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] CLOSING BRIEF FOR REDISTRICTING OF THE NEW MEXICO HOUSE OF REPRESENTATIVES

[1]This Closing 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 and Multi-Tribal Overview of the Multiple Maps Before the Court

The Multi-Tribal Plaintiffs opened the House evidentiary hearing with a promise and a request: a promise to prove all of the elements to establish a Section 2 Voting Rights Act ("Section 2") claim, and a request that the Court listen to the tribal perspective that was presented to the Legislature and, hopefully, would be to the Court. The Multi-Tribal Plaintiffs end the House hearing with the belief that both objectives were met. The Court patiently listened to evidence and testimony on self-determination, tribal communities of interest, traditional cultural properties and the Native American history of resilience in the face of discrimination and paternalistic public policy -- issues that are not usually in evidence in a state court proceeding. *See, e.g.* Test. of Luarkie, Trial Tr. 15:2-16:23, Dec. 15, 2011; Test. of Tsosie, Trial Tr. 76:15-86:23, Dec. 20, 2011. The Multi-Tribal Plaintiffs believe these issues are integral to 1) meeting their burden of proving the Voting Rights Act claims, and 2) fashioning the new House map itself.

The Pueblos and Jicarilla Apache Nation began the legislative process for redistricting with a firm commitment that this decennial the Legislature would pass reapportionment plans that satisfied both the Voting Rights Act and, also importantly, the tribes' own assessment of which districts would best serve their policy needs. Multi-Tribal Exs. 6, 7, 14, 15, and 31. After intensive, laborious work in collaboration with each other through the Native American Redistricting Workgroup (NARW)[2],

[2]The NARW, which included representation and input from the AIPC, 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

and consultation with the Legislature, the All Indian Pueblo Council (AIPC), the Jicarilla Apache Nation and the Pueblos approved the Legislative Plan for Districts 6, 65 and 69 and the districts that contained the Northern Pueblos - the Voters and Election Substitute for HB 39 passed by the Legislature ("HB 39"). Test. of Dorame, Trial Tr. 116:25-117:9, Dec. 19, 2011; Test. of Reval, Trial Tr. 72:12-20, Dec. 19, 2011. There was disappointment when Governor Martinez vetoed HB 39 since the desire of the tribes was to come to a solution through the legislature, in a collaborative manner, rather than through litigation. Test. of Garcia, Trial Tr. 79:15-19, Dec. 15, 2011; Test. of Luarkie, Trial Tr. 27:4-10, Dec. 15, 2011. Her position was inconsistent with the position of the tribes themselves. Test. of Chino, Trial Tr. 159:9-20, Dec. 19, 2011.

It was ironic that Governor Martinez used Native American vote dilution and splitting of Native American communities of interest as an excuse for the veto, since her plans were more destructive to the Native American communities of interest than the Legislature's and there was no vote dilution in the Legislative Plan. Multi-Tribal Ex. 8; Test. of Engstrom, Trial Tr. 236:13-237:1, Dec. 19, 2011. In addition, she never shared such concerns with the NARW or the pueblo governors. Test. of Chino, Trial Tr. 159:9-16, Dec. 19, 2011.

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. Multi-Tribal Ex. 7, 15, and 31; Test. of Chino, Trial Tr. 160:14-161:5, Dec. 19, 2011. (Extensive, exhaustive effort that represented investment of time, money and heart and soul.)

The veto, however, forced the matter to Court. As the evidentiary hearing began, three of the plans (Legislative, Egolf and Maestas) incorporated the Multi-Tribal Plaintiffs' requests. Notably, the Executive Plan and the James Plan followed similar patterns of splitting Pueblos and moving Pueblos to districts they did not want to be in. Multi-Tribal Exs. 23 and 25. During the course of the trial, the Executive Defendants eventually produced a map, Alternative 3, with errata, Statement of Kennedy, Trial Tr. 128:16-20, Dec. 22, 2011, that came within one precinct of incorporating the Native American majority districts that had been proposed by the Pueblos and Jicarilla Apache Nation since September and the Navajo Plan for Districts 1, 2, 3, 4, 5, and 9[3]. Executive Alternative 3 also re-united the Pueblos of San Ildefonso and Tesuque Pueblo[4]. Solely, the James and Sena Plans have not been altered during the litigation to address the Native American concerns. In addition, the Executive Defendants continue to advocate for their initial plan and each of their alternatives.

The Legislature is unable to modify its plan to incorporate the Navajo Nation's precinct changes, but the Navajo Nation's districts can be dropped into the existing Legislative Plan since the outer boundaries of Districts 6, 65 and 69, as proposed by the Multi-Tribal Plaintiffs, are the same

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[3]The Multi-Tribal Plaintiffs disagree with the Executive Defendants that these issues were only uncovered through testimony at trial. Statement of Kennedy, Trial Tr. 170:10-11, Dec. 19, 2011. The Native American positions were presented to Governor Martinez in September, at the end of the legislative session and on the initial deadline to submit maps to this Court.

[4]The last plan, however, splits Ohkay Owingeh and divides it between Districts 41 and 40. *See* Multi-Tribal Ex. 5 (which shows that Ohkay Owingeh covers precincts 2, 3, 5, 37 and 41); *See also* Exec. Def. Ex. 33 at 58 (District 40 has precincts 2, 5, and 37, and District 41 has precincts 3, 36 and 41).

in the Navajo Nation proposal and HB 39. Test. of Sanderoff, Trial Tr. 196:10-20, Dec. 22, 2011.

The Multi-Tribal Plaintiffs respectfully urge the Court to adopt a plan that incorporates fully the shape of the Native American majority districts and that preserves the Northern Pueblos communities of interest intact. The Native American majority districts are subject to the Voting Rights Act. The preservation of communities of interest for the northern Pueblos is not required by the Voting Rights Act, but is consistent with good public policy and traditional redistricting criteria as enunciated by the courts and the New Mexico Legislature. Fortunately, as the Court weighs the many other factors at play, it has a wide choice of potential maps that also meet the Multi-Tribal Plaintiffs and Navajo Intervernors' requests: Legislative HB 39 (modified with Navajo), Egolf 2-5, Maestas 1-2, and Executive Alternative 3 (with errata and, hopefully, modification to eliminate splitting Ohkay Owingeh).

The Sena Plan should be rejected by the Court because it raises serious policy considerations for the Court given the plan's disregard for tribal requests in District 69 and specific precincts for the Native American majority districts proposed by the Navajo Intervenors in Districts 4, 5 and 9.

The James Plan and the original Executive Plan and Alternatives 1-2, we argue, constitute a violation of Section 2 at their worst, and disregard tribal communities of interest, negate tribal self-determination, attack tribal electoral mobilization efforts and subordinate of traditional redistricting principles, at their best. Test. of Luarkie, Trial Tr. 20:21-21:23, Dec. 15, 2011; Test. of Engstrom, Trial Tr. 215:16-24, 216:11-17, 229:11-25, 230:1-15, Dec. 19, 2011.

The James Plaintiffs and Executive Defendants may not have intended to harm tribes and Native American voters in this manner, but their plans have 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).

II. 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 affected 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 representatives." *Gingles*, 478 U.S. at 47.

Precisely, the statute reads that a state violates Section 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, 425 (2006)(quoting 42 U.S.C. § 1973(b) (emphasis added)). (Note

that *Gingles* used the term white voters because of the unique demographics in that case, the statute itself speaks to protected class and other members of the electorate. *See* Test. of Engstrom, Trial Tr. 199:9-200:9, Dec. 19, 2011.) As discussed below, the Multi-Tribal Plaintiffs have presented specific evidence to this Court of a Section 2 Voting Rights Act claim.

III. The Multi-Tribal Plaintiffs Have Met the *Gingles* Threshold Criteria

The Multi-Tribal Plaintiffs have satisfied the three threshold conditions, first set out by the Supreme Court in *Gingles*, 478 U.S. at 50-51, and known as the *Gingles* factors.

A. The Maps Demonstrate Native Americans are Sufficiently Compact and Numerous to Form Majority Districts.

The first *Gingles* prong was proved by the ability to draw six compact Native American majority districts in six[5] of the eight original plans and was corroborated by at least three of the parties' experts**.** Test. of Engstrom, Trial Tr. 204:11-16, Dec. 19, 2011; Test. of Sanderoff, Trial Tr. 158:6-9, Dec. 12, 2011; Test. of Williams, Trial Tr. 191:23-25, Dec. 15, 2011; Multi-Tribal Ex. 4.

The Executive Plan also draws six Native American majority districts. The original Executive Plan and Alternative 1 do so by fracturing Pueblo voting communities, splitting tribal political boundaries, ignoring communities of interest, and altering the existing character of the Native American districts. Test. of Reval, Trial Tr. 64:1-7, Dec. 19, 2011; Test. of Morgan, Trial Tr. 128:16-20 and 131:5-10, Dec. 14, 2011; Test. of Luarkie, Trial Tr. 20:20-21:14, Dec. 15, 2011. In

[5]The Multi-Tribal Plaintiffs' three districts fit into the six Native American majority districts of the Navajo, Egolf, Maestas and Legislative Plans.

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 first alternative plan proposed by the Executive Defendants to correct defects in their original plan harmed Native American voters in Districts 4, 5 and 9, and changed the character of District 69 by making it more of a San Juan County district, rather than a Sandoval County Pueblo and Apache district. Test. of Reval, Trial Tr. 64:1-7, Dec. 19, 2011; *Sanchez v. King*, No. 82-0067-M (Consolidated) (D.N.M. Aug. 8, 1984) (Court's Findings of Fact and Conclusions of Law) (Legis. Ex. 5(H)) at 135-136 (Dist. 65 is a predominantly Pueblo district.); Test. of Sanderoff, Trial Tr. 40:17-41:3, Dec. 22, 2011. Representative James Roger Madalena is the only Pueblo member to have served in the legislature, and is very important to the Pueblos. Test. of Dorame, Trial Tr. 115:1-16, Dec. 19, 2011. The long process of education, consultation, negotiation and adoption of redistricting plans that began in the summer and concluded with the adoption of HB 39, took into account every precinct change. Test. of Reval, Trial Tr. 63:1-4, Dec.19, 2011; Test. of Sanderoff, Trial Tr. 279:14-19, Dec. 13, 2011. As Mr. Dorame noted in his testimony, "it involves precincts, but most importantly it involves people." Test. of Dorame, Trial Tr. 139:18-19, Dec. 19, 2011. The first three Executive alternatives failed to follow the precincts as proposed by the tribes - although

the Governor's counsel has indicated a willingness to correct it. Statement by Kennedy, Trial Tr. 128:16-20, Dec. 22, 2011.

B. The Racially Polarized Voting Analysis Proves *Gingles* Prongs 2 and 3.

The expert testimony submitted has proven the second and third prongs of racial bloc voting and Native American political cohesion. These prongs are essential to establish a vote dilution claim. *Growe v. Emison*, 507 U.S. 25 (1993) 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 (8th Cir. 2006) (quoting *Buckanaga v. Sisseton Indep. Sch. Dist.*, 804 F.2d 469, 473 (8th Cir. 1986). It is proven through expert analysis of preferably endogenous elections, and preferably between candidates who are members of the protected class and non-protected class. *Id*. at 1020-21 (citations omitted).

Professor Richard 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 used the most recent version of the ecological inference analysis developed by Professor Gary King of Harvard University and 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 racially polarized voting. Test. of Engstrom, Trial Tr. 196:7-11, 201-202, Dec. 19, 2011. 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. Test. of Engstrom, Trial Tr. 196:7-11, 201-202, Dec. 19, 2011. 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. *But*, *see Gingles* at 63 ("we conclude that under the 'results test' of § 2, only the correlation between race of the voter and selection of certain candidates, not the causes of the correlation, matters[]"); *and Sanchez* at 1320 ("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)). In "racially polarized voting, the inquiry is not a causal one, it's a descriptive one." Test. of Engstrom, Trial Tr. 282:11-12, Dec. 19, 2011.

IV. The Totality of Circumstances Evidence 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 section 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 Report and legal precedent was the ultimate proof required to show 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 Senate Report 97-417, 97th Cong. 2nd Sess. (1982) ("Senate Report") that accompanied the 1982 amendments to the Voting Rights Act. The relevant factors for New Mexico's Native American citizens are:

> the history of voting-related discrimination in the State or political subdivision;
> the extent to which voting in the elections of the State or political subdivision is racially polarized; . . .
> 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]
> the extent to which members of the minority group have been elected to public office in 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*. at 45, and that "other factors may also be relevant and may be considered." *Id*. (citing Senate Report at 29-30). 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*. (quoting Senate Report at 29). 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*.(citing Senate Report at 29), 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. *Johnson v. De Grandy*, 512 U.S. 997, 1000 (1994) (cited in *LULAC v. Perry*, 548 U.S. at 426).

A. 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 14.6%, Multi-Tribal Ex. 19, while the state population grew at a rate of 13.2%. Test. of Sanderoff, Trial Tr. 91:21-22, Dec. 12, 2011. 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 Native American majority districts are one shy of the seven Native American majority districts for proportional representation. *See LULAC v. Perry*, at 436-38 (computing the proportionality of the Latino districts). The Multi-Tribal Plaintiffs do not seek seven Native American majority districts. Instead, the proportionality analysis demonstrates that there is less representation at the State Legislature than the population would suggest - thereby encouraging adoption of a map that is sensitive to the lack of representation.

B. Native Americans in New Mexico Have and Continue to Encounter Electoral Discrimination

Of even more probative value for our Voting Rights Act claim, is the historic and contemporary electoral discrimination against Native American voters. New Mexico denied Native Americans living on Pueblo lands the right to vote until 1948. *Montoya v. Bolack*, 70 N.M. 196, 200 (1962) (citing to *Trujillo v. Garley*, No. 1350 (D.N.M. 1948)) and as late as 1962, attempts were

being made to disenfranchise Navajo voters, as noted in the *Bolack* case, 70 N.M. at 198. 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[.]" at 25.

As a result of this past discrimination, some 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, Test. of Garcia, Trial Tr. 64:20-21, Dec.15, 2011, and there was a fear that voting would negatively impact tribal sovereignty. Test. of Warren, Trial Tr. 89:16-90:6, Dec. 19, 2011 ("we're in a very early stage of participating effectively in the political process"). Currently, Native Americans do not register to vote at the same levels as Anglos or Hispanics in New Mexico. Test. of Sanderoff, Trial Tr. 202:2-4, Dec. 12, 2011. At Acoma Pueblo, it is only recently that candidates have gone to the Pueblo to campaign and their Senator has never even visited the Pueblo - outside of the Legislative Redistricting Committee hearing held in August. Test. of Garcia, Trial Tr. 64:8-17, Dec. 15, 2011.

Unfortunately, electoral discrimination in New Mexico is also quite contemporary and evokes similar circumstances addressed in key Voting Rights Act cases. 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. Multi-Tribal Exs. 10 and 11. When provisional ballots finally arrived, there were numerous other problems leading to the rejection of votes. Test. of Luarkie, Trial Tr. 12:1-6, Dec. 15, 2011; 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 twelve 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. July 6, 2011). The three Judge panel found that the County Clerk in

Sandoval County is hostile to the Native American efforts. The Judges threatened the County with contempt of court if the County does not comply with the Consent Decree and its obligations under the Voting Rights Act. *Id*. at 3, 10-15.

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, *United States v. Cibola County*, No. 93-1134 (D.N.M. Mar. 19, 2007).

While 23% of New Mexicans were voting early in 2006, there were no early voting sites on Pueblo lands, and only one site on Native American lands – at Shiprock. Multi-Tribal Ex. 12; Test. of Luarkie, Trial Tr. 12:18-20, Dec. 15, 2011. Cibola County was unwilling to install early voting on Pueblo lands until it was mandatory – thanks to the early voting law the Pueblo of Laguna championed. Test. of Luarkie, Trial Tr. 43:15-21, Dec. 15, 2011; Test. of Martinez, Trial Tr. 253:7-19, Dec. 21, 2011.

The official disenfranchisement, long-standing consent decrees, lack of early voting, and Laguna 500 project all demonstrate that Native Americans living in Cibola and Sandoval counties 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)

C. Racially Polarized Voting Exists in New Mexico

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.

Professor Engstrom's analysis demonstrates racially polarized voting in elections involving Native American and non-Native American candidates. Test. of Engstrom, Trial Tr. 201-202, Dec. 19, 2011; Multi-Tribal Ex. 2. There was no expert testimony presented by any party refuting the presence of racially polarized voting for Native Americans, nor did any of the other parties' experts refute or even critique Professor Engstrom's findings. *See, e.g.*, Test. of Gaddie, Trial Tr. 283:22-284:4, Dec. 14, 2011.

D. Despite Progress, There Remains a Lack of 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. Former Secretary of Indian Affairs, Mr. Alvin Warren, testified about the disparity in legislative funding for basic infrastructure that exists between Indian and non-Indian communities throughout the state and how the lack of dependable paved roads, clean dependable running water, sewage systems, and health care facilities make it difficult in the Native American communities to get to school, medical appointments, work and the voting booth. Test. of Warren, Trial Tr. 80-85, 100:17-102:1, Dec. 19, 2011. Even though the Tribal Infrastructure Fund provides a minimal but dependable level of infrastructure

funding for tribal communities, Mr. Warren testified that the level of funding for tribes is still disproportionate to what non-Native American communities receive, and comes nowhere close to addressing the overwhelming residual needs of the tribes. Test. of Warren, Trial Tr. 82:25-84:10, Dec. 19, 2011; Multi-Tribal Ex 21.

Of extreme concern to the Native Americans is the lack of responsiveness and outright adversity to their requests for respect for traditional cultural properties. Test. of Chino, Trial Tr. 148:2-6, 150:17-24, 151:8-23, Dec. 19, 2011. 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, and Zuni, the Hopi Tribe in Arizona, and the Navajo Nation submitted a formal application to the 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. Test. of Chino, Trial Tr. 144:12-147:18, Dec. 19, 2011. 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. Test. of Chino, Trial Tr. 149:8-11, 153:13-24, Dec. 19, 2011; Test. of Luarkie, Trial Tr. 21:6-9, Dec. 15, 2011; Test. of Garcia, Trial Tr. 61:7-9, Dec. 15, 2011. The Traditional Cultural Properties designation was awarded. Test. of Chino, Trial Tr. 147:24-148:1, Dec. 19, 2011. However, in a swift and adverse

backlash, several bills were introduced in the New Mexico Legislature which would undermine the Traditional Cultural Properties designation or nomination process. Test. of Chino, Trial Tr. 148:2-149:4, Dec. 19, 2011. *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. As Mr. Chino noted, it was "almost a feeling that Indians had gotten too much, that despite our following the process and submitting volumes of reasons and justification, those reasons and justification weren't being honored." Test. of Chino, Trial Tr. 150:19-24, Dec. 19, 2011.

While tribal leaders testified to the improved legislative relationship between the state and the tribes, the testimony was always qualified as needing improvement. Test. of Chino, Trial Tr. 154:20-25, Dec. 19, 2011; Test. of Warren, Trial Tr. 89:12-14, Dec. 19, 2011 ("its taken a very long time to get even as far as we are now."), Test. of Warren, Trial Tr. 91:22-92:12, Dec. 19, 2011. ("That has been very, very hard fought.") Tribes still have "many challenges" and "[t]ribal citizens continue to experience disproportionately–disproportionate high rates of particular diseases, have very extreme infrastructure needs, have challenges with regard to educational performance." Test. of Warren, Trial Tr. 80:20-81:5, Dec. 19, 2011.

E. Native Americans Rank the Worst in the State's Socioeconomic Factors

The lack of equal access in the electoral and legislative processes affects the lives of Native Americans in other profound ways as discussed above. Based on U.S. Census Bureau data, New Mexico's Native American population is significantly poorer than the rest of the State's population: 31.5% of Native Americans live in poverty compared to 10.5% of non-Hispanic Whites. Multi-Tribal Ex. 33; Test. of Engstrom, Trial Tr. 234:22-235:8, Dec. 19, 2011. *See also*, Multi-Tribal Ex. 21; Test. of Warren, Trial Tr. 80:25-85:19, Dec. 19, 2011, Test. of Luarkie, Trial Tr. 27:16-28:2, Dec. 15, 2011. The courts have noted that "[o]nce lower socio-status. . . has been shown, there is no need to show the causal link of this lower status on political participation. . . . 'Inequality of access is an inference which flows from the existence of economic and educational inequalities.'" *Windy Boy* at 1016 (citations omitted).

V. The Multi-Tribal Plaintiffs Satisfied Both the *Gingles* Threshold Criteria and the Totality of the Circumstances to Establish a Section 2 Claim

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 districts 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).

VI. The Redistricting Process Should 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.

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, 531 (1832). The Court heard significant testimony from tribal leaders and experts about the importance of both tribal sovereignty and self-determination, and the interaction of these concepts with redistricting. Test. of Luarkie, Trial Tr.

15:7-16:6, Dec. 15, 2011; Test. of Tsosie, Trial Tr. 76:13-86:3, Dec. 20, 2011; Test. of Engstrom, Trial Tr. 228:6-229:10, Dec. 19, 2011.

Professor Tsosie considered the *Jepsen* court's finding that the 2002 map was consistent with tribal self-determination as both forward thinking and a vindication that self-determination is an important state policy. Test. of Tsosie, Trial Tr. 83:16-20, Dec. 20, 2011; *Jepsen v. Vigil-Giron*, No. D-0101-CV-2001-02177 (N.M. 1st Jud. Dist. Jan. 24, 2002), Court's Findings of Fact and Conclusions of Law Concerning State House of Representatives Redistricting, at 13, (Conclusion 10).

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, to respect 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. Test. of Luarkie, Trial Tr. 16:16-23, 49:8-10, Dec. 15, 2011 (looking for legislator "that can carry our needs and our concerns forward in a responsible, respectful manner with integrity"); Test. of Warren, Trial Tr. 91:22-25, Dec. 19, 2011 ("Too much of our history in the State has involved the creation of policy and allocation of resources without regard to the needs and the opinions of Tribes on behalf of our Tribal members"); Test. of Engstrom, Trial Tr. 219:23-220:10,

222:9-19, Dec. 19, 2011 (Pueblos have a sense that "We are one," and commonalities would be harmed if the preferences were not respected).

The James, Sena and multiple Executive Plans submitted to the Court 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. Test. of Chino, Trial Tr. 157:2-8, Dec. 19, 2011; Test. of Engstrom, Trial Tr. 222:12-226:18, Dec. 19, 2011. Professor Engstrom called for respecting the tribal preferences as "something that relates directly to representation." Test. of Engstrom, Trial Tr. 220:8-10, Dec. 19, 2011. 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. Test. of Warren, Trial Tr. 91:22-94:18, Dec. 19, 2011; Test. of Tsosie, Trial Tr. 84:21-85:22, Dec. 20, 2011. Even the Executives' expert recognized that the minority community should be listened to when developing a section 2 remedy. Test. of Gaddie, Trial Tr. 280:19-23, Dec. 14, 2011.

The Court repeatedly heard the tribal leaders dismay at the failure of the Governor to consult with the tribal leadership about her redistricting plans – before the session, during the session, before her veto and when drafting her original plan and the multiple alternatives. Test. of Luarkie, Trial Tr. 20:20-25, 27:4-14, Dec. 15, 2011; Test. of Chino, Trial Tr. 159:12-16, Dec. 19, 2011; Test. of Reval, Trial Tr. 71:25-72:11, Dec. 19, 2011; Test. of Warren, Trial Tr. 88:23-89:5, Dec. 19, 2011. The

request for respect for self-determination has a very practical effect – it leads to solutions. Test. of Luarkie, 16:16-23, Dec. 15, 2011. The Legislature's commitment to honoring self-determination this time around, Test. of Sanderoff, Trial Tr. 163:8-22, Dec. 12, 2011, led to the adoption of a plan for the Pueblos and Jicarilla Apache Nation in Districts 6, 65 and 69 that they could support both during the Legislature and in the courtroom. The Governor's failure to honor self-determination and tribal state collaboration has meant the Multi-Tribal Plaintiffs have had to respond to four different plans proffered by the Governor, each with a different set of problems concerning Native Americans.[6]

VII. The House Plans Proposed and Endorsed By the Multi-Tribal Plaintiffs Best Remedies the Section 2 Voting Rights Act Claims of Native Americans in New Mexico

The Multi-Tribal Plaintiffs believe that their proposed plan for the State House, as incorporated into either the Legislative Plan, Egolf 1-5, or Maestas 1-2, is the best plan to remedy the Section 2 Voting Rights Act violations they have suffered.[7] The Multi-Tribal Plan:

- builds on the progress made in 2002 in creating Native American majority districts;
- does not drastically alter the boundaries of the current districts thereby maintaining the political cohesion and momentum for electoral engagement that has been building in those districts;

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[6]The split of the Ohkay Owingeh in Executive Alternative 3 is an example of an issue that could have been addressed more fully during the evidentiary phase if the map had been available in advance, with time to carefully review it and have witnesses testify about it.

[7]The Multi-Tribal Plaintiffs are not advocating for Executive Alternative 3 because that map continues to move and split a Pueblo community between districts - this time Ohkay Owingeh.

- 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*, Native American majority 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) all above 64%. *See Jepsen*, (Conclusion 26).

The plan proposed by the Multi-Tribal Plaintiffs, together with the plan proposed by the Navajo Nation 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%. 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).

Professor Engstrom testified that current Districts 6, 65 and 69 provided Native Americans with an opportunity to elect a candidate of their choice at the percentages adopted by the Court in 2002. His review of the electoral history of these districts showed that two of the districts had candidates of choice serving as the elected Representatives, while the third district, District 6, had provided an reasonable opportunity to elect a candidate, but that the presence of multiple Native American candidates had allowed a non-Native American to win the election with a plurality of the vote (43%). Test. of Engstrom, Trial Tr. 211:1-212:1, 213:17-21, Dec. 19, 2011; Multi-Tribal Ex. 22.

VIII. Potential Violations of Section 2 and Traditional Redistricting Criteria in the James' and Initial Three Executive Plans

The original Executive Defendants' Plan creates six majority districts that, based on numerical analysis alone, are not that different than the Multi-Tribal districts. Test. of Engstrom, Trial Tr. 218:17-20, Dec. 19, 2011. However, the Executive Defendants' original plan splits Laguna Pueblo into two districts, moves part of Laguna Pueblo into District 6, and moves Acoma Pueblo from District 69 to District 6. Test. of Luarkie, Trial Tr. 21:1-22:2, Dec. 15, 2011; Test. of Garcia, Trial Tr. 66:6-20, Dec. 15, 2011; Multi-Tribal Ex. 25. Although the Governor's mapmaker was aware of

the tribal boundaries, he split Laguna "[t]o equalize population in that area" Test. of Morgan, Trial Tr. 129:14-22, Dec. 14, 2011. He testified that he had preserved Native American communities of interest, Test. of Morgan, Trial Tr. 126:17-19, Dec. 14, 2011, but then acknowledged that he did not know what Native American communities of interest were impacted by his map, Test. of Morgan, Trial Tr. 127:11-19, Dec. 14, 2011, and acknowledged his Districts 6, 65 and 69 were different than the existing districts. Test. of Morgan, Trial Tr. 128:16-20; 129:5-11, 131:1-10 and 130:15-18, Dec. 14, 2011. This lack of knowledge as to Native American communities of interest is not surprising given that he did not read the documents provided by the tribes to Governor Martinez and the Legislature, and Governor Martinez failed to conduct any consultation with the tribes before, during or after the special session, or while formulating the alternative plans. Test. of Morgan, Trial Tr. 127:5-8, Dec. 14, 2011; Test. of Luarkie, Trial Tr. 20:20-25, 22:7-16, 26:13-16, Dec. 15, 2011. In addition, the Executive's original and first two alternative plans split Tesuque Pueblo and San Ildefonso Pueblo.[8] Multi-Tribal Ex. 32; Test. of Dorame, Trial Tr. 120:1-5, Dec. 19, 2011 ("I don't like to see our Reservation dissected the way it is here. . . . [N]ow that we know a little bit about redistricting and what can and can't be done, we don't agree with this House plan"). The first alternative plan changes the Pueblo-Apache nature of House District 65. Test. of Reval, Trial Tr. 63:24-64:7, Dec. 19, 2011. Each alternative plan does damage to the voting rights of Native Americans and/or Native American communities of interest and ignores tribal self-determination and

[8]As noted previously, Alternative 3 splits Ohkay Owingeh between Districts 40 and 41.

the Executives' obligations to consult with the tribes.[9] Test. of Dorame, Trial Tr. 120:11-20, Dec. 19, 2011.

Similar to the Executive Defendants' Plan, the James Plaintiffs' Plan moves Acoma Pueblo from District 69 to District 6 and splits Laguna Pueblo. Multi-Tribal Ex. 3; Test. of Luarkie, Trial Tr. 24:6-10, Dec. 15, 2011 ("the problems are the same as with the Executive map"). 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." *Voinovich v. Quilter*, 507 U.S. 146, 153-154 (1993); *De Grandy,* 512 U.S. at 1007 (citation omitted) (problem is that packing minimizes the minorities "influence in the districts next door").

Professor Engstrom testified that total Native American VAP above 70% in the James Plan would be considered packing and a dilution of Native American vote. Test. of Engstrom, Trial Tr. 216:21-23 and 217:6-10, Dec. 19, 2011; Multi-Tribal Ex. 3. The inquiry is whether there are new opportunities or influences that can be created by unpacking a district. In this instance, three districts that provide a reasonable opportunity to elect could be created by unpacking James' Districts 6 and 65. Test. of Engstom, Trial Tr. 216:22-217:6, Dec. 19, 2011. Two of the three districts have elected

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[9]The Multi-Tribal Plaintiffs' claims in this action apply to the entire House map because as noted in their complaint, each of the Multi-Tribal Plaintiff tribes have members who reside in reservations all over the state. Their interest is, therefore, the protection of Native American voting rights throughout the state.

candidates of the Native Americans' 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. Test. of Engstrom, Trial Tr. 213:17-18, 214:10-24, Dec. 19, 2011. *See Bone Shirt*, "some sort of guarantee that 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." 461 F.3d at 1023.

The James and Executive maps which split and move the Pueblos around from district to district, also misunderstand the Voting Rights Act. "[A] State may not 'assum[e] from a group of voters' race that they think alike, share the same political interests, and will prefer the same candidates at the polls.'" *LULAC v. Perry*, 548 U.S. at 433 (internal quotation and citation omitted). In addition, in formulating a redistricting plan to comply with Section 2 of the Voting Rights Act, "a State may not trade off the rights of some members of a racial group against the rights of other members of that group." *Id*. at 437. 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' (Preliminary) 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 cannot choose to, ignore. *See* Gov. Ex. 4, Guidelines for the Development of State and Congressional Redistricting Plans.

This Court has been presented with significant evidence of the appropriate communities of interest applicable to tribes. This Court has the authority to make determinations regarding communities of interest.

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. *LULAC v. Perry*, 548 U.S. at 432. *LULAC v. Perry*, also stated 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 433-35.

The Executive Defendants' and James Plaintiffs' maps have a more egregious effect. As noted above, the Pueblo of Laguna has begun to mobilize voters, to register new voters, and to encourage early voting. Test. of Luarkie, Trial Tr. 11:2-5, 12:9-24, Dec. 15, 2011. Like *LULAC v.*

Perry at 441, the Executive Defendants' and James Plaintiffs' Plans would "break apart," the Native American opportunity district just as the Laguna members were becoming mobilized. Test. of Luarkie, Trial Tr. 12:9-17, Dec. 15, 2011. 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* . . ." 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 403. *See* Test. of Luarkie, Trial Tr. 11:2-5, Dec. 15, 2011; Test. of Warren, Trial Tr. 91:4-94:18, Dec. 19, 2011. Splitting communities like the Pueblo of Laguna or Pueblo of Tesuque could affect electoral participation such as candidate pools, organization and mobilization efforts and lead to voter confusion. Test. of Engstrom, Trial Tr. 229:11–230:15, Dec. 19, 2011.

The Court heard from Governor Richard Luarkie and Lt. Governor David F. Garcia's testimony that the dividing district line proposed in the original 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 from a traditional cultural property that is central to these Native Americans' history, culture, identity and practices. Test. of Luarkie, Trial Tr. 33:12-14, Dec. 15, 2011 (Mt.

Taylor is about principles and a way of life). 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. Test. of Chino, Trial Tr. 154:6-16, Dec. 19, 2011. (Acoma and Laguna would have "less of a voice if there were any threat to that cultural property," and no direct access to the elected official).

IX. 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. 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. *Id.* 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 (citation omitted). 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. Test. of Sanderoff, Trial Tr. 153:15-18, 233:2-9, Dec. 12, 2011; Test. of Gaddie, Trial Tr. 212:3-6, Dec. 14, 2011. The districts are similar to the districts drawn 10 years ago and are generally as compact as the Court determined was adequate ten years ago. Test. of Engstrom, Trial Tr. 203:22-204:3, Dec. 19, 2011. The mathematical compactness analysis presented in the case further supports that there are no compactness issues in the plans. Gov. Ex. 10. Furthermore, consistent with the Redistricting Guidelines, and similar traditional redistricting criteria, the Multi-Tribal Plaintiffs' Plan respects tribal political boundaries. Test. of Engstrom, Trial Tr. 228:3-18, Dec. 19, 2011. The record is furthermore replete with testimony that the districts as proposed by the Multi-Tribal Plaintiffs respect communities of interest as defined by the tribes themselves. *See, e.g.*, Test. of Sanderoff, Trial Tr. 98:24-99:5, Dec. 13, 2011; Test. of Luarkie, Trial Tr. 19:10-23, Dec. 15, 2011.

X. 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 of the three 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).

Given the limited precedential value of the *Larios* case, if it can teach anything at all, *Larios* 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 *Larios* case are not present in this case, Test. of Arrington, Trial Tr. 15:4-21:17, Dec. 19, 2011, and *Larios* is, therefore, inapplicable here.

Indeed, the Executive's goal of reducing population deviations without regard to the impact the significant shifts in population would create for communities, led to the splitting of three different Pueblos' political boundaries, and moving four Pueblos away from their historic districts where they had established a relationship with their legislators. *See* Executive Original Plan and Alternatives 1-2.

The House Plan proposed by the Multi-Tribal Plaintiffs, and incorporated in the Legislative, Egolf 1-5, Maestas 1-2 and Executive 3 Plans, maintains 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 districts; avoid going beyond the boundaries of the Native American areas to communities that would not share the same interests; avoid diluting the Native American percentages; and recognize the distance between and rural nature of the Pueblos and Jicarilla Apache Nation. Test. of Sanderoff, Trial Tr. 114:6-115:20, 116:18-117:1, Dec. 13, 2011. In responding to a question about policy reasons for deviations, the Executive's own expert acknowledged that compliance with the Voting Rights Act was a policy in the public interest that was a superior principle of redistricting. Test. of Gaddie, Trial Tr. 281:6-18, Dec. 14, 2011.

Dr. Williams testified that it has historically been common to use negative deviations in minority districts, to align interests and ensure the districts are effective, including because of the historic undercount of these communities. Test. of Williams, Trial Tr. 181:11-21, 182:16-183:6, Dec. 22, 2011. Lower deviations lessen the flexibility to incorporate communities of interest and other factors that relate directly to improved representation. Test. of Engstrom, Trial Tr. 233:11-15, Dec. 19, 2011. It is the position of the Multi-Tribal Plaintiffs that the population deviations within their proposed House plan are acceptable without justification notwithstanding *Larios*. However, even if justification is required, the traditional redistricting principles and Voting Rights Act claims honored in the Multi-Tribal Plaintiffs' proposed plan provide sufficient justification for the minimal deviations present.

XI. 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. *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.

XII. Conclusion

The legislative configuration the Court chooses for New Mexico tribal lands will be of great significance for the Nations and Pueblos of New Mexico. The best remedy will be the one that preserves core communities of shared Native American interests and ensures that the Native American voice – a voice you have heard in your courtroom – will continue to be heard in New Mexico's electoral process.

Respectfully submitted this 28th day of December, 2011.

By /s/Teresa Isabel Leger

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CERTIFICATE OF SERVICE

I hereby certify that on December 28, 2011, a true and correct copy of the foregoing **MULTI-TRIBAL PLAINTIFFS' CLOSING 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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