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

CAUSE NO. D-101-CV-2011-02942

BRAIN F. EGOLF, JR., HAKIM BELLAMY, MEL HOLGUIN, MAURILIO CASTRO and ROXANE SPRUCE BLY,

Plaintiffs,

-vs-

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,

Defendants.

CONSOLIDATED WITH CAUSE NOS.: D-101-CV-2011-02944; D-101-CV-2011-03016; D-101-CV-2011-03099; D-101-CV-2011-03107; D-101-CV-2011-02945; D-506-CV-2011-00913; D-202-CV-2011-09600

JAMES PLAINTIFFS' TRIAL BRIEF FOR SENATE REDISTRICTING TRIAL

Plaintiffs Conrad James, Devon Day, Marge Teague, Monica Youngblood, Judy McKinney and John Ryan ("the James Plaintiffs") submit the following trial brief in connection with the trial currently scheduled to begin on January 3, 2012 for the purpose of reapportioning the forty-two districts of the New Mexico Senate.

The James Plaintiffs intend to offer two maps for consideration. The primary difference between the two James Plaintiffs' maps will be that the alternate (or second) James Plaintiffs' map will have substantially lower deviations than the original James Plaintiffs' map. The James Plaintiffs' maps will otherwise be largely similar and will highlight two important issues. First, the James Plaintiffs will offer maps that best position the Native American community to elect three (3) candidates of choice to the New Mexico Senate. Second, following proper evaluation

for partisan performance, the James Plaintiffs will offer maps for New Mexico Senate districts that are politically fair.

A. Permissible Population Deviation

The equal protection clause mandates equalization of populations within electoral districts "as nearly as practicable" following the decennial census. There is no ± 5% or other safe harbor for population deviation in connection with reapportionment:

> [T]he Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable.
>
> ....
>
> So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature. But neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation.

Reynolds v. Sims, 377 U.S. 533, 577, 579-80 (1964). "In challenging the District Court's judgment, appellant invites us to weaken the one-person, one-vote standard by creating a safe harbor for population deviations of less than 10 percent, with which districting decisions could be made for any reason whatsoever. The Court properly rejects that invitation." Cox v. Larios, 542 U.S. 947, 949 (2004).

The standard for permissible deviations in legislative plans fundamentally differs from the standard applicable to redistricting plans drawn by courts after the legislature and executive have failed to enact a plan or such a plan is found to be unconstitutional. In Chapman v. Meier, 420 U.S. 1 (1975), the Court determined that:

> 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.[1] The Court further held that any departure from de minimis deviation must be supported by an articulation of significant state policies: "Where important and significant state considerations rationally mandate departure from these standards, it is the reapportioning court's responsibility to articulate precisely why a plan…with minimal population variance cannot be adopted." Id. at 27. "The burden is on the District Court to elucidate the reason necessitating any departure from the goal of population equality, and to articulate clearly the relationship between the variance and the state policy furthered." Id. at 24. The presence of other feasible and yet "less statistically offensive" plans will indicate that the greater deviation is unacceptable. Id. at 26.[2]

In New Mexico's last reapportionment litigation, in its findings and conclusions the district court cited In re Apportionment of the State Legislature -- 1982, 321 N.W.2d 585 (Mich. 1982), for the proposition that this stricter deviation standard for court-drawn plans applied only to federal and not state courts. Jepson v. Vigil-Giron, No. CV-2001-2177, at 12 (1st Jud. Distr. Ct. Jan. 24, 2002). In the Michigan case, following an initial determination that a state legislative apportionment plan drawn by a commission violated the equal protection clause, that state's Supreme Court approved a plan drawn at the court's request by the Michigan Secretary of

[1] In a footnote to this statement, however, the Court cautioned that, "This is not to say, however, that court-ordered reapportionment must attain the mathematical preciseness required for congressional redistricting...." 420 U.S. at 27 n.19. Courts have construed Chapman's holding to require deviation ranges of less than 2%, Wisconsin State AFL-CIO v. Elections Bd., 543 F. Supp. 630, 634 (E.D. Wis. 1982), and "closer to Wesberry than Brown" Burton v. Sheheen, 793 F. Supp. 1329, 1345 (D.S.C. 1992), i.e., no more than 5%.

[2] Thus, in Sanchez v. King, Civ. No. 82-0067, Slip Op. at 131, 131 n.3 (D.N.M. Aug. 8, 1984), notwithstanding the need to draw 18 new New Mexico House districts to remedy Voting Rights Act violations, the three-judge panel acknowledged the Chapman deviation strictures and kept population deviations from the ideal to less than 1% for seven districts and less than 3% for sixteen districts.

State that contained deviations of up to 16.4%. See In re Apportionment of State Legislature -- 1992, 486 N.W.2d 639, 643-44 (1992) (discussing 1982 case history). An appeal to the United States Supreme Court was dismissed for want of a substantial federal question. Kleiner v. Sanderson, 459 U.S. 900 (1982).

It would not be appropriate to conclude from the dismissal of the appeal that the Supreme Court of the United States determined that the Chapman rule of de minimis deviation is not applicable to state court-drawn redistricting plans. While a dismissal for want of substantial federal question is a disposition on the merits and has precedential effect, Hicks v. Miranda, 422 U.S. 332 (1975), there is no record of the Court's grounds for the dismissal (or even the precise issue raised on the appeal) and therefore it is impossible to ascertain the rule or proposition for which the case stands. Further, the Court has admonished parties that, "[T]he fact that a 10% or 15% variation from the norm is approved in one State has little bearing on the validity of a similar variation in another State. 'What is marginally permissible in one State may be unsatisfactory in another, depending upon the particular circumstances of the case.'" Swann v. Adams, 385 U.S. 440, 445 (1967) (quoting Reynolds v. Sims, 377 U.S. at 578). Thus, the United States Supreme Court just as if not more likely could have dismissed the appeal on the grounds of some unique circumstance of the Michigan case as opposed to the improbable adoption of a general principle that the Chapman rule does not apply to state court-drawn reapportionment plans.

Indeed, Michigan has a longstanding policy, embodied in its constitution and statutes, of not crossing county and municipal boundaries to the extent possible in drawing legislative district boundaries. 486 N.W.2d at 732 ("For well over a century, Michigan law has recognized that effective representative government is strongly enhanced by apportioning the state in a

manner that honors jurisdictional lines."). The 16.4% deviation was justified on the basis of preserving those boundaries. Id. at 733.[3]

If anything, it is probable that the Supreme Court dismissed the appeal of the 1982 Michigan redistricting case on the grounds of this special consideration rather than the fact that a state versus a federal court drew the plan. See also Voinovich v. Quilter, 507 U.S. 146, 161-62 (1993) (policy embodied in Ohio constitution favoring preservation of county boundaries could justify deviations exceeding 10% in reapportioned state legislative districts). New Mexico, of course, has no similar constitutional or even statutory policy in favor of preserving county or municipal boundaries.

There are additional reasons why this Court should decline to follow the decision of the district court in New Mexico's redistricting litigation ten years ago and instead conclude that a court-drawn redistricting plan must contain no more than de minimis deviation from the population norm for districts. First, Chapman and Connor v. Finch, 431 U.S. 407, 418 (1977), which reiterated the "no more than de minimis deviation rule for court-drawn plans, do not distinguish between federal and state court-drawn plans. Chapman repeatedly refers generally to the limited permissible deviation in a "court-ordered plan," not a "federal court-ordered plan." 420 U.S. at 24, 26. Similarly, Connor provides that, "[T]he latitude in court-ordered plans for departure from the Reynolds standards in order to maintain county lines is considerably narrower than that accorded apportionments devised by state legislatures, and the burden of articulating

[3] See also 321 N.W.2d at 583 ("[W]e see in the constitutional history of this state dominant commitments to contiguous, single-member districts drawn along the boundary lines of local units of government which, within those limitations, are as compact as feasible. We accordingly direct that election districts shall be drawn in accordance with the following criteria: ... Senate and House election district lines shall preserve county lines with the least cost to the federal principle of equality of population between election districts consistent with the maximum preservation of county lines and without exceeding the range of allowable divergence under the federal constitution which, until the United States Supreme Court declares otherwise, shall be deemed to be 16.4% (91.8-108.2%).").

special reasons for following such a policy in the face of substantial population inequalities is correspondingly higher." 431 U.S. at 419-20.

Second, there is no principled basis for adopting different standards. Indeed, courts are "ill-suited," Johnson v. Miller, 922 F. Supp. 1556, 1559 (S.D. Ga. 1995), to carry out this balancing of competing policy considerations. "Many factors, such as the protection of incumbents, that are appropriate in the legislative development of an apportionment plan have no place in a plan formulated by the courts." Wyche v. Madison Parish Police Jury, 769 F.2d 265, 268 (5th Cir. 1985).

Third, there also is no reason to construe the New Mexico constitution's equal protection clause any different from the federal provision. A state court should enforce the state constitution's guarantee of every man's and woman's right to have his or her voted counted the same as the next person's vote with the same vigor that the federal courts enforce the federal right.

Fourth, when confronted with this precise question, other state courts have concluded that Chapman's strict deviation standard for court-drawn reapportionment plans applies equally 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) (internal quotation marks and citations omitted; emphasis original). Accord, Burling v. Chandler, 804 A.2d 471, 478 (2002).

B. Section 2 of the Voting Rights Act

The James Plaintiffs will not dispute the necessity of districts with sufficient Native Americans of voting age population (NA-VAP) for the Native American community to elect candidates of their choice. The James Plaintiffs, however, will present evidence that the proper NA-VAP is well above sixty-five (65%) percent. Thus, the James Plaintiffs will argue that their maps are the only map that gives the Native American community a realistic opportunity to elect three candidates of choice. Section 2 provides:

> (a) No voting qualification or prerequisite to voting or standard, practice or procedure shall be imposed or applied ... in a manner which results in a denial or abridgment of the right of any citizen ... to vote on account of race or color....
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) 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.

(emphasis added)

Three "necessary preconditions" must be established before it can be said that Section 2 requires the drawing of a majority-minority district because failure to do so will dilute the minority group members' votes: "(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 cohensive," and (3) the majority must vote "sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate." Bartlett v. Strickland, ___ U.S.

___, ___, 129 S. Ct. 1231, 1241 (2009) (quoting Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986)). Accord, Growe v. Emison, 507 U.S. 25, 40-41 (1993). "Only when a party has established the Gingles requirements does a court proceed to analyze whether a violation has occurred [or will occur in the absence of a minority-majority district] based on the totality of the circumstances." Bartlett, 129 S. Ct. at 1241.

Section 2 liability cannot be premised on the failure to establish an minority "influence district," because it does not satisfy the first prong of the Gingles test. In "influence districts, ... a minority group can influence the outcome of an election even if its preferred candidate cannot be elected. The Supreme Court of the United States has held that § 2 does not require the creation of influence districts." Bartlett, 129 S. Ct. at 1242 (citing LULAC v. Perry, 548 U.S. 399, 445 (2006)). The evidence will show that the creation of a Native American "influence district" will detrimentally reduce the voting strength of VAP-NA in other districts below the effective level.

Similarly, "coalition districts," in which two or more minority groups can band together to elect a candidate of their combined choice, also have been rejected as a premise to Section 2 liability. Nixon v. Kent County, 76 F.3d 1381, 1393 (6th Cir. 1996) ("The language of the Voting Rights Act does not support a conclusion that coalition suits are part of Congress' remedial purpose and, as previously discussed, there are compelling reasons to believe that they are not.") (cited in Bartlett, 129 S. Ct. at 1242). More generally, the Supreme Court has rejected the proposition that the prohibition against diluting minority group voting strength is to be equated with an affirmative mandate to maximize that strength. Bartlett, 129 S. Ct. at 1244 (quoting Johnson v. DeGrandy, 512 U.S. 997, 1016-17 (2004).

Finally, to satisfy the first Gingles requirement of a sufficient number of minority group members to constitute a majority in a single member districts, the majority population must be

based on numbers of citizens who may vote. In LULAC the Supreme Court concluded that, in reconstituting a majority-minority congressional district the Texas Legislature violated Section 2, because the re-drawn district did not contain enough Hispanic citizens to constitute a majority of the voters:

> The first Gingles factor requires that a group be sufficiently large and geographically compact to constitute a majority in a single-member district. Latinos in [old Texas Congressional] District 23 could have constituted a majority of the citizen voting-age population in the district.... Latinos, to be sure, are a bare majority of the voting-age population in new District 23, but only in the hollow sense, for the parties agree that the relevant numbers must include citizenship. This approach fits the language of § 2 because only eligible voters affect a group's opportunity to elect candidates. In sum, appellants have established that Latinos could have had an opportunity district in District 23 had its lines not been altered and that they do not have one now.

LULAC, 548 U.S. at 427-29.

In Sanchez v. King, the three judge panel noted that "courts have observed that a minority population needs 65 percent of the population of a district in order to have a meaningful opportunity to elect a candidate of their choice." No. 82-0067-M, slip op. at 61 fn. 1 (D.N.M. Aug. 8, 1984) (citations omitted). However, the Sanchez court found that "[I]n view of the extreme depression of Indian voter participation, the percentage [needed to have a meaningful opportunity to elect a candidate of choice] may in fact be higher for Indians in northwest New Mexico," id., and established districts with Native American populations as high as 97 percent.

C. Performance Measures

Political fairness or representational fairness will be argued by many parties to be a consideration by the Court when either selecting or drawing a redistricting map. As argued by another party to this lawsuit, "[r]edistricting is the most nakedly partisan activity in American politics[.]" Keith Gaddie & Charles S. Bullock III, *From Ashcroft to Larios: Recent Redistricting Lessons from Georgia*, 34 Fordham L.J. 997, 997 (2007). "When re-drawing

electoral maps, courts take partisan fairness into consideration. When forced to correct defective maps, courts have taken pains to avoid advantaging one political party, lest the court be guilty of gerrymandering." Gaddie & Bullock, supra at 1004, (*citing Abrams v. Johnson*, 521 U.S. 74 (1997), *Upham v. Seamon*, 456 U.S. at 41-42. The problem, however, is that all other parties are expected to improperly measure political fairness.

Research & Polling's ("R&P's") performance numbers, which are being widely used in this matter, will be shown to be flawed, especially when considering New Mexico Senate elections. The evidence will show that the R&P numbers are derived by adding the votes for Democrat and Republican candidates in fourteen (or fifteen) statewide elections (four in 2004 and 2008, the Presidential election years, and ten (or eleven) in 2006 and 2010, the Gubernatorial election years) between 2004 and 2010. The result—52.8% of the votes were for Democrats and 47.2% were for Republicans—is represented to be a rough approximation of long-term party performance. The James Plaintiffs expect other parties to suggest that a map with political performance measures—as calculated by R&P—of Republican leaning districts of 19 or more are biased maps. This argument will be shown to be misguided.

As Senator Rod Adair will testify vastly different numbers of persons vote in Presidential election years versus Gubernatorial election years. New Mexico Senate elections are only held during Gubernatorial election years. The disparity results in different electorates in each cycle: on average, more persons vote Democrat in Presidential election years than in Gubernatorial election years. The evidence will show that for New Mexico Senate elections, R&P's performance measures understate Republican performance. The evidence will show that the James' maps are politically fair and that maps such as SB33 are politically biased in favor of

Democrats. The result, of course, is that the R&P measure would result in the election of far more Democrats than the votes for them justify.

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CERTIFICATE OF SERVICE:

WE HEREBY CERTIFY that on the 30th day of December, 2011, we filed the foregoing electronically, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing and we e-mailed a true and correct copy of the foregoing pleading on this 30th day of December, 2011 to the following:

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