

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

BRIAN EGOLF, et al.

D-101-CV-2011-02942

Plaintiff-Petitioners,

vs.

DIANNA J. DURAN, et al.,

Defendant-Respondents.

**SENA AND LEGISLATIVE PLAINTIFFS' OBJECTIONS TO
PRELIMINARY PLAN NO. 1 AND PRELIMINARY PLAN NO. 2**

Plaintiffs, Jonathan Sena, Minority Whip Don Bratton, Senator Carroll Leavell, and Senator Gay Kernan (“Sena and Legislative Plaintiffs” or “Sena Plaintiffs”), by counsel (Patrick J. Rogers), submit the following comments and objections to the Preliminary Plan No. 1 and Preliminary Plan No. 2.

Unfortunately, but understandably, the Court has in substantial part carried out the remand instructions from the Supreme Court and produced Preliminary Plan No. 1. The Sena Plaintiffs respectfully believe that the remand instructions were not consistent with constitutional requirements or federal law, specifically the Fourteenth Amendment of the United States Constitution and the Voting Rights Act. The Sena Plaintiffs believe the District Court should have ignored the specific instructions to “address the partisan performance changes and bias noted” in the Supreme Court’s Remand Order and followed the general direction to “devise a plan that is partisan-neutral and fair to both sides.” *Remand Order* (February 10, 2012) at 20. The Sena Plaintiffs urge the Court to honor the letter and spirit of the Court’s direction and revise the Preliminary Plan No. 1 to provide a partisan-neutral and fair map that recognizes at

least 33 Republican performance districts. Minor modifications to Preliminary Plan No. 1 are desirable and achievable. *See* Section II below.

Preliminary Plan No. 2 should be rejected forthwith. This preliminary plan is based upon evidence contrary to the Supreme Court instructions to create a new map from evidence in the record and not to admit new evidence. *Id.* at 18. Contrary to the direction of the Supreme Court, as well as the District Court’s own “Order Establishing Deadlines on Remand from the New Mexico Supreme Court” one of the parties representing partisan Democratic interests ignored the orders and submitted an additional (new) map, new evidence and a proposal to pair a Democrat incumbent with a Democrat incumbent who has recently announced his intention to retire. The consideration of this new evidence and proposal is contrary to the Supreme Court’s Order, this Court’s order to implement the Supreme Court’s directions, and the Rule of Law. No reason and no lawful basis exist to consider Preliminary Plan No. 2.

I. The Supreme Court’s Specific Directions to this Court.

The Supreme Court’s Remand Order provides four (4) specific instructions for this Court’s creation of a revised reapportionment plan:

- 1) The Supreme Court’s order, while recognizing that “low population deviations are desired” and that population equality is a “primary consideration[.]” in any court-drawn plan, *see, id.* at 6, 19, finds that this Court’s adopted map “achieved very low population deviations . . . at the expense of other traditional state redistricting policies, the most evident being the failure to keep communities of interest, such as municipalities, intact.” *Id.* at 19. The Order instruct this Court to “consider whether additional cities, such as Deming, Silver City, and Las Vegas, can be maintained whole through creating a plan with greater than one-percent deviations.” *Id.*;

2) the Order states that, should the District Court decide to begin with its Adopted Plan, it should “address the partisan performance changes and bias noted in this order.” *See, Id.* at 20;

3) the Order states that, with regard to any new district that paired a Democrat and a Republican Legislator, the political performance of that district should “provide[] an equal opportunity to either party” to win in a subsequent election. *Id.*; and

4) the Order requires a citizen Hispanic voting-age majority district that includes the Hispanic community around the 21st Street area in Clovis. *Id.* at 20-21.

The Sena Plaintiffs respectfully disagree with all four directions, but given the directions, the Sena Plaintiffs have no quarrel with the District Court’s efforts to comply with directions 1 and 4 (deviations and the creation of the Hispanic voting age majority district including portions of Clovis). The Sena Plaintiffs respectfully object to the Court’s Preliminary Plan maps as they address directions 2 and 3 the “partisan performance standards” and the pairing in the Northeast heights of Albuquerque.

II. A Fair and Partisan Neutral Plan Would have a Minimum of 33 Republican Performing Districts.

Brian Sanderoff’s firm, Research and Polling, Inc. devised a formula to analyze statewide elections from 2004 through 2010, excluding elections in which the successful candidate won by more than twenty percent (20%). *Trial Transcript* 12/13/11 at 52:17-55:15. Mr. Sanderoff (the expert witness retained by the Democratic leadership) totaled the votes cast and determined that approximately fifty-three percent (53%) of the total votes in those races were for Democratic candidates and approximately forty-seven percent (47%) were for Republican candidates. *Id.* at 12:22-15:13. That ratio is the same as the current 37/33 Democrat/Republican split in the House. Brian Sanderoff’s testimony on the last day of trial establishes that Hall/Executive 3 diverges

from the current statewide average voting pattern and current party split in the House by only .7% in one district. *Trial transcript* 12/22/11 at 55-56.

Various parties representing the interests of partisan Democrats argued in their pleadings concerning the Writ of Superintending Control that the map remanded by the Supreme Court (Hall/Executive 3) demonstrated “blatant partisan bias”, “significant partisan change”, or “severe” partisan change. *Opinion* at 42 (Dissent, Judge Sutin). The majority opinion cites to a portion of Brian Sanderoff’s testimony, for the proposition that the Hall/Executive 3 map established “significant partisan change”. *Id.* at 14. However, that portion of the cited testimony does not establish any “significant” partisan change and does not address changes from the current partisan make-up of the districts but rather a change from earlier maps in litigation. *Id.* More importantly, and despite the fact that the District Court did not conclude that any severe, significant or blatant partisan changes or biases were established, the Supreme Court nonetheless faults the District Court for not “slowing the process down enough to determine whether significant partisan performance changes could have been ameliorated.” *Majority Opinion* ¶ 40. Because it did not occur the majority opinion cannot and does not cite to any trial objection or request by the various parties representing the partisan Democratic interests, for more time.

Judge Sutin in his dissent considered the directions on remand by the majority and concluded the instructions amounted to “essentially requiring Judge Hall to reduce Republican seats”. *Id.* at 31. In the final Supreme Court opinion (Order of 2-21-12, No. 33,386) the majority opinion takes significant umbrage at Judge Sutin’s conclusion about the majority’s direction to the trial court: “The accusation that we ordered the District Court to reduce Republican seats in the House originates in the imagination of the accuser.” *Id.* at 32. Based upon the general direction to create fair partisan neutral districts and the clarification in the

majority opinion of February 21, 2012, this Court should ignore any express, implied or imagined directions to reduce Republican seats and create a map that is as “fair and partisan-neutral” as possible. This would mean a minimum of 33 Republican performing seats, not 31 seats and one 50/50 seat, as provided in Preliminary Plan No. 1.

This Court should not reduce Republican seats but rather arrive at a neutral and fair plan, and the current districts should be the relevant baseline. Only recognized and evidenced demographic changes consistent with redistricting principles should guide the court’s hand. The Hall/Executive 3 Republican performance districts (34) not only mirrored the existing 2001 House District Map (prior to the court’s increasing the Democratic performance districts to 39) but the 34 districts in the remanded Hall/Executive 3 plan were the result of demographics and the changes the court required for Voting Rights Act provisions.

Preliminary Plan No. 1 does not comply with a reasonable interpretation of the Supreme Court’s Order. District 24 is supposedly a Republican district although the Preliminary Plan No. 1 Republican performance numbers are 50/50. In actuality the Preliminary Plan No. 1 has 31 Republican performing districts, 38 Democratic performing districts and one 50/50 district. A “fair and partisan neutral” plan would not produce less than 33 Republican performing districts. The demographic changes over the last decade support an increase of the number of Republican districts as Democratic areas have lost relative population while Republican leaning areas have gained population. Of the three (3) areas under populated to a significant degree, sufficient to justify eliminating a district, two (2) of the three (3) areas are Democratic and one (1) is Republican. *Governor’s Exhibits* 6 and 26. The north central region is clearly Democratic. The south east region is Republican and the central Albuquerque area is also Democratic. Of the eleven (11) districts with the total negative deviation of one hundred four point three percent

(104.3%) eight (8) are held by Democratic incumbents and three (3) are held by Republican incumbents. Seventy-eight percent (78%) of the cumulative negative deviation is attributable to Democratic districts. *Id.* Based upon demographics and demographics only, two (2) of the three (3) districts that must be eliminated in a “fair and partisan neutral effort” would be Democratic districts. *Id.*

Conversely the areas of high growth are predominantly Republican. District 44 and 66 have a total positive deviation of one hundred thirteen point six percent (113.6%), are Republican districts and have sufficient population for a new district. District 29, which is overpopulated by a hundred point nine percent (109%) is a Republican District and has sufficient population for a new district. *Id.* Districts 12, 13 and 16 have a total positive deviation of one hundred nineteen point two percent (119.2%), are Democratic districts and have a sufficient population for new districts. *Id.* A one seat net gain cannot possibly constitute an unfair partisan advantage. Preliminary Map No. 1 and any map that artificially establishes the number of Republican districts at less than 33, in the face of the evidence of relative population loss in Democratic areas and growth in Republican areas, would constitute the “unfair partisan advantage” that the Supreme Court insists this court avoid. Preliminary Plan No. 1 should be revised to make District 24 a Republican performance district and at least one other district should be created to establish a minimum of 33 Republican performing districts.

III. Pair Retiring Legislators in Albuquerque.

The Supreme Court directed a 50/50 pairing in the event that the Court drafted a map pairing a Democrat and a Republican. It is therefore not necessary and in fact it is punitive and partisan to reduce the incumbent Republican in District 24 to a 50/50 district when the paired Democrat is not running. Alternatively, the map could, and the demographic evidence strongly

suggests House District 26 and District 25 pairing, as neither Representative is running for re-election.

IV. Conclusion.

The Sena and Legislative Plaintiffs respectfully object to the portions of Preliminary Plan No. 1 and request revisions to establish a fair and partisan neutral plan. Preliminary Plan No. 2 should not be considered.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I certify that on this 23rd day of February, 2012, I caused a true and correct copy of the foregoing Objection to be electronically filed with the court, which caused all counsel of record to be served by electronic means. I further certify that a copy of this document was also transmitted by my office via e-mail to Judge Hall (jhall@jhall-law.com) as well as the following counsel of record:

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