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

BRIAN F. EGOLF, JR., HAKIM BELLAMY, MEL HOLGUIN, MAURILIO CASTRO, and ROXANE SPRUCE BLY, Plaintiffs, v. DIANNA J. DURAN, in her official capacity as New Mexico Secretary of State, SUSANA MARTINEZ, in her official capacity s 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, Defendants.	NO. D-101-CV-2011-02942 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

LEGISLATIVE DEFENDANTS' OMNIBUS PRETRIAL BRIEF

I. INTRODUCTION

The Fiftieth Legislature convened in a 2011 special session called by the Governor for the primary purpose of redrawing New Mexico's electoral districts, applying the 2010 federal census data. Plans which would create new districts for the State House of Representatives, State Senate, and the Public Regulatory Commission (PRC) passed in both houses of the legislature (collectively "Legislature's Plans") but failed to become law due to gubernatorial veto. This Court now has the duty to adopt redistricting plans in the absence of duly enacted redistricting statutes, and has asked the parties to provide guidance on the following two questions:

1) What are the standards which the Court must apply in determining whether a proposed redistricting plan meets the constitutional and federal statutory requirements, in the absence of a redistricting plan that was duly adopted by the state legislature and signed into law by the Governor; and

2) What criteria ought the Court utilize in choosing among plans that meet the constitutional and federal statutory mandates.

The Legislative Defendants submit this Pre-Trial Brief both in answer to those questions and in support of their contentions, which they intend to establish at the trials that follow, that their plans for the state legislative districts and the PRC meet constitutional and federal statutory mandates, and best adhere to the guidelines and prudential considerations that this Court must evaluate in selecting among plans that may meet the constitutional and federal statutory requirements.

With respect to the Court's first question, the duty of this Court is two-fold: to assure that districts are apportioned so that the districts achieve substantial population equality under the Fourteenth Amendment, permitting minor deviations within an overall range of ten percent to accommodate legitimate and rational state policies, see Part II(B), *infra*, and to assure that a plan does not dilute the voting strength of minority voters in violation of the Voting Rights Act, while avoiding impermissible racial gerrymandering, see Parts II(C) and (D), *infra*.

If more than one plan meets the above mandatory requirements, the Court should follow the following path in choosing from among those plans:

First, the Court should give thoughtful consideration to plans passed by the Legislature as such plans necessarily reflect the will of the people expressed through their elected representatives. See Part II(A), *infra*.

Second, the Court should review plans to evaluate the extent to which each one would require the minimal or "least change" from the policies embodied in the state's most current, legally sanctioned plans. See Part E, *infra*; and

Third, the Court should then evaluate the extent to which each plan adheres to and most reasonably balances traditional redistricting principles. These principles counsel that redistricting plans should contain districts that: are compact and contiguous; avoid splitting communities of interest; respect political and geographic boundaries; seek to preserve the core of existing districts; and avoid pairing incumbents. See Part II(F), *infra*.

The Legislative Defendants submit that in applying the foregoing, their plans for the State House, Senate and PRC will emerge—based on the evidence to be submitted during the trials—as the appropriate plans for adoption by this Court.

II. LEGAL AUTHORITY AND APPLICATION TO LEGISLATIVELY PASSED PLANS

A. Sound Principles Counsel that the Court Give Thoughtful Consideration to Plans Passed by the State Legislature.

The task of redistricting requires the exercise of sensitive political judgments in order to adequately balance competing interests. *Easley v. Cromartie*, 532 U.S. 234, 242(2001); *Miller v. Johnson*, 515 U.S. 900, 915 (1995); *Gaffney v. Cummings,* 412 U.S. 735, 753 (1973) ("Politics and political considerations are inseparable from districting" because "[t]he reality is that districting inevitably has and is intended to have substantial political consequences, . . . [and a] "politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results . . . ."); *Getty v. Carroll County Bd. of Elections*, 399 Md. 710, 734, 926 A.2d 216, 231 (Md. Ct. App. 2007); *Terrazas v. Ramirez*, 829 S.W.2d, 712, 720 (Tex. 1991).

The Legislature is constitutionally charged with making these political decisions in the first instance, *see* N.M. Const. art. IV, § 3(D), and is best-suited to do so because state legislators are popularly elected, are closest to the people who select them, and are otherwise uniquely equipped to perform the task. *See Connor v. Finch*, 431 U.S. 407, 414-15 (1977) ("[A] state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality."); *Butcher v. Bloom*, 203 A. 2d 556, 569 (Pa. 1964) ("The composition of the Legislature, the knowledge which its members from every part of the state bring to its deliberations, it techniques for gathering information, and other factors inherent in the legislative process, make it the most appropriate body for the drawing of lines dividing the state into ...[legislative districts]."); *see also Jensen v. Wisconsin Elections Bd.*, 249 Wis.2d 706, 639 N.W.2d 537, 540 (2002) ("The framers [of the Wisconsin Constitution] in their wisdom entrusted [redistricting] to the legislative branch because the give-and-take of the legislative process, involving as it does representatives elected by the people to make precisely these sorts of political and policy decisions, is preferable to any other.")

In light of this reality, the Supreme Court of the United States has recognized that courts "should follow the policies and preferences of the State, as expressed in statutory and constitutional provision or in the reapportionment plans *proposed by the state legislature* whenever adherence to state policy does not detract from the requirements of the Federal Constitution." *Upham v. Seamon*, 456 U.S. 37, 41 (1982), quoting *White v. Weiser*, 412 U.S. 783, 794-95 (1973) (internal quotations omitted and emphasis added). A number of federal courts have similarly found that they are bound to give "thoughtful

consideration" to plans passed by the state legislature but vetoed by the governor, as such plans represent the legislature's "proffered current policy." *O'Sullivan v. Brier*, 540 F. Supp. 1200, 1202 (D. Kan. 1982) quoting *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187 (1972); *Carstens v. Lamm*, 543 F. Supp. 68, 79 (D. Colo. 1982); *see also Terrazas v. Clements,* 537 F. Supp. 514, 528 (N.D. Tex. 1982) (Plans "derived from the plans adopted by the legislature, are the result of a legislative process which we should recognize as an expression of legitimate legislative activity.").

This approach of giving "thoughtful consideration" to legislatively passed plans was precisely what the Court did in the last round of redistricting litigation in New Mexico. In 2001-2002, District Judge Frank Allen presided over the consolidated redistricting litigation. Judge Allen was presented with numerous competing plans for redistricting the New Mexico House of Representatives, including a plan that had passed both houses of the Legislature but had been vetoed by the Governor. Judge Allen ultimately adopted the legislatively passed plan, as amended by a Native American proposal for the northwestern section of the state, where Judge Allen found Voting Rights Act concerns. In reaching this conclusion, Judge Allen noted, "[i]n evaluating the plans submitted by the parties, it is appropriate that the Court give thoughtful consideration that [the legislatively passed plans] are plans developed through a process which reflects the will of the people, expressed through their elected representatives." Findings of Fact and Conclusions of Law Concerning State House of Representatives Redistricting, Finding No. 40, January 24, 2002, Case No. D-0101-CV-2001-02177 (attached hereto as Exhibit A). This Court should follow the same approach in evaluating the legislatively passed

plans presented by the Legislative Defendants for the New Mexico House, Senate and PRC.[1]

As discussed more fully below in Section II(B)(ii), this Court has broader latitude to consider state policy expressed in legislative plans than do federal courts, particularly in permitting variations from absolute equal population in state legislative plans. *See In Re Apportionment of State Legislature,* 321 N.W. 2d 585 (Mich. 1982) (Levin and Fitzgerald, J.J. concurring), *appeal dismissed for want of a substantial federal question sub. nom. Kleiner v. Sanderson*, 459 U.S. 900 (1982). This is so because federal courts are constrained by principles of federalism and comity in creating state legislative plans and therefore they "must ordinarily achieve the goal of population equality with little more than *de minimis* variation." *Chapman v. Meier*, 420 U.S. 1, 26-27 (1975). Federal courts, unlike state courts, "possess no distinctive mandate to compromise sometimes conflicting state apportionment policies in the people's name." *Connor*, 431 U.S. at 415. These constraints do not bind this Court, which is a branch of the same sovereign as the Legislature. *See Growe v. Emison*, 507 U.S. 25, 33-34 (1993) (requiring federal courts to defer consideration of redistricting disputes "where the State, through it legislative *or* judicial branch, has begun to address that highly political task itself"); *Chapman,* 420 U.S. 1, 27 (1975) ("[R]eapportionment is primarily the duty and responsibility of the

[1] Some parties to the litigation have suggested that the Legislature's passed plans are somehow entitled to less consideration because those plans did not have bipartisan support. Which legislators supported or opposed the Legislature's plans has no bearing on the degree of consideration to which those plans are entitled. As with any proposed legislation, the acts of a majority of the members in both houses with respect to the adoption of redistricting plans constitute the acts of the whole body. Where the Legislature, as a body, adopts redistricting plans, those plans are entitled to thoughtful consideration.

State through its legislature *or other body*, rather than of a federal court." (Emphasis added).

In addition to being unconstrained by principle of federalism and comity, constitutional separation of powers principles also militate in favor of deference to legislative policy choices embodied in passed plans *See* N.M. Const. Art. III, § 1. More specifically, New Mexico courts recognize that it is the particular domain of the Legislature "as the voice of the people" to make public policy. *Torres v. State*, 119 N.M. 609, 612, 894 P.2d 386, 389 (1995); *State ex rel Taylor v. Johnson*, 1998-NMSC-015, ¶ 21, 125 N.M. 343, 961 P.2d 768.) ("We also have recognized the unique position of the Legislature in creating and developing public policy").

These separation of powers principles particularly embodied in New Mexico's Constitution also counsel that the Legislature's expression of state policy is entitled to greater deference than that contained in plans promoted by the Executive branch, which were put forward only after the matter ended up before this Court after an Executive veto. Unlike the affirmative grant of authority to the Legislature to create public policy, the Governor's veto power is only a negative power. *See State ex rel. Sego v. Kirkpatrick*, 86 N.M. 359, 365, 524 P.2d 975, 981 (1974); *see also P Mills v. Porter*, 69 Mont. 325, 331, 222 P. 428, 430 (Mont. 1924) ('The veto is distinctly a negative, not a creative, power. The general rule is that the Governor may not exercise any creative legislative power whatsoever."); *Fulmore v. Lane*, 104 Tex. 499, 511-512, 140 S.W. 405, 412 (Tex. 1911) *Welden v. Ray*, 229 N.W.2d 706, 712 (Iowa 1975). New Mexico's special constitutional solicitude for the special role of the legislature as the ultimate "voice of the people" to

make public policy counsels that this Court afford a heightened respect for lawful policies contained in the redistricting plans passed by the Legislature.

Furthermore, unlike any other plans before the Court in this litigation, the Legislative plans are the product of a lengthy and intensive process of public participation, debate and compromise. The Legislature began the redistricting process in January, 2011, with the unanimous adoption of Redistricting Guidelines by the bi-partisan Legislative Council. The Redistricting Guidelines established the principles and objectives that would guide the work of the Legislature and its committees in the development and evaluation of redistricting plans. A copy of the Guidelines is attached hereto as Exhibit B and is discussed further below in Section E.

The Legislature also established a bi-partisan Redistricting Committee to gather public input on redistricting, develop plans and make recommendations to the Legislature in advance of the special session. Throughout the summer of 2011, the Committee held public meetings in locations all over the state, including Farmington, Gallup, Rio Rancho, Santa Fe, Clovis, the Pueblo of Acoma, Las Vegas, Roswell, Las Cruces and Albuquerque.[2] Each hearing included time for public questions and comment by individuals and groups interested in redistricting.[3]

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[2] At the public hearings, Mr. Sanderoff provided an overview of the redistricting process, including demographic changes in the state since the last decennial census, and basic principles involved in state and congressional redistricting. Mr. Sanderoff also presented a series of "concept maps" which Research and Polling had developed, at the Committee's request, for purposes of illustrating potential redistricting options and outcomes. At the final meeting, on August 31, 2011, the Committee voted to send all of the concept maps to the Legislature for consideration, rather than recommend any particular plan or plans, so that legislators could evaluate the plans and consider the public comment that had been developed over the summer.

[3] The agendas and minutes for the public hearings are posted on the Legislature's public website, along with videos of the hearings:
http://www.nmlegis.gov/lcs/redcensus/redcensuscommitteedetail.aspx?CommitteeCode=RD

On September 6, 2011, the Governor convened the special legislative session. Legislators, staff, committees and caucuses met throughout the session to do the hard work of redistricting. Numerous redistricting plans were introduced and debated in committee meetings and on the floor of both houses, ultimately resulting in the passage of plans for the New Mexico House, Senate and PRC.

In contrast with the legislatively passed plans, the plans offered in this litigation by the Executive Defendants were not presented to the Legislature for consideration before or during the special session, and therefore were not subject to or the result of the scrutiny, deliberation, public debate and compromise inherent in the legislative process. Instead, the plans now presented by the Governor were disclosed only when they were submitted to the Court in this litigation, after the legislative session was over, the passed plans were vetoed, and litigation had commenced. If such plans were to be given the same degree of consideration by the Court as the Legislature's passed plans, the Executive branch would be encouraged to remain silent during the legislative process, at the very time where competing interests are to be weighed and considered, in order to avoid the scrutiny which the Legislature's plan has endured.[4] And, it is precisely because the Legislature's passed plans are the product of the political process, informed through public input, debate and compromise, that they should receive a greater level of deference than other plans, including those promoted by the Executive Defendants.

In light of the foregoing, this Court should:

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[4] By waiting until after the legislative session to introduce their plans, the Executive Defendants seem to seek to do the very thing for which they have criticized other parties, to "gain through the Court a . . . plan that they could not obtain through the political process." See The Executive Defendants' Pre-Trial Brief Regarding the Congressional Redistricting Plan, p. 2.

1. Evaluate the legislative plans, giving due deference to the policy choices contained therein;

2. In doing so, evaluate that plan under the criteria imposed by federal law and the redistricting principles adopted by the bi-partisan Legislative Council when it created and charged the Interim Legislative Redistricting Committee;

3. Afford recognition to the fact that the legislative passed plans - unlike the other presented to the Court - necessarily involved a degree of reconciliation of traditional state policies in the people's name and most closely approximate the will of the people expressed through their elected representatives; and

4. Deviate from those plans only if, and to the extent that those plans deviate from the lawful standards adopted by the Legislative Council or federal or state law.

B. The Legislatively Passed Plans Comply with Equal Population or "One-Person, One-Vote" Standards.

i. State Legislative Districts with Population Deviations Below Ten Percent are Presumptively Constitutional.

Unlike the Equal Population standard derived from Article I, Section 2 of the U.S. Constitution, which compels that the population of congressional districts in the same state must achieve population equality "as nearly as is practicable," *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964), federally mandated "equal population" requirements in the state legislative context derive from the Equal Protection Clause of the Fourteenth Amendment. *Reynolds v. Sims*, 377 U.S. 533, 568, (1964). In contrast to the strict standard enunciated in the context of Congressional redistricting, "equal population" in this context requires only "substantial equality of population among the various districts," and may contain deviations which are "based on legitimate considerations incident to the effectuation of a rational state policy...." *Id.* at 579. "Minor deviations" among districts are insufficient to require justification by the State. *Brown v. Thomson,* 462 U.S. 835, 842 (quoting *Gaffney v. Cummings*, 412 U.S. 735, 745(1973)); *see also Voinovich v.*

Quilter, 507 U.S. 146, 160-162 (1993). The Supreme Court has stated that, generally, overall deviations of less than ten percent are minor deviations which do not, by themselves, trigger a state's burden to show substantial and legitimate state concerns. *Brown*, 462 U.S. at 842.

The "ten percent rule," as it is sometimes referred to, means that where a plan's overall deviation is below that range, it is presumptively constitutional. *Kidd v. Cox*, No. 1:06-CV-0997-BBM, 2006 WL 1341302, *6 (N.D.Ga. May 16, 2006) ("[P]opulation deviations of less than ten percent 'are presumptively constitutional, and the burden lies on the plaintiffs to rebut the presumption....") (quoting *Larios v. Cox*, 300 F. Supp. 2d 1320, 1341 (N.D. Ga. 2004), *aff'd*, 542 U.S. 947 (2004)). The "ten percent rule" does not create a safe harbor, but in order to prove an equal protection claim where this presumption applies, a plaintiff "must prove that the redistricting process was tainted by arbitrariness or discrimination." *Fairley v. Hattiesburg, Miss.*, 584 F.3d 660, 675 (5th Cir. 2009) (internal quotation omitted). To do so, plaintiffs "have the burden of showing that the 'minor' deviation in the plan results *solely* from the promotion of an unconstitutional or irrational state policy" and "that the asserted unconstitutional or irrational state policy is the actual *reason* for the deviation." *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F. Supp. 1022, 1032 (D. Md. 1994) (first emphasis added); *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 365 (S.D.N.Y. 2004) *aff'd*, 543 U.S. 997 (2004). In addition, the plaintiff must prove that the minor population deviation is *not* caused by the promotion of legitimate state policies. *Rodriguez*, 308 F. Supp. 2d at 365. As stated by the court in *Rodriguez*:

> If the burden on the plaintiffs in minor-deviation cases were anything less than this substantial showing, then the plaintiffs would be able to challenge any

> minimally deviant redistricting scheme based upon scant evidence of ill will by district planners, thereby creating costly trials and frustrating the purpose of *Brown*'s "ten percent rule."

Id.

The propriety of the ten percent population deviation standard is not altered by the case of *Larios v. Cox*, 300 F. Supp. 2d 1320, 1326 (N.D. Ga. 2004). That case affirmed that plans with deviations below ten percent are entitled to a presumption that they are the result of a good faith effort to achieve population equality. *Id.* at 1340. That presumption is rebuttable where invidious discrimination or arbitrariness is demonstrated. *Id.* (citing *Daly v. Hunt*, 93 F.3d 1212, 1220 (4th Cir. 1996)). The *Larios* case struck down the Georgia Legislature's state House and Senate plans in light of extremely egregious facts which demonstrated that the Legislature wholly ignored traditional redistricting principles for the express purpose of protecting Democratic incumbents at the expense of Republican incumbents, which had the effect of favoring rural and inner-city residents at the expense of voters in other parts of the state.[5] *Id.* at 1334. The legislators and drafters in that case conceded that they were unconcerned that deviations be supported by any legitimate state interest, *id.* at 1325, and that traditional redistricting principles were not considered. *Id.* at 1331. Cases since *Larios* have made clear that total population deviations of less than ten percent still enjoy a presumption of validity, *see Moore v. Itawamba County, Miss.*, 431 F.3d 257, 259 (5th Cir. 2005) *Kidd v. Cox*, No. 1:06-CV-0997-BBM, 2006 WL 1341302, *6 (N.D.Ga. May 16, 2006); *Fairley v. Hattiesburg, Miss.*, 584 F.3d 660, 675 (5th Cir. 2009). Furthermore, recent cases in this

[5] For example, the Georgia House plan struck down in *Larios* contained 50 overpopulated Republican districts and 13 underpopulated Republican districts, and 22 overpopulated and 59 underpopulated Democratic districts. *Id.* at 1331. The House plan paired 37 Republican incumbents and 9 Democratic incumbents. *Id.* at 1329.

context have rejected claims similar to those raised in *Larios* in the absence of facts showing a complete lack of adherence to traditional redistricting principles.[6] *See Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 370 (S.D.N.Y. 2004) *aff'd*, 543 U.S. 997 (2004); *Bonneville County v. Ysursa*, 142 Idaho 464, 470-71, 129 P.3d 1213, 1219-20 (Id. 2005).

ii. State Courts Charged with Adopting State Legislative Redistricting Plans in the Absence of a Redistricting Statute are Not Required to Institute De Minimis Population Deviations, and There are Good and Sufficient Reasons why this Court Should be Guided by the Ten Percent Deviation Standard.

As previously noted, federal courts faced with drawing redistricting plans, unlike state courts, operate under constraints of federalism and comity. Where federal courts are asked to draw political boundaries for state government races, they often apply a *de minimis* approach to the population deviation in state legislative districts, rather than the ten percent deviation, as a prudential way of avoiding improperly choosing among various permissible state policy choices. *See Chapman v. Meier,* 420 U.S. 1 (1975); *Connor v. Finch,* 431 U.S. 407 (1977).

However, the state judiciary, representing as it does a branch of state government, need not be so constrained, as is made clear by the thoughtful analysis contained in *In Re*

[6] In addition to involving egregious facts inapplicable here, *Larios* is of limited precedential value, because it was summarily affirmed by the Supreme Court without a majority opinion. *See Cox v. Larios*, 542 U.S. 947831 (2004). Summary affirmances "are not of the same precedential value as would be an opinion of this Court treating the question on the merits." *Edelman v. Jordan*, 415 U.S. 651, 671 (1974). Furthermore, the Supreme Court has more recently acknowledged that "[I]n addressing political motivation as a justification for an equal-population violation... *Larios* does not give clear guidance." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 423 (2006).

Apportionment of State Legislature, 321 N.W. 2d 585 (Mich. 1982) (Levin and Fitzgerald, J.J. concurring), *appeal dismissed for want of a substantial federal question sub. nom. Kleiner v. Sanderson*, 459 U.S. 900 (1982). As explained by justices in that case:

> When a federal court apportions a state legislature, there is a risk that legitimate state policies will be ignored or misunderstood. To limit encroachment by the federal judicial on state sovereignty, the United State Supreme Court limited the discretion of the federal courts by requiring greater population equality in federal court-ordered plans. *This concern is not present where the court ordering the plan is not a federal court but a state court which has declared and acts to enforce state policy.*

Id. at 593 (emphasis added). The opinion in that case carefully distinguished the holdings of cases such as *Chapman* and *Connor* which announced a *de minimis* standard for "court-ordered" plans on the ground that those cases were adopting a prudential rule, considering the role of federal courts in redistricting state political boundaries. *Id.* As explained by the Michigan opinion:

> *Chapman*, by imposing higher standards on a United States district court when it is devising a remedial plan, with a view to confining the discretion of the federal courts where such discretion is not limited by state policy, does not limit the power of a state court to define state policy any more than it limits the power of a legislature or of a state apportionment board or commission to define state policy."

Id. These principles led Judge Allen in the *Jepsen* litigation to rule that the New Mexico District Court was "constrained only by the 10% population deviation standard . . . ." (*Jepsen* State House Redistricting Finding 8).

Indeed, the United States Supreme Court recognizes that state entities have more latitude in accommodating state policy than do federal courts in drawing state legislative districts. Thus, in *Connor* the Supreme Court based the need for special federal court

constraints on the fact that, unlike state courts, federal courts "possess no distinctive mandate to compromise sometimes conflicting state apportionment policies in the people's name." *Connor,* 431 U.S. at 415. Similarly, in *Growe v. Emison*, the Supreme Court required a federal court constraint "where the State through its legislative *or judicial* branch has begun to address that highly political [redistricting] task itself." 507 U.S. at 33-34 (emphasis added).

Cases cited to by other parties to this litigation for a contrary view are unavailing. Specifically, no case cited to by the Executive Defendants (see Executive Defendants' Preliminary Proposed Finding of Fact and Conclusions of Law for the New Mexico House of Representatives Hearing, Conclusion 9) for the proposition that *Chapman*'s *de minimis* rule is derived from the Fourteenth Amendment hold or even suggest that such is the case, and a reading of *Chapman* quickly dispels that claim. Moreover, if that standard were constitutionally compelled by the Fourteenth Amendment, then it would necessarily apply with equal force to state legislatures as well as state courts.

While the Supreme Court of New Hampshire, in *Below v. Gardner*, 963 A.2d 785, (N.H. 2002), held that state courts were bound by a *de minimis* deviation standard citing to *Chapman* and *Connor*, the court in that case did not carefully analyze the prudential source of the *de minimis* rule as did the justices in the Michigan case. Careful analysis of the source of the *de minimis* rule reveals that the New Hampshire court's interpretation of the law is this area is flawed and that the Michigan court's prudential approach and this Court's interpretation of ten years ago is correct. Additionally, even though New Hampshire has announced that its courts must adhere to the *de minimis* standard, the New Hampshire Supreme Court has found it appropriate to adopt a plan with a range of

deviation of 9.26% when faced with the task of adopting a plan in the face of the absence of a redistricting statute. *Burling v. Chandler,* 804 A.2d 471, 484-85 (N.H. 2002).

Also contrary to the suggestion in the Findings and Conclusions of some parties (*see* Maestas Plaintiffs' Preliminary Findings of Fact and Conclusions of Law Concerning the New Mexico House of Representatives, Conclusion 6), state cases cited do not apply state constitutional equal protection principles to compel stricter standards of equal population in state court redistricting plans. In *Ater v. Keisling,* 819 P.2d 296 (Ore. 1991), the court made clear that the action of the Secretary of State (to whom the task of redistricting fell when the legislature failed in its efforts) adopted a standard of "zero population variance" that was not constitutionally compelled but was rather a judgment within his discretion to make. *See id.* at 302. Similarly, in *Wilson v.Eu,* 823 P.2d 545 (Cal. 1992), a case primarily involving Voting Rights Act claims, the Court was reviewing the plans drawn by three special masters who had chosen a low level of deviation under statutory "guidelines." The court nowhere suggests that the low deviations chosen were required by either federal or state equal protection standards, while stressing that the deviations from the ideal in the case were amply justified by "legitimate state objectives." *Id.* at 552.

Cases cited to for the proposition that state separation of powers principles require state courts to adhere to a *de minimis* standard (see Executive Defendants' Preliminary Proposed Finding of Fact and Conclusions of Law for the New Mexico House of Representatives Hearing, Conclusion 12) are wholly inapplicable. *King v. State Bd. of Elections*, 979 F. Supp. 582 (N.D. Ill. 1996) examined whether strict scrutiny applied to a federal court's ordered plan in the face of a claim of racial gerrymandering. *Balderas v.*

State of Texas, 2001 WL 34104836, 6:01 CV 1581 (E.D. Texas Nov. 14, 2001), involved a federal court's review of a redistricting plan which was enacted as law. Finally, the New Mexico case cited, *Bd. of Educ. of Carlsbad Mun. Sch. v. Harrell*, 118 N.M. 470, 484, 882 P.2d 511 (1994), was a case in which the New Mexico Supreme Court held that separation of powers principles require that courts have an opportunity to review decisions of arbitrators in statutorily compelled arbitrations. *Id.* at 525. Constitutional separation of powers principles do not require a state court to apply a zero or near-zero population deviation standard.

There is a further and compelling practical reason, also rooted in state sovereignty concerns, that state courts ought to follow the ten percent standard in adopting state redistricting plans. Unlike the *de minimis* rule required by Constitutional compulsion in congressional redistricting, the ten percent rule provides the necessary flexibility to allow state court adopted plans to remain consistent with previously adopted "traditional districting principles" that represent important state policies. Balancing those important state policies is an important part of the redistricting process, and for a state court to ignore them by imposing a *de minimis* standard that is not constitutionally compelled, does essential violence to the importance of those established policies.

Indeed, the Colorado Supreme Court has acknowledged that when the state court is required to take on the task of redistricting in the absence of a duly enacted statute, "the court's task closely resembles legislation" in that "the court gathers information regarding alternative plans, hears expert advice, weighs alternatives, and ultimately adopts the plan it deems the best for the state." *People ex rel. Salazar v. Davidson*, 379

P.3d 1221, 1237 (Colo. 2003).[7] The Michigan Supreme Court, tasked with reapportioning the Michigan Legislature in the absence of a duly enacted statute in 1992, adopted a plan which contained an overall deviation of more than ten percent, finding that such deviations were supported by substantial and legitimate state concerns. *In re Apportionment of State Legislature-1992*, 439 Mich. 251, 252, 483 N.W.2d 52 (1992).

In summary, the conclusion that this Court is not bound to apply a *de minimis* standard and may permit deviations within the ten percent range to accommodate legitimate public policy derives from three constellations of principles: 1) those principles articulated by the Michigan opinion as relied on by Judge Allen; 2) the United States Supreme Court's regard for the special, and different competence of state courts in state redistricting matters, *see Growe v. Emison,* 507 U.S. 25 (1993); and 3) the importance of allowing the necessary flexibility to assure that what is finally achieved is also consistent with the traditional districting principles under state law. *See Jepsen* State House Redistricting Finding 8.

Evidence at trial will show that the deviations in the Legislature's passed plans are minor and therefore presumptively constitutionally valid. To the extent the plans deviate from the ideal, they do so in a non-partisan fashion. For example, in sharp contrast to the facts of the *Larios* case, the deviations in the Legislature's House and

[7] The Colorado Supreme Court considered the state court's role to determine "what is best for the state" where a state legislature fails to pass any redistricting plan at all, *see Davidson*, 379 P.3d at 1227 & 1237, and therefore did not have cause to consider the degree of deference or consideration state courts are to give to legislatively passed plans, such as those before the Court in this litigation. As discussed above in Part II(A), the plans passed by the Legislature are entitled to thoughtful consideration as they embody policy choices adopted through a process which reflects the will of the people and as the Legislature is the body with primary authority under the state Constitution to make such policy choices.

Senate plans do not result in a net gain in Democrat-leaning districts. Moreover, evidence at trial will show that deviations from the ideal are justified by traditional redistricting principles discussed in Part II(E) below.

C. **The Legislatively Passed Plans Comply with the Voting Rights Act.**

The federal Voting Rights Act ("VRA") protects against the dilution of voting strength on the basis of race or color. All states must comply with Section 2 of the VRA to ensure that minority voting interests are protected in the redistricting process.[8] Section 2 of the VRA is violated if, "based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of [protected] citizens . . .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." 42 U.S.C. § 1973(b)

The Supreme Court has identified three threshold conditions for establishing a Section 2 violation: (1) the racial group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the racial group is politically cohesive; and (3) the majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate. *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). These are known as the "*Gingles* factors." The first of the *Gingles* factors examines whether minorities make up more than 50 percent of the voting-age population in the relevant geographic area. *Bartlett v. Strickland*, 129 S.Ct. 1231, 1246 (2009). The second and third factors, minority voting cohesion and majority bloc voting, can be demonstrated in a variety of ways, including regression analysis of election statistics and a lack of success

[8] Some states are also subject to "preclearance" by the U.S. Department of Justice under Section 5 of the VRA. New Mexico was previously subject to the requirements of Section 5, but is no longer.

of minority candidates in the relevant area. *See League of United Latin American Citizens (LULAC) v. Perry*, 548 U.S. 399, 425 (2006); *see also Harville v. Blythe School Dist.*, 71 F.3d 1382, 1389 (8th Cir. 1995).

If all three *Gingles* factors are established, courts must then consider the "totality of circumstances" to determine whether minorities have less opportunity than other members of the electorate to elect their candidate of choice. *LULAC*, 548 U.S. at 425. The factors courts consider in assessing the "totality of circumstances" for purposes of a Section 2 claim are those set forth in the Senate Report on the 1982 amendments to the VRA, and include the following:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
>
> 6. whether political campaigns have been characterized by overt or subtle racial appeals;
>
> 7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Thornburg v. Gingles, 478 U.S. 30, 36-37 (1986) (intemal quotation marks omitted).

"Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are: whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group[;] and whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous." *Gingles*, 478 U.S. at 37 (internal quotation marks omitted). "Another relevant consideration is 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." *LULAC*, 548 U.S. at 426.

In evaluating a claim of minority vote dilution, the court must examine the *Gingles* factors and the totality of the circumstances in the local area or political subdivision where such dilution is claimed. *See Gingles*, 478 U.S. at 79; *see also* 42 U.S.C. § 1973(b) (violations of Section 2 may be shown by evidence of lack of minority opportunity in "the State *or political subdivision*") (emphasis added). The court must "determine, based 'upon a searching practical evaluation of the 'past and present reality' whether the political process is equally open to minority voters" in that relevant area. *Id.* (internal citations omitted). This determination "requires '**an intensely local appraisal of the design and impact**' of the contested electoral mechanisms" and claimed effects of discrimination. *Id.* (emphasis added). Accordingly, courts evaluating Section 2 claims look to evidence of racial polarization and other factors in the district or area in which the violation is claimed. *See, e.g., LULAC*, 548 U.S. at 427 (finding cohesion among the minority group and bloc voting among the majority population within the challenged district); *Gingles*, 478 U.S. at 52 (examining election results in the challenged districts).

Likewise, a Section 2 claim cannot be defeated by pointing to minority voting opportunities elsewhere in the state, outside of the challenged district or area. *LULAC*, 548 U.S. at 429 ("The Court has rejected the premise that a State can always make up for the less-than-equal opportunity of some individuals by providing greater opportunity to others.").

The evidence at trial will show that the redistricting plans passed by the Legislature for the New Mexico House, Senate and PRC comply with the requirements of Section 2 of the VRA. None of the legislatively passed plans diminish the opportunity of minorities to elect their candidates of choice. To the contrary, they ensure that the state retains the same number of majority Hispanic, Native American and majority-minority[9] districts that exist currently (a number which represents an increase in minority districts over the number created by the Court last decennial). Just to cite a few examples, the legislatively passed House plan maintains six Native American majority districts, three of which have greater than 64% Native American voting age population. Under the Senate plan, an additional Native American district is created, and two of the Native American districts exceed 64% Native American voting age population. The Senate and House plans also maintain traditionally Hispanic districts in the North Central part of the state. The Legislature's PRC plan maintains the current Hispanic majority district and includes three majority-minority districts. One of those districts has a 31% Native American voting age population.

The evidence at trial will also show that the Executive plan for the New Mexico House of Representatives violates Section 2 of the VRA in its treatment of Hispanics in

[9] As used here, a "majority-minority" district is one in which the white or Anglo voting age population is less than 50 percent.

the City of Clovis. In the New Mexico redistricting litigation in the early 1980's, a three-judge panel of the United States District Court found that the House districts enacted into law in 1982 violated Section 2 by, among other things, splitting the Hispanic community of Clovis into three separate House districts. *See* Legislative Defendants' House Trial Exhibit 5, Court's Findings of Fact and Conclusions of Law, August 7, 1984, issued in *Sanchez v. King*, U.S. Dist. Ct. for the Dist. of New Mexico Case No. 82-0067-M (Consol.) (Hon. Juan Burciaga) at pp. 63-80, 130. The Court's findings were based on evidence of minority compactness and cohesiveness, majority bloc voting, and past and present discrimination which impeded Hispanics' political opportunities in Clovis. *Id.* at 63-80. As a remedy, the Court in *Sanchez* ordered the creation of a new House District 63, which unified the minority community of Clovis. *Id.* at 137. Since the *Sanchez* Court's creation of HD 63 in 1984, the district has and has consistently – and apparently for the first time – elected Hispanic candidates to the House of Representatives.

The Executive Defendants' proposed House plan radically changes the contours of HD 63, taking it out of Clovis entirely and expanding it north and east to include more than four new counties. The Executive Plan splits the Hispanic community of Clovis into two districts, HD 64 and HD 67, neither of which have majority Hispanic voting age populations. In doing so, the Executive plan dilutes the voting strength of Hispanics in Clovis and unlawfully impedes their opportunity to elect a candidate of their choice.[10] At

[10] The Executive Defendants suggest that accepting or rejecting plans to maintain a Hispanic majority district in the Clovis would amount to racial gerrymandering. (The Executive Defendants' Preliminary Proposed Findings of Fact and Conclusions of Law for the New Mexico House of Representatives Hearing, Finding 45). As is discussed in Part II(D), race-conscious districting decisions are only subject to strict scrutiny where other districting principles are subordinated. Additionally, compliance with Section 2 is a legitimate state interest for which

trial, the Legislative Defendants will present evidence that the Hispanic community in Clovis satisfies all three *Gingles* factors, and that the totality of circumstances establishes that, under the Executive plan, Hispanics in Clovis will have less opportunity than other members of the electorate to elect their candidate of choice.

D. The Legislative Plans Comply with the Prohibition Against Racial Gerrymandering.

Pursuant to the Fourteenth Amendment the act of drawing districts based predominantly on race, also known as racial gerrymandering, is subject to strict scrutiny. *Shaw v. Reno*, 509 U.S 630, 643 (1993). Importantly, race-conscious redistricting decisions are not always unconstitutional, and strict scrutiny will only apply where race is "the predominant factor motivating the legislature's decision" and where other legitimate districting principles have been "subordinated to race." *Bush v. Vera*, 517 U.S. 952 (1996). Commonly, cases of racial gerrymandering are brought based upon districts which are so bizarrely shaped that they are "unexplainable on grounds other than race." *See Miller v. Johnson*, 515 U.S. 900, 905 (1995); *Shaw*, 509 U.S. at 643. However, even where race is shown to be a predominant factor, the plan will still be held permissible if it is narrowly tailored to achieve a compelling government interest, such as compliance with the Voting Rights Act. *See Bush,* 517 U.S at 976-77.

The evidence will show that the Legislative Plans advanced in this litigation are reasonably compact and made of contiguous districts and are not "bizarrely shaped." Race was properly considered in the Legislative Plan for purposes of assuring compliance with the Voting Rights Act, but race was not the predominant factor in the drawing of

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predominantly race-conscious decisions will survive even strict scrutiny if narrowly tailored to their purpose. *See Bush v. Vera*, 517 U.S. 952, 977 (1996).

district lines, and race-neutral districting principles were not subordinated to race. Therefore the Legislative Plans fully comply with the Fourteenth Amendment's prohibition against racial gerrymandering.

E. Adoption of the Legislature's Plans Are Most Consistent With Least Change Principles.

In ruling on the constitutionality of state redistricting laws, courts have found it appropriate to apply "least change" principles as a means of avoiding undue encroachment on policy-making rights that belong to states under principles of federalism, out of regard for state sovereignty. Least change principles require courts to adopt plans which "most clearly [approximate] the reapportionment plan of the state legislature, while satisfying constitutional requirements." *White v. Weiser,* 412 U.S. 783, 796 (1973); *see also Upham v. Seamon,* 456 U.S. 37, 43 (1982) (directing federal courts to reconcile "the Constitution with the goals of state political policy" by limiting "modifications of a state plan . . . to those necessary to cure any constitutional or statutory defect."). In the absence of enacted redistricting laws, courts have found it appropriate to approve maps which "reflect the least change [from pre-existing districts], when the least amount of change does not conflict with governing federal principles." *Wright v. City of Albany,* 306 F. Supp. 2d, 1228, 1237 (M.D. Ga. 2003); *See also Markham v. Fulton County Bd. of Registrations & Elections,* 2002 WL 32587313, *6 (N.D. Ga. May 29, 2002) ("Keeping the minimum change doctrine in mind, the Court made only the changes it deemed necessary to guarantee substantial equality and to honor traditional redistricting concerns.").

Judge Allen, in the 2001 *Jepsen* litigation found it appropriate to apply least change principles on separation of powers grounds, so as to avoid making political

decisions that should more appropriately be made by the political branches. (*Jepsen* Congressional Redistricting Findings and Conclusions, attached as Exhibit C, Finding 20; State House of Representatives Redistricting Finding 39.) In doing so the Court sought to approximate the last clear expression of state policy as embodied in the last redistricting scheme which was adopted by the New Mexico Legislature and the Governor as a duly enacted statute (Congressional Finding 27 &34). The Court, referencing least change principles, adopted a Congressional plan which, among other things, shifted the minimum population necessary to comply with one-person, one-vote (Congressional Findings 22, 23 & 28) and which avoided splitting Albuquerque, something the political branches had declined to do since 1968. (Congressional Findings 24 & 25).

Evidence at trial will show that adoption of the Legislature's passed plans are most consistent with least change principles as those plans shift sufficient population to fully comply with equal population mandates yet avoid drastic population shifts and thereby preserve long-recognized communities of interest, preserve the core of existing districts, avoid pairing incumbents, and otherwise comply with applicable law. For instance, in the Legislature's House and Senate Plans shifts fewer people into new districts than any other presented plans other than the Sena Plans. The Legislature's House plan has an average core retention of 70.5%, more than any other plan in the litigation other than the Sena plan, and the Legislature's House Plan maintains the same compactness score as the current plan under the Reock measure. Additionally, the Legislature's House plan splits fewer municipalities than any other House plan presented in the litigation and pairs incumbents in only three places.

F. The Legislative Plans Most Fairly Balance the Traditional Districting Principles, which are Embodied in the Legislature's Adopted Redistricting Guidelines.

In evaluating redistricting plans, courts also look to whether those plans comply with what are known as "traditional districting principles." Although not constitutionally required, traditional districting principles help to ensure that lines are drawn in a fair and non-discriminatory manner. *See Shaw v. Reno*, 509 U.S. 630, 647. In addition to one-person-one-vote and avoiding the dilution of minority voting strength, traditional districting principles include: (1) contiguity; (2) compactness; (3) preservation of political subdivisions; (4) preservation of communities of interest; (5) preservation of the cores of existing districts; and (6) protection of incumbents. *See, e.g. Reynolds v. Sims*, 377 U.S. 533, 578-79 (1964); *LULAC*, 548 U.S. at 433-34. These principles are embodied in the Redistricting Guidelines adopted by the Legislative Council to guide the 2011 redistricting process, as discussed further below. When examining a plan that is challenged on equal protection or Voting Rights Act grounds, courts will assess whether district boundaries, and any resulting population deviations, are justified by adherence to traditional districting principles. *See, e.g., Shaw*, 509 U.S. at 647 (traditional districting principles are not constitutionally required, but are "objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines") (internal cites omitted).

- **Contiguity and Compactness.** A contiguous district is simply one in which all parts of the district are connected to each other. There is no one universally accepted way to measure compactness, but generally the focus is on the overall geometric shape of

the district. In general, the more "bizarre" the district's shape, the less compact it is. *See, e.g. Bush v. Vera*, 517 U.S. 952, 965.

- **Preservation of political subdivisions.** This principle is accomplished by minimizing, to the extent possible, the number of political subdivisions which are split by district lines. The Supreme Court has recognized that maintaining the integrity of political subdivisions, such as counties and municipalities, is a legitimate state interest. *See Reynolds*, 377 U.S. at 578; *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

- **Preservation of communities of interest.** A "community of interest" is a group of people who share substantial cultural, economic, political and social ties. *See Diaz v. Silver*, 978 F.Supp. 96, 123 (E.D.N.Y. 1997). Preservation and respect for communities of interest is important in redistricting because "formulating a plan without any such consideration would constitute a wholly arbitrary and capricious exercise." *Carstens v. Lamm*, 543 F. Supp. 68, 91 (D. Colo. 1982). Preservation of communities of interest enhances the ability of constituents with similar interests to obtain effective representation of those interests. *See Smith v. Clark*, 189 F. Supp. 2d 529, 543 (S.D. Miss. 2002); *Arizonans for Fair Representation v. Symington*, 828 F. Supp. 684, 688 (D. Ariz. 1992) *aff'd sub nom. Hispanic Chamber of Commerce v. Arizonans for Fair Representation*, 507 U.S. 981, 113 S. Ct. 1573, 123 L. Ed. 2d 142 (1993). A plan "which provides fair and effective representation for the people of [the state] must identify and respect ...communities of interest within the state. *Carstens*, 543 F. Supp. at 91. In determining whether a community of interest exists, courts look at factors such as common employment, services, religion, economy, country of origin and culture. *See id.* at 124; *see also Bush v. Vera*, 517 U.S. 952 (1996).

- **Preservation of the Cores of Existing Districts.** Courts have recognized that there is a legitimate state interest in not radically changing district boundaries, unless necessary to accommodate legal requirements such as one person, one vote or protecting minority voting strength. *Karcher v. Daggett*, 462 U.S. 725 (1983). Preserving the core of existing districts promotes continuity of representation and minimizes disruption to the relationships between constituents and their representatives.

- **Protection of Incumbents.** The Supreme Court has recognized that incumbency protection, by avoiding drawing district lines that would result in contests between incumbents, is a legitimate state objective. *See Bush v. Vera*, 517 U.S. 952, 964 (1996). However, sometimes the pairing of incumbents is unavoidable when, for example, population changes necessitate that boundaries be shifted or moved significantly.

Several traditional districting principles are codified in New Mexico law. For example, members of the State House of Representatives and State Senate must be "elected from districts that are contiguous and that are as compact as is practical and possible." NMSA 1978, §§ 2-7C-3; 2-8D-2. State law also requires that, when redistricting, a local public body "shall not split a precinct into two or more districts for any elected office unless necessary to comply with federal law or to preserve communities of interest." NMSA 1978, § 1-3-12(E).

Finally, the New Mexico Legislative Council has incorporated traditional districting principles into the Redistricting Guidelines that the Council adopted to govern the 2011 redistricting effort:

> Districts shall be drawn consistent with traditional districting principles. Districts shall be composed of contiguous precincts, and shall be reasonably compact. To the extent feasible, districts shall be drawn in an attempt to preserve communities of interest and shall take into consideration political and geographic boundaries.

> In addition, and to the extent feasible, the legislature may seek to preserve the core of existing districts, and may consider the residence of incumbents.

Exhibit A ("Redistricting Guidelines") at para. 7.

The evidence will show that the plans for the New Mexico House, Senate and PRC passed by the Legislature are consistent with traditional districting criteria, to the extent possible in light of the constitutional and other legal requirements that the plans must satisfy. All districts in all the Legislature's plans are contiguous, and no districts split precincts. The plans take care to respect communities of interest, so as not to group drastically unlike communities together in a district unless necessary to comply with other constraints. The plans also unify a number of communities and towns that are currently split by district lines. In addition, the Legislature's plans take care to avoid pitting incumbents against each other, unless doing so was necessary to meet equal population or minority voting concerns.

G. Political Competitiveness and/or Representational Fairness Fail as Appropriate Standards in the Judicial Evaluation of Redistricting Plans

Because of the intensely political nature of redistricting, partisan competitiveness and/or representational fairness is not one of the required districting criteria. *See Davis* v. *Bandemer*, 478 U.S. 109, 130 (1986) ("Our cases . . . clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be."); *see also DeGrandy v. Wetherell*, 794 F. Supp. 1076, 1084 (N.D. Fla. 1992). Additionally, the bi-partisan Legislative Council did not adopt political competiveness or representational fairness as one of its established criteria.

A recent University of California Study—Cain, MacDonald, & Hui, "Competition and Redistricting in California: Lessons for Reform," (UC Berkeley, 2006)—made a number of astute observations about the difficulty of using political competitiveness as a redistricting criteria. Among those are the following:

- The discussion of competition has been grossly oversimplified and the answer of whether a district is indeed competitive is highly nuanced, and there are many different measures of competition that may lead to much different results. *Id.* at 10;

- Because Assembly districts are smaller than Congressional districts, candidates' personalities and political experience sometime over-ride advantages in political affiliation. *Id.* at 11;

- Where the creation of majority-minority districts is compelled by Section 2 of the VRA, the ability to draw potentially competitive seats is diminished. *Id.* at 21-22.

- Preserving city and county lines places a real constraint on competitiveness. *Id.* at 26;

The report concluded with this observation:

> [R]edistricting is limited in its capacity to create a heavily competitive state. Even plans that ignore constitutional and good government criteria for the sake of maximizing competitiveness still leave well over half the state in safe seats. The sources of electoral safety to a greater degree lie in our choices to live with like-minded people and in socially homogenous areas. Moreover, even when districts are potentially competitive, they do not become actually competitive unless there are good candidates with well-financed campaigns. And even then, the number of seats that will turnover will likely be as low as when the court masters drew the lines [in the past]. *Id.* at 29.

Finally, courts are cautioned in this context to eschew any consideration of political competitiveness, especially when not contained within the traditional non-political districting principles established and utilized by the state policy makers. *See, e.g., Fletcher v. Golder,* 91-2314C(7), 1992 WL 105910 (E.D. Mo. Feb. 24, 1992) *aff'd,* 959 F.2d 106 (8th Cir. 1992):

> While legislatures may legitimately compromise based on partisan considerations, a court, where no legislative body has adopted a plan, should base its decision on the Constitution and the laws rather than become embroiled in partisan political questions. *Therefore, this Court declined to consider Plaintiffs' evidence concerning political competitiveness....*

For the foregoing reasons, this Court should not engage in such an intensely political judgment, especially since the bi-partisan Legislative Council did not adopt it as one of its established criteria.

In addition, courts have uniformly rejected claims of "partisan gerrymandering," and, moreover, have declined to announce any judicially discoverable and manageable standards by which such claims may be brought. Instead the Supreme Court of the United States, in *Davis,* 478 U.S at 130-32, stated:

> [A] group's electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult, and a failure of proportional representation alone does not constitute impermissible discrimination under the *Equal Protection Clause.*

The Court agreed that mere disproportionate results in one election was insufficient to establish a partisan gerrymandering claim and that it would require both establishment of a discriminatory purpose as well as effect, but the Court in that case split four ways and could not agree on the standard to be applied and the evidentiary basis required to establish such a claim. Furthermore, in subsequent Supreme Court cases decided in the last decade, *Vierth v. Jubelirer,* 541 U.S. 267 (2004); *Cox v. Larios*, 542 U.S. 947 (2004), and *LULAC v. Perry,* 548 U.S. 399 (2006)) the Court continued to struggle to find judicially manageable standards to govern such cases, with two justices concluding that cases lack such standards and are therefore not justiciable, *see Perry,* 548 U.S. at 511(Scalia & Thomas, JJ., concurring in the judgment in part and dissenting in part) and two others reserving judgment on whether such claims are justiciable, *see id.* at

492 (Roberts, CJ. & Alito, J., concurring in part, concurring in the judgment in part, and dissenting in part). Thus, as the Court has recognized, the lack of judicially manageable standards further militate against any such claims.

IV. CONCLUSION

For the foregoing reasons, the Court in its drafting of final, enforceable redistricting plans, should undertake to accomplish the following:

Assure that districts are apportioned so that the districts achieve substantial population equality under the Fourteenth Amendment, permitting reasonable deviations to accommodate legitimate and rational state policies, and assure that a plan does not dilute the voting strength of minority voters in violation of the Voting Rights Act, while avoiding impermissible racial gerrymandering.

If more than one plan meets the above mandatory requirements, the Court should follow the following path in choosing from among those plans:

First, the Court should give thoughtful consideration to plans passed by the Legislature as such plans reflect proffered legislative policy and reflect the will of the people expressed through their elected representatives.

Second, the Court should review plans to evaluate the extent to which each one would require the minimal or "least change" from the policies embodied in the state's most current, legally sanctioned plans.

Third, the Court should then evaluate the extent to which each plan adheres to and most reasonably balances traditional redistricting principles. These principles counsel that redistricting plans should contain districts which are compact and contiguous, that plans should avoid, where possible, splitting communities of interest, that plans should

respect political and geographic boundaries, that plans should seek to preserve the core of existing districts, and that plans should avoid pairing incumbents.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2011, I caused a true and correct copy of LEGISLATIVE DEFENDANTS' OMNIBUS PRETRIAL BRIEF to be e-mailed to all parties or counsel of record as follows, along with this Certificate of Service to be filed electronically through the Tyler Tech System, which caused all parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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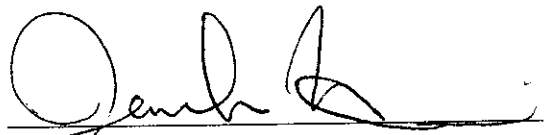
By: 

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