

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

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

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

Plaintiffs,

-vs-

DIANNA J. DURAN, in her official capacity as New Mexico Secretary of State, SUSANA MARTINEZ, in her official capacity as New Mexico Governor, JOHN A. SANCHEZ, in his official capacity as New Mexico Lieutenant Governor and presiding officer of the New Mexico Senate, TIMOTHY Z. JENNINGS, in his official capacity as President Pro-Tempore of the New Mexico Senate, and BEN LUJAN SR., in his official capacity as Speaker of the New Mexico House of Representatives,

Defendants.

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

**JAMES PLAINTIFFS' CLOSING BRIEF FOR REDISTRICTING
THE NEW MEXICO PUBLIC REGULATION COMMISSION**

Plaintiffs Conrad James, Devon Day, Marge Teague, Monica Youngblood, Judy McKinney and John Ryan ("the James Plaintiffs") submit the following written closing argument in connection with the January 11-12, 2012 hearing on redistricting the New Mexico Public Regulation Commission ("PRC").

The James Plaintiffs respectfully submit James Plan 3 to this Court for consideration.¹ For the reasons set forth in this Closing Brief and in the James Plaintiffs' Proposed Findings of Fact and Conclusions of Law filed concurrently herewith, James Plan 3 is the best plan before the Court for redistricting the PRC.

¹ The James Plaintiffs previously withdrew their Plan 1 in open court, and withdrew their Plan 2 by notice emailed to the Court and to counsel of record on January 16, 2012.

A. The PRC is Fundamentally Different Than a Legislative Body.

The PRC does not perform the same duties as the U.S. House of Representatives or the New Mexico Legislature. In fact, the PRC's regulatory responsibilities are determined by the Legislature. Article XI, Section 2 of the New Mexico Constitution, enacted in 1996, provides:

The public regulation commission shall have responsibility for chartering and regulating business corporations in such manner *as the legislature shall provide*. The commission shall have responsibility for regulating public utilities, including electric, natural gas and water companies; transportation companies, including common and contract carriers; transmission and pipeline companies, including telephone, telegraph and information transmission companies; insurance companies and others engaged in risk assumption; and other public service companies in such manner *as the legislature shall provide*. [emphasis added]

While PRC members are elected by constituents in their districts, they do not represent those constituents in the same manner as do legislators. The PRC makes and implements regulations applicable statewide and pertaining to the specific industries set forth in the Constitution. In implementing regulations, the PRC acts as a quasi-judicial body. Its work tends to involve highly technical issues such as rate-making and regulating competition. The PRC interacts with the industries it regulates as well as the public, and its mission is to serve the general public interest and not specific local constituencies. Test. of R. Adair, 1/11/12 Tr. at 30-34; Test. of K. Gaddie, 1/12/12 Tr. at 186-87.

The PRC frequently conducts public hearings in connection with its work, and members of the PRC serve as administrative judges and not constituent advocates in such proceedings. The fundamental statutes passed by the Legislature to provide organization and structure to the PRC reflect this quasi-judicial function. *See*, NMSA 1978, §8-8-1, et seq., the Public Regulation Commission Act., e.g. §8-8-17 (prohibition of *ex parte* communications by or with PRC Commissioners in adjudicatory proceedings) and §8-8-4 (general powers and duties of PRC).

Section 8-8-18.A requires a PRC Commissioner to recuse himself or herself from adjudicatory proceedings “when he is unable to make a fair an impartial decision”. This includes when the Commissioner “... has prejudged a disputed evidentiary fact involved in a proceeding prior to hearing” (§ 8-8-18.A(1)) and “when, as a candidate for office, he announced how he would rule on the adjudicatory proceeding or a factual issue in the adjudicatory proceeding” (§8-8-18.A(4)). These provisions, among many others, demonstrate the profound differences between PRC Commissioners and legislators.

To the extent voters in different parts of the state might hold different views in connection with general matters that come before the PRC, the divisions generally will be regional as opposed to local, with the most common division of interests being between rural and urban concerns. Test. of B. Sanderoff, 1/12/12 Tr. at 43, 45-46, 56, 132-43. Because only five PRC districts exist, and because a large portion of New Mexico’s population is concentrated in urban areas, particularly Albuquerque, PRC districts will necessarily combine rural and urban areas. All of the maps before the Court reflect the fact that populating five PRC districts requires allocating population from the Albuquerque area to multiple districts.

As a result of these differences in the structure and role of the PRC, as opposed to legislative bodies, splitting towns, counties or other local communities of interest is much less of a concern in this proceeding. Moreover, a community can derive a positive benefit from being represented by two or more PRC members. Test. of B. Sanderoff, 1/12/12 Tr. at 143.

The PRC districts that are currently in place were adopted by legislation passed in 2001 by the Legislature that was signed into law by the Governor. These PRC districts reflect the most recent expression of New Mexico policy regarding how traditional districting considerations should be balanced. Test. of B. Sanderoff, 1/12/12 Tr. at 143-45. The current

PRC districts split numerous towns and counties, some of them multiple times. In particular, the current PRC districts split Albuquerque three ways, Bernalillo County four ways, and the Albuquerque metropolitan area (which includes southern Sandoval County, Torrance County and Valencia County) five ways. Legis. Dfdts. Ex. 6; Test. of B. Sanderoff, 1/12/12 Tr. at 139.

All of the maps remaining for consideration by the Court in this proceeding split villages, cities and counties. All of the PRC redistricting plans submitted to this Court split communities of interest.² Gov. Ex. 28. The evidence is conflicting as to how many towns and counties each plan splits. Legis. Dfdts. Exs. 13 and 14 indicate that, while the existing plan splits a total of 20 towns and counties, the James 3 Plan, the Legislative Defendants Plan, the Maestas 2 Plan and the Navajo Plan split 29, 12, 12 and 20, respectively. Gov. Ex. 28 indicates that while the existing plan splits 41 towns and cities, the James 3 Plan, the Legislative Defendants Plan, the Maestas 2 Plan and the Navajo Plan split 42, 21, 34 and 34, respectively. There was no clear explanation for these disparities, although Gov. Ex. 28 likely counts both incorporated and unincorporated communities while Legis. Dfdts. Ex. 13 likely counts only incorporated communities.³ Test. of B. Sanderoff, 1/12/12 Tr. at 145-47; Test. of K. Gaddie, 1/12/12 Tr. at 178, 193-95, 200-01.

Because of the foregoing differences in the function and purpose of the PRC, differences between the maps before the Court pertaining to the number of split political subdivisions are

² For example, the Legislative Defendants are critical of the James 3 Plan because it places portions of Dona Ana County with Hispanic populations in the Eastside District 2. However, the Legislative Defendants Plan and the Maestas 2 Plan also do this, because they split the unincorporated community of Chaparral south of Las Cruces between Districts 2 and 5. Test. of B. Sanderoff, 1/12/12 Tr. at 90-91, 147.

³ Legis. Dfdts. Ex. 13, which was prepared by Research & Polling, Inc., contains at least one error. It shows the James 3 Plan as splitting but the Maestas 2 and Legis. Dfdts. Plans not splitting San Ysidro. The map packets that the same company prepared for all of the plans show that in fact none of the three plans splits this very small town. Test. of B. Sanderoff, 1/12/12 Tr. at 153-56. It is not possible to determine how many other errors Exhibit 13 contains because the Research & Polling map packets for the PRC do not provide detail for many towns and other political subdivisions.

neither significant nor material. Gov. Exhibit 28. The number of split political subdivisions in the James 3 Plan, moreover, is consistent with the Legislature's 2001 PRC map.

B. The James 3 Plan Effectively Eliminates Population Deviations.

As dramatically shown on Gov. Exs 27 and 28, the James 3 Plan has the lowest population deviations of any PRC plan before the Court – less than plus or minus 0.01 percent. Because the “one person one vote” mandate is the most important consideration in the court reapportionment process, the Court should decline any invitation to adopt a plan that does not contain close to zero population deviations among the five PRC districts. *See Cox v. Larios*, 542 U.S. 947, 949-50 (2004) (“the equal-population principle remains the only clear limitation on improper districting practices, and we must be careful not to dilute its strength.”) (*citing Vieth v. Jubelirer*, 541 U.S. 267 (2004)). The James Plaintiffs’ Requested Conclusions of Law submitted herewith provide additional authority pertaining to the one person, one vote mandate, and this mandate has been repeatedly referenced, cited and probed in the course of the multiple trials in this proceeding.

Low deviations are a key feature of James Plan 3, and are a powerful argument in favor of its adoption by this Court.

C. The James 3 Map Reasonably Promotes Political Competition.

Because of New Mexico’s political and physical geography, the PRC maps before the Court all divide New Mexico similarly, providing for districts in Albuquerque and in the northwest, north central, eastern, and southwest regions of the State. The northwest (District 4) and north central (District 3) districts in each map will have a strong Democratic performance, while the district on the eastern side of the State (District 2) will be Republican performing. On

the other hand, the Albuquerque district (District 1) and the southwest district (District 5) can be drawn competitively.

The Legislative Defendants' Plan was expressly designed, at the request of Democrat Representative Al Park to increase Democratic Party performance. One of Representative Park's instructions to the maps' drafters was to manipulate District 1 to increase Democrat Party performance to 55% so that it would be a solid and noncompetitive Democrat district for the next decade. Gov. Ex. 32; Test. of B. Sanderoff, 1/12/12 Tr. at 76-82. As enacted by the Legislature and presented to this Court, this plan indeed does create an uncompetitive, solid Democrat, District 1 with a 54.1 percent Democrat performance. This district is less competitive than the current plan. Likewise, the Legislative Defendant's District 5 also is more Democratic (51.4 percent Democrat performance) and is less competitive than the current plan. Test. of K. Gaddie, 1/12/12 Tr. at 187-92.

Evidence adduced at trial also showed that the Maestas 2 Plan used the highly partisan Legislative Defendants' Plan as its starting point. Test. of B. Sanderoff, 1/12/12 Tr. at 105, 128-29. It is therefore not surprising that the Maestas 2 Plan retains the biased political performance of the Legislative Defendants' Plan. Districts 1 and 5 have 53.1% and 51.2% Democrat political performance, respectively. And, like the Legislative Defendants' Plan, the Maestas 2 Plan's Districts 1 and 5 are both less competitive and more Democrat leaning than they are in the current plan; in fact in the Maestas Plan Democrat performance increases in all districts except District 4. Test. of B. Sanderoff, 1/12/12 Tr. at 129; Test. of K. Gaddie, 1/12/12 Tr. at 187-92.

Under the legal standards for a court drawn redistricting plan, the Court should not grant partisan political advantage to one side or the other.

When the Court drafts the plan, it may not take into account the same political considerations as the Governor and the Legislature. Judges are forbidden to be partisan politicians.

In re Legislative Districting of the State, 805 A.2d 292, 298 (Md. 2002). The Maestas Plaintiffs and Legislative Defendants are asking the Court to choose, for the next ten years, the political party that will hold the PRC seats representing some 800,000 people in Districts 1 and 5. This is neither appropriate nor necessary. As demonstrated by the James 3 Plan, a plan for redistricting the PRC can be drawn that enhances competitiveness. Depending upon the results of elections every two years, under the James Plan the PRC could have a 4-1 or 3-2 Democrat-Republican split, or possibly a 3-2 Republican split. Test. of B. Sanderoff, 1/12/12 Tr. at 161-62. The James Plan draws Districts 1 and 5 so that, according to the same political performance measures used by the Legislature during the special session, the Democrat-Republican performance is 51.1%-49.9%. James 3 is politically neutral and promotes competition. It can be expected that PRC commissioners in those districts would be more sensitive to voter views and concerns. James Ex. 4; Test. of B. Sanderoff, 1/12/12 Tr. at 161. This is a better outcome.

The extremely low deviations found in the James 3 Plan, the support of the Navajo Nation as set forth in Section D of this Closing Brief, and James 3's compliance with other redistricting requirements are reason enough for the Court to adopt this Plan. The fact that James Plan 3 does not incorporate the Legislature's partisan political agenda, but rather would enhance political competitiveness is an additional benefit this Plan offers to the State of New Mexico.

D. The James 3 Plan Meets or Exceeds Traditional Redistricting Requirements.

The James Plaintiffs' Proposed Findings of Fact and Conclusions of Law submitted herewith in connection with the PRC redistricting trial provide detail concerning compliance by the James 3 Plan with traditional redistricting criteria. To avoid unnecessary repetition, the James Plaintiffs will not repeat these details here. However, evidence at trial demonstrated that James 3 meets or exceeds the requirements of traditional redistricting criteria such as contiguity, and compactness. James 3 also sufficiently tracks the Plan submitted by the Navajo Nation, as to District 4, to enable the Nation to not oppose, but rather to "support" and "endorse" the James 3 Plan. Statement of J. Dumas, 1/11/12 Tr. at 12, Test. of L. Gorman, 1/12/12 Tr. at 22. James 3, in fact, provides Native Americans the greatest voting strength in District 4 of any Plan before the Court. Test. of L. Gorman, 1/12/12 Tr. at 34.

E. Conclusion.

The James Plaintiffs' redistricting Plan for the New Mexico Public Regulation Commission minimizes deviations and complies with traditional redistricting criteria. In addition, the James Plaintiffs' plan, better than any of the other plans, promotes partisan fairness, neutrality, and competitive districts in which the people select their representatives and not the other way around. The Court should adopt the James Plaintiffs' plan.

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CERTIFICATE OF SERVICE:

WE HEREBY CERTIFY that on the 17th day of January, 2012, we filed the foregoing electronically, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing; and we e-mailed a true and correct copy of the foregoing pleading on this 17th day of January, 2012 to the following:

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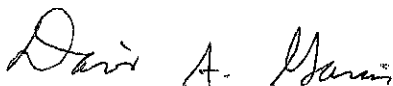
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