

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

**BRIAN EGOLF, HAKIM BELLAMY, MEL HOLGUIN,
MAURILIO CASTRO, and ROXANE SPRUCE BLY,**

Plaintiff-Petitioners,

v.

**NMSC No. 11/33239
D101-CV-2011-02942
D101-CV-2011-02944
D101-CV-2011-02945
County of Santa Fe
First Judicial District Court**

**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, JR., in his official capacity as Speaker of the
New Mexico House of Representatives,**

Defendant-Respondents.

**JONATHAN SENA, DON BRATTON,
CARROLL LEAVELL AND GAY KERNAN,**

Plaintiffs-Real Parties in Interest,

v.

**D-506-CV-201100913
County of Lea
Fifth Judicial District Court**

**DIANA DURAN, in her official capacity as Secretary of State
for the State of New Mexico and SUSANA MARTINEZ,
in her official capacity as Governor of the State of New Mexico,**

Defendants-Real Parties in Interest.

SUPREME COURT OF NEW MEXICO

FILED

OCT 11 2011

[Handwritten signature]

REPRESENTATIVE CONRAD JAMES, DEVON DAY,
MARGE TEAGUE, MONICA YOUNGBLOOD,
JUDY McKINNEY, and SENATOR JOHN RYAN,

Plaintiffs-Real Parties in Interest,

v.

D-202-CV-2011-09600
County of Bernalillo
Second Judicial District Court

DIANA J. DURAN, in her official capacity as Secretary of
State of the State of New Mexico and SUSANA MARTINEZ, in her official
capacity as Governor of the State of New Mexico,

Defendants-Real Parties in Interest.

PUEBLO OF LAGUNA, RICHARD LUARKIE,
and HARRY A ANTONIO, JR.,

Intervenors.

**RESPONDENTS CONRAD JAMES', DEVON DAY'S, MARGE TEAGUE'S,
MONICA YOUNGBLOOD'S, JUDY McKINNEY'S AND JOHN RYAN'S
RESPONSE TO EMERGENCY PETITION FOR WRIT OF
SUPERINTENDING CONTROL AND APPLICATION FOR RELIEF**

Pursuant to NMRA 2011, Rule 12-504(C), and this Court's September 30,
2011 Order entered herein, Conrad James, Devon Day, Marge Teague, Monica
Youngblood, Judy McKinney and John Ryan ("the Albuquerque Plaintiffs"),
Plaintiffs in Cause No. CV-2011-9600 filed in the Second Judicial District Court
and Respondents herein, respond as follows to the Petitioners' Emergency Petition
for Writ of Superintending Control and Application for Relief.

To achieve judicial economy and avoid the possibility of inconsistent determinations, the Albuquerque Plaintiffs do not oppose consolidation by this Court of the five actions that initially were the subject of the Petition as well as sixth action filed on September 29, 2011 by the Pueblo of Laguna and others in the First Judicial District Court and docketed as Cause No. CV-2011-3016 (“Laguna Pueblo action”). The Albuquerque Plaintiffs concur that this Court has authority to order such consolidation. However, venue of the consolidated actions should rest in Albuquerque, i.e., the Second Judicial District, and not in the First Judicial District as the Petitioners propose. That is, the Court should consolidate the First and Fifth Judicial District actions into the Second Judicial District action. Further, this Court should decline to appoint a judge to hear the consolidated actions, and instead should allow the judge to be determined in accordance with the procedural rules that already are in place.

A. The Second Judicial District Is the Appropriate Venue for the Consolidated Actions.

For several reasons, the Petitioners’ argument to place the venue of the consolidated actions in the First Judicial District fails. First, as a general rule, when two actions are consolidated, the latter-filed action is consolidated into the first-filed action. See, e.g., NMRA 2011, LR1-203(E) (“cases consolidated for trial shall be heard by the judge assigned to the case bearing the lowest case number (the oldest case)”); NMRA 2011, LR2-105(A) (same). Cf. Save Power

Ltd. v. Syntek Fin. Corp., 121 F.3d 947, 950-51 (5th Cir. 1997) (reversing, as an abuse of discretion under “first to file” rule of federal comity, lower court’s denial of motion to transfer action to court before which previously filed, related case was pending); State ex rel. Kermac Nuclear Fuels Corp. v. Larrazolo, 70 N.M. 474, 483, 375 P.2d 118, 123 (1962) (“Generally, a second suit based on the same cause of action as a suit already on file will be abated where the first suit is entered in a court of competent jurisdiction in the same state between the same parties and involving the same subject matter or cause of action, if the rights of the parties can be adjudged in the first action.”). The Second Judicial District proceeding was filed first, on September 25, 2011. The Petitioner’s three First Judicial District actions were filed on September 26. The Fifth Judicial District action was filed on September 26 as well. As stated above, the Laguna Pueblo action was filed in the First Judicial District on September 29. Accordingly, the First and Fifth Judicial District actions should be consolidated into the Second Judicial District action.

Second, Petitioners wrongly suggest, see Petition at 10, that the only proper venue for actions against state officers is Santa Fe County. NMSA 1978, § 38-3-1(G) (1988), expressly authorizes actions against state officers to be brought “in the county where a plaintiff, or any one of them in case there is more than one, resides.” All of the Albuquerque Plaintiffs reside in Bernalillo County, hence venue in the Second Judicial District is proper.

Third, the Second Judicial District clearly would be the most centrally located and convenient venue for the parties. In their complaints,¹ which are attached to the Petition as Exhibits A, B and C, the Petitioners state that two of them are residents of Dona Ana County, two of them reside in Bernalillo County; the fifth, Brian Egolf, is a State Representative representing a House district in Santa Fe County. The four plaintiffs in the Fifth Judicial District action state in their complaint that they all reside in Lea County, i.e., the far southeast corner of the State. The individual plaintiffs in the Laguna Pueblo action state in their complaint that they reside in Cibola County, some thirty to forty miles west of Albuquerque. The Albuquerque Plaintiffs all reside in Bernalillo County. Four of the five defendant state officials reside in or north of Santa Fe County, but the fifth resides in Chaves County.² Thus, far more parties reside in or south of

¹ The Petitioners have chosen to split their claims about the constitutionality of New Mexico's House, Senate and congressional districts into separate complaints. The other actions that are the subject of the Petition raise all of these claims (as well as the unconstitutional apportionment of the Public Regulation Commission districts), but do so in unitary complaints. For purposes of addressing the merits of Petitioners' consolidation request, the distinction has no significance and the Petitioners' filings should be treated as one suit.

² Moreover, the status of the Speaker of the State House of Representatives and the President pro Tempore of the State Senate as necessary parties to this litigation is doubtful. While the Governor holds supreme executive power and ultimate responsibility for executing the laws, see N.M. Const., art. V, § 4, and the Secretary of State is New Mexico's chief election officer, see NMSA 1978, § 1-2-1 (2011), the court's judgment and decree in this matter need and will not operate against the Legislature.

Albuquerque than reside in or north of Santa Fe County, and the Cibola County parties can more easily reach Albuquerque than Santa Fe.

Fourth, the Second Judicial District would be the most centrally located and convenient venue for counsel. With the exception of three of the Petitioners' seven counsel and two of the three counsel for the plaintiffs in the Laguna Pueblo action, all counsel in these actions reside and practice in, or south or west of,³ Albuquerque.

Fifth, the fundamental reason for all of these actions is the imbalance in congressional, House, Senate and PRC district populations resulting from demographic changes over the past decade. The greatest population change has occurred in Albuquerque's rapidly growing west side. See Deborah Baker, "Redistricting Battles Head for Court," Albuquerque Journal, Sept. 27, 2011, at A1, A3. While all of the subject actions allege injury caused by malapportionment, citizens who reside in Albuquerque are suffering the greatest dilution of their constitutional right to have their votes count as much as the next man or woman. See generally Reynolds v. Sims, 377 U.S. 533, 559 (1964) (citing Wesberry v. Sanders, 376 U.S. 1, 14 (1964)). For this reason as well, the court that hears these cases should sit in Albuquerque.

³ Rich Olson, one of the counsel who have entered their appearance in this proceeding on behalf of the Speaker of the House and the President pro tem of the Senate, resides and practices in Chaves County. Casey Douma, one the counsel for the plaintiffs in the Laguna Pueblo action, practices in Cibola County.

B. This Court Should Decline Petitioners' Request That It Choose a Judge to Preside Over the Consolidated Actions.

Petitioners' request that this Court select a judge to preside over these actions is premature at best. First, there is no basis for assuming, once the First and Fifth Judicial District actions are consolidated into the Second Judicial District actions, that a judge cannot be identified in accordance with the procedures established by NMRA 2011, Rules 1-088 and -088.1. The normal process can and should be allowed to run its course. (The Second Judicial District action has been assigned to the Honorable Carl J. Butkus, whom the Albuquerque Plaintiffs will not excuse.) Second, before any request is made to this Court to select a judge, by way of either a writ of superintending control or the last sentence of NMRA 2011, Rule 1-088(B), at a minimum counsel for the parties should confer and attempt to stipulate to a judge. See id. To date this effort has not occurred. Consequently, the Petitioners' claim that a writ of superintending control "is the only plain, speedy, and adequate remedy available," Petition at 7, is unfounded. Because such a writ is to be granted only when "none of the ordinary remedies provided by law are applicable," In re Extradition of Martinez, 2001-NMSC-009, ¶ 12, 130 N.M. 144, 20 P.3d 126, Petitioners' request that the Court appoint a judge to preside over these actions should be denied.

C. Conclusion

For all of these reasons, the Albuquerque Plaintiffs respectfully request the Court to consolidate the First and Fifth Judicial District actions into the Second Judicial District action, Cause No. CV-2011-9600, and deny the balance of the Petition that seeks appointment of a judge to preside over the consolidated actions.

Respectfully submitted,

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

By: Henry M. Bohnhoff by MKA
Henry M. Bohnhoff
P.O. Box 1888
Albuquerque, NM 87103
Phone: (505) 765-5900
hbohnhoff@rodey.com

SAUCEDO CHAVEZ, PC

Christopher T. Saucedo
Iris L. Marshall
100 Gold Ave. SW, Suite 206
Albuquerque, NM 87102
Phone: (505) 275-3200
csaucedo@saucedochavez.com

DAVID A. GARCIA LLC

David A. Garcia
1905 Wyoming Blvd. NE
Albuquerque, NM 87112
Phone: (505) 275-3200
david@theblf.com

ATTORNEYS FOR PLAINTIFFS-REAL PARTIES IN
INTEREST JAMES, DAY, TEAGUE, YOUNGBLOOD,
MCKINNEY AND RYAN

CERTIFICATE OF SERVICE:

We hereby certify that a true and correct copy of the foregoing pleading was served via U.S. First Class Mail to the following counsel of record on this 11th day of October, 2011:

Ray M. Vargas, II
David P. Garcia
Erin B. O'Connell
Garcia & Vargas, LLC
303 Paseo del Peralta
Santa Fe, NM 87501
Attorneys for Plaintiff-Petitioners

Joseph Goldberg
John W. Boyd
David H. Urias
Sara K. Berger
Freedman Boyd Hollander
Goldberg & Ives
20 First Plaza Ctr. NW, #700
Albuquerque, NM 87102
Attorneys for Plaintiff-Petitioners

Patrick J. Rogers
Modrall, Sperling, Roehl, Harris &
Sisk PA
P.O. Box 2168
Albuquerque, NM 87103
*Attorneys for Plaintiffs in Sena v.
Duran; D-506-CV-2011-0091*

Jessica Hernandez
Matthew J. Stackpole
Office of the Governor
490 Old Santa Fe Trail
Santa Fe, New Mexico 87501-2704
*Attorneys for Susana Martinez,
Governor of the State of New Mexico*

Paul John Kennedy
Kennedy & Han PC
201 12th St NW
Albuquerque, NM 87102-1815
*Attorneys for Susana Martinez,
Governor of the State of New Mexico*

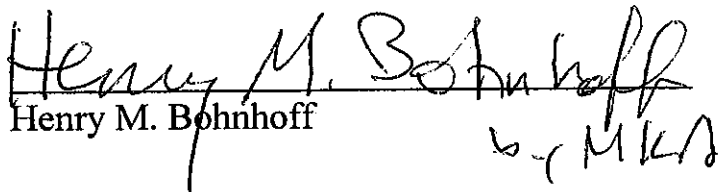
Luis G. Stelzner
Sara N. Sanchez
Stelzner, Winter, Warburton, Flores,
Sanchez & Dawes, P.A.
P.O. Box 528
Albuquerque, New Mexico 87103
*Attorneys for Timothy Z. Jennings,
President Pro-Tempore of the New
Mexico Senate and Ben Lujan,
Speaker of the New Mexico House of
Representatives*

Richard E. Olson
Jennifer M. Heim
Hinkle, Hensley, Shanor & Martin, LLP
P.O. Box 10
Roswell, New Mexico 88202-0010
***Attorneys for Timothy Z. Jennings,
President Pro-Tempore of the New Mexico Senate
and Ben Lujan, Speaker of the
New Mexico House of Representatives***

Robert M. Doughty, III
Doughty & West PA
20 First Plaza NW Suite 412
Albuquerque, NM 87102-3391
Phone: (505) 242-7070
rob@doughtywest.com
Attorneys for Dianna J. Duran, Secretary of State of New Mexico

Teresa Isabel Leger
Cynthia Kiersnowski
Nordhaus Law Firm, LLP
1239 Paseo de Peralta
Santa Fe, New Mexico 87501
Phone: 505-982-3622
tleger@nordhauslaw.com
ckiersnowski@nordhauslaw.com

Casey Douma
Pueblo of Laguna
P.O. Box 194
Laguna, New Mexico 87026
Phone: 505-522-5776
cdouma@lagunatribe.org
***Attorneys for Pueblo of Laguna, Richard Luarkie
and Harry A. Antonio, Jr.***


Henry M. Bohnhoff
by MKA