IN THE NEW MEXICO SUPREME COURT

TIMOTHY Z. JENNINGS, in his official
capacity as President Pro-Tempore
of the New Mexico Senate, and
BEN LUJAN, SR., in his official capacity
as Speaker of the New Mexico House of Representatives,

Petitioners,

vs. Sup Ct No. 33,387

THE NEW MEXICO COURT OF APPEALS,

Respondent,

and

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

Real Parties in Interest.

ON A WRIT OF SUPERINTENDING CONTROL
TO THE NEW MEXICO COURT OF APPEALS

PETITIONERS' OPENING BRIEF

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TABLE OF CONTENTS

SUMMARY OF PROCEEDINGS 1

A. Nature of the Case 1

B. Course of Proceedings and Disposition Below 1

C. Summary of the Relevant Facts 4

INTRODUCTION TO THE ARGUMENT 7

ARGUMENT 9

I. The Decision Below Erroneously Concluded That The Federal Constitution And Other Dictates of the United States Supreme Court Compelled the Application Of *De Minimis* Population Deviations In This State Court Determination Of A State Legislative Districting Plan. 9

A. The Fourteenth Amendment does not require a drastically low deviation from the ideal in the judicial adoption of a redistricting plan 10

B. While a *de minimis* standard may be relevant with respect to federal courts engaged in adopting redistricting plans in the absence of a new state law on the subject, it does not apply to a similar enterprise by a state court 15

C. Recent United States Supreme Court rulings make clear that a rigorous *de minimis* standard ought not be applied by a court, when doing so would override legislative policy decisions which do not conflict with the Constitution or the Voting Rights Act 19

II. The Decision Below Improperly Disregarded The Detrimental Consequences Of Its Judgment To The Integrity Of Essential Political Processes And Separation Of Powers Principles 25

III. The Decision Below Failed To Afford Thoughtful Consideration To The Legislative Plan 30

A. The Legislature's plan is entitled to heightened, "thoughtful consideration" because the Legislature is the body tasked with determining redistricting policy in the first instance and because it represents a balancing of competing goals achieved by the people's elected representatives....31

1. *The Legislature's plan is in full compliance with both the Equal Protection Clause and the Voting Rights Act, and therefore meets the definitional requirements for thoughtful consideration*....35

2. *Further, consistent with the criteria for thoughtful consideration, the Legislature's plan is consistent with other valid sources of state policy, including the policy embodied in current districts and policy embodied in past redistricting practices*....37

B. The district court failed to give "thoughtful consideration" to the Legislature's use of deviations and instead only permitted deviations where required to avoid Voting Rights Act violations....38

IV. The Decision Below Runs Afoul of The Limited Role The State District Court Must Play In Such Matters....39

V. All of the Foregoing Errors Led to the Wrongful Rejection of the Legislative Plan and the Adoption of a Plan that Suffers from a Voting Rights Act Violation and Unfair Partisan. 41

CONCLUSION....46

STATEMENT OF PAGE LIMIT COMPLIANCE....47

CERTIFICATE OF SERVICE....48

TABLE OF AUTHORITIES

New Mexico Cases:

Jepsen v. Vigil-Giron, Case No. D-0101-CV-02177, January 24, 2002..........passim

State ex rel. Coll v. Carruthers, 107 N.M. 439, 759 P.2d 1380 (1988)..................28

State ex rel. Clark v. Johnson, 120 N.M. 562, 904 P.2d 11 (1995)........................26

State ex rel. Stewart v. Martinez, 2011-NMSC-045, __ N.M. __,
__ P.3d __ (No. 33,028, Dec. 14, 2011)..27

State ex rel. Taylor v. Johnson, 1998-NMSC-015, 125 N.M. 343,
961 P.2d 768..27, 28

Torres v. *State,* 119 N.M. 609, 894 P.2d 386 (1995)..34

Federal Cases:

Abrams v. Johnson, 521 U.S. 74 (1997)..20

Brown v. Thomson, 462 U.S. 835 (1983)..11, 12, 23

Chapman v. Meier, 420 U.S. 1 (1975) ....passim

Connor v. Finch, 431 U.S. 407 (1977)..15, 16, 17, 18

Gaffney v. Cummings, 412 U.S. 735 (1973)...11, 14, 30

Growe v. Emison, 507 U.S. 25 (1993) 16

Kleiner v. Sanderson, 459 U.S. 900 (1982) 16

Markham v. *Fulton Cnty. Bd. of Registrations & Elections,* No. Civ. A.1:02-
CV1111WB, 2002 WL 32587313, *6 (N.D. Ga. May 29, 2002).......................39

Mistretta v. United States, 488 U.S. 361 (1989) 28

O'Sullivan v. *Brier,* 540 F. Supp. 1200 (D. Kan. 1982) 32

Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701 (2007) 10

Perry v. Perez, 565 U.S. ___, Nos. 11-713, 11-714 and 11-715 (January 20, 2012) (Slip Op.) .... passim

Reynolds v. Sims, 377 U.S. 533 (1964) 11, 12, 18, 35

Sanchez v. King, 550 F. Supp. 13 (D. N.M. 1982) 37, 42

Scott v. Germano, 381 U.S. 407 (1965) 16

Shayer v. *Kirkpatrick,* 541 F. Supp. 922 (W.D. Mo. 1982) 32, 37

Terrazas v. *Clements,* 537 F. Supp. 514 (N.D. Tex. 1982) 32

Thornburgh v. Gingles, 478 U.S. 30 (1986) 42

Upham v. Seamon, 456 U.S. 37 (1982) .... passim

Wesberry v. Sanders, 376 U.S. 1 (1964) 11

White v. Weiser, 412 U.S. 783 (1973) 31, 32, 33, 40

Other State Cases:

Below v. Gardner, 963 A.2d 785 (N.H. 2002) 17, 18

Burling v. Chandler, 804 A.2d 471 (N.H. 2002) 17, 18

In re Apportionment of State Legislature, 321 N.W. 2d 585 (Mich. 1982) 16, 17, 18

Constitutional and Statutory Provisions:

U.S. Const., art. I, § 2 11

N.M. Const., art. III, § 1 26

N.M. Const., art. IV, § 15 26

N.M. Const., art. IV, § 17 26

SUMMARY OF PROCEEDINGS

A. Nature of the Case

This appellate matter arises from the numerous state-court lawsuits that were filed when the New Mexico Legislature in the 2011 special redistricting session, and after a lengthy and transparent public process, passed a redistricting plan for the New Mexico State House of Representatives in conformity with the 2010 decennial census. This and other legislative redistricting plans were vetoed by the Governor. The redistricting litigation that followed was consolidated by this Court in the First Judicial District, and assigned to the Honorable James A. Hall, District Judge Pro Tempore.

More particularly, this proceeding is a review of the district court's final judgment adopting a redistricting plan for the New Mexico House of Representatives.

B. Course of Proceedings and Disposition Below

At the evidentiary hearing on the State House of Representatives, the trial court was presented initially with six state-wide redistricting plans as follows:

- The Legislative Plan, contained in House Voters and Elections Committee Substitute for HB 39 (hereafter, "HB 39") as passed by the Legislature, and presented by the Legislative Defendants, Petitioners herein;

- <u>The Executive Plan</u> presented by the Executive Defendants (Governor Martinez, Lt. Governor Sanchez, and Secretary of State Duran), Real Parties in Interest herein;

- <u>The Egolf Plan</u> and the <u>Maestas Plan</u> presented by two separate Plaintiff groups of Democratic legislators and voters; and

- <u>The James Plan</u> and the <u>Sena Plan</u> presented by two separate Plaintiff groups of Republican legislators and voters.

In addition, partial House plans for the Northwest region of the state were submitted by the <u>Navajo Nation</u> and the <u>Multi-Tribal Plaintiffs</u>.

As the trial progressed, and patent defects in the Executive Plan and in the plans of some Plaintiff groups were exposed, those parties submitted modified plans—often at the behest of the trial court—five by the Egolf Plaintiffs, one by the Maestas Plaintiffs and three by the Executive Defendants. *See* Trial Court's State House Findings and Conclusions at 7 (Finding 28). Petitioners, in their official capacities as leaders of the respective houses of the Legislature, could present and defend only the plan which was passed by both houses. That bill, enrolled and engrossed as HB 39 and vetoed by the Governor did, however, include the partial plan of the Multi-Tribal Plaintiffs, and was in full compliance with applicable law. That latter reality was not challenged by the district court.[1]

[1] The district court "made no determination" of the Legislative Plan's constitutionality had it been signed into law. *See* Findings and Conclusions at 30, n.1.

Petitioners opposed the Governor's continually proffered "alternative plans" by way of a Motion to Strike, on the ground that continuing to allow the Governor to her plan, after she failed to offer any plans for consideration during the legislative process, denigrated that process, and raised separation of powers concerns. The Motion to Strike was denied by the district court.

After eight days of testimony, the district court issued its Findings and Conclusions announcing adoption of Executive Alternative Plan 3, which included the Multi-Tribal/Navajo Nation partial plan, and a judicially imposed move of one Bernalillo Precinct. *See* Conclusion of Law 33. Judgment was entered on January 17, 2012.

Due to the significant questions of law under the constitution of the United States and the constitution and law of New Mexico and the time-sensitive nature of this matter in light of the upcoming election cycle, Petitioners, on the same day the judgment was entered, filed and docketed an appeal in the Court of Appeals and also filed the instant Petition seeking this Court's plenary review of the judgment below. On the following day, this Court granted the Petition, stayed the district court judgment pending further order of this Court, set an expedited briefing and argument schedule, and issued the Writ, directing the Court of Appeals to certify the case to this Court. The Court of Appeals Order formally certifying the case to this Court was issued on January 20, 2012.

C. Summary of the Relevant Facts[2]

At trial, the Petitioners presented undisputed evidence establishing that the Legislative Plan was developed through a transparent and public process over the course of many months. *See infra,* Point III. The Legislative Plan incorporated Native American preferences for the Northwest region, and public comment from community members throughout the state. *Id.* The population deviations contained in the Legislative Plan were all within a range of plus or minus five percent from the ideal, in full compliance with the Legislature's own guidelines, New Mexico's redistricting policy since 1982, and governing law. *Id.* The Petitioners further showed that the deviations contained in the Legislative Plan were justified by adherence to traditional redistricting principles such as preserving the core of districts, preserving political subdivisions, avoiding the pairing of incumbents, and preserving communities of interest. *See* infra Points III and V.

By contrast, the evidence revealed that the Executive Defendants' plans were developed only after litigation commenced and were produced by lawyers and an out-of-state consultant with no public input or consultation with Native American or other groups. *See infra* Point III. The Executive Defendants' initial plan did not conform to either the Multi-Tribal or Navajo Nation plans; split

[2] Citations in this Brief are to the Documents and Transcripts contained in the Appendix to the Petition.

Pueblos and communities of interest; and violated Section 2 of the Voting Rights Act by splitting the Hispanic community of Clovis into two districts without Hispanic majorities. *See infra* Point V. The plan ultimately adopted by the district court, Executive Alternative Plan 3, was the fourth map proposed by the Executive Defendants at trial. Although that plan corrected some of the defects in earlier iterations, it created significant partisan bias in favor of Republican districts, still violates the Voting Rights Act in Clovis, and represents a dramatic departure from historical state redistricting policy and those policies embodied in current districts. *Id.*

Particularly relevant to the issues raised herein are the following findings and conclusions by the district court:

General Findings

- Finding 20: The Legislature and Native American leaders worked together extensively before and during the special session in an effort to accommodate Native American preferences as expressed in the plan presented by the Native American Redistricting Work Group.

- Finding 21: Leaders from a number of tribes attempted to communicate with the Governor's office prior to and during the special session to convey their preferences but received no response from the Governor's office.

- Finding 23: Members of the public expressed a desire to have their communities remain intact to help ensure that their representative lived and worked within their communities, would recognize their values and concerns, and could thereby provide them with better representation.

- Finding 24: During the special session, numerous redistricting plans were introduced and debated in committee meetings and on the floor of both

houses. . . . During the special session, no redistricting plan was introduced which was identified as proposed or approved by the Governor.

Regarding the Executive Plan

- Finding 70: Except for the [Native American districts in the northwest quadrant required by the Voting Rights Act], Executive Alternative Plan 3 maintains deviations between -1.0 and +1.0 percent.

- Finding 72: Incorporating the Multi-Tribal/Navajo Nation Plan into the Executive Plan necessarily produced political performance consequences in other districts outside the northwest quadrant. As a result of the inclusion of the Multi-Tribal/Navajo Nation Plan, the number of swing districts (49-51% Republican) increased from five to eight. The number of majority Republican districts (>50%) increased from 31 in the original Executive Plan, to 33 in the Executive Alternative Plan 2, to 34 in Executive Alternative Plan 3.

Conclusions of Law

- Conclusion 6: A court-ordered reapportionment plan of a state legislature is held to a higher standard than a legislatively drawn map, because it "must ordinarily achieve the goal of population equality with little more than *de minimis* variation." *Chapman v. Meier,* 420 U.S. 1, 26 (1975).

- Conclusion 7: The *Chapman* distinction between legislatively adopted plans and court-ordered plans is based on the equal protection clause of the Fourteenth Amendment to the United States Constitution.

- Conclusion 10: Because the Constitution limits this Court's role to construing the law, this Court must apply neutral, objective criteria, and, further, must construe those criteria strictly so that the Court's role in redrawing New Mexico's political maps is limited.

- Conclusion 16: Th[e] argument of the Legislative Defendants [that adopting the Executive approach would . . . undermine the entire political process of redistricting] is not persuasive for at least two reasons. First, the Legislative Defendants provide no authority for the proposition that a Court may properly take into account what legislatures or governors may do in future

redistricting cycles. . . .Second, it is not the role of the Court to encourage future legislatures and governors to perform their legal responsibilities.

- Conclusion 17: Although a court-ordered plan need not have exactly zero population deviation, "any deviation from approximate population equality must be supported by enunciation of historically significant state policy or unique features."

- Conclusion 27: The Legislative Plan presented to the Court is entitled to thoughtful consideration; however, after giving the Legislative Plan thoughtful consideration, the Court concludes that the Plan fails to satisfy the requirements necessary for a court-ordered plan. The Legislative Plan contains significant population deviations between districts which are not justified by historically significant state policy or unique features. . . . These population deviations are not *de minimis* for a court-ordered plan.

INTRODUCTION TO THE ARGUMENT

The district court committed two critical errors in the State House of Representatives redistricting trial. First, it became wedded to the idea of requiring extremely low deviations from the ideal population for virtually all House districts. It did so with the express intent of ensuring that its adoption of a redistricting plan in the absence of an enacted state law would provide a "neutral, and objective" standard divorced from any political consequences. *See* Conclusion 10. However, its actions inevitably led to the opposite result, as the plan ultimately adopted by the district court suffers from serious partisan bias, represents a significant departure from established redistricting policy in this state, and results in a

violation of Section 2 of the Voting Rights Act in Eastern New Mexico. *See infra* Points I and V.

Second, although miming the words, the trial court erred in failing to give "thoughtful consideration" to the Legislative Plan, as Judge Allen did when confronted with the same circumstances ten years earlier.[3] *See infra,* Point III. Instead, the court placed on the Petitioners a heightened and unprecedented burden to justify population deviations in excess of + or – 1%, erroneously concluding that the only permissible justification for such deviations lies in compliance with the Voting Rights Act, and disregarding the important and time-honored traditional districting principles adhered to by the Legislature.

Both of these errors which undergird the district court's judgment were so fundamental that they alone merit reversal of the district court judgment. In addition, however, those errors led to two other palpable and highly significant errors: the district court's express disregard of the harmful consequences flowing from its judgment for the functioning of our political system and important separation of powers principles, *see infra* Point II, and its failure to carefully

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[3] Judge Hall ignored the sound analysis in Judge Allen's decision in *Jepsen v. Vigil-Giron,* Case No. D-0101-CV-02177, January 24, 2002. Judge Allen was a distinguished jurist. Moreover, his decision should be considered the last statement of New Mexico districting policy prior to the instant effort.

calibrate and adhere to the very limited role a court must play in redistricting matters. *See infra,* Point IV.

Finally, all of the foregoing errors led to the wrongful adoption of the Executive State House Redistricting Plan, Alternative 3, and improper rejection of the State Legislative House Redistricting Plan. *See infra,* Point V.

ARGUMENT

I. The Decision Below Erroneously Concluded That The Federal Constitution And Other Dictates of the United States Supreme Court Compelled the Application Of *De Minimis* Population Deviations In This State Court Determination Of A State Legislative Districting Plan.

The district court rejected the Legislature's House Plan based on an erroneous holding that it is compelled by the Fourteenth Amendment and United States Supreme Court authority to achieve the goal of population equality with little more than 0% deviations. *See* Conclusions 6-10. The district court's conclusion is in error for three reasons. First, neither the Fourteenth Amendment nor other legal principles require such drastically low deviations. *See* Point I(A), *infra.* Second, while a very low *de minimis* standard has been applied by some federal courts engaged in adopting redistricting plans, such a standard does not apply to a similar enterprise by a *state court.* *See* Point I(B), *infra.* And, finally, even if the district court were correct in its refusal to distinguish state courts from federal courts with respect to standards for court-drawn plans, the United States

Supreme Court has recently made very clear that no such narrow *de minimis* standard ought to be applied when doing so would override legislative policy decisions that do not conflict with the Constitution or the Voting Rights Act. *See* Point I(C), *infra*.

A. The Fourteenth Amendment does not require a drastically low deviation from the ideal in the judicial adoption of a redistricting plan.

The district court erred to the extent it decided that very low deviations are required, "based on the equal protection clause of the Fourteenth Amendment to the United States Constitution." Conclusion 7. The so-called *de minimis* rule of *Chapman v. Meier,* 420 U.S. 1, 27 (1975), relied on by the district court, neither articulates such a draconian low deviation standard as applied by the district court, nor does it even suggest that such a rule is compelled by the Fourteenth Amendment. *See* further discussion of *Chapman* in Point I(B) *infra.*

Moreover, if such a *de minimis* rule were constitutionally compelled, it would have to apply to every governmental body, including the legislature in drafting plans and reviewing courts in the position of this Court. That is because all federal constitutional doctrines bind *all* instrumentalities of government, including state legislative and state judicial bodies. *See, e.g., Parents Involved in Community Schools v. Seattle School Dist. No. 1,* 551 U.S. 701 (2007) (holding school districts as well as federal and state courts to the same federal constitutional

standards under the Fourteenth Amendment). Thus, such a constitutionally compelled doctrine would prohibit state redistricting laws that utilize the + or – 5% standard, and render unconstitutional New Mexico's districting principles and legislatively-adopted guidelines that incorporate that standard. *See* Legislative Defendants' Exh. 2.

Furthermore, the trial court's use of the + or – 1% standard is inconsistent with long-settled federal law. There is no doubt that the primary task in redistricting is adherence to the constitutionally-mandated standard of "One-Person, One Vote." But the "nearly as practicable" standard imposed on *congressional redistricting* is compelled by the special force of Art. I, § 2 of the United States Constitution. *See Wesberry v. Sanders,* 376 U.S. 1, 7-8 (1964) However, that is a much more exacting standard than that required for state legislative redistricting.

Federally mandated requirements *in the state legislative context* demand only "*substantial equality* of population among the various districts," *Reynolds v. Sims*, 377 U.S. 533, 579 (1964) (emphasis added), and may contain deviations which are "based on legitimate considerations incident to the effectuation of a rational state policy…." *Id.* at 579. "Minor deviations" among districts are insufficient to require justification by the State. *Brown v. Thomson,* 462 U.S. 835, 842 (1983) (quoting *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973)). Overall

deviations of less than ten percent from the ideal are minor deviations which do not, by themselves, trigger a state's burden to justify them as necessary to serve substantial and legitimate state concerns. *Brown*, 462 U.S. at 842 ("deviations from population equality may be necessary to permit the states to pursue other legitimate objectives").

In this case, the court became committed to the Executive Defendants' Plan, based on the erroneous belief that the federal constitution required it to construct state legislative districts with deviations "*as nearly a population* [sic] *as is practicable.*" Tr. 12/12/11, pp. 56-57 (Exec. Defs. Opening Statement) (emphasis added). *See* Conclusions No. 6 & 7. In doing so the district court ignored the recognition in *Reynolds* that, under the Fourteenth Amendment standard "[s]omewhat more flexibility may . . . be constitutionally permissible with respect to state legislative apportionment than in congressional districting." *Reynolds,* 377 U.S. at 578.

The result is that the district court improperly applied a standard for state legislative districting that approached the much stricter congressional standard, thereby denigrating the importance of *Reynolds*' "substantial equality" standard that allows the legislature to balance the traditional state districting principles—principles which are embodied in the guidelines adopted by the bi-partisan New Mexico Legislative Council, *see* Finding 14, and which have guided redistricting

since 1982. This fundamental legal error led directly to the district court's improper rejection of the Legislative Plan.

Not only does the district court's commitment to draconian *de minimis* deviations constitute legal error, it also makes no sense as a matter of policy. This approach plainly exalts form over substance. For example, the differences between population deviations from the ideal in the Legislative and Executive Plans are virtually insignificant. The ideal population of a house district is 29,417 people. A one percent deviation amounts to a mere 294 people. A difference of 3% (e.g., between 1% and 4%) population deviation within a district amounts to just 882 people.

The trial court in its describes the average relative deviation in the Legislative Plan as 3.47%. See Finding 33. The Court then equates that percent to a population imbalance of 71,511 persons. But that number is not a meaningful measure of the impact of the average relative deviation. Rather, deviations are only relevant when considered on a district by district basis. When viewed that way, the average deviation in the Legislative Plan amounts to 1,020 people per district.

Considering the total New Mexico population of 2,059,179, these numbers are insignificant even if multiplied across the State. This insignificance is highlighted when one considers that the census data is not accurate, and that the

Census Bureau itself admits that it undercounts minorities. Tr. 12/15/11, pp. 260, 273-275 (T. Arrington); Tr. 12/19/11, p. 208 (R. Engstrom). Moreover, the census count is required to include any number of individuals who are not eligible to vote (including children, non-citizens, felons, etc.) and therefore necessarily lacks the precision which would be required to make these population deviation numbers worthy of consideration. Tr. 12/12/11, p. 112 (B. Sanderoff).

Recognition of these and other limitations on the usefulness of the census count for redistricting purposes led the United States Supreme Court to explain:

> [Substantial equality of population among districts] is a vital and worthy goal, but surely its attainment does not in any commonsense way depend upon eliminating the insignificant population variations [of 7.83% in Connecticut's House plan and 1.81% in the Senate plan] involved in this case. Fair and effective representation . . . does not depend solely on mathematical equality among district populations. There are other relevant factors to be taken into account and other important interests that States may legitimately be mindful of. An unrealistic overemphasis on raw population figures . . . may submerge these other considerations and itself furnish a ready tool for ignoring factors that in day-to-day operation are important to an acceptable representation and apportionment arrangement.
>
> . . .
>
> We doubt that the Fourteenth Amendment requires repeated displacement of otherwise appropriate state decisionmaking in the name of essentially minor deviations from perfect census-population equality that no one, with confidence, can say will deprive any person of fair and effective representation in his state legislature.

Gaffney v. Cummings, 412 U.S. 735, 748-49 (1973) (internal citations omitted).

B. While a *de minimis* standard may be relevant with respect to federal courts engaged in adopting redistricting plans in the absence of a new state law on the subject, it does not apply to a similar enterprise by a state court.

In concluding that it is bound by strict *de minimis* population deviations, the district court erroneously relied on two decisions, *Chapman v. Meier*, 420 U.S. 1 (1975), and *Connor v. Finch*, 431 U.S. 407 (1977), both of which arose in the context of federal court-drawn plans. *See* Conclusions 6 & 7. The *Chapman* Court never cited the Fourteenth Amendment as a basis for a stricter deviation standard for court-ordered plans, but rather derived the rule from principles of federalism. In doing so, *Chapman* expressly distinguished between plans ordered by federal courts and plans "formulated by state legislatures *or other state bodies*," 420 U.S. at 26 (emphasis added), and emphasized that "reapportionment is primarily the duty and responsibility of the State through its legislature *or other body*, rather than of a *federal court*." *Id.* at 27 (emphases added). The Court echoed this principle in *Connor v. Finch*, 431 U.S. 407 (1977), making clear that *Chapman*'s stricter population equality standards "reflect the unusual position of *federal courts* as draftsmen of reapportionment plans." *Id.* at 414 (emphasis added); *see also id.* at 415 (explaining that "federal courts . . . possess no distinctive mandate to compromise sometimes conflicting state apportionment policies in the people's name").

Therefore, a careful reading of *Chapman* and *Connor* reveals that the narrow *de minimis* standard applied by the court below is neither constitutionally compelled nor applicable to state courts, which have long been recognized as instruments of state redistricting on par with state legislatures. *Cf. Growe v. Emison*, 507 U.S. 25, 33-34 (1993) (redistricting is the province of the states, through their legislative or judicial branches, and thus federal courts must defer to state courts in adopting a redistricting plan). Indeed, *Growe* reinforced that "state courts have a significant role in redistricting," *id.* at 33, and that "'[t]he power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged.'" *Id.*, quoting *Scott v. Germano*, 381 U.S. 407, 409 (1965).

In adopting legislative redistricting plans, state courts, therefore, are not bound by the same *de minimis* standards as federal courts.[4] *See In re Apportionment of State Legislature,* 321 N.W. 2d 585 (Mich. 1982) (Levin and Fitzgerald, J.J. concurring), *appeal dismissed for want of a substantial federal question sub. nom. Kleiner v. Sanderson*, 459 U.S. 900 (1982). As explained by justices in that case:

[4] Indeed, the recent actions of the U.S. Supreme Court demonstrate that even federal courts may have unduly concentrated on very narrow deviation standards. *See* Point I(C), *infra*.

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

Id. at 593 (emphasis added). The opinion carefully distinguished the holdings of *Chapman* and *Connor*, on the ground that those cases were adopting a rule to help *federal courts* from invading state sovereign interests in redistricting state political boundaries. *Id.* These principles led Judge Allen in the *Jepsen* redistricting litigation in 2002 to rule that the New Mexico District Court was "constrained only by the 10% population deviation standard . . . ." *Jepsen v. Vigil-Giron,* Case No. D-0101-CV-02177, January 24, 2002 (Findings of Fact and Conclusions of Law Concerning State House of Representatives Redistricting, Conclusion No. 8) (per Allen, J.).

The district court erred in rejecting the Michigan court's *In re Apportionment of State Legislature* analysis, *see* Conclusion 14; in finding comfort in *Below v. Gardner*, 963 A.2d 785 (N.H. 2002) and *Burling v. Chandler,* 804 A.2d 471, 478 (N.H. 2002), *see* Conclusion 8; and in its complete disregard of Judge Allen's judgment in the *Jepsen* litigation of 10 years ago.

Contrary to the district court's conclusion, the Michigan justices' analysis was not based on any unique "Michigan constitutional requirements." *See*

Conclusion 14. The justices there made clear that they rejected the applicability of *Chapman* and *Connor* because redistricting by state courts does not create a danger of federal encroachment on state sovereignty. *In re Apportionment of State Legislature 1982*, 321 N.W.2d at 593. Moreover, the particularities of Michigan's state constitution could not have been a basis for avoiding a requirement supposedly compelled by the Fourteenth Amendment of the United States Constitution. *See Reynolds*, 377 U.S. at 584 (a state may not avoid an equal protection claim by citing adherence to the state's constitution).

Furthermore, the district court's reliance on the New Hampshire decision in *Below* is misplaced. That case held that New Hampshire's state courts were bound by a *de minimis* deviation standard, citing to *Chapman* and *Connor*, but without the careful analysis of the source of the *de minimis* rule provided by the justices in the Michigan case. *Below*, 963 A.2d at 791. Most notably, however, and ignored by the district court, the New Hampshire court's subsequent ruling in *Burling* nevertheless found a range of 9.26% to be an appropriate deviation for court-drawn maps – a far cry from the plus or minus 1% deviations to which the court below constrained itself. *See Burling,* 804 A.2d at 484-85.

Finally, while the district court may have disagreed with Judge Allen's view of the law in *Jepsen,* its wholesale disregard of that considerable effort ten years earlier by a respected New Mexico jurist—the last statement of New Mexico

districting policy prior to the instant effort—should not escape this Court's attention.

C. Recent United States Supreme Court rulings make clear that a rigorous *de minimis* standard ought not be applied by a court, when doing so would override legislative policy decisions which do not conflict with the Constitution or the Voting Rights Act.

Even if the district court had been correct in its refusal to distinguish state courts from federal courts with respect to the judicial adoption of redistricting in the absence of a new state law, one of the most recent United States Supreme Court rulings demonstrate that rigorous *de minimis* deviation standards have no place in judicially adopted districting plans when they override legislative policy decisions that do not violate federal law. *See Perry v. Perez,* 565 U.S. ___, Nos. 11-713, 11-714 and 11-715 (January 20, 2012) (Slip Op.).[5]

In *Perry*, Texas had enacted redistricting plans which could not be implemented because they were pending preclearance under Section 5 of the Voting Rights Act. *Perry*, Slip Op. at 2-3. Because of the approaching election cycle, the district court was faced with adopting interim redistricting plans for the Congress and the Texas legislature. *Id.* at 3. In creating those plans, the federal district court disregarded the legislature's plans and instead created its own

[5] The Slip Opinion in *Perry* is at http://www.supremecourt.gov/opinions/11pdf/11-713.pdf.

"independent map" which reflected the court's judgment of what constituted "the collective public good." *Id.* at 7. The Supreme Court vacated the orders of the federal district court implementing the interim maps, holding that the court erred "[t]o the extent the District Court exceeded its mission to draw interim maps that do not violate the Constitution or the Voting Rights Act, and substituted its own concept of "the collective public good" for the Texas Legislature's determination of which policies serve 'the interests of the citizens of Texas.'" *Id.* at 7-8.

Concerned with "the difficulty of defining neutral legal principles in this area," because "criteria and standards . . . [have to be] weighed and evaluated by the elected branches," *id.* at 4, the *Perry* court reinforces the Supreme Court's long-standing pronouncement that, "as a general rule, [courts] should be guided by the legislative policies underlying" a state plan "to the extent those policies do not lead to violations of the Constitution or the Voting Rights Act." *Id.* at 4-5 (quoting *Abrams v. Johnson,* 521 U.S. 74, 79 (1997)). The legislatively crafted plan should serve "as a starting point" because it "provides important guidance that helps ensure that the district court appropriately confines itself to drawing interim maps that comply with the Constitution and Voting Rights Act, without displacing legitimate state policy judgments with the court's own preferences." *Id.* at 5.

The *Perry* court also made clear that the district court's error in disregarding the legislative policy decisions embodied in the state plans included a failure to honor the population deviations contained in those plans:

> [T]he [district] court . . . altered [the districts in the state plan] to achieve *de minimis* population variations—even though there was no claim that the population variations in those districts were unlawful. In the absence of any legal flaw in this respect in the State's plan, the District Court had no basis to modify that plan.

Id. at 8. The Court explained that, although "court-drawn maps are held to a higher standard of acceptable population variation than legislative maps," *id.* at 8-9, n. 2, those "stricter standard[s]" are not triggered where a district court incorporates unchallenged portions of a State's map into an interim map." *Id., quoting Upham v. Seamon,* 456 U.S. 37, 42-43 (1982) (per curiam).

This recent action by the U.S. Supreme Court makes clear, if it was not so before, that there is nothing sacrosanct in minimal deviations; that they are not to be used by courts in disregard of the "policy judgments" of a legislatively adopted plan that is not violative of federal law; and that invariably, judicial resort to very low deviations does not necessarily result in neutral and objective standards that avoid political judgments.

The fact that *Perry* involved legislatively enacted plans signed by the governor, while this case involves legislative plans which were vetoed, does not change the applicability of its enunciated principles to this case. Although the state

redistricting plans in *Perry* had been enacted into law, Section 5 of the Voting Rights Act prevented them from taking effect unless and until they are precleared, thereby necessitating court-ordered plans. Therefore, much like the Legislative Plan in this case, the state plans in Perry embodied the considered policy judgments of the state legislature, but were not legally enforceable. And, while the Legislative Plan here did not receive gubernatorial approval, there was no countervailing executive policy for the trial court to consider in this case, because (as discussed in more detail below), the Executive Defendants' ever-changing House plans were the result of closed-door litigation tactics designed to gain the upper hand in court – not considered policy choices presented in the political arena on behalf of the people of the State of New Mexico. Tr. 12/14/11, pp. 84-85 (J. Morgan).

Like the district court in *Perry*, the trial court in this case erroneously disregarded the sound policy choices embodied in the Legislature's Plan in favor of the very narrow, *de minimis* deviations in the Executive Defendants' plan. The policies underlying the Legislative Plan are set forth in the 2011 Redistricting Guidelines adopted by the bipartisan Legislative Council. Paragraph 2 of the Guidelines provides:

> State districts shall be substantially equal in population; no plans for state office will be considered that include any district with a total population that deviates more than plus or minus five percent from the ideal.

Legislative Ex. 2, paragraph 2.[6]

This legislative policy is not only a correct statement of the relevant law, *see, e.g.*, *Brown*, 462 U.S. at 842 (deviations in state legislative plans within ten percent of the ideal are "minor deviations"), it has been consistently followed in every decennial since 1982 by the New Mexico Legislature and by the State Court applying that policy in the House during the last redistricting process. Tr. 12/22/11, pp. 70-72 (B. Sanderoff); *Jepsen,* Case No. D-0101-CV-02177, January 24, 2002.

In sharp contrast, the Executive Plan adopted by the trial court departed from this longstanding and entirely lawful policy and practice by imposing deviations of plus or minus 1% on New Mexico's State House redistricting – a policy never presented by anyone to the Legislature at any time during the redistricting process. Tellingly, the Governor's Veto message, while it does criticize *how* deviations are used in the Legislative Plan (i.e., some areas have deviations on the high end while some areas are on the low end) makes no claim that very low deviations are required. *See* Legis. Def's Exh. 4.

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[6] When asked by the court about the meaning of this Guideline, House Majority Leader Kenneth Martinez testified that anything within the plus or minus 5 percent satisfied the "substantially equal" part of the Guidelines. Tr. 12/21/11, pp. 284-285 (K. Martinez).

Moreover, and consistent with its historic commitment to avoid diluting the voting rights of minorities,[7] the Legislature's policy respects Native American preferences in the North West quadrant of the State. *See* Findings 18, 20, 32.

Furthermore, the Legislative policy embodied in the Guidelines and applied historically to redistricting plans in New Mexico includes respect for traditional districting principles, *see* Legis. Def's Exhibit 2 at ¶ 7, and the Legislature succeeded in drawing a plan which respects those principles, including compactness, contiguity, preservation of communities of interest and geographic and political boundaries and preservation of cores of existing districts and respect for the residences of incumbents. *See* Point V, below. The Executive Plan, despite several modifications, does not measure up to the Legislative Plan in these respects.

Finally, the Executives' Alternative 3 Plan regressed from their prior submissions by increasing Republican performance in several swing districts, and by creating three new additional Republican majority districts as compared with the Executives' initial plan. Tr. 12/22/11, pp. 58-71 (B. Sanderoff); Legis. Def's Exh. 30. This significant increase in partisan bias was not a necessary consequence of other changes to the map. Tr. 12/22/11, pp. 118-119 (B. Sanderoff).

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[7] *See* Legis. Def's Exh. 2 at ¶ 5.

II. The Decision Below Improperly Disregarded The Detrimental Consequences Of Its Judgment To The Integrity Of Essential Political Processes And Separation Of Powers Principles.

The trial court recognized that the Governor failed to participate in the legislative process, waited on the sidelines throughout the interim and the special session, ignored the important concerns put forward by Native Americans and other groups, and came forward with a plan constructed without any public input and only after litigation had commenced. *See* Findings 21 & 24. Then, less than a day before the trial for redistricting the House was to begin, the Governor changed her plan in an attempt to correct Voting Rights Act violations and other serious defects that were identified by the Petitioners' expert and others in discovery. Subsequently and throughout the trial, and over the objection of the Petitioners, the Executive Defendants repeatedly submitted amendments or alternatives to their plans in response to significant problems in those plans raised at trial. *See* Finding 28.

Near the close of trial, the court asked the Executive Defendants to integrate the Multi-Tribal/Navajo Nation Plan into their plan. Tr. 12/15/11, p. 284 (Hall, J.). Petitioners' expert, Brian Sanderoff, testified that in carrying out that instruction, the Executive Defendants systematically increased Republican performance in several districts and that this systematic increase was not made necessary by accommodating the tribal concerns in the Northwest. Tr. 12/22/11, pp. 56-67, 118-

119 (B. Sanderoff). There was no evidence which contradicted this testimony, yet the district court erroneously concluded that the integration of the Multi-Tribal/Navajo Nation Plan "necessarily" resulted in political performance consequences. Finding 72 and Conclusion 35.[8]

The Legislature is constrained to act in accordance with constitutional and statutory procedure in connection with redistricting legislation, and is unable to make amendments to its plan without following that procedure. *See, e.g.*, N.M. Const., art. IV, § 17 (requiring passage of bills by majority vote in each house); *id.* at § 15 ("No law shall be passed except by bill"). The Executive branch is also subject to constitutional constraints in the context of the legislative process, so as to preserve the proper balance of power between the Executive and Legislative branches. *See* N.M. Const., art. III, § 1; *State ex rel. Clark v. Johnson,* 120 N.M. 562, 575, 904 P.2d 11, 24 (1995) (noting Governor's role with respect to passed legislation is limited to approving or vetoing the legislation).

The decision below allowed the Executive to use this litigation as an end-run around those constraints in order to dictate redistricting in New Mexico without

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[8] The district court also found that courts are not permitted to consider partisan considerations in coming to their decision. Conclusion 35. Yet the district court *considered partisanship* in striking down the Egolf and Maestas plans for pairing the only Republican incumbent in North Central with a Democratic incumbent. Conclusions 29 and 30.

participating in the political process. Similar efforts by the Executive to circumvent the legislative process have been condemned by our courts. *See State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 33, 125 N.M. 343, 961 P.2d 768 ("[the Executive branch members] made these core policy choices themselves, thereby preventing the constitutionally required input of the people's elected law-making representatives."); *see also State ex rel. Stewart v. Martinez*, 2011-NMSC-045, ¶¶ 14 & 23, __ N.M. __, __ P.3d __ (No 33,028, Dec. 14, 2011) (governor's partial veto is the power to disapprove, and "is not the power to enact or create new legislation by selective deletions" of parts of a bill) (internal citations omitted).

Adopting the Executive approach sets a dangerous precedent that would allow any future Governor who disagrees with the Legislature to undermine the entire political process of redistricting that is mandated by our constitution and laws. This approach, if sanctioned by this Court, would allow – nay, encourage – such future Governors to stand aside from the political process; veto whatever is passed by the legislature; and use the resulting litigation to finally dictate his or her vision of the ideal political landscape of the state without the opportunity or any regard for public participation and transparency that are the hallmark of our democratic tradition—thereby disrupting our constitutional order of political checks and balances.

The district court erroneously dismissed this concern as lacking authority, *see* Conclusion 15, and also stated that "it is not the court's role to encourage future legislatures and governors to perform their legal responsibilities." Conclusion 16. Petitioners did cite case authority, which explained that it is very much the court's role in cases of this nature not only to encourage, but to direct the political branches "to perform their legal responsibilities." *See State ex. rel. Taylor v. Johnson*, 1998-NMSC-015, which denied the Governor the authority to alter unilaterally the state public assistance program because of the consequence it would have on the proper relationship between the political branches. *See also Mistretta v. United States,* 488 U.S. 361, 382 (1989) ("we have not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch."); *State ex rel. Coll v. Carruthers,* 107 N.M. 439, 443-45, 759, P.2d 1380, 1384-87 (1988) (describing this Court's role as maintaining "the appropriate constitutional balance"). Thus, it is very much an essential function of a court to "encourage future legislatures and governors to perform their legal responsibilities."

Similarly, adoption of the district court's unprecedented minimal deviation standard would have a perverse and disruptive effect on the legislative process of redistricting. Despite the fact that the law clearly allows state legislative districts

to deviate up to 10% from the ideal in order to accommodate important policy goals, legislatures doing the hard work of redistricting would be deterred from addressing those important policies for fear that a plan which legitimately balances those important interests, after Gubernatorial veto, may be rejected by a court for failure to slice the pie as thin as a plan prepared for litigation by the Governor or other special interest groups.

Such a result would cause irreparable damage to the legislative process. The evidence introduced below demonstrates the dangers of ignoring communities of interest, minority voting rights, and other critical factors in a relentless pursuit of low deviations. *See, e.g.,* Findings 63 – 65, 67-69 (citing numerous deficiencies in the iterations of the Executive plan); Tr. 12/12/11, pp. 234-265 (B. Sanderoff) (regarding Executive plan's splitting of communities and Pueblos, Voting Rights Act compliance concerns in Eastern New Mexico, and the history of minority voting preferences); Legis. Def's Exhs. 15, 28 and 29 (reflecting municipalities and other communities which could have been united under the Executive's original, Alt. 2 and Alt. 3 plans without exceeding + or – 5% deviations).

Indeed, almost forty years ago, the United States Supreme Court recognized these dangers and warned against a "race to the bottom" approach to population deviations:

> The District Court thought the state plan involved unacceptably large variations between districts, although in the House, with districts of about

> 20,000 people, the average variation involved only 399 people, and the largest variations involved only 1,573 people.... [The Court] appointed its own Master to come up with ... another scheme. That plan, we are told, involves a total maximum deviation in the House of only 1.16%.... [W]hat is to happen to the Master's plan if a resourceful mind hits upon a plan better than the Master's by a fraction of a percentage point? Involvements like this must end at some point, but that point constantly recedes if those who litigate need only produce a plan that is marginally 'better' when measured against a rigid and unyielding population-equality standard.

Gaffney, 412 U.S. at 750-51.

This Court should not allow the lower court's judgment to stand because it will unnecessarily constrain future legislatures; deter them from following their own guidelines for implementing legitimate state policy; and upset the delicate separation of powers balance between the executive and the legislature. The people of the State of New Mexico would be ill-served by a legislature that redistricts with an eye toward litigation, rather than making sensible policy choices which respond to the needs of the citizenry and honor long-recognized redistricting principles.

III. The Decision Below Failed To Afford Thoughtful Consideration To The Legislative Plan.

Although the district court *stated* that it gave "thoughtful consideration" to the Legislature's Plan, *see* Finding 27, it is clear from the court's decision that it did not. Instead, the district court erroneously imposed upon the Petitioners a heightened and unprecedented burden to justify the population deviations in their

plan, and then improperly disregarded the overwhelming and uncontroverted evidence of historic and sound redistricting policies that the Petitioners presented in support of the deviations in their plan.

A. The Legislature's plan is entitled to heightened, "thoughtful consideration" because the Legislature is the body tasked with determining redistricting policy in the first instance and because it represents a balancing of competing goals achieved by the people's elected representatives.

Courts are bound to give "thoughtful consideration" to legislative plans. *See White v. Weiser*, 412 U.S. 783, 793 (1973) ("the court should . . . have implemented Plan B, which most clearly approximated the reapportionment plan of the state legislature, while satisfying constitutional requirements."). Similarly, in *Upham v. Seamon*, 456 U.S. 37, 40 (1982), the Supreme Court held that the District Court erred in substituting its own reapportionment preferences for those of the state legislature. *Id.* at 40.

"Thoughtful consideration" in this context means more consideration than that given to plans submitted by others, and contrary to the conclusion of the district court, *see* Conclusions 11, it requires that a Legislative Plan be adopted by the Court if it is consistent with law, follows the last clear expressions of State Policy on redistricting, avoids radical or partisan change, and respects other traditional redistricting principles, including communities of interest.

The Court in *White* v. *Weiser* expressly recognized that courts should follow the policies and preferences contained in "reapportionment plans *proposed by the state legislature.*" 412 U.S. at 783, 795 (emphasis added); *see also Shayer* v. *Kirkpatrick,* 541 F. Supp. 922, 932 (W.D. Mo. 1982) (legislative proposals, even where they do not constitute enacted law, are a source of state policy to which courts should look in redistricting, and that "[t]he further a bill goes in the legislative process (*e.g.*, out of committee, passed by one house, passed by both houses but vetoed) the more it evidences a legislative policy."); *O'Sullivan* v. *Brier,* 540 F. Supp. 1200, 1202 (D. Kan. 1982) (plans passed by the legislature but vetoed by the governor are entitled to "thoughtful consideration"); *Terrazas* v. *Clements,* 537 F. Supp. 514, 528 (N.D. Tex. 1982) (plans "derived from the plans adopted by the legislature, are the result of a legislative process which we should recognize as an expression of legitimate legislative activity").

This principle of giving "thoughtful consideration" to legislatively-passed but vetoed plans was appropriately defined and applied by the district court ten years ago in *Jepsen.* The *Jepsen* court held, "[i]n evaluating the plans submitted by the parties, it is appropriate that the Court give thoughtful consideration that [the legislatively passed plans] are plans developed through a process which reflects the will of the people, expressed through their elected representatives." *Jepsen,* Finding No. 40.

As the Supreme Court most recently explained in *Perry*, redistricting is a task best left to state legislatures, rather than courts, as redistricting necessarily requires the making of sensitive political judgments in order to balance and reconcile competing interests. *Perry*, Slip Op. at 4-5. *Perry* further explains that where substantial population changes (such as those that occurred in New Mexico between 2000 and 2010) require significant changes to district lines, courts faced with adopting redistricting plans should look to the state's legislatively enacted plan for guidance, in order to avoid being compelled to make "standardless decisions" about where to shift districts in response to population trends. *Perry*, Slip Op. at 4.

The *Perry* court reinforced the longstanding principle that a legislatively enacted plan should serve "as a starting point for the district court" because "[i]t provides important guidance that helps ensure that the district court appropriately confines itself to drawing interim maps that comply with the Constitution and the Voting Rights Act, without displacing legitimate state policy judgments with the court's own preferences." *Perry*, Slip Op. at 5; *see also White v. Weiser*, 412 U.S. 783, 795-96 (1973) (holding that the district court erred in selecting the plan which ignored the districting preferences of the state and constructed districts solely on the basis of population considerations); *Upham*, 456 U.S. at 40-41 (holding that the

lower court erred in substituting its own reapportionment preferences for those of the state legislature).[9]

Like the Legislature's plan presented in the *Jepsen* litigation, the Legislature's House plan presented below was developed through a rigorous and transparent public process which reflects the will of the people, expressed through their elected representatives. The plan was the product of the legislative process following an intensive effort to gain input from the public. Tr. 12/12/11, pp. 100-105 (B. Sanderoff). Deliberation and debate regarding various plans took place during committee and floor hearings during the special session. Tr., 12/12/11, pp. 109-110 (B. Sanderoff); Tr. 12/21/11, pp. 235-238; 244-247 (K. Martinez).

The Legislature worked closely with Native Americans leaders in an effort to preserve the voting strength of the various tribes and pueblos in Northwest New Mexico, to respect their communities of interest, and to accommodate their preferences. Tr. 12/21/11, pp. 235-238; 245-246 (K. Martinez); Tr. 12/19/11, p. 160-161 (C. Chino); Tr. 12/19/11, pp. 69-72 (L. Reval); Tr. 12/19/11, pp. 116-117, 120 (C. Dorame). The Legislature also carefully considered the preferences of citizens in municipalities around the state, who expressed a desire that their

[9] This authority is consistent with the pronouncement that it is the particular domain of the Legislature "as the voice of the people" to make public policy. *Torres* v. *State,* 119 N.M. 609, 612, 894 P.2d 386, 389 (1995).

communities remain intact, *see* Tr., 12/12/11, pp. 103-105 (B. Sanderoff); Tr., 12/13/11, pp. 207-210 (B. Sanderoff), as is evidenced, in part, by the fact that the Legislature's plan splits fewer incorporated municipalities than any other plan before the Court. Tr., 12/12/11, p. 225 (B. Sanderoff); Legis. Def. Exh. 14.

Using the Redistricting Guidelines, Tr., 12/21/11, pp. 222-223 (K. Martinez), the Legislature carefully weighed and balanced sometimes competing but legitimate goals and desires in an effort to develop a plan which overall best serves the interests of the people of New Mexico. Tr., 12/21/11, pp. 227-228, 230. 235-238, 239, 245-246, 267-268 (K. Martinez). Thus, the Legislature's plan is entitled to heightened consideration in large part because it is the only plan which is the product of the open and transparent legislative process and the only plan which represents a balancing and reconciliation of competing interests undertaken by the people's representatives.

1. *The Legislature's plan is in full compliance with both the Equal Protection Clause and the Voting Rights Act, and therefore meets the definitional requirements for thoughtful consideration.*

The Equal Protection Clause of the Fourteenth Amendment requires "substantial equality of population among the various districts" and permits deviations "based on legitimate considerations incident to the effectuation of a rational state policy...." *Reynolds*, 377 U.S. at 579. Petitioners presented overwhelming and unchallenged evidence of rational state policy served by the

minor deviations present in the Legislative plan which included efforts to: preserve of the cores of existing districts, Tr. 12/12/11, pp. 165-167, 174-175, 217-218, 219-220, 223; Leg. Def. House Exh. 16; Gov. House Exh. 10; unify and avoid splitting municipalities, Tr. 12/12/11, pp.172-173, Leg. House Exh. 14; preserve communities of interest, Tr. 12/12/11 pp. 119, 131, 161-163, 167, 258 (B. Sanderoff) Tr. 12/13/11, pp. 194-195 (B. Sanderoff); Tr. 12.21.11, pp. 231-235, 237-238 (K. Martinez); and avoid pairing incumbents, Tr. 12/12/11, pp. 139, 183 (B. Sanderoff). That evidence was erroneously ignored or brushed aside by the district court as irrelevant, given the court's faulty premise that only violations of the VRA could justify deviations plus or minus 5% from the ideal. *See* Conclusion 28.

The Legislature's plan is also in full compliance with the Voting Rights Act as it does not dilute the voting strength of minorities in areas where minority groups are capable of electing candidates of their choice. *See* Tr. 12/12/11, pp. 200-202, 204-208, 217 (B. Sanderoff). The Legislature took particular care to avoid diluting the voting strength of Native Americans in the northwest quadrant of the state, *id.*, pp. 200-202, 219-220 (B. Sanderoff), and to avoid dividing the Hispanic community in and around Clovis which was united in 1982 by a three-judge federal district court in order to remedy Voting Rights Act issues. *Id.*, pp.

217-218, 219-220 (B. Sanderoff); *See Sanchez v. King*, 550 F. Supp. 13 (D. N.M. 1982).

> 2. *Further, consistent with the criteria for thoughtful consideration, the Legislature's plan is consistent with other valid sources of state policy, including the policy embodied in current districts and policy embodied in past redistricting practices.*

In the absence of enacted redistricting law, courts are directed to consider the last clear expression of state policy embodied in current districts, and to deviate from that policy as little as possible. *See infra* Point IV. In addition to being fully compliant with the law, the Legislature's plan more closely approximates the policy choices embodied in the current districts than did the plan which was ultimately chosen by the court. *See infra* Point V. Finally, in the absence of enacted redistricting statutes, courts are directed to look to a state's historical redistricting practices to determine state policy. *See Shayer*, 541 F. Supp. 922 at 932-33. The Legislature's plan is wholly consistent with past redistricting practices as New Mexico's courts and Legislatures have used a range of overall deviation of + or – 5% for at least the past three decades in order to accommodate legitimate state policy and traditional redistricting principles. Tr. 12/13/11, p. 198 (B. Sanderoff); Tr. 12/22/11, pp. 70-71 (B. Sanderoff).

B. The district court failed to give "thoughtful consideration" to the Legislature's use of deviations and instead only permitted deviations where required to avoid Voting Rights Act violations.

The district court purported to give thoughtful consideration to the Legislature's plan; however, the only choice made by the Legislature which the court deemed an acceptable explanation for deviations above 1% was the decision to avoid diluting Native American voting rights in contravention of the Voting Rights Act. *See* Conclusion 28. In adopting its rigid *de minimis* standard, the district court announced that it would permit deviations for "historically significant state policy or unique features," *see* Conclusions 17, 27 & 29, but then made clear that the only historically significant state policy which would suffice for this purpose was compliance with the Voting Rights Act. *See* Conclusions 27, 28, 33 & 34. That the district court completely failed to give the Legislature's passed plan thoughtful consideration is further evidenced by the court's criticism of the Egolf Plaintiffs for using the Legislature's plan as a starting point in creating their maps. *See* Conclusion 29.

Instead of giving thoughtful consideration to the Legislature's legitimate policy choices, the district court imposed upon Petitioners a heavy burden to justify any population deviations in their plan greater than plus or minus one percent by showing that such deviations were compelled by the Voting Rights Act. In doing so, the court vitiated the importance of districting principles in all areas of the state

where there are no Voting Rights Act problems, which led the court into the error of rejecting the Legislative plan. *See* Conclusions 27, 33, and 34.

IV. The Decision Below Runs Afoul of The Limited Role The State District Court Must Play In Such Matters.

When called upon to draw redistricting plans in the absence of an enacted statute, courts should stray no further than necessary from established state policy, as embodied in current districts, in order to bring those districts into compliance with governing law. *See Perry, supra* (courts should defer to policy decisions made by the state legislature to the extent that they do not conflict with the Constitution or the Voting Rights Act); *Upham,* 456 U.S. at 43 (directing federal courts to limit "modifications of a state plan ... to those necessary to cure any constitutional or statutory defect."); *Markham* v. *Fulton Cnty. Bd. of Registrations & Elections,* No. Civ. A.1:02-CV1111WB, 2002 WL 32587313, *6 (N.D. Ga. May 29, 2002) ("Keeping the minimum change doctrine in mind, the Court made only the changes it deemed necessary to guarantee substantial equality and to honor traditional redistricting concerns.").

That is why adherence to districting principles that are concerned with preserving *pre-existing* communities of interest, maintenance of the core of *pre-existing* districts, moving the fewest number of people to preserve *pre-existing* relationships between constituents and their current representatives, and avoiding

electoral clashes between *pre-existing* incumbents are such important considerations. They both preserve the *status-quo* and preclude the court—even inadvertently—from making new state policy choices in the guise of neutrality.

Accordingly, a court's equitable powers to adopt or draw a redistricting plan in the absence of an enacted statute are limited. "The remedial powers of an equity court must be adequate to the task, but they are not unlimited." *Upham*, 456 U.S. at 42 (1982). Courts facing such a task must not "intrude upon state policy any more than necessary." *White*, 412 U.S. at 795. Here, the district court should have acted with restraint to take into account state redistricting policy, both as expressed in previous decades, and as expressed by the Fiftieth Legislature in HB 39.

These important principles and limitations on the court's role are embodied in the "least change" doctrine, which further supports judicial adoption of the Legislative Plan. That is why Judge Allen found it appropriate to apply least change principles so as to avoid making political decisions that should properly be made by the political branches. (*Jepsen* Congressional Redistricting Finding 20; *Jepsen* State House Finding 39.). Judge Allen recognized the limited role of the courts in drawing redistricting plans in the absence of an enacted statute, and rejected plans which represented a significant or unnecessary change in state redistricting policy.

The district court below failed to adhere to this limited role. While the court may have believed that the extremely low deviations in the Executive Defendants' plans would generate a "neutral and objective" result, *see* Conclusion 10, they did not. Instead, the adopted plan represents a significant departure from New Mexico's historic redistricting policy; lags well behind the Legislative Plan on important state policies, including retaining the cores of existing districts, avoiding the pairing of incumbents, and number of people shifted into new districts; and in the process, incorporated unnecessary political bias. *See* Legis. Def's Exhs. 16, 30; Tr. 12/22/11, pp. 56-57, 118-119, 222-223 (B. Sanderoff); Exec. Def's Exhs. 10 & 30.

V. All of the Foregoing Errors Led to the Wrongful Rejection of the Legislative Plan and the Adoption of a Plan that Suffers from a Voting Rights Act Violation and Unfair Partisan Bias.

The Executive Defendants' approach, adopted by the district court—based primarily on a quest for near-zero population deviations—represents a dramatic departure from the long-standing policies of the State of New Mexico. *See supra* Point IV; ignored the thoughtful consideration to which the Legislature's plan is entitled, *see supra* Point III; and would endorse radically new redistricting policy in violation of the Court's limited role in this arena.

Of equal if not greater concern, the evidence showed that the Executive Alternative 3 Plan violates Section 2 of the Voting Rights Act by dismantling

House District 63 in Clovis—a district originally created by a three-judge federal court in 1982 to remedy Voting Rights Act concerns. *See Sanchez v. King*, 550 F. Supp. 13 (D. N.M. 1982). Since its creation, HD 63 has consistently elected Hispanic candidates to the State House of Representatives. Legis. Def's Exh. 18 (election results for HD 63 since 1984, showing that the Hispanic candidate was successful in all but two House races). The district court found that the three preconditions for a violation of Section 2 of the Voting Rights Act set forth in *Thornburgh v. Gingles*, 478 U.S. 30, 50-51 (1986), were satisfied with regard to the Hispanic community of Clovis. *See* Findings 64, 65. In addition, Petitioners presented undisputed evidence to support a finding of the "totality of circumstances" needed to find a Section 2 violation in that area. *See* Tr. 12/13/11, pp. 219-235 (R. Sandoval) (regarding history of discrimination against Hispanics in Clovis and use of discriminatory appeals in local political contests); Legis. Def's Exh. 17 (socioeconomic data showing extreme disparities between Anglos and Hispanics in Clovis).

The expert for the Egolf Plaintiffs, Dr. James Williams, testified that the Executive Defendants' plan, even as amended by them during trial, failed to create an effective Hispanic majority district in the Clovis area. *See* Tr. 12/15/11, pp. 135, 146-147 (J. Williams) (testifying that Representative Dodge is the representative of choice for the people of Clovis, that the Executive 2 plan does not

fully restore the historic District 63 and separates Dodge from Clovis/Portales, and that the 50.2% Hispanic population in the Executive 2 plan in HD 63 does not make it an effective Hispanic majority district).[10] The Executive Plan adopted by the district court dismantled the highly successful strong majority Hispanic House District 63 in Clovis and hence runs afoul of Section 2 of the VRA.

Moreover, as discussed above in Part I, the Executive Alternative 3 Plan contains significant partisan bias which has no place in a court-ordered plan. *See* Tr. 12/22/11, pp. 56-67; 118-119 (B. Sanderoff); Legislative Defendants' Exh. 30.

By contrast, the Legislative Plan is superior to the Executive Alternative 3 Plan in the following respects:

- The Legislative Plan uses plus/minus 5% deviations, which have been utilized in New Mexico since 1982 to accommodate important state policies such as preserving communities of interest and unifying municipalities. Tr. 12/22/11, pp. 70-72 (B. Sanderoff).
- The Legislative Plan does much better than the Executive Defendants at avoiding splits of acknowledged communities of interest. Legis. Def's Exhibits 14, 15, 28 and 29.

[10] There was no change in the Clovis area between Executive Alternative Plans 2 and 3.

- It better respects other communities of interest such as the area of historic Hispanic settlement in North Central New Mexico, *see* Tr. 12/21/11pp. 230-235 K. Martinez); Tr. 12/12/11, pp. 118-119, 164-168, 207 (B. Sanderoff); Tr. 12/19/11, p. 45 (T. Arrington); Tr. 12/21/11, pp. 36-37 (R. Adair),[11] and areas such as Los Alamos, Grants, Eldorado, Isleta Pueblo and the Hispanic neighborhoods in Clovis. *See* Tr. 12/12/11, pp. 105, 161, 173, 217 (B. Sanderoff).
- The Legislative Plan has respected from the outset the desires of the Native Americans in Northwest New Mexico. *See* Findings 20, 38.
- Although the Legislative Plan differs from the partial plan of the Navajo Nation by eleven (11) precincts, Brian Sanderoff testified that the Navajo

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[11] With respect to North Central New Mexico, Brian Sanderoff, an expert on redistricting in New Mexico and New Mexico demographics, testified that:

> In North Central New Mexico, as an example, the Hispanics are very different from Southern New Mexico, and even very different from Albuquerque. You hear Hispanics talking about their proud traditions and calling themselves Spanish. They have certain -- certain traditions, certain linkages with neighboring communities, small towns, kinships with each other, politically, socioeconomically, religious traditions. So you'll see North Central New Mexico as a tight-knit Hispanic area. ...You say to a Northern New Mexico Hispanic that they are part of a minority group, they have more of a sense of efficacy and more control over their destiny in part of the political process.

Tr. 12/12/11, p. 119 (B. Sanderoff).

Nation plan could be "dropped into" the Legislative Plan without having to make any other changes or creating any "ripple effects." Tr. 12/22/11, pp. 96-99 (B. Sanderoff). Petitioners do not contest the district court's finding of a Voting Rights Act violation in the current Native American districts, nor its imposition of a remedy in the form of full adoption of the Multi-Tribal Plan for House Districts 6, 65, and 69, and the Navajo Nation Plan for House Districts 1, 2, 3, 4, 5 and 9. Conclusions 21, 23.

- The Legislative Plan moves the least number of people from their current district, far less than the original Executive Plan does. *See* Legis. Def's Exhibit 16.[12] Likewise, it excels in retention of the cores of the current districts. *See* Executive Defendants' Exhibits 10, 30.
- The Legislative Plan is fair. Tr. 12/20/11, p. 42-44 (J. Katz) (Legislative Plan has a zero partisan bias). It only pairs three sets of incumbents, 2 Democrats, 2 Republicans and 1 Democrat with 1 Republican. Tr. 12/14/11, p. 214 (R. Gaddie); Executive Exhibits 10, 30. In the latter pairing, it is superior to the Executive Plan because the district in which a Democrat and a Republican are paired is a swing district in which either a Democrat or a Republican could win. Tr. 12/12/11, p. 229 (B. Sanderoff). In contrast, the

[12] The Executive Defendants did not present any evidence to show that their Alternative 3 Plan moved fewer people into a new district than their original plan did.

Executive Defendants pair a Democrat and a Republican in a strong Republican district. Tr. 12/12/11, pp. 230-232 (B. Sanderoff).

- The Legislative Plan, along with the Egolf and Maestas original plans are the only ones that show zero Democratic bias. *See* Egolf Exhibit 8.

In sum, when all the redistricting principles applicable to this case are fully and fairly considered, it becomes clear that the Legislative Plan is superior to the other plans presented to the Court, especially the Executive plan that was adopted. Particularly when viewed in the light of the thoughtful consideration to which it is entitled, the Legislative Plan is the one which should be adopted as the redistricting plan for the New Mexico State House of Representatives.

CONCLUSION

For the foregoing reasons, this Court should issue a Final Writ of Superintending Control holding the original Judgment for naught, and directing the Respondent to Order that a new Judgment be entered forthwith, adopting the Legislative Plan as the Redistricting Plan for the New Mexico House of Representatives.

Respectfully submitted,

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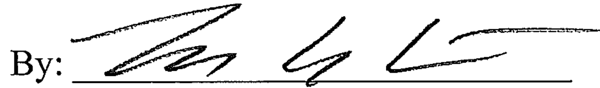
By: 

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STATEMENT OF COMPLIANCE

In conformity with Rule 12-213(G), this Brief was prepared using a proportionally-spaced typeface, contains 10,729 words in the body of the Brief above the signature block and complies with the limitations of Rule 12-213(F). The word-count information is obtained from a Microsoft Word Program 97-2003.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 27th, 2012, I caused a true and correct copy of the foregoing ***Petitioners' Opening Brief*** to be e-mailed to all parties or counsel of record as follows:

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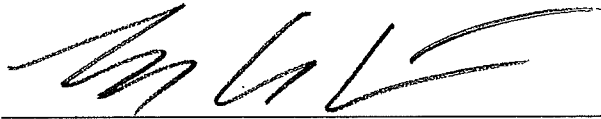
By: 

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