STATE OF NEW MEXICO

COUNTY OF SANTA FE

FIRST JUDICIAL DISTRICT COURT

No. D-101-CV-2011-02942

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

STATE EXECUTIVE DEFENDANTS' BENCH MEMORANDUM OF AUTHORITIES GOVERNING REDISTRICTING

As this Court is aware, New Mexico's effort to redraw political boundaries due to population changes, otherwise known as redistricting, occurs only once a decade. Further, the body of law that has developed in the courts regarding redistricting is not typically encountered

in a New Mexico civil action. Therefore, New Mexico Governor Susana Martinez, Lt. Governor John Sanchez, and Secretary of State Dianna Duran (collectively, the "State Executive Defendants") respectfully submit the following proposed bench memorandum setting forth the primary authorities that govern this redistricting effort.

BACKGROUND

The 2010 census determined that the population of the State of New Mexico grew by approximately 13.2 percent. State demographics have changed and shifted geographically since the 2000 decennial census and the redistricting that followed. Specifically, the current districts for the State House of Representatives have deviations from the ideal population ranging from -24.3 percent to 100.9 percent. The current districts for the State Senate have deviations from the ideal population ranging from -19 percent to 73 percent. The current Congressional districts have deviations between -3.3 and 2.3 percent, and the current Public Regulation Commission districts have deviations between -8.1 and 8.4 percent.

Major population shifts occurred over the last decade. Most of these shifts occurred in the western areas of Albuquerque and in Rio Rancho, which grew at a rate much faster than the rest of the state. Other areas, including Northern New Mexico, central Albuquerque, and the southeastern/eastern portions of the state, saw dramatically slower growth and/or population declines during this period.

Following the receipt of official census data, the Governor called the New Mexico Legislature into a special session, commencing on September 6, 2011. The Legislature passed legislation redrawing districts for the State House, the Senate, and the PRC, but the Governor vetoed these bills. The Legislature did not pass a bill to redistrict the three Congressional districts. New Mexico did adopt a redistricting plan for the Public Education Commission,

which the Legislature passed prior to the end of the special session and the Governor signed into law on October 5, 2011.

New Mexico's three United States Congressional Districts are subject to reapportionment by the State Legislature following each federal decennial census. See NMSA 1978 §1-15-15.1. See also U.S. Const. art. I, §2. Regarding state legislative districts, New Mexico law is more specific. The Constitution of the State of New Mexico provides that the "legislative power shall be vested in a senate and house of representatives which shall be designated the legislature of the state of New Mexico." N.M. Const. art. IV, § 1. The State Senate "shall be composed of no more than forty-two members elected from single member districts" and the State House of Representatives "shall be composed of no more than seventy members elected from single-member districts." N.M. Const. art. IV, §§ 3(B) and 3(C). The Constitution further provides that "[o]nce following publication of the official report of each federal decennial census hereafter conducted, the legislature may by statute reapportion its membership." N.M. Const. art. IV, § 3(D). Finally, New Mexico law provides that the Public Regulation Commission is "composed of five members to be elected from districts established by law." NMSA 1978 § 8-7-2.

Therefore, reapportionment is, at least initially, a legislative function, "and the location and shape of districts is within the discretion of the State Legislature so long as the Constitution is complied with." Sanchez v. King, 550 F. Supp. 13, 14-15 (D.N.M. 1982). However, if the legislative effort fails, a court may assume the apportionment function and create a map through the judicial process. See Baker v. Carr, 369 U.S. 186 (1962). As explained in detail below, the standards for a court-drawn plan, while similar to a legislatively created plan, are much more stringent. The United States Supreme Court, and other appellate courts, have been reluctant to affirm court-drawn plans that fail to strictly adhere to "one person, one vote" population

requirements or that dilute minority voter participation in violation of Section 2 of the Voting Rights Act. A court-drawn plan should also follow traditional redistricting criteria, and maintain representational or political fairness. However, a plan passed by a legislature and not signed into law by the executive is **not** entitled to any deference. Instead, the Court must either select a plan, or draw a plan, that meets the requirements of the law.

THE LEGAL STANDARDS GOVERNING REDISTRICTING

I. REDISTRICTING PLANS MUST COMPLY WITH THE "ONE PERSON, ONE VOTE" POPULATION REQUIREMENT.

The starting point for any redistricting plan is whether it protects every person's right to vote by ensuring that each person's vote counts equally. See Gray v. Sanders, 372 U.S. 368, 381 (1963) (stating "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing – one person, one vote."). Normally, this means that the population within each district must be equal or nearly so in the case of state offices such as the Legislature or the Public Regulation Commission. See Wesberry v. Sanders, 376 U.S. 1, 18 (1964) and Reynolds v. Sims, 377 U.S. 533, 578-79 (1964).

A. Congressional Districts Must Contain Equal Population As "Nearly As Is Practicable."

Article I, Section 2 of the United States Constitution states that "[t]he House of Representatives shall be composed of members chosen every second year by the people of the several states." In Wesberry, the Supreme Court held that this provision requires courts to draw congressional districts so that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." Wesberry, 376 U.S. at 7-8. The Court further emphasized that "[w]hile it may not be possible to draw congressional districts with

mathematical precision, that is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives." Id. at 18. Moreover, population equality "appears now to be the preeminent, if not the sole, criterion on which to adjudge constitutionality." Chapman v. Meier, 420 U.S. 1, 23 (1975).

Despite the "nearly as practicable" standard, zero population deviation is the ultimate goal of any redistricting map. Kirkpatrick v. Preisler, 394 U.S. 526 (1969). Thus, for deviations above zero, the Supreme Court has declined to impose a fixed numerical standard for constitutional purposes, and instead looks to whether the plan's architects intended to achieve "nearly as practicable" population equality. See Karcher v. Daggett, 462 U.S. 725, 731-32 (1983) (discussing case law rejecting rigid numerical standards). In Kirkpatrick, the Court refused to accept a redistricting plan that allowed a fixed percentage population variance "small enough to be considered *de minimis* and to satisfy without question the 'as nearly as is practicable' standard." Kirkpatrick, 394 U.S. at 530. In rejecting that plan, the Court held that the plan must reflect a "good-faith effort to achieve precise mathematical equality." Id. at 530-31. Fixed numerical standards are flawed because "[i]f state legislators knew that a certain *de minimis* level of population differences was acceptable, they would doubtless strive to achieve that level rather than equality." Karcher, 462 U.S.at 731.

Following Wesberry, the Supreme Court has further elaborated on the "nearly as is practicable" standard, while maintaining strict adherence to the requirement that "absolute population equality be the paramount objective of apportionment." Karcher, 462 U.S. at 732. In Karcher, the Supreme Court established a two-part evaluation for population variances in congressional redistricting plans. As discussed below, this test ultimately requires the proponent

of a redistricting plan containing population inequality to prove that the deviations were necessary to prove a specific, legitimate state objective.

The first prong of the Karcher test evaluates "whether the population differences among districts could have been reduced or eliminated altogether by a good-faith effort to draw districts of equal population." Id. at 730. The party challenging a proposed redistricting plan bears this initial burden. Id. at 730-31. This initial burden can be met if the challenging party presents a plan with a smaller population deviation or by a showing that "one can reduce the maximum population deviation of the plan merely by shifting a handful of municipalities from one district to another." Id. at 738-39. If that burden is met, then the burden shifts to the proponent of the original plan to prove that "the population deviations in its plan were necessary to achieve some legitimate state objective." Id. at 740.

The second part of the Karcher test provides that "[a]ny number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives." Id. at 740. Provided they are non-discriminatory, these policies could each justify minor population deviations. Id. The proponent, however, "must [] show with some specificity that a particular objective required the specific deviations in its plan, rather than simply relying on general assertions." Id. at 741. This showing can be flexible, "depending on the size of the deviations, the importance of the State's interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely." Id. See also Desena v. Maine, No. 1:11-CV-117, slip op. at 12 (D. Me. June 21, 2011) ("the greater the deviation, the more compelling the justification must be"). Therefore,

deviations must be evaluated on a case-by-case basis. Karcher, 462 U.S. at 741. See also id. at 727 (applying two-part test to reject a redistricting scheme in which the population deviations among the districts were less than one percent); Puerto Rican Legal Defense and Education Fund, Inc. v. Gantt, 796 F. Supp. 681, 692 (1992) (applying two-part test to adopt a redistricting scheme in which the population deviations among the districts were less than one percent).

B. Legislative and PRC Districts Must Also Strive to Contain Equal Population.

The districts drawn for the New Mexico Legislature and the PRC are also governed by "one person, one vote" principles. Beginning with Wesberry, the United States Supreme Court has found that the "one person, one vote" principle governs redistricting of state legislative districts and almost every other representative body elected by districts. Id. at 6-7. See also Avery v. Midland Cnty., 390 U.S. 474 (1968) (expanding "one person, one vote" to all state political subdivisions). Thus, legislative seats, like their congressional counterparts, must "be apportioned equally, so as to ensure that the constitutionally guaranteed right of suffrage is not denied by debasement or dilution of the weight of a citizen's vote." Larios v. Cox, 300 F. Supp. 2d 1320, 1337 (N.D. Ga. 2003), aff'd, Cox v. Larios, 542 U.S. 947 (2004). "Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State." Reynolds, 377 U.S. at 568. If equal population "is submerged as the controlling consideration in the apportionment of seats in the particular legislative body, then the right of all of the State's citizens to cast an effective and adequately weighted vote would be unconstitutionally impaired." Id. at 581.

For these reasons, achieving equal population in state legislative and representative districts is "'the most elemental requirement of the Equal Protection Clause.'" Connor v. Finch,

431 U.S. 407, 409-10 (1977) (quoting Reynolds, 377 U.S. at 577 (1964) and Chapman v. Meier, 420 U.S. 1 (1975)). Accordingly, "the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." Reynolds, 377 U.S. at 577. See also Sanchez v. King, 550 F. Supp. 13, 15 (1982). Although "[m]athematical exactness or precision is hardly a workable constitutional requirement[,]" "the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." Reynolds, 377 U.S. at 577, 579.

C. The Court's Plans Must Meet More Stringent Population Deviation Requirements Than Plans Drawn By The Legislature.

While legislatures may adopt plans that redistrict themselves or other representative districts with deviations without committing a violation of the Equal Protection Clause, court-ordered plans are held to much higher standards than legislatively enacted maps. Connor v. Finch, 431 U.S. 407, 414-17 (1977). As explained by the United States Supreme Court:

> A court-ordered plan . . . must be held to higher standards than a State's own plan. With a court plan, any deviation from approximate population equality must be supported by enunciation of historically significant state policy or unique features. . . . [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. Where important and significant state considerations rationally mandate departure from these standards, it is the reapportioning court's responsibility to articulate precisely why a plan . . . with minimal population variance cannot be adopted.

Chapman v. Meier, 420 U.S. 1, 26-27 (1975). This arises from the Supreme Court's recognition that "reapportionment is primarily the duty ... of the state through its legislature or other body," rather than through a court. Id. at 27; Connor, 431 U.S. 407, 414-15 (1977). The stricter standard for court-ordered plans is also required by equal protection clauses of state constitutions. See Ater v. Keisling, 819 P.2d 296, 303 (Ore. 1991); Wilson v. Eu, 823 P.2d 545,

551-52 (Cal. 1992). As a result, "the [Supreme] Court has tolerated somewhat greater flexibility in the fashioning of legislative remedies for violation of the one-person, one-vote rule than when a federal court prepares its own remedial decree." McDaniel v. Sanchez, 452 U.S. 130, 138-39 (1981). Thus, the starting point for any court-drawn or adopted plan is the elimination of population differences between districts, or if this is somehow impossible, reduction of population disparities to an absolute minimum.

D. The Deviations Allowed in State Legislative Redistricting are Inapplicable to Court Plans and Do Not Create a Safe Harbor Even for Legislative Plans.

Even though courts are required to adopt plans that maintain equal representation for equal numbers of people, a certain amount of deviation is sometimes acceptable in a legislatively drawn plan of state offices. See Wesberry, 376 U.S. at 7-8 (1964) and see Reynolds, 377 U.S. at 577 (1964). Specifically, "deviations from exact population equality may be allowed in some instances [in plans drawn by a legislature] in order to further legitimate state interests such as making districts compact and contiguous, respecting political subdivisions, maintaining the cores of prior districts, and avoiding incumbent pairings." Larios, 300 F. Supp. 2d at 1337.

"However, where population deviations are not supported by such legitimate interests but, rather, are tainted by arbitrariness or discrimination, they cannot withstand constitutional scrutiny." Id. at 1338. For example, in Larios v. Cox, 300 F. Supp. 2d 1320 (N.D. Ga. 2003), aff'd, Cox v. Larios, 542 U.S. 947 (2004), the Georgia legislature created two redistricting plans with specific goals. One of those goals was to maintain a total population deviation of less than 10 %, or a range of +4.99 % to -4.99 %, in the House of Representatives and Senate. The District Court found that "[i]n an unambiguous attempt to hold onto as much of that political power as they could, and aided by what they perceived to be a 10% safe harbor, the plans' drafters intentionally drew the state legislative plans in such a way as to minimize the loss of

districts in the southern part of the state." Id. at 1328. The court found it "clear that rather than using the reapportionment process to equalize districts throughout the state, legislators and plan drafters sought to shift only as much population to the state's underpopulated districts as they thought necessary to stay within a total population deviation of 10%." Id. at 1329. Applying this 10 percent deviation metric "was an intentional effort to allow incumbent Democrats to maintain or increase their delegation, primarily by systematically underpopulating the districts held by incumbent Democrats, by overpopulating those of Republicans, and by deliberately pairing numerous Republican incumbents against each other." Id. Thus, the District Court concluded that "[s]uch use of a 10% population window as a safe harbor may well violate the fundamental one person, one vote command of Reynolds, requiring that states 'make an honest and good faith effort to construct districts . . . as nearly of equal population as practicable' and deviate from this principle only where 'divergences . . . are based on legitimate considerations incident to the effectuation of a rational state policy.'" Larios, 300 F. Supp. 2d at 1341 (citing Reynolds, 377 U.S. at 577 (1964)). Ultimately, the District Court found that the Georgia plans violated the Equal Protection Clause. Larios, 300 F. Supp. 2d at 1338.

In its summary affirmance of the District Court's decision, the United States Supreme Court briefly discussed the appellant's invitation "to weaken the one-person, one-vote standard by creating a safe harbor for population deviations of less than 10 percent, within which districting decisions could be made for any reason whatsoever." Cox v. Larios, 542 U.S. 947, 949 (2004). In rejecting that invitation, the court held that "the equal-population principle remains the only clear limitation on improper districting practices, and we must be careful not to dilute its strength." Id. at 949-50 (citing Vieth v. Jubelirer, 541 U.S. 267 (2004)).

Importantly for this Court, and as explained in detail above, the deviations permitted in legislatively drafted plans does not apply to plans drawn or adopted by a court, unless that court can "articulate precisely" why it chose to depart from the "one person, one vote" standard. See Chapman, 420 U.S. at 26-27. Thus, to redistrict, a court must be guided by neutral principles, such as lower population deviations than is allowed in the political process. See Balderas, et al. v State of Texas, et al., Civil Action No. 6:01 CV 1581 (E.D. Texas filed Nov. 14, 2001).

II. REDISTRICTING PLANS MUST COMPLY WITH FOURTEENTH AMENDMENT AND THE VOTING RIGHTS ACT BY AVOIDING THE DILUTION OF MINORITY VOTING STRENGTH.

Closely related to the "one person one vote" requirement of redistricting is the need to protect minority voting interests. As the Court is aware, New Mexico contains a sizeable minority population, and, indeed, is a "majority-minority" state where the collective minority population is greater than the Anglo majority. See, e.g., Karen R. Humes et al., Overview of Race and Hispanic Origin, www.census.gov/prod/cen2010/briefs/c2010br-02.pdf (March 2011) at 19. Thus, in New Mexico, any redistricting plan adopted by the Legislature or the courts must comply with the Fourteenth Amendment by avoiding the dilution of minority voting strength. See Shaw v. Reno, 509 U.S. 630, 641 (1993). The Supreme Court has held that the Fourteenth Amendment requires redistricting plans that expressly distinguish among citizens because of their race to be narrowly tailored to further a compelling government interest. Id. at 643. This requirement also applies to legislation that appears race-neutral on its face, but is unexplainable on grounds other than race. Id.

A party claiming racial discrimination or racial gerrymandering has the burden "to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the

legislature's decision to place a significant number of voters within or without a particular district." Miller v. Johnson, 515 U.S. 900, 916 (1995). For such a showing, the party must prove that a legislative or court-drawn plan subordinated traditional race-neutral districting principles, such as compactness, contiguity, and respect for existing political subdivisions and communities of interest. Id. It then becomes the state's burden to show that the traditional redistricting principles were the basis for the adopted plan and were not subordinated to race.

Congress enacted Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, to provide similar protections and to prohibit redistricting schemes that result in the dilution of minority voting strength. To establish a violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, a party generally must demonstrate that, based on the totality of the circumstances, a state's voting processes "are not equally open to participation by members of [a protected minority 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." Id. § 1973(b).

The United States Supreme Court has clarified that the first step in demonstrating a claim of vote dilution pursuant to the Voting Rights Act requires a party to meet certain prerequisites. Thornburg v. Gingles, 478 U.S. 30 (1986). These prerequisites are: (1) the minority group is sufficiently large and geographically compact to constitute a majority in a single member district; (2) the minority group is politically cohesive; and (3) the majority can vote as a bloc to defeat the minority's preferred candidate. Id. at 50-51. As part of the totality of circumstances analysis, the court may consider numerous factors described in the Senate Report accompanying the 1982 amendments to the Voting Rights Act, including:

> the history of voting-related discrimination in the state . . .; the extent to which voting in the elections of the state . . . is racially polarized; the extent to which the State . . . has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large

> election districts, majority vote requirements, and prohibitions against bullet voting; the exclusion of members of the minority group from candidate slating processes; 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.

Id. at 45. The Court, therefore, must determine whether, on the totality of the circumstances, a minority group has been denied an equal opportunity to participate in the political process and elect representatives of their choice. 42 U.S.C. § 1973(b).

III. DISTRICTS SHOULD ADHERE TO TRADITIONAL REDISTRICTING CRITERIA.

In addition to population equality and protection of minority voting rights, redistricting plans should comply with a set of traditional redistricting principles: (1) compactness; (2) contiguity; (3) preservation of counties and other political subdivisions; (4) preservation of communities of interest; (5) preservation of cores of prior districts; and (6) protection of incumbents. See, e.g., Reynolds, 377 U.S. at 578, Arizonans for Fair Representation v. Symington, 828 F. Supp. 684, 688 (D. Ariz. 1992). Although these principles are not constitutionally required, they ensure that districts are drawn to be fair both to elected representatives and, most importantly, to their constituents. See Shaw, 509 U.S. at 647; Arizonans for Fair Representation, 828 F. Supp. at 688. In addition to the above and as discussed in the following section, these traditional criteria are considered when evaluating compliance with Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, and the constitutional prohibition of discrimination under the Equal Protection Clause of the Fourteenth Amendment. Shaw, 509 U.S. at 647. Some of these criteria are also recognized by New Mexico law. See NMSA 1978 §§ 2-7C-3, 2-8D-2 (mandating that state Senate and House of Representatives be "elected from districts that are contiguous and that are as compact as is practical.").

A. Compactness and Contiguity

Compactness and contiguity are generally evaluated together. The term "compactness" has historically been used to relate to the minimum distance between all parts of the constituency. Contiguity requires that all parts of a district be connected at some point with the rest of the district. However, given the enormous disparities in legislative districts across the nation, there are no hard and fast rules as to when a district is compact. The United States Supreme Court uses an "eyeball approach" to evaluate compactness. Bush v. Vera, 517 U.S. 952, 960 (1996). A state does not need to show that it drew the most compact district possible, but is required to have compactness as one of its primary goals. Compactness is not necessarily a reference to geometric shape, but to the ability of citizens to relate to each other and their representatives and to the ability of representatives to relate effectively to their constituency. DeWitt v. Wilson, 856 F. Supp. 1409, 1414 (E.D. Cal. 1994). Further, it speaks to relationships that are facilitated by shared interests and by membership in a political community, including a county or city. Id.

B. Preservation of Political Subdivisions

A third common priority in redistricting is the preservation of counties and other political subdivisions. This is accomplished by attempting to minimize, as much as possible, the number of counties and political subdivisions split between districts. See, e.g., Rodriguez v. Pataki, No. 02 Civ. 618, 2002 U.S. Dist. LEXIS 9272 (S.D. N.Y. May 23, 2002) (affirming plan that respected pre-existing political subdivisions); Jensen v. Ky. State Bd. of Elections, 959 SW.2d 771, 775-76 (Ky. 1997). Preserving political boundaries must, of course, give way to concerns over population deviations between districts. See Karcher, 462 U.S. at 734 n. 5 (noting that

preservation of political subdivisions is permissible as a "secondary goal" but is not normally a "sufficient excuse for failing to achieve population equality.").

C. Preservation of Communities of Interest

Maintenance of communities of interest is a "legitimate and traditional goal" in redistricting. See Bush, 517 U.S. at 977. Courts interpret "communities of interest" to include not only political, racial, ethnic, cultural, language and religious interests, but also communities organized around income levels, educational backgrounds, housing patterns, living conditions, and employment and economic patterns (including high tech, university-based, and agricultural and natural resources industries), as well as "shared broadcast and print media, public transport infrastructure, and institutions such as schools and churches[.]" See e.g. Carstens v. Lamm, 543 F. Supp. 68, 94-97 (D. Colo. 1982); Bush, 517 U.S. at 964; Theriot v. Parish of Jefferson, 185 F.3d 477, 486 (5th Cir. 1999); Graham v. Thornburgh, 207 F.Supp. 2d. 1280, 1924 (D. Kan. 2002); Polish Am. Congress v. City of Chicago, 226 F.Supp. 2d 930, 936 (N.D. Ill. 2002); Perrin v. Kitzhaber, Case No. 0107-07021 (Ore. Cir. Ct. Oct. 19, 2001). Thus, the Court can, and should, consider preservation of communities of interest when either adopting or crafting a redistricting plan, and such considerations should cover a wide spectrum that includes not only interests with regard to race, ethnicity and culture but also economic and social interests. However, a court must balance such considerations with the need to protect every citizen's equal right to vote. See Reynolds, 377 U.S. at 577 (stating "The fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote.").

D. Preservation of District Cores

Core retention essentially measures the amount current districts are disrupted by a proposed new map; i.e., how much a particular district stays the same from one redistricting

cycle to the next. See Larios, 300 F.Supp.2d at 1333-34. As explained below in the discussion regarding political fairness, core retention is closely related to the concept of judicial conservatism when it comes to drawing maps – unless required to equalize population, courts should try to avoid making radical changes to existing districts, especially when those districts were previously the product of legislation passed and adopted into law by elected officials versus a plan judicially mandated by a court. See discussion infra, Upham v. Seamon, 456 U.S. 37, 42 (1982) ("in fashioning a reapportionment plan or in choosing among plans, a district court should not . . . intrude upon state policy any more than necessary."). In addition, core retention attempts to preserve continuity of representation such that constituents have some assurance that their old senator, representative or commission member will remain part of their district when a new map is adopted. See, e.g., White v. Weiser, 412 U.S. 783, 791 (noting interest in preserving "constituency-representative relations."), Larios, 300 F.Supp.2d at 1333-34. Thus, radical changes to the shape of existing districts should be avoided, unless countermanded by other legal requirements or traditional criteria, such as equalizing population or protecting minority voting rights.

E. Protection of Incumbents

The final traditional criterion attempts to minimize the pairing of incumbents such that elected officials are not forced, by the redrawing of districts, to run against each other. See Bush, 517 U.S. at 964 ("we have recognized incumbency protection, at least in the limited form of 'avoiding contests between incumbent[s],' as a legitimate state goal"). Where incumbents must be paired, courts should ensure that such pairings are politically fair such that they do not advantage one political party over another. See Larios, 300 F.Supp.2d at 1333-34. Thus, redistricting plans can protect incumbents, but must do so "in a consistent and neutral way" that

avoids pitting one party's incumbents against each other while shielding the other party's incumbents from pairings. See id. at 1329, 1347 (citing Brown v. Thomson, 462 U.S. 835, 845-46). Moreover, incumbency protection must give way to the higher priorities recognized by the law, such as elimination, or at least minimization, of population deviations and protection of minority voting rights. See, e.g., Bush, 517 U.S. at 967-70.

IV. REDISTRICTING PLANS SHOULD BE POLITICALLY FAIR.

Political or representational fairness can also be considered by the Court when either selecting or drawing a redistricting plan. After all, "[r]edistricting is the most nakedly partisan activity in American politics[,]" and courts should strive to keep politics out of a Court-drawn plan as much as is possible. See Keith Gaddie & Charles S. Bullock III, From Ashcroft to Larios: Recent Redistricting Lessons from Georgia, 34 Fordham L.J. 997, 997 (2007). Thus:

> When re-drawing electoral maps, courts take partisan fairness into consideration. When forced to correct defective maps, courts have taken pains to avoid advantaging one political party, lest the court be guilty of gerrymandering.

Gaddie & Bullock, supra at 1004, citing Abrams v. Johnson, 521 U.S. 74 (1997), Upham v. Seamon, 456 U.S. at 41-42. Representational fairness can often be accomplished simply by following the traditional redistricting criteria, such as compactness, preservation of political boundaries and communities of interest, and incumbency protection, described above. Courts can also promote political fairness by using as the court's starting point "the last legal map for the jurisdiction." See Gaddie & Bullock, supra at 1005, Johnson v. Miller, 922 F. Supp. 1556, 1559 (S.D. Ga. 1995) ("In fashioning a remedy in redistricting cases, courts are generally limited to correcting only those unconstitutional aspects of a state's plan .... The rationale for such a 'minimum change' remedy is the recognition that redistricting is an inherently political task for which federal courts are ill suited.") (citing Upham v. Seamon, 456 U.S. 37 (1982)). The "least

changed" approach should not, however, override other important considerations, such as adherence to traditional redistricting principles. For example, if a court determines that a plan should attempt to preserve county boundaries, it can adopt such a map in lieu of a "least changed" plan. Further, and as explained below, the "least changed" approach is **not** an invitation to a court to employ, or even start with, a map that passed a legislature but was vetoed by a governor, because at that point the court would be judicially overriding the governor's veto in favor of the legislative branch of government.

V. PLANS PASSED BY THE LEGISLATURE BUT VETOED BY THE GOVERNOR ARE NOT ENTITLED TO DEFERENCE.

Longstanding jurisprudence establishes that legislatively enacted redistricting plans that failed to survive a gubernatorial veto are not entitled to judicial deference. In Smiley v. Holm, 285 U.S. 355, 373 (1932), the Supreme Court held that, when a state constitution provides for executive approval of legislative enactments before they become law, the state legislature is without authority "to create congressional districts independently of the participation of the governor . . . .".

This principle was further developed in Sixty-Seventh Minnesota State Senate v. Beens, 406 U.S. 187 (1972), in which the Supreme Court reviewed a reapportionment plan created by a three-judge panel after the governor had vetoed the Minnesota legislature's reapportionment bills. The Court, while acknowledging that plans proffered by either the legislative or executive branch were "entitled to thoughtful consideration," found that it was not required to defer to either the legislature or the governor's redistricting plans.

Similarly, in O'Sullivan v. Brier, 540 F. Supp. 1200 (D. Kan. 1982), the United States District Court for the District of Kansas considered "whether we owe deference either to the plan passed by the legislature and vetoed by the Governor, or the plan now supported by the Governor

but rejected by the legislature." Id. at 1202. The court concluded that "[a]lthough a federal court should defer to any enacted constitutionally acceptable state redistricting plan, . . . we are not required to defer to any plan that has not survived the full legislative process to become law." Id. The court acknowledged that it would give the plans "thoughtful consideration." Id.

Although courts have not explained what they mean by "thoughtful consideration[,]" courts have made clear that legislative plans vetoed by a governor are entitled to no more deference than plans submitted by the governor or other executive branch officials. For example, in Carstens, the court refused to defer to a vetoed legislative plan. There, the court interpreted constitutional language that was nearly identical to New Mexico's Constitution to find that both the state governor and the state legislature were "integral and indispensable parts of the legislative process." Id. at 79. Further, the court stated:

> To take the Carstens' position to its logical conclusion, a partisan state legislature could simply pass any bill it wanted, wait for a gubernatorial veto, file suit on the issue and have the court defer to their proposal. This court will not override the governor's veto when the General Assembly did not do so. Instead we regard the plans submitted by both the Legislature and the Governor as 'proffered current policy' rather than clear expressions of state policy and will review them in that light.

Id. (citing Beens, 406 U.S. at 197). Thus, where a court chooses to adopt a plan rather than draw its own, it should not defer to any plan passed by a legislature but vetoed by a governor. See Carstens, 543 F. Supp. at 79. This should especially be the case where the legislature is controlled by one political party, but the executive is controlled by another. Cf. Dunnell v. Austin, 344 F. Supp. 210, 215 (E.D. Mich. 1972) (in drawing plans a court should avoid "entering the underbrush of that political thicket."). In such cases, partisan fairness principles dictate that a court should be skeptical of any plan that appears to be the product of raw party

politics rather than adherence to the equal population, voting rights, and traditional redistricting principles well established in the law.

CONCLUSION

As explained above, population deviation is by far the most important criterion for this Court to apply when examining the plans presented to it by the parties to this litigation, followed by protection of minority voting interests, traditional redistricting criteria, and political or partisan fairness. Only plans that meet all of these criteria should be accepted by this Court. Further, rather than deferring to plans that failed to survive the lawmaking process, the Court should apply these criteria to each plan presented by the parties in order to arrive at a plan that is both legal and fair.

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I hereby certify that on November 10 , 2011 I filed the foregoing pleading electronically through the tyler tech system, which caused all parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

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