IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

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. No. 33,387

THE NEW MEXICO COURT OF APPEALS,

Respondent,

vs.

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,

and

JONATHAN SENA, DON BRATTTON, CARROLL LEAVELL,
GAY KERNAN, CONRAD JAMES, DEVON DAY, MARGE TEAGUE,
MONICA YOUNGBLOOD, JUDY MCKINNEY, JOHN RYAN,
MAURILIO CASTRO, BRIAN F. EGOLF, JR., MEL HOLGUIN,
HAKIM BELLAMY and ROXANE SPRUCE BLY,

Intervenors.

CORRECTED
EGOLF PLAINTIFFS' BRIEF IN SUPPORT OF REVERSING DISTRICT COURT'S REDISTRICTING PLAN FOR THE NEW MEXICO HOUSE OF REPRESENTATIVES

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I. Introduction.

This appeal arises from the gross malapportionment of current electoral districts for the New Mexico State House of Representatives, the failure of the legislative and executive to remediate it through redistricting legislation, resulting in these lawsuits seeking judicial relief. After an eight-day trial, the trial court below was faced with a stark choice between two competing sets of plans[1]: (1) plans submitted by the Executive Defendants (the Governor, Lt. Governor and Secretary of State) that achieved dramatically and, as we explain below, unnecessarily low population deviations by sacrificing historical racial and ethnic minority voting interests in Southeastern and Southwestern New Mexico; and (2) plans submitted by the Egolf Plaintiffs (a legislator and a number of New Mexico electors) who promoted plans protecting racial and ethnic minority voting interests) that achieved significantly low population deviations and, importantly, provided greater protections than the Executive Defendants' plans with respect to racial and ethnic minority voting interests. The trial court, misunderstanding the

[1] All other parties submitted plans. The Native American parties' plans were incorporated into all of the Egolf plans and were ultimately incorporated into the final Executive Defendants' plan adopted by the trial court. The Egolf plans all are based on the Legislative Defendants' plan, HB 39 (passed by the Legislature but vetoed by the Governor), but improved by the Egolf demographic expert by lowering population deviations and correcting to address racial and ethnic minority voting interests. A full reading of the trial record and the trial court's findings of fact and conclusions of law reveal that the plans of other plaintiffs were not subject to serious consideration by the trial court due to their partisanship and/or disregard of racial and ethnic minority voting interests.

law and beguiled by unnecessarily low population deviations, selected the Executive Defendants' last proposed plan, impermissibly sacrificing the historically protected voting interests of Hispanic communities in Southeastern and Southwestern New Mexico in order to achieve population deviations in those geographic areas within +/-1%. The trial court erroneously emphasized low population deviations at the expense of traditional redistricting principles and abused its discretion. This Court should reverse the trial court's selection and instruct it to implement Egolf Plan 2 or Egolf Plan 5.

II. The Parties.

The Egolf Plaintiffs, a state legislator and registered voters, presented redistricting plans to the trial court designed to protect, consistent with accepted and traditional redistricting principles, the voting interests of New Mexico's historic racial and ethnic minorities. TR 1/15/2011, at 84-85 (testimony of Egolf demographer, Dr. James Williams, that his instructions were to develop plans designed to protect the interests of racial and ethnic minority communities). While two groups of plaintiffs, the Navajo Intervenors and the Multi-Tribal Plaintiffs, presented plans specifically addressing the voting interests of Native Americans, only the Egolf Plaintiffs presented plans focused on protecting the voting interests of New Mexico's historic Hispanic communities.

The other parties to the case include the Maestas plaintiffs, representing Democratic interests, and two groups representing Republican interests (James and Sena). Of the five defendants, three represented Republican interests — the Governor, Lt. Governor and Secretary of State — and the two Legislative defendants, the Speaker of the House and the President Pro Tempore of the Senate, both Democrats, defended the redistricting plans passed by the Legislature.

III. Nature and Course of Proceedings.

These proceedings stem from the redistricting plan passed by the New Mexico Legislature, The House Voters and Elections Committee Substitute for HB 39 ("HB 39"), during the Special Legislative Session of 2011 which was vetoed by Governor Susana Martinez. This Court consolidated the resulting redistricting lawsuits and appointed retired judge, the Honorable James A. Hall, to preside over the consolidated cases.

The Legislature's plan, HB 39, was developed through a process that included public meetings throughout the State where the public and interest groups provided substantial input. This public input was then followed during the Special Legislative Session by hearings, public testimony, extensive debate and deliberative consideration. *See* TR 12/12/2011, at 100-07 (Testimony of Brian

Sanderoff). HB 39 utilized the guidelines adopted by the Legislature[2] and was based on New Mexico's law and custom regarding the creation of State and Congressional redistricting plans. *Id.* at 95-98.

A. The Egolf Plaintiffs' Plans.

At trial, the parties stipulated to the unconstitutional malapportionment of the then-existing legislative electoral districts. All parties introduced proposed remedial plans. At the trial court's invitation, all of the parties with the exception of the Legislative defendants introduced numerous modified plans. Ultimately, the parties presented seventeen (17) prospective remedial plans for New Mexico House redistricting to the trial court.

i. Egolf Plan 2.

The Egolf Plaintiffs introduced 5 proposed House redistricting plans. All of them started with HB 39, not only because HB 39 reflected the product of an open, public process that incorporated the input of the public generally, various interest groups and legislators, but also because HB 39 reflected the result of certain

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[2] The Guidelines were adopted by the Legislature unanimously and are the same or similar guidelines to those the Legislature applied in the past four redistricting cycles, since the 1980s. *Id.* at 98-99; *see Sanchez v. King*, No. 82-0246, at 83 (D. N.M. Aug. 8, 1984) (noting the Legislature's use of neutral criteria and that the Legislature's plan stayed within the plus or minus 5% deviation). The Legislative Guidelines for the 2011 redistricting cycle, adopted by the Legislature in 2001, *see* 2001 N.M. Laws, ch. 220, § 3(A)(2), were reaffirmed by resolution on Jan. 17, 2011. *See* 2011 Guidelines for the Development of State and Congressional Redistricting Plans, adopted Jan. 17, 2011.

difficult decisions consistent with traditional redistricting principles. Among those difficult map-drafting decisions were the movement of hundreds of thousands of people to level the deviations to a +/-5% range, the "tough decision" to move one district from the east side of the State into Northwest Albuquerque, the identification of what district within Central Albuquerque should be moved to Westside Albuquerque to alleviate the population pressures, and decisions as to which incumbents to pair. TR 12/15/2011, at 93-94 (Testimony of Dr. James Williams).

Because the demography of the malapportioned districts in the current map demonstrated a number of low-populated districts throughout the State, the decision as to which districts to move and population to shift posed challenges for each map drawer. *Id.* at 91-92. As stated by Dr. Williams, the Egolf expert demographer, the current "malapportioned map is potentially a great threat to incumbency" and potentially "a great threat to minority community areas, so we're going to have to have a complex balancing act of decisions that have to be made about how to rectify the great malapportionment" resulting from 10 years of population growth and decline around the State. *Id.* at 91. Dr. Williams therefore used HB 39 as a base for the Egolf plans, recognizing that legislators' familiarity with New Mexico's neighborhoods, communities, people and precincts are better than most. *Id.* at 95. "[T]he Legislative Plan resolved the problem of a whole lot

of input about communities of interest and neighborhood[s] and areas." *Id.* Dr. Williams determined that while HB 39 brought the House districts down to an acceptable level of deviation, consistent with the Guidelines (within + or – 5% deviations), there were a number of improvements that could be made to increase the protection to racial and ethnic minority voting rights and to further reduce population deviations. TR. 12/15/11, at 92-93.

The Egolf 2 map is identical to Egolf 1, with the exception of making slight alterations to certain districts in the Northwest quadrant of the State to accommodate the concerns of the Navajo Intervenors and Multi-Tribal Plaintiffs. Egolf 2, consistent with accepted traditional redistricting principles, substantially improved upon the number of deviations on the higher and lower end of the +/-5% range in HB 39. *Id.* at 96-97, 118-20, 124; Egolf Tr. Ex. 25. Improving on the Legislative plan, Egolf 2 significantly reduces deviations in the Albuquerque Metro and the North Central areas of New Mexico without consolidating or "jumping" a North Central New Mexico district. *See* Egolf Tr. Exhs. 8 & 25. No district is over +/-5%. *Id.* Egolf 2 created two new districts on the Westside of Albuquerque while simultaneously avoiding the pairing/elimination of an historical North Central New Mexico seat and preventing the accumulation of overpopulated districts in Albuquerque (i.e., districts at the high-end of +5% from the ideal).

In HB 39, many districts in the North Central New Mexico region were underpopulated (at the high-end of -5%), while Albuquerque had a significant percentage of districts that were somewhat overpopulated (at the high-end of +5%).[3] Egolf 2 avoided "moving" or "crunching" or "jumping" an entire district in the North Central area to Albuquerque by reducing overpopulation in Albuquerque and underpopulation in the North Central area by shifting additional population to the North Central area from the Albuquerque area.[4]

In Egolf 2, Dr. Williams also significantly improved on HB 39 with respect to protecting the voting interests of New Mexico's historic racial and ethnic minority communities. Like HB 39, Egolf 2 incorporates the consensus plans

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[3] Brian Sanderoff, the Legislature's expert map-drawer and demographer, testified that the population deviations in HB 39 were not used to discriminate in favor of some areas to the detriment of others. TR 12/12/2011, at 198-99. The Legislature did not employ deviations at the higher ends of +/-5% for improper purposes or to increase the number of Democratic seats in the House. *Id.* at 199. Dr. Theodore Arrington, the Egolf Plaintiffs' political-scientist expert, testified that he did not see any evidence in any plan indicating that deviations were being used for an improper purpose. TR 12/15/2011, at 234.

[4] Dr. Williams employed this approach (i.e., shifting rather than moving a district) because the North Central region was underpopulated by only about 9,000 people, which is less than half of an entire district, and to consolidate an entire district would have required moving approximately 29,000 people. TR 12/15/2011, at 119. As noted by Dr. Williams, "if you accidentally shift lines and pile up 15,000 [people], you have now a whole new deviation problem [to remedy]." *Id.*; *see* TR 12/12/2011, at 142-43 (Sanderoff) (explaining that consolidating two districts has significant consequences, including the creation of excess population the map-drawer must accommodate, and change to the nature of neighboring districts, resulting in awkward districts).

presented by a group of New Mexico sovereign Native American tribal governments, with the exception that Egolf 2 incorporated more recent changes to the tribal plans than were presented to the Legislature. As to New Mexico's historic Hispanic communities, the Egolf 2 plan increases the number of majority Voting Age Population Hispanic ("VAPH") districts from the current, malapportioned plan by two districts, from 27 to 29, *see* Egolf Ex. 8, and maintains, strengthens and restores Hispanic communities of interest in a number of other places. Egolf 2 reunites Representative Rudy Martinez with a VAPH district in Southwestern New Mexico and retains the VAPH district that was created by the federal district court in *Sanchez v. King*, HD 63, as a Section 2 remedy for the historic discriminatory practices that had occurred in the Clovis-Portales area of the State. *See Sanchez*, No. 82-0067, at 79-84; TR 12/12/2011, at 217, 237-38.

As explained below, the evidence at trial amply established that HD 63, created in *Sanchez v. King* to remediate entrenched discrimination against the Hispanic minority communities in the Clovis-Portales area, accomplished its purposes and allowed these minorities to elect legislative candidates of their choice that otherwise they would have been deprived of as a result of historic racial block voting patterns. *See* TR 12/12/2011, at 243-44, 253-54 (Sanderoff); TR 12/13/2011, at 233-34 (Testimony of Dr. Theodore S. Arrington); TR 12/13/2011,

at 219, 225-27 (Testimony of Robert Sandoval). The evidence also established that Hispanics continue to suffer discrimination in voting and in other ways such that maintaining the core of HD 63, as contemplated by the *Sanchez* Court, remains necessary. TR 12/13/2011, at 219, 225-34 (Testimony of Robert Sandoval). Egolf 2 retains District 63 as a VAPH district, and retains both the character and core of District 63 as it was developed in *Sanchez*. Egolf 2 also united traditional Hispanic communities in east and Southeastern New Mexico, in Clovis, Hobbs and Carlsbad.

Egolf 2 also minimizes incumbent pairings, suffers from no measureable partisan bias, and is one of only three plans that limits its incumbent-pairings to three. *See* Egolf Tr. Ex. 8. While Dr. Williams respected incumbency, he never attempted to harm or help any incumbent and did not attempt to favor one political party over another.

ii. Egolf Plan 5.[5]

Egolf Plan 5 ("Egolf 5"), based on Egolf 2 and Egolf 3, employs further shifting of district boundaries and was developed to further improve deviations to the extent practicable, closer to zero, without moving or jumping a district from the

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[5] Egolf 5 is Egolf 3 with a minor precinct-swap correction; the Egolf Plaintiffs withdrew Egolf 3 from the district court's consideration and substituted Egolf 5 in its place. The district court did not, however, acknowledge nor address Egolf 5 in its Findings and Conclusions. Egolf 4 was a plan that was submitted at the invitation of the trial court that "jumped" a district from the North Central area of the State to Albuquerque, creating a third new district on Albuquerque's Westside.

North Central area to the Westside of Albuquerque, and without harming the character, nature or voting strength of Native American and Hispanic minority communities throughout the State. Egolf 5 has an overall maximum population deviation of 6.9%, has a mean deviation of only 1.4% and a median deviation of only 1.3%. *See* Egolf Tr. Ex. 26.

Except for four Native American VAP districts and two *Sanchez v. King* districts, HD 63 & HD 58, which are historic minority districts, no House district in Egolf 5 has a deviation above +/-2%. *See* Egolf Tr. Ex. 25. And of the six districts over +/-2%, none are over +/-5%. *Id.* Egolf 5 does not consolidate a district in the North Central area of the State, retains the Native American VAP districts as proposed by the Multi-Tribal Plaintiffs and Navajo Intervenors, and retains District 63 as contemplated in *Sanchez v. King*.

Egolf 5 increases the number of VAPH districts from the current plan by three districts, from 27 to 30. *See* Egolf Tr. Ex. 25. And Egolf 5 maintains all six (6) VAPNA districts as proposed by the Multi-Tribal Plaintiffs and the Navajo Intervenors, and both have testified in support of Egolf 5. *Id.* Egolf 5 pairs three sets of incumbents as follows: Democrat-Democrat, Democrat-Democrat, and Republican-Republican.

B. Executive Defendants' Plans.[6]

The Executive Defendants, representing the Republican interests of the Governor, Lt. Governor and Secretary of State, did not propose, introduce or support any redistricting plan during the Special Legislative Session of 2011. TR 12/14/2011, at 84 (Testimony of John Morgan). After the Governor vetoed the plan passed by the Legislature, the Executive Defendants hired a Virginia-based political consultant, John Morgan, unfamiliar with New Mexico and who works exclusively for Republican interests around the county, to work as their expert map-drawer. TR 12/13/2011, at 301-03.

As opposed to the Egolf plans, the Executive Defendants' plans do not adequately protect the voting interests of New Mexico's historic racial and ethnic minorities. Two points about the Executive Defendants' plans are clearly established in the record: (1) unnecessarily low population deviations – approaching as close as is possible zero deviations – is the primary "driver" of the Executive Defendants' plans; and (2) these plans are driven by "numbers," and not by thorough familiarity with (and respect for) New Mexico's geography, history and communities.[7]

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[6] Contrary to the district court's Findings and Conclusions, there were four Executive Defendant plans submitted, not three.

[7] This latter point is perhaps best illustrated by the fact that the Executive Defendants' initial proposed plan (1) did not incorporate the wishes of the Native American sovereign tribal governments and instead substituted Mr. Morgan's

Mr. Morgan was instructed by attorneys for the Executive Defendants to use the current, malapportioned, map as his guide for drafting a new redistricting plan, and was instructed to create a plan with deviations "as low as practicable." TR 12/14/2011, at 85. Mr. Morgan agreed that he had no personal or particular knowledge about the history, litigation, Section 2 violations, political subdivisions, communities of interest or people of New Mexico. *Id.* at 90, 107. In using the current map as his baseline and having no consideration whatsoever for the people or communities in New Mexico, Mr. Morgan relied solely on performance numbers (i.e., minority district numbers and Republican performance numbers) and those communities of interest he could identify from the current, malapportioned map.[8] *Id.* at 90, 107-27. Mr. Morgan had no idea, *inter alia*, that the Northwest quadrant of the State was subject to Section 5 preclearance in the 1990s, or that House District 63 in the Southeast was judicially-created to remedy Section 2 violations in the 1980s. *Id.* at 88-89.

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judgment that low population deviations were preferable to paying attention to the wishes of the tribal governments as to their electoral desires, and (2) the plan split historic minority communities repeatedly, such as the Laguna and San Ildefonso pueblos, and the Hispanic community in Clovis, among others. TR 12/12/2011, at 257, 262; TR 12/14/2011, at 128-31. While Mr. Morgan attempted (somewhat grudgingly) to correct these trespasses in later plans, it is clear that he judged his plans not on the basis of familiarity with New Mexico's communities, people and history, but on the basis of numbers.

[8] As stated by the Egolf Plaintiffs' political-scientist expert, Dr. Arrington, redistricting plans cannot be based simply on "numbers." Communities of interest and other districting principles play a fundamentally important role. TR 12/15/2011, at 242.

In developing his low-deviation plan based on the current map, Mr. Morgan, first, failed to respect the sovereignty and self-determination rights of the Native Americans. Mr. Morgan did not consult any Native American groups, did not review any of the testimony or documents submitted by tribal leaders during the Special Session, and did not incorporate the then-Native American Consensus Group's plan for the Northwest quadrant that was adopted in HB 39. TR 12/14/2011, at 90-91; TR 12/22/2011, at 39. The Executives' original plan was substantially different from and did not adopt the plans advocated by the Multi-Tribal Plaintiffs and Navajo Intervenors.

The original Executive plan split Laguna Pueblo and San Ildefonso, TR 12/12/2011, at 257, 262, and the plan split Native American communities and subdivisions that had not been split on the current map. TR 12/14/2011, at 128-31; *id.* at 129 (acknowledging Laguna Pueblo was split "[t]o equalize the population in that area").

The Executive Defendants' original plan also removed the Clovis communities, created as a result of the Section 2 violations in *Sanchez v. King*, out of HD 63 and split them into two different districts, HD 67 and HD 64. TR 12/12/2011, at 253-54; Findings & Conclusions, at 14, ¶ 64. In the Southwest, the Executives' original plan created a district, HD 39, which split Silver City and then

proceeded to span from the half of Silver City retained in the district into the heart of downtown Las Cruces. TR 12/12/2011, at 260.

The Executive Defendants, again at the invitation of the trial court, submitted a number of modified plans in an attempt to correct the splitting of racial and ethnic minority communities. After several modifications, the Executive Defendants ultimately incorporated into their plan the consensus plans of the Navajo Intervenors and Multi-Tribal Plaintiffs, accepting population deviations in the +/-4 to 5% range in the Northwest quadrant.

The Executive Defendants' fourth plan, named Executive Alternative 3, which Judge Hall adopted as the court's remedy for the House redistricting, attempted to unify some communities of concern that had been expressed by various witnesses and the district court. TR 12/22/2011, at 53. Alternative 3 unified Tesuque, San Ildefonso, Dixon, Alamogordo, Bayard, and Tajique. *Id.* at 53. Notably, Executive Alternative 3 increased the Republican performance numbers even further from Executive Alternative 2, reflecting a significant Republican partisan bias. Significantly, Executive Alternative 3, adopted by Judge Hall, continued to destroy the historic *Sanchez v. King* HD 63, and disregarded Hispanic minority communities in Southwestern New Mexico, as discussed further below.

C. District Court Findings and Conclusions.

After almost two weeks of evidence and the submission of written closing arguments and proposed Findings and Conclusions, Judge Hall chose Executive Alternative 3 as the new redistricting plan for the New Mexico House of Representatives, with minor modifications.[9] *See* Findings & Conclusions, at 34, ¶ 36. The court concluded that the Executive Alternative 3 plan "best compli[ed] with legal standards for court-ordered redistricting" in that it "properly placed the highest priority on population equality and compliance with the Voting Rights Act." *Id.* at 33, ¶ 34. The court's decision, however, is in error as a matter of law. Judge Hall courted and ultimately adopted a plan that improperly sacrificed neutrally applied traditional redistricting principles, including the destruction of historical minority districts, in favor of a plan that managed to achieve the lowest possible deviations.

While the law without question holds that a state's traditional districting principles must be honored and applied, in addition to achieving population equality as nearly as is practicable and in addition to compliance with the Voting Rights Act, Judge Hall's decision violates this legal standard. The only districts the court found were justified in having deviations reflecting respect for communities of interest and other districting principles were the Native American

[9] It is important to note that there are no admitted exhibits reflecting Executive Alternative 3. The Alt. 3 plan had been submitted on the second to last day of trial.

districts in the Northwest quadrant of the State. *Id.* at 30, ¶ 27. The court (appropriately) determined that compliance with Section 2 of the Voting Rights Act, preservation of tribal communities of interest, and continued dilution of Native American voting rights, *inter alia,* justified deviations in the Northwest quadrant within +/-5%. *Id.* at 13, ¶¶ 60, at 27-28, ¶¶ 21-25, at 30, ¶ 27.

The court, however, did not find "persuasive evidence that Sec. 2 of the Voting Rights Act requires any particular Hispanic district be drawn." *Id.* at 29, ¶ 26. The court found that the Hispanic community, formerly in HD 63, "in and around Clovis is politically cohesive and that Anglos in the area vote sufficiently as a bloc to enable them to usually defeat the minority's preferred candidate." *Id.* at 14, ¶ 65. HD 63 had been created as a result of the long-standing discriminatory practices found in *Sanchez v. King*, No. 82-0246, at 83 (D. N.M. Aug. 8, 1984).

Judge Hall, however, nonetheless found that the Executive Alt. 3 plan addressed these concerns, *id.* at 14, ¶ 66, despite the fact that the Clovis Hispanic community in question was moved from an effective minority voting district, HD 63, to an ineffective district, HD 67. The court utterly ignored, and did not so much as mention, the evidence demonstrating that carving the Clovis Hispanic community out of HD 63, and putting it into HD 67, would result in that historic community of Hispanics no longer having the opportunity to elect the candidate of their choice.

Despite the fact that one of the plans submitted, Egolf 5, had very low deviations while simultaneously maintaining the historical Clovis minority in HD 63 and keeping other communities and political subdivisions together, only the Executive Alt. 3 plan was praised for its low deviations. *Id.* at 33, ¶ 34. The district court notably ignored Egolf 5 in its entirety, which had deviations no greater than +/-2% in all districts excepting two *Sanchez v. King* districts and four Native American districts in the Northwest (and all six of those districts are within +/-5%). *See* Egolf Tr. Ex. 25. The Executive Alt. 3 plan had deviations no greater than +/-1% in all districts, excepting the four Native American districts in the Northwest. *See* Egolf Tr. Ex. 25. The differences, from a strict deviation perspective, between Egolf 5 and Executive Alternative 3 effectively boils down to Egolf 5 preserving two *Sanchez v. King* districts versus the Executive Plan achieving population deviations in some districts 1% lower than the Egolf Plan.

While the evidence reflects that Executive Alt. 3 plan had an overall maximum deviation of 6.2%, and Egolf 5 had an overall maximum deviation of 6.9%, the district court praised the Executive Alt. 3 plan for its low deviations while having completely ignored so much as mentioning Egolf 5 in its decision.

IV. Argument.

A. The District Court Erred in Favoring Lower Deviations Over Other Redistricting Criteria.

As noted above, the district court made clear in its findings and conclusions that it regarded achieving the lowest possible population deviations as the driving force behind its selection of plans. In doing so, the district court ignored the United States Supreme Court's repeated caution that deviations of up to a total of 10% are not only permissible in state legislative redistricting, but are likely to be necessary if redistricting is to maintain historic communities of interest, ethnic communities and political subdivisions. As explained below, the United States Supreme Court has repeatedly recognized that the redistricting of state legislatures—whether performed by a legislature or by a court—is *not* subject to the type of population exactitude that the Supreme Court requires in Congressional redistricting. In striving to achieve near zero deviations, the district court threw the baby out with the bath water.

i. The role of population deviations in state legislative redistricting.

In the context of state legislative redistricting, the Supreme Court has *never* held that the constitutional rigor of precise population equality among Congressional districts is applicable to state legislative redistricting. In the seminal case of *Reynolds v. Sims*, the Supreme Court put it bluntly: In state legislative

reapportionment, "mathematical nicety is not a constitutional requisite." *Reynolds v. Sims*, 377 U.S. 533, 569 (1964). A decade later, the United States Supreme Court explicitly held, *in a judicial redistricting case*, that there was no requirement that "court-ordered reapportionment of a state legislature must attain the mathematical preciseness required for congressional redistricting." *Chapman v. Meier*, 420 U.S. 1, 27 (1975) (concluding a 20% total deviation in a court-imposed redistricting plan was impermissible "in the absence of significant state policies or other acceptable considerations that require adoption of a plan with so great a variance"). This is because sensible redistricting of state legislative districts at deviations as near to zero as possible, as a practical matter, is not reasonably possible. As the Vermont Supreme Court stated:

> Early on, the Supreme Court acknowledged the practical impossibility of arranging state legislative districts "so that each one has an identical number of residents," and required only "that a State make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable."

In re Reapportionment of Towns of Hartland, Windsor and West Windsor, 624 A.2d 323, 329 (Vt. 1993) (quoting *Reynolds*, 377 U.S. at 577).

Since *Chapman*, the Supreme Court has stated more clearly what it means: In state legislative redistricting, there are likely to be unavoidable, minor deviations, which the Court has defined as anything less than ten percent, necessitated by a state's demography, geography, communities and political

boundaries. Indeed, the Court has anticipated that state legislative bodies might be able to justify even higher deviations from strict population equality in legislative redistricting:

> Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations. A plan with larger disparities in population, however, creates a prima facie case of discrimination and therefore must be justified by the State. *See Swann v. Adams*, 385 U.S. 440, 444 (1967) ("*De minimis* deviations are unavoidable, but variations of 30% among senate districts and 40% among house districts can hardly be deemed *de minimis* and none of our cases suggests that differences of this magnitude will be accepted, without a satisfactory explanation grounded on acceptable state policy.")

Brown v. Thomson, 462 U.S. 835, 842-43 (1983). The "ultimate inquiry" is whether the plan "'may reasonably be said to advance [a] rational state policy' and, if so, 'whether the population disparities among the districts that have resulted from the pursuit of this plan exceed constitutional limits.'" *Id.* (quoting *Mahan v. Howell*, 410 U.S. 315, 328 (1973)). And the Court has reiterated its view over the years since *Brown*. *See Voinovich v. Quilter*, 507 U.S. 146, 160-62 (1993) ("Our decisions have established, *as a general matter*, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations.") (emphasis added).

And in evaluating the important policies of a given state, the U.S. Supreme Court, in just the past week, has reiterated that "'faced with the necessity of

drawing district lines by judicial order, a court, as a general rule, should be guided by the legislative policies underlying' a state plan—even one that was itself unenforceable—'to the extent those policies do not lead to violations of the Constitution or the Voting Rights Act.'" *Perry v. Perez*, 565 U.S. __, slip op. at 4 (2012) (per curiam) (quoting *Abrams v. Johnson*, 521 U.S. 74, 79 (1997)). The Court emphasized that a state plan, even an unenforceable one, "provides important guidance" to help ensure that the district court will appropriately confine itself to drawing maps that comply with the Constitution and the Voting Rights Act without displacing legitimate state policy judgments with the court's own preferences. *Id.*

Applying these principles, the U.S. Supreme Court has held that a deviation of over 16% was sustainable in a state's legislative reapportionment if the state could establish that the deviation served a state policy of preserving the boundaries of political subdivisions. *Mahan*, 410 U.S. at 324-25. In *Voinovich*, the Court reversed the decision of a district court that had rejected a legislature's plan because its deviation exceeded 10%. *Voinovich*, 507 U.S. at 160-62. The Supreme Court criticized the lower court in *Voinovich* for its failure to undertake an inquiry into the legitimacy of the interests that had resulted in deviations greater than ten percent and pointed out that, in *Mahan*, it had already accepted a 16% deviation "where justified." *Id.*

The Supreme Court and lower courts have recognized numerous neutral redistricting criteria that are important and that necessitate deviations from population equality among state legislative districts. "Any number of consistently applied legislative policies might justify some variance." *Karcher v. Daggett*, 462 U.S. 725, 740 (1983). The Oklahoma Supreme Court summarized those that the United States Supreme Court has recognized as including: "(1) preserving cores of existing districts, or communities of interest; (2) providing geographically compact districts; (3) minimizing splitting of political subdivisions; (4) maintaining historical placement of district lines; (5) fairness to voters; and (6) avoiding contests between incumbents running for reelection." *Alexander v. Taylor*, 51 P.3d 1204, 1211 (Okla. 2002)

The Supreme Court and lower courts have recognized that population deviations are *necessary* if important, neutral redistricting criteria are to be honored. As a three-judge federal court explained:

> Because the promotion of these important state policies will often necessitate "minor deviations" from absolute population equality, the [Supreme] Court has held that such minor deviations, alone, are insufficient to establish a prima facie case of invidious discrimination. *Voinovich v. Quilter*, 507 U.S. 146, 160-62 (1993). In *Brown v. Thomson*, 462 U.S. 835, 842 (1983), the Court held that redistricting plans with a maximum population deviation below ten percent fall within the category of minor deviations that are insufficient to establish a prima facie violation of the Equal Protection Clause. "Thus, a redistricting plan with a maximum deviation below ten percent is prima facie constitutional and there is no burden on the

> State to justify that deviation." *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F.Supp. 1022, 1031 (D.Md. 1994).

Rodriguez v. Pataki, 308 F.Supp.2d 346, 363-64 (S.D.N.Y. 2004).

ii. Population deviations in court-adopted plans.

The Supreme Court has indeed cautioned that courts engaged in redistricting are held to "a higher standard of acceptable population variation than legislatively enacted maps." *Perry*, 565 U.S. __, slip op. at 8 n.2; *see also Connor v. Finch*, 431 U.S. 407, 419 (1977) (A court has a higher burden than a legislature of articulating a policy that requires "substantial population inequalities" among legislative districts). But the Court has never suggested that a court adopting a state legislative redistricting plan is subject to any stricter standard than the requirement that its plan meet the "*de minimis*" or "minor" deviation standard of less than 10% total deviation, which the Supreme Court, as noted above, has found often to be necessary to state legislative redistricting. *See Chapman v. Meier*, 407 F.Supp. 649, 664 (D.C.N.D. 1975), *on remand after reversal in Chapman*, 420 U.S. 1 (explicitly adopting the "*de minimis*" standard as not exceeding 10%); *Connor*, 431 U.S. at 413 (providing court-ordered legislative reapportionment plan should be "as near *de minimis* as possible"); *see also Bone Shirt v. Hazeltine*, 387 F.Supp.2d 1035, 1038 (D. S.D. 2005) (holding that a court-ordered reapportionment plan must meet the "*de minimis*" standard); *Wright v. City of Albany*, 306 F.Supp.2d

1228, 1235 (M.D.Ga. 2003) (using "*de minimis*" and "minor" deviation standards interchangeably for purposes of court redistricting).

The Supreme Court has given only general guidance to lower courts that are required to adopt redistricting plans. It has simply reiterated, with implied emphasis that it be followed closely, and with articulated justification when the deviations are "substantial," the same "*de minimis*" standard that applies to state legislatures: "[U]nless there are persuasive justifications, a court-ordered reapportionment plan of a state legislature . . . must ordinarily achieve the goal of population equality with little more than *de minimis* variation." *Connor*, 431 U.S. at 414. The Court's guidance continues to be limited to providing that courts, in adopting a plan, need not "attain the mathematical preciseness required for congressional redistricting," *Chapman*, 420 U.S. at 27 n.19, and may exceed even "*de minimis*" deviations "[w]here important and significant state considerations rationally mandate departure from these standards," *id.* at 27, so long as the reapportioning court "articulate[s] precisely why a plan . . . with minimal population variance cannot be adopted." *Id.*

Thus the fundamental question of law before this Court is whether a court that is called upon to reapportion a state legislature acts within its discretion when it selects a plan because it has the lowest population deviation even though a) the plan it selects sacrifices cores of traditional districts and cuts communities and

traditional communities of interest, including ethnic communities of interest, and b) other submitted plans that preserve communities of interest, including ethnic and racial communities of interest - are well within the range of *de minimis* deviations that the Supreme Court explicitly has approved in the contest of state legislative redistricting. The foregoing cases indicate that a redistricting court has the discretion to adopt plans falling under a 10% overall deviation in order to apply neutral redistricting criteria, including the preservation of ethnic, racial and other communities of interest. What makes this case utterly unique is that the trial court essentially set aside traditional redistricting criteria in order to achieve deviations as close to zero as possible when there was no legal reason to do so. These Plaintiffs have found no cases in which another court did so.

The only case that the Egolf Plaintiffs have located that appears to address such a circumstance, even inferentially, is *Mahan v. Howell*, 410 U.S. 315, 323 (1973), a companion case to *Chapman*. In *Mahan*, the underlying three-judge court had rejected Virginia's legislative redistricting plan and adopted its own, largely in order to achieve a lower population deviation among districts. *Mahan*, 410 U.S. at 319-20. In reversing the trial court's decision in relevant respects, the Court criticized the lower court for "substituting population equality for [political] subdivision representation." *Id.* at 323. While *Mahan* involved a redistricting plan that had been adopted by Virginia's legislature, its holding is relevant here: a court

should not sacrifice established redistricting principles simply to achieve a lower population deviation among legislative districts. *Id.* at 328-30.

The Supreme Court has been less than specific in its discussions of the duties of courts engaged in redistricting, but its decisions provide some guidance as to what is meant by the "stricter standard" that governs courts in adopting redistricting plans: Under *Connor*, a court-imposed plan *must* have population deviations of less than 10% unless the court articulates "important and significant state considerations" that "mandate" a departure. *Connor*, 431 U.S. at 418. A narrower reading of *Connor*, as noted above, is that a court has a higher burden to justify any "substantial population inequalities" among legislative districts. *Id.* at 419. Here, of course, none of the plans had any substantial population inequalities, including the Native American areas of the State. Thus, the strictness required of courts engaged in redistricting relates to the need for rigorous justification for any plan whose deviation is "substantial" or exceeds 10%. A legislature, on the other hand, is granted latitude to adopt a plan that is below 10% in total deviation, absent invidious discrimination, and greater latitude in justifying a redistricting plan whose deviation exceeds 10%. *See, e.g.*, *Voinovich*, 507 U.S. at 160-62 (holding that legislative deviations above 10% to be permissible where reasonably justified). Implicit in the decisions discussed above, which recognize the impediments to zero deviations in state legislative redistricting plans, is that a court may adopt a plan

that is under 10% in its deviations and, where faced with competing plans whose deviations are *de minimis*, should adopt the plan that most closely adheres to a state's identifiable, neutral redistricting principles, including reasonable deference to incumbency.

Judge Finesilver, in *Carstens v. Lamm*, 543 F.Supp. 68, 98-99 (D.Colo. 1983) (three-judge court), eloquently addressed why a redistricting court, like the court below, is wrong to sacrifice other redistricting criteria in favor of a zero-deviation plan, *even in Congressional redistricting*:

> District courts, floundering in the absence of any definable deviation standards, began to adopt plans which fell below the lowest deviation accepted by the Supreme Court and reject those which were greater regardless of the actual impact of the plan on representation. Litigants, seeking court approval of their plans, strove to achieve a greater degree of mathematical precision, again without regard to the impact on the quality of representation. Thus, the current overriding and at times illogical dominance of population equality in congressional redistricting is more the result of inadvertent evolution and blind adherence to prior court decisions than of reasoned decision making.

Id. at 98. The *Carstens* Court stated that while population equality should be prominent, "it should be one factor considered equally with others such as the absence of racial discrimination, compactness and contiguity, preservation of county and municipal boundaries, and preservation of communities of interest in determining the constitutionality of any given redistricting plan," assuming the deviations fall within "some chosen range" that it believed was in the 5% to 15%

range. *Id.* "Due to differences in population growth rates and inaccuracies in the census figures, exact population equality is almost certain to be illusory." *Id.*

iii. Inaccuracy of census data two years after the census makes slavish adherence to zero population deviations a distraction.

As stated *Carstens*, population data from the census is inaccurate to begin with and becomes more so quickly with the passage of time. "'[C]ensus data are not perfect,' [and] 'population counts for particular localities are outdated long before they are completed.'" *Abrams*, 521 U.S. at 100-01 (quoting *Karcher*, 462 U.S. at 732). Thus, even the Supreme Court has acknowledged, as stated in *Carstens*, that the pursuit of population precision, even in the context of Congressional redistricting, "'is a search for a will-o'-the-wisp.'" *Carstens*, 543 F.Supp. at 99 (quoting *Kirkpatrick v. Preisler*, 394 U.S. 526, 538-39(1969)).

In determining how to assess the matter of population deviations, the Seventh Circuit has also explained that census data has a margin of error that, coupled with population movement after a census, is likely to make the formality of population "equality" under the census figures less and less compelling as the redistricting process addresses smaller political units. *Frank v. Forest County*, 336 F.3d 570, 572-76 (7th Cir. 2003) (noting that margin of error in the data and passage of time make the "10% rule" less and less compelling as the reapportioned political districts become smaller and more sparsely populated).

In the present context, the Supreme Court's decision in *Abrams* is significant because the Court went to pains to praise the district court for accepting some deviation in favor of other redistricting criteria: "The court was careful to take into account traditional state districting factors, and it remained sensitive to the constitutional requirement of equal protection of the laws." *Abrams*, 521 U.S. at 101.

iv. Courts should reject a plan that is not politically neutral.

There is another check on court-ordered redistricting that is at issue here. Lower federal courts and state appellate courts have held that another restraint on courts in the adoption of redistricting plans is political neutrality. Here, the district court adopted a plan that is not politically neutral, as plainly reflected by the evidence. *See* Egolf Tr. Ex. 25. As stated by the Supreme Court of Indiana: "A court called upon to draw a map on a clean slate should do so with both the appearance and fact of scrupulous neutrality." *Peterson v. Borst*, 786 N.E.2d 668, 673 (Ind. 2003); *see id.* ("'Judges should not select a plan that seeks partisan advantage—that seeks to change the ground rules so that one party can do better than it would do under a plan drawn up by persons having no political agenda—even if they would not be entitled to invalidate an enacted plan that did so.'") (quoting *Prosser v. Elections Bd.*, 793 F.Supp. 859, 867 (W.D.Wis. 1992)).

Here, there is no dispute that the Executive Alternative Plan adopted by the trial court contains a severe partisan bias. *See* Egolf Tr. Ex. 25. The district court only acknowledged this in noting that the Executive Alternative 3 plan "has some limited impact on the partisan performance measures of individual districts," but does not elaborate as to what this means in practice. *See* Findings and Conclusions, at 33, ¶ 35; Egolf Tr. Ex. 25.

B. The Plan Adopted by the District Court Gave Undue Consideration to Extremely Low Population Variance at the Expense of Hispanic Communities of Interest in New Mexico.[10]

i. The plan adopted by the district court sacrifices the voting interests of the Hispanic community in Curry County in favor of needlessly low population deviations.

For many years, Clovis Hispanics have resided in an effective Hispanic majority district, HD 63, currently constituting 54.6% of the total voting age population in that district and approximately 50.1% of the citizen voting age population in that district.[11] The plan adopted by the district court, however, removes the Hispanic community in the heart of Clovis from HD 63, where it has been for three decades (and where the Hispanic community could and had been

[10] As shown above in the preceding sections, the district court was wrong in its belief that the *de minimis* deviation standard articulated by the federal courts equates to "close to zero" population deviation, and erred in determining that traditional redistricting principles, especially where minority communities of interest were concerned, could be ignored in pursuit of such low deviations.

[11] *See* Legis. Def. Ex. 8 (District Profile for HD 63); James Ex. 9 (showing citizen voting age population by county compared to voting age population).

exercising their ability to elect candidates of their choice), and relocates that community to HD 67 (where this minority community will not likely be able to select candidates of their choice). As a result of being carved out of HD 63 in the plan adopted by the district court, the Hispanic community in Clovis is now joined with Anglo voters to the east of Clovis to the Texas state line.[12] The Hispanics in HD 67 constitute 50.9% of the total voting age population in that district, or approximately 46.4% of the citizen voting population.[13] As shown more fully below, in relocating this historically cohesive minority group in Clovis from an effective Hispanic opportunity district - which grew from the remedial minority district created by the court in *Sanchez* precisely to effectuate the voting strength of the minorities in this area - to an ineffective Hispanic district, the district court below improperly vitiates the historical *Sanchez* district and disregards this important ethnic community, all in the name of unnecessarily low population deviations. This is error and requires rejection of the remedial plan adopted by the trial court.

The district court had before it proposed redistricting plans that kept the Hispanic community in Clovis largely intact and in HD 63, including the Egolf 2 and Egolf 5 plans, both of which resulted in retaining the Clovis Hispanic

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[12] *See* Gov. Ex. 33 (Clovis Area Profile).

[13] *See id.* (District Profile for HD 67).

community in HD 63, with over 57% of the total voting age population and approximately 52.5% of the citizen voting age population.[14] The Egolf Plaintiffs' plans strengthened the voting power of the Hispanic community in Clovis while simultaneously keeping low population deviations.[15] The plan adopted by the district court preferred even lower population deviations, but at the cost of cutting out and transporting the Hispanic community of Clovis into an entirely different district where the community will no longer be able to vindicate their voting rights by having the opportunity to elect candidates of their choice.

Traditional redistricting principles, especially the maintenance of compact and effective racial or ethnic minority voting interests, have always been balanced with the other requirements of redistricting. *See, e.g., Abrams*, 521 at 98-100; *LULAC v. Perry*, 548 U.S. 399, 424-25 (2006). In New Mexico, a state with such a rich and unique Hispanic culture, the correct balancing test must favor heavily the interests of cohesive Hispanic communities over the quest for unnecessary "near zero" population deviations. The district court, however, in pursuing its stated goal of nearly exact population equality, ignored the interests of the

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[14] *See* Egolf Ex. 21 ("Egolf 2") (57.4% Hispanic Voting Age Population); Egolf 26 ("Egolf 5") (57.9% Hispanic Voting Age Population); *see also* James Ex. 9 (showing that the difference between Hispanic voting age population and Hispanic citizen voting age population in Curry County is 4.5%).

[15] *See* Egolf Ex. 21 ("Egolf 2") (-3.1% deviation); Egolf 26 ("Egolf 5") (-3.9% deviation).

Hispanic community in Clovis, repudiated their historical ability to vindicate their voting rights, since *Sanchez*, and ignored their long history of discrimination by the Anglo majority. The district court's decision to do so was in error.

ii. The plan adopted by the district court violates Section 2 of the Voting Rights Act because it impermissibly dilutes the voting strength of the Hispanic community in Curry County.

Another reason the redistricting plan adopted by the district court is in error is because it violates Section 2 of the Voting Rights Act in that it dilutes the voting strength of the Hispanics residing in the remedial district created by the federal court in *Sanchez v. King*.[16] A redistricting plan violates Section 2 of the Voting Rights Act if:

> [B]ased on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of [a racial group] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

42 U.S.C. § 1973(b). The Supreme Court has identified three threshold conditions for establishing a Section 2 violation, known as the *Gingles* requirements. *See*

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[16] The district court erroneously glossed over the potential Section 2 violations in the plans presented to it, stating that it "finds no persuasive evidence that Sec. 2 of the Voting Rights Act requires any particular Hispanic majority district be drawn." Findings of Fact and Conclusions of Law at 29, ¶ 26. The district court did not, however, even consider whether the plan it adopted diluted the voting strength of Hispanics in any particular district in violation of Section 2.

Johnson v. De Grandy, 512 U.S. 997, 1006-07 (1994). First, the racial group at issue must be "sufficiently large and geographically compact to constitute a majority in a single-member district;" second, the racial group must be shown to be "politically cohesive;" and finally, there must be some evidence that the majority "vot[es] sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Id.*; *see also Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). If all three *Gingles* requirements are met, the text of Section 2 directs the court to consider the "totality of the circumstances" to determine whether members of a racial group have less opportunity than do other members of the electorate. *De Grandy*, 512 U.S. at 1011-12; *Abrams*, 521 U.S. at 91. The totality of the circumstances consideration involves consideration of certain factors referred to in the Senate Report on the 1982 amendments to the Voting Rights Act, including:

> [T]he history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group . . .; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction. The [Senate] Report notes also that evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group and that the policy underlying the State's or the

> political subdivision's use of the contested practice or structure is tenuous may have probative value.

Gingles, 478 U.S. at 44-45 (citing S.Rep. No. 97-417 (1982), U.S. Code Cong. & Admin. News 1982, pp. 177, 206).

In terms of "effective" minority districts, the Supreme Court has held that the relevant inquiry involves the consideration of the total ***citizen*** voting age population in a political subdivision, not the total voting age population. *LULAC*, 548 U.S. at 429. Under these established criteria, the district court's determination below to sacrifice the voting interests of the Hispanic community in Clovis in HD 63 in order to achieve needlessly low population deviations is a violation of Section 2 of the Voting Rights Act.[17]

a. *LULAC v. Perry.*

To confirm that the plan adopted by the district court in this case impermissibly dilutes the voting strength of the Hispanic community in Clovis, this Court need not look further than *LULAC v. Perry*, 548 U.S. at 399. *LULAC* is an appropriate starting point here because the plan challenged and struck down in that case, as shown below, bears a striking resemblance to the plan adopted by the

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[17] The district court apparently found persuasive that the Executive plan it adopted maintained the "highest number" of VAPH districts. Findings and Conclusions, at 15, ¶ 71. But had the district court performed the appropriate analysis and considered the citizen voting age populations in the proposed plans, it would have found that Egolf 2 was the plan with the most truly majority VAPH districts. *Compare* Gov. Ex. 33 *with* Egolf Ex. 21; *see also* James Ex. 9 (used to subtract from the overall voting age population the non-citizen voting age population).

district court here and demonstrates that Section 2 does not permit the type of minority vote dilution which will result in Clovis under the plan adopted by the district court. In *LULAC*, groups of minority voters brought suit challenging a redistricting plan that they claimed diluted their voting strength in a congressional district in South and West Texas. The district, Congressional District 23 ("CD 23"), was split under the challenged plan such that Hispanics in Webb County and the city of Laredo resided in a district where the total Hispanic voting age population was just over 50% but the Hispanic citizen voting age population was only 46%. *See id.* at 424. Before the enactment of the challenged plan, the same Hispanic community resided in the previous configuration of CD 23 and had enjoyed a majority citizen voting age population of 57.5%. *See id.* at 423. The plaintiffs alleged that the manner in which the plan split the Hispanic community ensured that they no longer lived in an effective Hispanic opportunity district, and that the challenged plan thus violated Section 2 and the Fourteenth Amendment. The three-judge federal district court, however, declined to find a Section 2 violation, finding that the loss of Hispanic population in CD 23 was remedied by the State's creation of a new Hispanic majority district in another part of the State. *See id.* at 440, 441.

To determine whether the change in CD 23 violated Sec. 2, the Supreme Court first analyzed whether the *Gingles* factors were met and found sufficient

evidence in the record that the three threshold factors were met in CD 23 in that there was cohesion among Hispanics in that district, that bloc voting existed in the Anglo population in that district (racially polarized voting), and that the Hispanics constituted a sufficiently large and geographically compact group. *See id.* at 427. The Court then turned to analyze the totality of the circumstances factors relevant to a Section 2 inquiry and found that Texas had a long, well-documented history of discrimination against Hispanics in the voting process and that there existed a "political, social, and economic legacy of past discrimination" for Hispanics in Texas. *Id.* at 439-40. Ultimately, the Court held that its analysis of these factors confirmed a violation of Section 2 of the Voting Rights Act. *See id.* at 427-42.

The Court held that the just over 50% total Hispanic voting age population in CD 23 was not enough to constitute or guarantee an effective Hispanic opportunity district, where the district had been steadily becoming an effective district before its dismantling by the Legislature such that the Hispanic citizen voting age population dropped to 46%. *See id.* at 427-29. The Court rejected the contention that the district was effective because it consisted of a Hispanic total voting age population of just over 50%.: "Latinos, to be sure, are a bare majority of the voting-age population in new District 23, but only in a hollow sense, for the parties agree that the relevant numbers must include citizenship." *Id.* at 429. The Court reversed the three-judge panel's determination and directed that new districts

in south and west Texas be redrawn to remedy the Section 2 violation in CD 23. *See id.* at 442.

b. The Redistricting Plan Adopted by the District Court.

In this case, the treatment of the Hispanic community in Clovis in the plan adopted by the district court closely mirrors the treatment of the Hispanic community in CD 23, which was ruled a violation of Section 2 of the Voting Rights Act in *LULAC*. As was the case for the Hispanics in CD 23 in *LULAC*, the Hispanic community in Clovis will now be moved from a district in which they previously constituted a majority of the *citizen* voting age population (approximately 50.1%) into a district in which they will constitute less than a majority of the citizen voting age population (approximately 46%).[18] The fact that in the new HD 67 that same Hispanic community will constitute 50.9% of the total voting age population does nothing to remedy the dilution of its voting strength, just as such a bare majority did nothing to remedy the vote dilution in *LULAC*, because the relevant inquiry must include consideration of the citizen voting age population. *See id.* at 429.[19]

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[18] In the original version of the Executive Defendants' proposed plan, the Hispanic community in Clovis was actually split in half and relegated into two separate districts, neither of which consisted of even a bare majority of an Hispanic population. *See* TR 12/12/11, at 239; TR 12/22/11, at 39.

[19] As counsel for the Governor explained at trial, the bare majority in the proposed district where Clovis Hispanics have been moved is "technically, at least, a

There can be little dispute that HD 63, as it has stood since shortly after it was created by the *Sanchez* court, has been an effective Hispanic opportunity district.[20] Since that time, in elections for the New Mexico House of Representatives, the Hispanic community has been able to elect their candidates of choice in 12 out of the 14 races conducted in that district.[21] The *Gingles* requirements for establishing a Section 2 violation all exist in Curry County, including the city of Clovis. With regard to the first *Gingles* factor, the Hispanic population is sufficiently large and geographically compact to constitute a majority in a single-member district.[22] In one of the redistricting plans proposed by the Egolf Plaintiffs, HD 63 contains a 57.4% total Hispanic voting age population (approximately 52.9% citizen voting age population), and in another Egolf plan the same district contains 57.9% (approximately 53.4% citizen voting age population).[23] As to the second and third *Gingles* factors, the evidence at trial demonstrated that the Hispanic community in Clovis is politically cohesive and

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Hispanic VAP district," but that is not the test for effectiveness set forth by the U.S. Supreme Court.

[20] *See* TR 12/12/11, at 237.

[21] *See* Leg. Def. Ex. 18(h); TR 12/12/11, at 252.

[22] *See* TR 12/12/11, at 241.

[23] *See* Egolf Ex. 21 (District Profile); Egolf Ex. 26 (District Profile).

that Anglo bloc voting continues to exist in the area.[24] Hispanics have historically voted together in that district for their preferred candidate of choice and Anglos in the district have historically voted as a bloc against Hispanic candidates.[25]

With regard to the "totality of the circumstances," the district court heard evidence from a Curry County Commissioner and 75-year resident of Clovis regarding the continued existence of many of the same factors indicating bias towards Hispanics that the *Sanchez* court had found thirty years ago.[26] The Commissioner provided testimony that disparities in education, income, and housing still exist between Hispanics and Anglos in Clovis and Curry County, and that there continued to be discrimination in the political process in that area.[27] In addition to the Commissioner's testimony, the district court admitted evidence from the U.S. Census Bureau American Community Survey for 2008-2010, which demonstrated that Hispanics in Curry County continue to fare much worse than Anglos in income and educational attainment.[28] All of this, coupled with the evidence of a long history of discrimination against Hispanics in Curry County as found in *Sanchez*, establish all of the requirements for finding a violation of

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[24] *See* TR 12/12/11, at 243-53.

[25] *See* Leg. Def. Exes. 19, 22.

[26] *See* TR 12/13/11, at 219-95 (Robert Sandoval).

[27] *See id.* at 222-34.

[28] *See* Leg. Def. Exe. 17.

Section 2 in the plan adopted by the court. The district court below simply brushed aside all this evidence in its unjustified desire to adopt needlessly low population deviations offered by the Executive Defendants' proposed plan.[29]

iii. The plan adopted by the district court also achieved unnecessarily low population deviations by either needlessly splitting or failing to unite Hispanic communities of interest in Southwest New Mexico.

In addition to the destruction of the compact and cohesive Hispanic community in Clovis, the plan adopted by the district court does violence to Hispanic communities in other cities and towns in New Mexico, including those in the Southwest quadrant of the State. For instance, under the Executive Defendants' plan adopted by the court, the Hispanic population in Deming is unnecessarily dissected and the Hispanic population in Silver City is kept divided, where it easily could have been united, all in the name of achieving "close to zero" population deviations. It bears repeating that the law does not require such a focus on near-perfect population equality, especially where the interests of minority groups are sacrificed.

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[29] The district court, however, made no findings with regard to the dilution of Hispanic voting strength in the remedial HD 63. In fact, nowhere in its Findings of Fact and Conclusions of Law did the district court even mention Hispanic communities of interest or attempt to analyze the manner in which the plan proposed by the Governor, and adopted by the district court, would affect traditional, Hispanic communities of interest in Curry County or, for that matter, anywhere else in New Mexico.

a. Deming.

In Deming, the entire Hispanic population of that town currently resides in a district in which the community constitutes 54.6% of the voting age population.[30] Because of the growth of the Hispanic population since the last redistricting cycle, the Egolf Plaintiffs were able to create redistricting plans that not only kept the entire town of Deming in the district in which it currently sits, but also made it a very effective Hispanic opportunity district for Deming Hispanics. Both "Egolf 2" and "Egolf 5" left these Hispanics in HD 32, where they would have constituted 60.2% of the total voting age population and 60.5% of the total voting age population, respectively.[31] Under both Egolf 2 and Egolf 5, as far as citizen voting age population is concerned, the Hispanic community in Deming would have constituted a majority of that population for the first time ever (53.4% and 53.7% respectively), ensuring that Hispanics would have the opportunity to elect their candidate of choice, likely for many years to come.[32] Furthermore, the Egolf Plaintiffs were able to keep the Hispanic community of Deming intact while still maintaining allowable population deviations. Egolf 2, for instance, contained a

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[30] *See* Leg. Def. Ex. 8.

[31] *See* Egolf Exhs. 21 & 26.

[32] The current Hispanic citizen voting age population in Deming is approximately 47.8%. *See* Leg. Def. Ex. 8 (Current District Profile); James Ex. 9 (citizen voting age population for Luna County).

population deviation of 2.2% for HD 32 and Egolf 5 contained a population deviation of merely 1.1%. [33]

The plan adopted by the district court, however, did *not* keep the town of Deming together in HD 32, but instead divided it and its Hispanic community in two, with the western half of the town in HD 39 and the eastern half in HD 32.[34] Under the adopted plan, the Hispanic community from west Deming would join Hispanic communities in places like Lordsburg, *approximately 60 miles to the west*, and parts of Silver City, *approximately 50 miles to the north*, to constitute 55.7% of the total voting age population of HD 39 or approximately 48.9% of the citizen voting age population in that district.[35] The Hispanic community from east Deming would be strung together with part of the Hispanic community in Las Cruces, *approximately 60 miles to the east*, to constitute 54.9% of the total voting age population of HD 32 or approximately 48.1% of the citizen voting age population in that district.

The result is the parting of the Deming Hispanic community into two districts which may be Hispanic "majority" districts in terms of overall population, but certainly not "effective" Hispanic majority districts, taking into account the

[33] *See* Egolf Exhs. 21and 26 (District Profiles).

[34] *See* Gov. Ex. 33 (Deming profile); James Ex. 9.

[35] *See id.*

resulting citizen voting age populations in those districts. *See LULAC*, 548 U.S. at 429. In addition, the manner in which these "majority" Hispanic districts were created by the Executive Defendants' plan raises serious questions regarding compliance with the Voting Rights Act.

In *LULAC*, the Supreme Court addressed the state of Texas' contention that minority vote dilution in CD 23 was offset by the creation of a new Hispanic majority district in central Texas, CD 25. *See id.* at 432. CD 25 was a "long, narrow strip" that combined part of the Hispanic population in McAllen, Texas, in the southern part of the State, with part of the Hispanic population in Austin, Texas, many miles to the north. *See id.* at 424-25. The Supreme Court found that although in the new district CD 25 Hispanics constituted 55% of the citizen voting age population, it was a concern that in order to achieve that majority the state had chosen to combine two separate Hispanic communities which had "divergent needs and interests." *Id.* at 424. The Court noted that the three-judge district court below had ruled that, "despite these concerns, [CD 25] would be an effective Latino opportunity district because the combined voting strength of both Latino groups would allow a Latino-preferred candidate to prevail in elections." *Id.* at 432. The Court, however, rejected that justification for combining two separate Latino communities, explaining that,

> While no precise rule has emerged governing § 2 compactness, the inquiry should take into account

> traditional redistricting principles such as maintaining communities of interest and traditional boundaries . . . there is no basis to believe a district that combines two farflung segments of a racial group with disparate interest provides the opportunity that [the Voting Rights Act] contemplates.

Id. at 433.

Here, the Hispanic community of east Deming and the Hispanic community in part of Las Cruces that are married together under the plan adopted by the district court, and the Hispanic community of west Deming and the Hispanic communities in Lordsburg and parts of Silver City that are married together in the same plan, fare even worse than the Hispanic communities that would have ended up residing in CD 25, the district criticized by the *LULAC* court. At least the Hispanic communities in CD 25 would have resided in a Hispanic majority district in terms of numbers of eligible voters (citizens). In this case, however, the Hispanic communities which will now reside in the elongated HDs 32 and 39 will not reside in truly effective Hispanic majority districts because in both districts Hispanics will constitute much less than 50% of the citizen voting age population. Of even greater concern is the fact that these newly merged Hispanic communities likely have very little in common in terms of the "needs and interests" described by the Supreme Court. *LULAC*, 548 U.S. at 424. This is true for the Hispanics living in east Deming, who will now be partnered with Hispanics in the much larger city of Las Cruces. It is equally true for the Hispanics living in west

Deming, who are now forced to join together with communities in both Lordsburg and the western part of Silver City.

b. Silver City.

In Silver City, a different, but just as compelling problem for the Hispanic population in that town will continue to exist if the plan adopted by the district court is allowed to stand. Currently, the Hispanic community in Silver City constitutes a majority of that town's population at 52.4%.[36] But rather than being a community that can vote together for their candidate of choice for the New Mexico House of Representatives, Silver City and its Hispanic community are almost evenly split between House District 38 and House District 39.

To alleviate this problem, and to ensure that the growing Hispanic community in Silver City was united in such a way that it could vote cohesively and pursue its shared political interests, the Egolf Plaintiffs' proposed redistricting plans maintained the entirety of the Hispanic community of Silver City in House District 39.[37] HB 39 also united the Hispanic community in Silver City.[38] The plan adopted by the district court, however, does not unite Silver City or the Hispanic community in that town into one House District. Instead, the adopted

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[36] *See* 2011 U.S. Census Bureau "State and County Quick Facts," available athttp://quickfacts.census.gov/qfd/states/35/3573260.html.

[37] *See* Egolf Exhs. 21 and 26.

[38] *See* TR 12/13/11, at 125 (Sanderoff).

plan maintains the division of the Hispanic population in Silver City between two House Districts, neither of which will result in Hispanics constituting an effective majority of the citizen voting age population.[39] The district court adopted the Executive Defendants' plan in pursuit of the lowest deviations possible, again at the expense of an Hispanic community that could have been, and should be, united given its geographical compactness. The district court did so in spite of the well-established legal principles that favor the maintenance of communities of interest.[40]

V. Conclusion.

For all the above reasons, the Egolf Plaintiffs respectfully request that this Court determine that the remedial plan adopted by the district court constitutes an improper imbalance of traditional redistricting principles, an abuse of the district court's discretion and remand to the district court with directions to adopt and implement Egolf Plan 2 or Egolf Plan 5.

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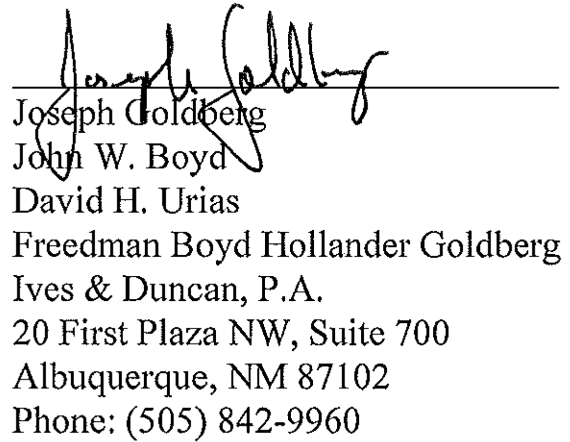
[39] The Egolf Plaintiffs' plans also necessarily resulted in the Silver City Hispanic community residing in less than an effective majority district, but the community was kept intact.

[40] The Supreme Court has made clear that traditional districting principles include maintaining communities of interest and traditional boundaries. *See Abrams*, 521 U.S at 94-95.

Respectfully submitted,



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I hereby certify that on January 31, 2012, I caused the foregoing to be served to all counsel of record in the consolidated redistricting cases pending in the First Judicial District Court and to the Respondent, the Hon. James A. Hall, District Judge *Pro Tempore* of the First Judicial District Court, via electronic mail at the following addresses:

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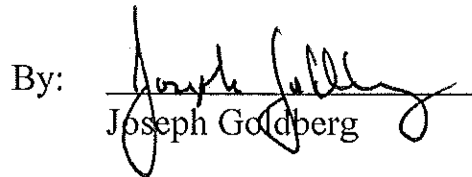
By: 
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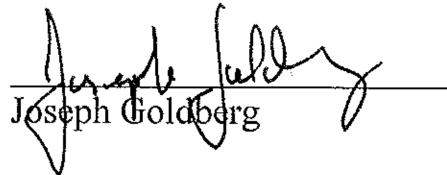
CERTIFICATE OF COMPLIANCE

The body of the attached brief exceeds the 35-page limit set forth in Rule 12-213(F)(2) NMRA. As required by Rule 12-213(G) NMRA, we certify that this brief complies with Rule 12-213(F)(3) NMRA in that the brief is proportionately spaced, in 14-point font and the body of the brief contains 11,516 words, which complies with this Court's Order of January 27, 2012, granting 2,500 additional words, but not exceeding 13,500 words. This brief was prepared and the word count determined using Microsoft Office Word 2007.



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