IN THE SUPREME COURT FOR THE STATE OF NEW MEXICO

No. 33,387

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,

Petitioners,

v.

THE NEW MEXICO COURT OF APPEALS,

Respondent,

and

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

Real Parties in Interest.

Appeal from the First Judicial District Court, Santa Fe County, New Mexico
The Honorable James Hall

SENA AND LEGISLATIVE PLAINTIFFS OPENING BRIEF

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Certificate of Compliance

The body of the attached brief does not exceed the 35-page limit set forth in the Rule 12-213(F)(2) NMRA. As Required by Rule 12-213(G) NMRA we certify that this brief complies with Rule 12-213(F)(3) NMRA, in that the brief is proportionately spaced and the body of the brief contains 3,513 words. This brief was prepared and the word count determined using Microsoft Word.

TABLE OF AUTHORITIES

New Mexico Cases

Other Jurisdictions

Jonathan Sena, Minority House Whip Don Bratton, Senator Carroll Leavell, and Senator Gay Kernan ("Sena and Legislative Plaintiffs" or "Sena Plaintiffs"), (consolidated Cause No. D-202-CV-2011-09600) request the denial of the Petition for Writ of Superintending Control filed by the Speaker of the House Lujan and Senate President Pro Tem Jennings. ("Petitioners" or "Legislative Defendants").

The Sena and Legislative Plaintiffs join in and incorporate the arguments set forth in the Executive Defendants and the James Plaintiffs Opening Briefs. The Legislative Defendants Petition should be denied and the District Court judgment should be affirmed.

I. INTRODUCTION

The present New Mexico House of Representative districts are unconstitutional. Under our present Constitution and applicable law, the New Mexico Legislature bears the responsibility to pass a plan that the Governor would approve. Alternatively, with a two-thirds vote, the Legislature can, can override a veto.

Judge James Hall was appointed by this Court. He received extensive evidence and argument over the course of eight days concerning the redistricting of the House. At the close of proofs, no party sought to submit additional modifications to its own plan or introduce further evidence. Judge Hall adopted, subject to his own additional modifications, the third alternative plan submitted by

the Governor and the other Executive Defendants. Judge Hall's House redistricting plan is constitutional, complies with the law and is supported by substantial evidence. Judge Hall's decision should be affirmed and the pending petitions for writs of superintending control should be denied.

II. FACTUAL AND PROCEDURAL BACKGROUND

While West Albuquerque and Rio Rancho saw much greater growth than the state-wide average in the last decade, other parts of the state did not keep pace with the average. North Central New Mexico has eleven adjacent districts that only have enough population to justify ten districts (districts 40, 41, 42, 43, 45, 46, 47, 48, 50, 68, and 70 have a cumulative deviation of approximately negative 92%); ten of these eleven districts are held by Democrat incumbents.

Defendant Ben Lujan, Speaker of the New Mexico House of Representatives, gave the Legislature's demographer (Brian Sanderoff) specific instructions not to consolidate any districts in the North Central region. TR 12/13/11 at 140:7, 158; FOF 35. By vote of the majority of the House Democrats HB 39 was passed, and it that did not consolidate a district in the North Central region. As a result, this under-populated the Democrat-heavy North Central districts and over-populated Republican districts in Albuquerque. Legis-Dfdts. Ex. 1. Consistent with the Speaker's order, HB 39 did not consolidate a seat in the North Central region. Rather, HB 39 consolidated seats in the two other areas with

nearly identical negative deviations: the Republican area in the Southeast and the area in the mid-heights of Albuquerque where a Democratic incumbent had announced his intention to leave the Legislature to run for another public office. HB 39 included numerous other partisan inspired features. *See*, *e.g.*, Sena Ex. 3.

HB 39 passed the New Mexico House by only two votes, over bipartisan opposition. HB 39 passed the Senate, but again with bipartisan opposition. HB 39 did not receive a single Republican vote in either chamber. FOF 25; TR 12/13/11 at 17. Because HB 39 failed to honor "one person, one vote principles[,]" and failed to apply neutral principles to address population shifts, the Governor exercised her authority under the New Mexico Constitution and vetoed the legislation on October 17, 2011. Veto Msg. (Gov. Ex. 8). The Petitioners made no attempt to override the veto and obtain their goal, in the usual constitutional manner. N.M. Const. Art. IV § 22.

The House Trial. Six plaintiff and intervenor groups -- denominated James, Sena, Egolf, Maestas, Multi-Tribal and Navajo Nation -- challenged the constitutionality of the current House districts. In accordance with a scheduling order, prior to trial each group submitted proposed maps or partial plans for new districts. The Legislative Defendants urged adoption of HB 39. The Executive Defendants -- the Governor, the Lieutenant Governor and the Secretary of State --

proposed their plan for House districts. The Sena and Legislative Plaintiffs proposed the Court adopt a plan drafted by Research and Polling, Inc., HB 47.

The Sena Plan, represented the "least change" map before the court, as it moved the fewest number of persons into new districts. It was drafted by Research and Polling, Inc., (the firm retained by the Legislative Counsel Service) as a "fair and sensible map" a "compromise map", with a 37/33 Democrat to Republican seat ratio. This 37/33 Democrat to Republican seat ratio most closely met the 53/47 statewide voter preference and "unbiased votes cast" formula. Gov. Ex. 30; TR 12/13/11 at 12:22, 15:13; 12/20/11 at 51:11 through 52:20. Research and Polling, Inc. made the HB 47 decision to combine or crunch the under populated North Central district. HB 47 was described as a "fair map" by Brian Sanderoff, the expert witness for the Legislative Defendants. HB 47 created more Hispanic majority seats than the current map, or HB 39.

Admittedly, while the HB 47 district population deviations were lower than the map proposed by the Legislative Defendants, the Sena districts (like the Legislative Defendants proposed districts) could not be described as *de minimus*.

III. GOVERNING LAW

A. Standard of Review

Without waiver of the obvious infirmity of Petitioners request for an extraordinary writ to substitute for an appeal the Sena Plaintiffs address the

standards of law. *See*, *e.g.*, Baca v. Burks, 81 N.M. 376, 378, 467 P.2d 392, 394 (1970).

1. A deferential standard of review is required.

The Court's review of a district court decision by way of an extraordinary writ remains subject to the deferential standards of review that apply to ordinary appeals: To prevail in this proceeding the Petitioners must "show, with reference to the best evidence supporting the trial court's decision, why each finding was error and why any finding that was not error was insufficient to support the judgment." State ex rel. Martinez v. Lewis, 116 N.M. 194, 206, 861 P.2d 235, 247 (Ct. App. 1993). The petitioner or appellant does not carry its burden where it "has not shown by reference to the evidence in the light most favorable to the decision that there were insufficient findings supported by substantial evidence to support the judgment." *Id*. at 209.

2. An abuse of discretion must be established.

Prior to trial all of the parties stipulated that the existing plan for the House was unconstitutional. The only issue before the Court was the appropriate remedy. In fashioning that remedy, Judge Hall was acting in equity. *See*, *e.g.*, Central Del. Branch, NAACP v. City of Dover, 110 F.R.D. 239, 241 (D. Del. 1985) (courts engaged in redistricting "have the equitable power to formulate a constitutionally-

based election plan and require that elections be conducted according to its own plan").

A grant or denial of equitable relief is reviewed for abuse of discretion. Wolf & Klar Cos. v. Garner, 101 N.M. 116, 118, 679 P.2d 258, 260 (1984). Abuse of discretion is difficult to establish. "A trial court abuses its discretion when its decision is contrary to logic and reason." Roselli v. Rio Communities Serv. Station, Inc., 109 N.M. 509, 512, 787 P.2d 428, 431 (1990).

B. Redistricting Requirements

1. Minimize population deviations.

A deviation of no more than ± 5% is prima facie valid for a legislatively enacted re-districting effort. Connor v. Finch, 431 U.S. 407, 418 (1977) (noting "the 'under-10%' deviations the Court has previously considered to be of prima facie constitutional validity" in the context of legislative apportionments). However, the standard for constitutionally permissible deviations fundamentally differs in the context of redistricting plans drawn by courts. *See*, *e.g.*, In Chapman v. Meier, 420 U.S. 1 (1975):

> A court-ordered plan ... must be held to higher standards than a State's own plan. With a court plan, any deviation from approximate population equality must be supported by enunciation of historically significant state policy or unique features.... We hold today that, unless there are persuasive justifications, a court-ordered reapportionment plan of a state legislature ... must ordinarily achieve the goal of population equality with little more than de minimis variation.

Id. at 26-27.

Chapman's strict deviation standard for court-drawn reapportionment plans applies to state courts:

> The degree to which a state legislative district plan may vary from absolute population equality depends, in part, upon whether it is implemented by the legislature or by a court. State legislatures have more leeway than courts to devise redistricting plans that vary from absolute population equality. With respect to "a court plan," any deviation from approximate population equality must be supported by enunciation of historically significant state policy or unique features. Absent persuasive justifications, a court-ordered redistricting plan of a state legislature must ordinarily achieve the goal of population equality with little more than de minimis variation. The latitude in court-ordered plans to depart from population equality thus is considerably narrower than that accorded apportionments devised by state legislatures.... The senate and senate president argue that because we are a state court, we should use the standard applied to state legislatures rather than the standard applied to federal district courts. We disagree.

Below v. Gardner, 963 A.2d 785, 791 (N.H. 2002); *see also*, Burling v. Chandler, 804 A.2d 471, 478 (N.H. 2002).

2. Voting Rights Act.

A court-drawn redistricting plan must also comply with the federal Voting Rights Act (42 U.S.C. § 1973). *See* Upham v. Seamon, 456 U.S. 37, 39 (1982) ("the special standards of population equality and racial fairness" override other considerations in court-order plans).

Three "'necessary preconditions'" must be established before Section 2 claim requires the drawing of a majority-minority district. "(1) The minority group must be 'sufficiently large and geographically compact to constitute a majority in a single-member district,' (2) the minority group must be 'politically cohesive,' and (3) the majority must vote 'sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate.'" Bartlett v. Strickland, 556 U.S. 1, 129 S. Ct. 1231, 1241 (2009) (quoting Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986)).

The Gingles requirements must be established first, before a court analyzes whether a violation has occurred and the need to consider drawing minority-majority districts. Bartlett, 129 S. Ct. at 1241. The Gingles requirements were not met.

3. Traditional Districting Factors.

After the one person one vote Constitutional requirement and the federal law considerations to protect minority voting rights, courts drawing redistricting plans consider traditional redistricting principles: compactness and contiguity, preservation of counties and other political subdivisions, preservation of communities of interest, preservation of cores of prior districts, and protection of incumbents. *See*, *e.g.*, 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 (1993). Although these

principles are not constitutionally required, they ensure that districts are drawn to be fair both to elected representatives and, most importantly, to their constituents. *See* Arizonans for Fair Representation, 828 F. Supp. at 688.

IV. ARGUMENT

Petitioners request that the Court reject the reasoned and reasonable decision of the District Court and impose the Legislative Defendants' map on the citizens of New Mexico without further lower court proceedings is unprecedented, unconstitutional and unwarranted. Petitioners' request to nullify the District Court's decision, particularly the factual determinations and to adopt their plan, improperly evades existing appellate rules as well as the usual burden of overturning discretionary decisions of the trial court. Neither the New Mexico Constitution nor the appellate rules support such an argument.

> Our Constitution gives us appellate jurisdiction, N.M. Const. art. 6, § 2, and also original jurisdiction and superintending control, N.M. Const. art. 6, § 3, but these powers do not include the power to review de novo the factual basis for the orders or judgments of district courts. The fact-finding process has always been left to the district courts. That is, factual issues are always determined either by the trial jury or the trial court sitting without a jury. The weight and credibility of the evidence and of witnesses are left for the trier of the facts and are not subjects of review by this court.

Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 313, 551 P.2d 1354, 1360 (1976). *See generally* State v. House, 1999-NMSC-014, ¶ 33, 127 N.M. 151, 978 P.2d 967 (substantial evidence rule).

A. The District Court was Required to Minimize Population Deviations

One person, one vote is the law of the land. For court ordered plans, *de minimus* variations are required absent "persuasive justification." Chapman v. Meier, 420 U.S. 1, 26-27 (1975). Judge Hall followed to the Supreme Court's directions and found the Legislative Defendants' map lacking any reasonable justification for the departure from the goal of population equality.

B. Defendants Plan was Defective, a Partisan Gerrymander

During the Special Session of the Legislature a redistricting plan was formulated in secret but eventually introduced and quickly passed by a partisan majority of almost all Democrats in the House of Representatives. This is the same plan now urged on this Court by the Democrat Speaker of the House and Democrat President Pro Temproe of the Senate. The redistricting plan ignored the minority party, New Mexico's changing demographics and the preferences of New Mexico voters. This plan is a partisan gerrymander, a naked attempt to artificially preserve the waning political control of the majority party, thwart the will of the New Mexico electorate and erode the one person one vote bedrock of our system. Final passage fell far short of the necessary two-thirds constitutionally mandated threshold necessary to override a veto. The petition before the court is nothing more than an attempted end run around the New Mexico Constitution for partisan purposes.

Judge Hall gave thoughtful consideration to HB 39. The great majority of HB 39's districts deviated significantly from the ideal district population, (Gov. Ex. 12), and with the exception of the Native American districts none of the deviations could be justified by "historically significant state policy or unique features." Chapman, 420 U.S. at 26. COL 27.

HB 39's under-population of the North Central region and overpopulation of the Albuquerque metropolitan area, Gov. Exs. 16, 17, coupled with the failure to pair any Democrat incumbents in the North Central similar to the pairing of Republican incumbents in the Southeast establish the obvious partisan, gerrymandering intent and outcome.

> [W]here population deviations are not supported by such legitimate interests [as compactness and contiguity] but, rather, are tainted by arbitrariness or discrimination, they cannot withstand constitutional scrutiny. The population deviations in the Georgia House and Senate Plans are not the result of an effort to further any legitimate, consistently applied state policy. Rather, we have found that the deviations were systematically and intentionally created ... to protect Democratic incumbents. Neither of these explanations withstands Equal Protection scrutiny.

Larios v. Cox, 300 F.Supp.2d 1320, 1333-34 (N.D. Ga.), aff'd, 542 U.S. 947 (2004).

The distinction that the Legislative Defendants attempt to create, between maps drawn by state or federal courts is a strained argument based on something significantly less than *dicta*. No persuasive precedent, no holding and no valid

reason supports the argument that this Court create such an exception particularly an exception with a partisan, failed and gerrymandered map as the impetus.

The argument that the state court can or should reject the federal court standard and apply the legislative standard of ± 5% has been clearly rejected by the courts addressing the argument. *See*, *e.g.*, Below v. Gardner, 963 A.2d 785, 791 (N.H. 2002); Burling v. Chandler, 804 A.2d 471, 478 (N.H. 2002).

The Legislative Defendants argue that White v. Weiser, 412 U.S. 783 (1973), suggests that courts should follow state reapportionment policies as expressed, among other things, "in the reapportionment plans proposed by the state legislature." 412 U.S. at 795-96. The map at issue in Weiser, however, was "signed into law" by the Governor of Texas.

The Petitioners spend no time explaining how their "thoughtful consideration" differs from forcing the Court to rubber stamp any partisan, gerrymandered map that passes the Legislature with the barest of margins but vetoed by the Governor. *See also* Carstens v. Lamm, 543 F. Supp. 68, 79 (D. Colo. 1982) ("a partisan state legislature could simply pass any bill it wanted, wait for a gubernatorial veto, file suit on the issue and have the court defer to their proposal.") No basis in the Constitution, the facts before the Court or the applicable law suggests Judge Hall did not give an appropriate measure of "thoughtful consideration" to the Petitioners partisan, gerrymander of a map. The

Petitioners view of "thoughtful consideration" was not based upon adequate thought or consideration of any appropriate criteria. It is essentially all sail and no anchor.

C. Executive Alternative 3 Was Fully Supported by Law

Judge Hall's findings that underlie his decision are supported by substantial evidence. Indeed, none of the petitioners/appellants attempt to mount a (supported) substantial evidence challenge. Based on those findings, Judge Hall did not abuse his discretion in adopting Executive Alternative 3 as the plan that best complied with the governing legal standards.

D. The Sena Plan is Clearly Superior to the Legislative Defendants Plan

Assuming arguendo that the New Mexico Constitution and the appellate rules and precedent allowed this court to substitute its findings of fact for the District Court's efforts, and assuming the large population deviations in HB 39 are appropriate and lawful for a court to accept, the Sena plan is clearly superior to the Legislative plan.

The Sena Plan is the "least change" plan, creates more Hispanic majority districts and fairly balances, the partisan interests and will of the New Mexico voters. HB 39 eliminates three Republican leaning districts and unnecessarily paired incumbent Republicans.

While the request to have this Court toss out the trial court's findings and consider the adoption of the petitioners map is entirely unwarranted, to the extent higher deviation maps are considered at any point, the Sena map is clearly superior to the Legislative Defendants map.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I certify that on this 27th day of January, 2012, I caused a true and correct copy of the foregoing Opening Brief to be filed with the court. I further certify that a copy of this document was also transmitted by my office via electronic mail to the following counsel of record:

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