redistricting Plans, and Multi-Tribal Ex. 7. Native American Redistricting Principles, which are consistent with the State's Guidelines.

The cold mathematical exercise, which the Executive Defendants suggest the Court is limited to, was also attempted unsuccessfully by the State of Texas when it argued that "aggregating the voting strength" of minorities, without concern for the communities of interest within the different

communities of the minority group, satisfied Section 2. *See LULAC v. Perry*, rejecting District Court decision and mandating that the inquiry regarding the proposed Latino districts must take into account communities of interest and traditional redistricting principles. The Court rejected the map that substituted a state drawn Latino district, which did not share communities of interest, for an existing Latino district that had a strong community of interest. *Id*. at 434-35.

The Executive Defendants and James Plaintiffs' maps have a more egregious effect of vote dilution. As noted above, the Pueblo of Laguna has begun to mobilize voters, to register new voters, and to encourage early voting. In 2002 there was only one precinct, and as Governor Roland Johnson will testify, the Pueblo requested the precinct be split into six to facilitate and promote tribal member voting at each of their villages. The Pueblo has six villages but considers itself one Pueblo community. The Pueblo's mobilization efforts were directed to the entire community. The Executive Defendants' and James Plaintiffs' plans would "break apart" the Native American opportunity district just as the Laguna members were becoming mobilized. Like the emerging electoral minority community in *LULAC v. Perry*, if adopted, these maps would "[make] fruitless the [Laguna] mobilization efforts but also act against those [Pueblo members] who were becoming most politically active, dividing them with a district line . . ." *Perry* 578 U.S. at 440 (emphasis added). Like Texas attempted in *LULAC v. Perry*, the Executive Defendants' and James Plaintiffs' maps would "undermine the progress of a racial group that has been subject to significant voting-related discrimination and that was becoming increasingly politically active and cohesive." *Id*. at 440.

For the Pueblos of Laguna and Acoma, the Court will learn from Governor Richard Luarkie and Lt. Governor David F. Garcia's testimony that the dividing district line proposed in the Executive

Defendants' and James Plaintiffs' plans has a more troubling effect. Those maps would place Mt. Taylor in a separate political district from Acoma and part of Laguna. Multi-Tribal Exs. 3, 23 and 25. These maps would sever these two Pueblos and the Navajo community of Alamo from a traditional cultural property that is central to these Native Americans' history, culture, identity and practices. The ability of the State Legislature to take actions that would harm, inadvertently or intentionally, the cultural sites on the mountain causes great alarm, especially if the Pueblos are no longer a significant political force within the legislative district that encompasses the property. Laguna has trust property on Mt. Taylor that it has acquired in an effort to reclaim lost aboriginal lands. Mt. Taylor was originally part of the Pueblo of Laguna, Pueblo of Acoma and Navajo Nation's aboriginal land and this land was involuntarily taken from them. *Pueblo of Laguna v. United States*, 17 Ind. Cl. Comm. 615, Findings 2, 10 and 38 (1967). The drawing of a political boundary between the Pueblos and Mt. Taylor is extremely disturbing and specifically against the self-determination request of the Pueblos.

The James Plan also suffers from "packing." Dilution of racial minority group voting strength, in our case the protected class of Native Americans, may be caused either by the dispersal of the Native Americans into districts that render the group ineffective to elect a candidate of choice, or by "concentrating" the Native American voters into districts where they "constitute an excessive majority." *Voinivich v. Quilter*, 507 U.S. 146, 153-154 (1993).

Engstrom will opine that total Native American VAP above 70% is not required to create a majority Native American district. The districts mandated by the court in 2002 had Native American populations far below this. Those districts have elected candidates of the Native American's choice.

Not all of the candidates of choice are Native Americans themselves. They have also provided a reasonable opportunity, not a guarantee, to Native Americans in the district to elect a candidate of their choice. *See Bone Shirt*, "some sort of guarantee that the Indian-preferred candidates will be elected is not persuasive; all that is required is that the remedy afford Native Americans a realistic opportunity to elect representatives of their choice." *Id*. at 1023.

XIV. The Native Americans' Proposed House Plan Follows Traditional Redistricting Principles

The *Shaw* decision teaches that majority minority districts must not subordinate to race the traditional redistricting principles of compactness, contiguity, keeping communities of interest intact, and respect for political boundaries. *Shaw* does not stand for the proposition that race conscious state decision making is impermissible in all circumstances. The *Shaw* court noted that the Supreme Court had never issued such a holding. *Id*. 509 U.S. at 642. *Shaw* held that when a reapportionment scheme is so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race, it is subject to a claim under the equal protection clause, will be given strict scrutiny and will require compelling justification. *Shaw*, 509 U.S. at 658 (emphasis added). At issue in *Shaw*, was the creation of a majority black district, which was "approximately 160 miles long and, for much of its length, no wider than the I-85 corridor [and wound] in snakelike fashion through tobacco country, financial centers, and manufacturing areas 'until it gobble[d] in enough enclaves of black neighborhoods.'" *Id*. at 635-36. The *Shaw* court also noted that traditional redistricting principles, such as compactness, contiguity, and respect for political boundaries "are

objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines." *Id*. at 647.

In the present case, all of the proposed plans, to varying degrees, propose districts that are compact and contiguous. The Multi-Tribal Plaintiffs' plan provides respect of tribal political boundaries unlike the Executive Defendants' and the James' plans. The districts are consistent with the districts mandated by the Court in 2002 and are generally as compact as the Court determined was adequate ten years ago. The mathematical compactness analysis presented in the case further supports that there are no compactness issues in the plans. Exec. Defs. Ex. 10.

XV. The House Plan Proposed by the Multi-Tribal Plaintiffs Maintain Native American Majority House Districts With Acceptable Population Deviations

A series of United States Supreme Court cases established the principle that minor population deviations of less than 10% (e.g., -5% to +5%) among districts in a state redistricting plan, in and of themselves, are "insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State." *Brown v. Thomson*, 462 U.S. 835, 842 (1983) *quoting* Gaffney v. Cummings, 412 U.S. 735, 745 (1973); *see* also *Voinovich*, 507 U.S. at 161. The Executive Defendants argue that a more exacting standard is necessary based on a summary affirmance by three justices (one dissenting) of a decision by a lower federal court where it was found that the deviations were used for invidious purposes, and that the population deviations were intentional, systematic and extreme. *Cox v. Larios*, 542 U.S. 947 (2004). Of note is that in *LULAC v. Perry,* the United States Supreme Court took note of *Cox* when rejecting appellants

attempt to claim manipulation of population variances because there had been no evidence or finding to support the allegations of bad faith. *LULAC v. Perry* 548 U.S. at 422.

Given the limited precedential value of the *Cox* case, if it can teach anything at all, *Cox* teaches that population deviations that may be acceptable without justification in some situations cannot be justified when those deviations are used, not for a legitimate state policy, but in an egregious manner solely to deliberately and systematically disadvantage one political party over another. The egregious facts of the *Cox* case are not present in this case and *Cox* is, therefore, inapplicable here.

The House Plan proposed by the Multi-Tribal Plaintiffs maintains six Native American majority districts that have population deviations ranging from -5.0% to .3%. Those deviations result from a good faith effort to: maintain the progress made in 2002 in creating the Native American majority minority districts; protect the communities of interest that are most important to the Native American communities, as determined by those Native American communities themselves; form compact and contiguous districts, and keep intact political divisions within the tribes' lands. As noted in *Jepsen*, the total maximum deviation of 9.5% (-4.6% to +4.9%), *Jepsen* Finding of Fact no. 43-44, were "justified by natural, political and traditional boundaries and the need to remedy the dilution of Native American voting rights," Finding of Fact no. 35, and "in full compliance with the requirements of the Equal Protection Clause of the United States Constitution." *Jepsen* Conclusion of Law no. 9. It is the position of the Multi-Tribal Plaintiffs that the population deviations within their proposed House plan are acceptable without justification notwithstanding *Cox*. However, even if justification

is required, the redistricting principles honored in the Multi-Tribal Plaintiffs' proposed plan provide sufficient justification for the minimal deviations present.

XVI. Courts Can Adopt Plans Proposed by Native Americans

In addressing violations of the Voting Rights Act suffered by Native Americans, a court may fashion its own remedy, or use a remedy that is proposed by the Native American voters that challenged the unlawful scheme. *Bone Shirt v. Hazeltine*, 387 F.Supp.2d 1035 (D.S.D. 2005), *aff'd* 461 F.3d 1011 (8th Cir. 2006). In the present case, the Multi-Tribal Plaintiffs have proposed a plan that complies with the Voting Rights Act, does not violate the one person one vote principle, keeps Native American communities intact, and provides for compact and contiguous districts. In *Bone Shirt*, Indian voters proposed a plan that honored the same principles and achieved population deviations of 1.24 %, 4.07% and 1.86% in the Native American majority districts. *Bone Shirt*, 387 F.Supp.2d at 1040. The court found those deviations to be within the permissible range for compliance with the one person one vote principle, *id*., and adopted the plan proposed by the Native American voters.

For all of the foregoing reasons, this court should adopt the plan proposed by the Multi-Tribal Plaintiffs.

Respectfully submitted this 9th day of December, 2011.

By /s/Teresa Isabel Leger

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CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2011, a true and correct copy of the foregoing **MULTI-TRIBAL PLAINTIFFS' TRIAL BRIEF FOR REDISTRICTING OF THE NEW MEXICO HOUSE OF REPRESENTATIVES** was electronically mailed and electronically filed and served through the court's e-filing system to the Honorable James A. Hall and the counsel listed below.

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