

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

No. D-101-CV-2011-02942

BRIAN F. EGOLF, JR., *et al.*,

Plaintiffs,

vs.

DIANNA J. DURAN, *et al.*,

Defendants.

- Consolidated with -

CAUSE NO. D-101-CV-2011-02944
CAUSE NO. D-101-CV-2011-02945
CAUSE NO. D-101-CV-2011-03016
CAUSE NO. D-101-CV-2011-03099
CAUSE NO. D-101-CV-2011-03107
CAUSE NO. D-202-CV-2011-09600
CAUSE NO. D-506-CV-2011-00913

THE EXECUTIVE DEFENDANTS' STATE SENATE PRE-TRIAL BRIEF

After weeks of testimony in the trials for redistricting the Congressional and House of Representatives districts, this Court is, by now, undoubtedly familiar with the legal standards employed by courts to create a reapportionment plan for a state's representative districts. The New Mexico Senate districts are treated no differently. In its limited, equitable role, this Court must first ensure that the Equal Protection Clause is honored to its fullest extent by adopting Senate districts that are as equal in population as is practicable. This is the sole Constitutional criterion about which there is no doubt. Then, this Court must ensure that minority voting rights

are protected. Finally, but only after these first two constitutional and statutory requirements are met, may the Court base selection of a plan on the secondary neutral criteria such as compactness, core retention, incumbent protection, communities of interest preservation, and political fairness. In short, how this Court determines New Mexico's Senate boundaries for the next decade should be no different than how it selected the boundaries for the Congressional and state House districts. Employing this methodology, the Court will again discover that the Executive Defendants' Plan balances all competing factors more appropriately than other proposed plans by maintaining minimal population deviations, protecting minority voting strength, and adhering to the secondary principles.

I. IT IS UNDISPUTED THAT THE EXECUTIVE PLAN CONTAINS THE LOWEST POPULATION DEVIATION.

Based on the 2010 Federal Census, the current districts for the New Mexico State Senate have deviations from the ideal population ranging from -19 percent to 73 percent, for a total range of 92 percent. *See* Current District Packet (Gov. Ex. 5). This malapportionment, and the failure of the legislative process to arrive at a plan, are, of course, the reasons why the task of redrawing the State's Senate districts falls upon this Court. As with the Congressional and State House redistricting, the Court must start with what the Equal Protection Clause of the Fourteenth Amendment requires -- that the seats in the New Mexico State Senate be apportioned on an equal population basis so that every New Mexican's vote counts the same. *See Reynolds v. Sims*, 377 U.S. 533, 568 (1964); *see also, e.g.*, Dep. of B. Sanderoff (11/21/11) at 85:12-23 (noting that in redistricting plans “. . . you are better off with populations closer to zero[.]”). No party can dispute the fact that, once again, the Executive Defendants have presented the Court with the best and most complete remedy to the State's currently malapportioned districts by submitting a

plan that, as much as is possible, maintains a *de minimis* difference between the number of persons assigned to each district.

The current State Senate Districts deviate from the ideal district population by as much as 35,793 people. Senate District Deviation Map (Gov. Ex. 6) (discussing current deviation for Senate District 23). The Executive Defendants’ Senate Redistricting Plan (hereinafter “Executive Plan”) corrects this malapportionment by achieving near zero population deviations and, in fact, contains the lowest range of population deviations among the plans presented to the Court. Specifically, the Executive Plan contains a range of population deviations between -0.98 and 0.99 percent, for an overall range of 1.97 percent. N.M. Senate Summary Table 1 (Gov. Ex. 12). At most, the Executive Plan’s most populous district contains only 965 people more than its least populous district. Plan Statistics, Deviation by District for Executive Plan (Gov. Ex. 23). In contrast, no other plan presented to the Court has an overall population deviation range that falls below 9.15 percent. *See* Gov. Ex. 12. That means that all other plans contain an overall population deviation range that is nearly five times greater than the deviations achieved by the Executive Plan.

Once again, the other parties to this case rely on the misinformed assertion that anything less than a ± 5 percent deviation range from ideal population is a “safe harbor” and, so long as they stay within that range, the parties are free to manipulate proposed Senate districts for whatever reason (whether stated to this Court or left unstated) they wish. As the Executive Defendants have demonstrated in previous briefing, those parties are wrong. As explained thoroughly in the Executive Defendants’ Pre-Trial Brief Regarding the New Mexico House of Representatives Redistricting, a court-ordered reapportionment plan of a state legislature is held to a higher standard than a legislatively drawn map and “must ordinarily achieve the goal of

population equality with little more than *de minimus* variation.” *Chapman v. Meier*, 420 U.S. 1, 26-27 (1975); Executive Defendants’ Pre-Trial Brief (12/9/11) at pp. 8-18; Executive Defendants’ Written Closing Argument Regarding the New Mexico House of Representatives Redistricting Plan (12/28/11) at pp. 15-21. In rejecting safe harbor deviations ranges, such as that proposed by the other parties, the Supreme Court has affirmed that “the equal-population principle remains the only clear limitation on improper districting practices, and we must be careful not to dilute its strength.” *Cox v. Larios*, 542 U.S. 947, 949-50 (2004) (citations omitted); Executive Defendants’ Pre-Trial Brief at pp. 18-20; Executive Defendants’ Written Closing Argument at pp. 15-21.

A perfect example of this is the Legislative Defendants’ Plan, which passed the New Mexico Legislature as Senate Bill 33 (“SB 33”). This proposal seeks to create a population deviation range between -4.80 percent and 4.71 percent and an overall range of 9.51 percent. Gov. Ex. 12. That amounts to a difference of 4,662 people between the Legislative Defendants’ least populous and most populous districts. Plan Statistics, Deviation by District for the Legislative Plan (Gov. Ex. 17). Statewide, the Legislative Defendants have created a plan that under or overpopulates all but fifteen of the forty-two Senate districts by more than two percent. *See id.* That amounts to population imbalance of 53,453 people. *Id.* The reasons for this will be made plain at trial. The Executive Defendants will demonstrate that, rather than draw the new Senate districts based upon the voting rights of New Mexicans, the Legislature sought to gain yardage on the political field of play by advocating a plan that both protected incumbent Democrats and sought to improve Democratic performance in critical competitive districts. Such nakedly partisan tactics should be frowned upon even in the legislative arena. However, they are certainly results to be avoided by a court when it adopts a plan.

The Legislative Defendants' Plan also underpopulates certain districts that have lost population or that have not kept pace with statewide population growth over the last decade. In fact, many of the underpopulated districts under the Legislative Defendants' Plan were among those districts whose population growth did not keep pace with the rest of the state over the last decade. Moreover, five of the eight districts underpopulated by -4 percent or more in SB 33 were already underpopulated in the current districts (SD 12, 13, 16, 17, and 35). *See* Senate District Deviation Map (Gov. Ex. 6). District 35, which the Legislature underpopulated by -4.4 percent, is currently the most underpopulated Senate district in the State at -19.0 percent. *Id.* Based on the prior changes in population in these underpopulated districts and the likelihood of further population decline over the next ten years, the Legislative Defendants' Plan all but guarantees further malapportionment in the Senate Districts in the coming years.

Similarly, the Egolf Plaintiffs' Plan contains an overall deviation of 9.16 percent, the Maestas Plaintiffs' Plan has an overall deviation of 9.51 percent, the James Plaintiffs' has an overall deviation of 9.97 percent, and the Sena Plaintiffs' has an overall deviation of 9.72 percent. Gov. Ex. 12. These deviations amount to a difference of roughly 4,500 people between the least populous and most populous districts. Due to these imbalances, the plans proposed by other parties fail to address the primary need for this redistricting process – malapportionment.

The Executive Plan, therefore, offers the best solution for the State Senate districts. It achieves an unparalleled, near zero population deviation among its districts. The near zero population deviation in the Executive Plan also prevents further population imbalance in districts that have experienced population growth or decline. As a result, it adheres to the strict standard imposed upon court-ordered redistricting plans to “achieve the goal of population equality with little more than *de minimis* variation.” *Chapman v. Meier*, 420 U.S. 1, 26 (1975). Moreover, by

keeping deviations to a minimum, the Executive Plan is fair. Rather than use a deviation “safe harbor” for political advantage, the Executive Plan rises above partisan politics to suggest a Senate map that treats all New Mexicans equally, rather than favor one political or geographic group over another.

II. THE EXECUTIVE PLAN MAINTAINS MINORITY VOTING STRENGTH.

As this Court is by now aware, the redistricting plan that is adopted or created by this Court must not deny or abridge the right of any citizen to vote on account of race or color, and that minority groups have an equal opportunity to “participate in the political process and to elect representatives of their choice.” 42 USC § 1973(b). Section 2 of the Voting Rights Act seeks to eliminate discrimination in the electoral process, but it does not act as a bar to redistricting plans that are based on neutral, non-discriminatory, and equal population principles. *See Miller v. Johnson*, 515 U.S. 900, 927 (1995). The Executive Defendants have proposed a neutral and non-discriminatory redistricting plan that promotes the voting strength of New Mexico’s minority groups. Importantly, the Executive Plan maintains minority voting strength and even increases minority voting opportunities while maintaining *de minimis* population deviations.

The Executive Plan creates three districts of at least 50 percent Native American voting age population and eighteen districts of at least 50 percent Hispanic voting age population. N.M. Senate Summary Table 2 (Gov. Ex. 13). This results in an increase of one majority-Native American district and two majority-Hispanic districts from the current plan. *Id.* The Executive Plan is also an improvement on the Legislative Defendants’ Plan, which contains three Native American majority districts and 17 Hispanic majority districts. *Id.*

Further, while other plans presented to this Court create a similar number of majority-minority districts, some of plans do not keep the minority voting age percentages within these

districts as high as the Executive Plan. *See id.* For example, the Legislative Defendants' Plan reduces non-Hispanic Native American voting strength in Senate District 4 from 68 percent to 61.0 percent non-Hispanic Native American voting age population. *See* Current Plan (Gov. Ex. 5); SB 33 (Gov. Ex. 9). The Egolf Plaintiffs and the Maestas Plaintiffs' Plans similarly reduce non-Hispanic Native American voting age population in Senate District 4 to 60.6 and 61.3 percent, respectively. *See, e.g.,* Egolf Ex. 10. The Executive Plan increases the non-Hispanic Native American voting strength in Senate District 4 to 68.8 percent. *See* Executive Plan (Gov. Ex. 1).

Accordingly, the Executive Plan provides appropriate opportunities for Hispanics and Native Americans to elect their candidates of choice and, in some districts, increases the voting strength of the State's minority groups. It is, by far, the best choice when it comes to meeting the requirements of the Voting Rights Act.

III. THE EXECUTIVE PLAN IS, BY FAR, THE MOST POLITICALLY FAIR.

More than in other cases, this Court will need to decide which amongst the plans presented is the most politically fair. Although in every hearing it has become apparent that other parties are seeking political gain through this Court, it is in the Senate that politics appears to play the greatest role. However, the redistricting process, in particular a court-ordered redistricting lawsuit, should never promote partisan interests or be motivated by the intent to create tangible benefits for one party over another. *See Upham v. Seamon*, 456 U.S. 37, 41-42 (1982); *see also Peterson v. Borst*, 786 N.E.2d 668, 673 (Ind. 2003) (holding that if the legislative and executive "branches cannot reach a political resolution and the dispute spills over into an Indiana court, the resolution must be judicial, not political."); *Johnson v. Miller*, 922 F. Supp. 1556, 1559 (S.D. Ga. 1995) ("In fashioning a remedy in redistricting cases, courts are

generally limited to correcting only those unconstitutional aspects of a state’s plan The rationale for such a ‘minimum change’ remedy is the recognition that redistricting is an inherently political task for which federal courts are ill suited.”). Whether termed a “politically fair” or a “least changed” plan, no party should be allowed to commandeer this redistricting process to tilt the scale in favor of that party’s partisan interests. The Executive Defendants will demonstrate at trial that their plan best maintains the political *status quo*, while other plans presented to the Court are political “Trojan horses” claiming to be partisanly fair when they are is not.

A. Unlike Other Plans, the Executive Plan Attempts to Maintain the Political *Status Quo*.

The Executive Plan deliberately maintains the political *status quo* for the State Senate and, as a result, is the most politically fair. The Executive Plan, when compared to the Legislative Defendants, Egolf Plaintiffs, and Maestas Plaintiff’s plans, pairs the least amount of incumbent Senators – the Executive Defendants pair two incumbents, whereas the Legislative Defendants, Egolf Plaintiffs, and Maestas Plaintiffs each pair 6 incumbents. Gov. Ex. 12. When dealing with the four most competitive districts, the Executive Defendants’ Plan makes two of the four districts more Democratic and two of the four districts more Republican. On the other hand, the three Democratic plans each make three of the four most competitive districts more Democratic. Senate Performance Tables (Gov. Ex. 25 and 26). When dealing with another very hotly contested district, SD 9, all three Democratic plans dramatically increase the Democratic performance. *See* Legis. Ex. 1; Egolf Ex. 10; Maestas Ex. 1. Accordingly, unlike the Democratic plans before the Court, the Executive Plan does not result in any tangible benefit to any political party.

B. The Legislative Defendants' Plan Seeks to Change the Political Landscape in Favor of the Party in Power.

This Court will likely hear that the Legislative Defendants' plan is politically "fair." It is not. Applying a population deviation range of 9.50 percent, the Legislative Defendants' Plan for the New Mexico Senate secures additional Democratic voting strength. *See* Summary Table 1 (Gov. Ex. 12). Specifically, the Legislative Defendants' Plan increases Democratic performing districts from 23 to 25 and decreases Republican performing districts from 19 to 17. *See* Summary Table 1 (Gov. Ex. 12); Ex. DG-V to Dep. of B. Sanderoff (11/21/11). As if taken directly from the facts in *Larios v. Cox*, 300 F. Supp. 2d 1320, 1338 (N.D. Ga. 2004), *aff'd*, *Cox v. Larios*, 542 U.S. 947, the Legislative Defendants have underpopulated districts that are Democratic performing and overpopulated districts that are currently Republican performing. Specifically, the Legislative Defendants, "rather than using the reapportionment process to equalize districts throughout the state, . . . sought to shift only as much population to the state's underpopulated districts as they thought necessary to stay within a total population deviation of 10%." *Id.* at 1329. Such a scheme will "allow incumbent Democrats to maintain or increase their delegation, primarily by systematically underpopulating the districts held by incumbent Democrats, [and] by overpopulating those of Republicans[.]" *Id.* As in *Larios*, the Legislative Defendants' Plan offends the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 338.

Under the Legislative Defendants' Plan, eight districts are underpopulated by four percent or more. Legis. Ex. 1; Gov. Ex. 17 (proposed Senate Districts 9, 11, 12, 13, 16, 17, 22, and 35). All eight of those underpopulated districts are currently occupied by Democrat Senators, and six of those districts politically perform in favor of Democrat candidates. Most of these underpopulated districts have lost population over the last decade or have not kept pace with statewide population growth. Legis. Ex. 1 (proposed Senate Districts 12, 13, 16, 17, and

35). It is inappropriate and unjustifiable to underpopulate districts that have experienced population decline and will likely experience continued population decline in the coming years. Further, four districts in the Legislative Defendants' Plan are overpopulated by four percent or more. Legis. Ex. 1; Gov. Ex. 17 (proposed Senate Districts 7, 31, 33, and 34). Of these four districts, three are Republican performing and held by Republican incumbents. Such overpopulation unfairly and impermissibly dilutes the votes of the New Mexicans who reside in these districts.

To accomplish these partisan benefits, the Legislative Defendants have relied erroneously upon the belief that this Court could adopt a plan in which the overall population deviation range was less than, but close to, ten percent. This is contrary to the equal population requirements of the United States Constitution and, as a result, the Legislative Defendants' Plan cannot pass constitutional muster.

C. Other Plans Seek to Tilt the Political Scale in Favor of the Majority Party.

Other parties follow the lead of the Legislative Defendants and SB 33 by using substantial population deviations to obtain a partisan benefit. Both the Egolf Plaintiffs and the Maestas Plaintiffs propose plans with a net gain of safe Democratic seats. *See* Senate Performance Table 2 (Gov. Ex. 26). In addition, both propose a plan that decreases the number of Republican performing seats by two. Gov. Ex. 12. Importantly, all of the Democratic plans deliberately target the three districts that the Democrats won in 2008 and improve Democratic performance numbers in those districts (SD 9, 15, and 37). This type of political gamesmanship should not be allowed in a redistricting plan adopted by this or any other court.

IV. THE EXECUTIVE PLAN HONORS TRADITIONAL REDISTRICTING CRITERIA.

Of all plans offered by parties to this suit, the Executive Plan contains the best proposal to promote traditional redistricting principles of: (1) compactness; (2) contiguity; (3) preservation of counties and other political subdivisions; (4) preservation of communities of interest; (5) preservation of cores of prior districts; and (6) protection of incumbents. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 578 (1964); *See* NMSA 1978, §§ 2-7C-3, 2-8D-2 (mandating that state Senate and House of Representatives be “elected from districts that are contiguous and that are as compact as is practical.”). Critically, the Executive Plan satisfies these traditional redistricting criteria while maintaining near zero population deviations and protecting minority voting rights. In other words, the Executive Plan best balances all relevant factors.

The evidence and testimony reveals that the Executive Plan satisfies both the “eyeball” and statistical approach required by law with regard to the contiguity and compactness of its districts. First, under the informal “eyeball” approach, *see Bush v. Vera*, 517 U.S. 952, 960 (1996), the Executive Plan reveals smooth boundaries of its proposed districts. *See* Executive Senate Map (Gov. Ex. 1). The statistical measurements, known as the Reock and the Polsby-Popper score, the Executive Plan is one of the most compact. *See* Senate Summary Table 1 (Gov. Ex. 12) (the Executive Plan, with a Reock score of 0.38, is behind only the James Plaintiffs’ Plan, with a score of 0.40); *id.* (the Executive Plan has a Polsby-Popper score of 0.29, behind only the Legislative Defendants Plan’s score of 0.30).

Of all of the plans submitted to this Court, the Executive Plan splits the least number of counties. Preservation of counties and political subdivisions should be accomplished by minimizing, to the greatest extent possible, the number of counties and political subdivisions split between districts. *See, e.g., Rodriguez v. Pataki*, No. 02-CV-618, 2002 U.S. Dist. LEXIS

9272 (S.D.N.Y. May 23, 2002). The Executive Plan accomplishes this by containing only 70 county splits, and only 19 divided counties. *See* Gov. Ex. 12. By contrast, the Legislative Defendants' Plan contains 80 county splits and 20 divided counties, the Maestas Plan contains 81 county splits and 20 divided counties, and the Egolf Plan contains 87 county splits and 23 divided counties. *Id.* Thus, the Executive Plan performs the best in this category.

The Executive Defendants' Plan also preserves the core of the existing districts and protects core constituencies, while best adjusting districts to accommodate population changes and to minimize population deviation. The preservation of district cores recognizes that there is significant value in continuity of present district lines. *See Karcher v. Daggett*, 462 U.S. 725, 758 (1983) (Stevens, J. concurring). Core retention and continuity can be measured by determining what percentage of a current district continues to exist in a proposed new district. The Executive Plan attempts to preserve New Mexico's existing House of Representatives districts in most cases by maintaining continuity with existing districts. *See* Gov. Ex. 12. The Executive Plan's core retention score is only slightly lower than the Legislative, Egolf, and Maestas plans, largely because of the significantly lower population deviations in the Executive Plan and its decision not to pair incumbents except when absolutely necessary based upon population changes.

The Executive Plan contains the least number of paired incumbents such that elected officials are not forced, by the redrawing of districts, to run against each other. *See Bush v. Vera*, 517 U.S. 952, 964 (1996) ("we have recognized incumbency protection, at least in the limited form of 'avoiding contests between incumbent[s],' as a legitimate state goal") (citations omitted). The Executive Plan, when compared to the Legislative Defendants, Egolf Plaintiffs, and Maestas Plaintiff's plans, pairs the least amount of incumbent Senators – the Executive Defendants pair

two incumbents, whereas the Legislative Defendants, Egolf Plaintiffs, and Maestas Plaintiffs each pair 6 incumbents. Gov. Ex. 12. As in the House of Representatives redistricting trial, the Executive Defendants made pairing decisions based solely upon whether they were required by population changes rather than upon political considerations. In the House of Representatives, there were three regions of the state that had each lost enough relative population to account for 100 percent of a district's worth of population (i.e. nearly 30,000 people). Under those circumstances, the Executive Defendants advocated that fairness required that each of those three regions lose one district and that those three districts be moved to the fast-growing Westside of Albuquerque and Rio Rancho. In the Senate redistricting process, it is not as obvious whether and where districts should be consolidated. This is due in part to the much larger size of Senate districts, nearly 50,000 people instead of approximately 30,000 people. There is only one area of the state where a compact group of districts have a cumulative negative deviation of almost 100%. That is the one area where the Executive Defendants consolidated districts. As the Court will see during the course of trial, the other consolidations made by other parties are not required or justified by population changes and are instead politically motivated and politically unfair.

While the Executive Defendants have fully briefed their concern that court-ordered redistricting plans must avoid undue consideration to the subjective and elusive subject of communities of interest, *see* Executive Pre-Trial Brief at 27-29, the Executive Defendants acknowledge that maintenance of communities of interest can be a legitimate and traditional goal in redistricting. *See Bush*, 517 U.S. at 977. Notably, the Executive Plan constitutes a good faith effort to protect existing communities of interest, in terms of maintaining political subdivisions and maintaining the political *status quo*. Nevertheless, the Executive Defendants urge this Court to avoid undue consideration of communities of interest advocated by parties and, instead, utilize

neutral and empirical data when selecting an apportionment plan, for which the Executive Plan provides the best proposal.

CONCLUSION

As the Executive Defendants will demonstrate at trial, the Court should adopt the Executive Plan because it is the most neutral of the plans presented to the Court, in that it achieves the constitutionally and statutorily required goals of *de minimis* population equality and maintaining minority voting opportunities, while adhering to traditional redistricting principles and maintaining political fairness.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of December 2011, I served via electronic mail and filed the foregoing pleading electronically, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

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