

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

BRIAN F. EGOLF, JR., HAKIM
BELLAMY, MEL HOLGUIN, MAURILIO
CASTRO, and ROXANNE SPRUCE BLY,

Plaintiffs,

v.

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.

**NO. D-101-CV-2011-02942
Honorable James A. Hall**

**CONSOLIDATED WITH
D-101-CV-2011-02944
D-101-CV-2011-02945
D-101-CV-2011-03016
D-101-CV-2011-03099
D-101-CV-2011-03107
D-202-CV-2011-09600
D-506-CV-2011-00913**

**EGOLF AND MAESTAS PLAINTIFF'S PRETRIAL BRIEF
IN SUPPORT OF THEIR JOINT PLAN FOR
THE NEW MEXICO STATE SENATE**

For the New Mexico Senate Redistricting trial before this Court, the Egolf Plaintiffs and Maestas Plaintiffs (hereinafter “Joint Plan Proponents”), by and through their respective attorneys, submit herewith their joint brief in support of the Egolf Plaintiffs’ newly-submitted Senate Plan—designated “Egolf 2” in Exhibits (hereinafter referred-to as the “Joint Plan”). Because the Joint Plan best retains and preserves existing and historical communities of interest, whilst strictly adhering to the one-person, one-vote requirement and satisfying other traditional redistricting criteria, the Joint plan should be adopted as the redistricting plan for the New Mexico Senate.

I. Introduction

The Joint Plan is the only plan, taken together, that complies with equal protection principles and the Voter Rights Act, lowers overall population deviations such that all districts, other than the seven districts affected by the Inter-tribal Plaintiffs and Navajo Intervenors' Plan(s), have population deviations at or lower than $\pm 2\%$, creates three additional VAPH districts, maintains the integrity and communities of interest of the VAPNA districts, including respect for the sovereignty and self-determination rights of the Native Americans, and that maintains and restores established communities of interest throughout the State.

The Joint Plan Proponents will prove, inter alia, that while they have maintained, restored and retained historical communities of interest, a number of other parties' plans, in their quest to reduce overall deviations, hurt minority rights, substituted their judgment for that of the Native Americans, at the expense of their federally recognized sovereignty and self-determination rights, reduced or change the number and character of VAPH and VAPNA districts, and subordinated other traditional districting principles for non-neutral purposes such as partisan incumbent-pairing and strengthening Democratic or Republican districts for partisan gain.

II. Argument

A. THE JOINT PLAN SHOULD BE ADOPTED BECAUSE IT AVOIDS DILUTION OF MINORITY VOTING STRENGTH AND RESPECTS EXISTING AND HISTORICAL COMMUNITIES OF INTEREST.

The Joint Plan has its origins in the Legislatively-passed plan, SB33. As will be proved at trial, SB33 was chosen as the starting point because it was, structurally, a thoughtful plan that had been vetted through the legislative process, including consideration of comments from the public and negotiation between policymakers. It is for these very reasons that courts are

counseled to give “thoughtful consideration” to plans created as a result of an open and deliberate legislative process. *O’Sullivan v. Brier*, 540 F.Supp. 1200, 1202 (D.C.Kan. 1982) (giving plan adopted by legislature and vetoed by governor “thoughtful consideration,” but not deference); *Major v. Treen*, 574 F.Supp. 325, 335 n.15 (1983) (providing reapportionment plan that does not survive process entitled to thoughtful consideration). Moreover, SB33 was created using the guidelines adopted by the Legislature, which were based on New Mexico’s law and custom regarding the creation of State and Congressional redistricting plans. The Legislative Guidelines were adopted by the Legislature in 2001, *see* 2001 N.M. Laws, ch. 220, § 3(A)(2), and reaffirmed by resolution on Jan. 17, 2011. Those Guidelines included, *inter alia*, crafting State districts to be substantially equal in population, with a maximum deviation not to exceed +/-5%; complying with the Voting Rights Act, including not diluting minority voting strength; using the precinct as the basic building block of each voting district; and drawing districts consistent with New Mexico’s policy and application of traditional districting principles.

Notwithstanding that legislative effort, the Joint Plan recognized areas where SB33 could be significantly improved. The Joint Plan, therefore, significantly improves the total deviation from 9.5% in SB33, to 8.1% in the Joint Plan. Moreover, the mean deviations in the Joint Plan are a mere 1.3% and median deviations a mere 1.2%. Indeed, with the exception of the seven (7) Senate districts drafted, and immediately impacted, by the Inter-tribal Group and/or Navajo Nation Plan, all Senate districts in the Joint Plan have deviations at or lower than $\pm 2\%$. And, of the seven higher-deviation districts remaining in the Joint Plan, there are two non-Native American districts that are “landlocked” by the Inter-tribal and Navajo Nation plans—Senate Districts 1 and 2—and those were kept in the low 2% deviation range. In sum, of the 42 Senate Districts, 35 are at or below the $\pm 2\%$ deviation range, and the remaining 7 districts are either

specifically the creation of the Inter-tribal Group and/or Navajo Nation Plan, or are landlocked by the districts in those plans.

To equalize population and keep deviations low, the Joint Plan made the difficult decision of moving a Southeast district to Rio Rancho—Senate District 40. This move allowed for fast-growing West Side of Albuquerque and Rio Rancho to have a total of 3 Senate districts. This move further accommodates projections that the East side of New Mexico will either continue to lose population, or merely fail to keep up with population growth, while the West Side of Albuquerque is projected to continue growing faster than other parts of the State.

The Joint Plan maintains and strengthens existing and historical communities of interest in a number of ways. First, the Joint Plan does not harm the Hispanic communities in the Clovis/Portales area. Second, the Joint Plan improves SD28 in Dona Ana County by placing Senator Morales in an HVAP majority district. The effect of that is to maintain—and avoid losing—the Hispanic-majority population’s ability to elect its candidate of choice. Third, the Joint Plan avoids splitting the Chaparral Area in Dona Ana and Otero Counties. Finally, the Joint Plan fully incorporates the Inter-tribal Group’s plan and the Navajo Nation plan as it is understood at this time, respecting the self-determination rights of the Native Americans and avoiding dilution of Native American voting strength.

The net effect of these changes is the creation of three (3) new HVAP majority districts (over 50%) over the current, and creation of two (2) new Hispanic “opportunity districts”—districts in which Hispanics have the opportunity to elect their candidate of choice, even if that candidate is an Hispanic. Thus, the Joint Plan avoids diluting Hispanic voting strength as a benefit of uniting and preserving communities of interest.

In addition to satisfying the one-person, one-vote standard and providing respect to communities of interest, the Joint Plan satisfies other, traditional redistricting criteria well. As will be proved at trial, the Joint Plan does very well on the Polsby-Popper Compactness scores, does well in contiguity, and minimizes incumbent pairings. Indeed, the Joint Plan provides a completely fair pairing scheme by having one Democrat-Democrat pairing, one Republican-Republican pairing, and one Democrat-Republican pairing. As for political fairness, the Joint Plan shows zero Democratic Bias in the partisanship seats/votes analysis.

The Joint Plan therefore is consistent with State and federal law, the Legislature's Guidelines for redistricting, and neutrally-applied districting principles, and, importantly, recognizes and respects New Mexico's unique communities and communities of interest. All of this is achieved by the Joint Plan while effectively reducing population deviations, creating three new VAPH districts, respecting the sovereignty and self-determination rights of the Native Americans, remaining politically neutral, and satisfying other traditional redistricting criteria. As will be demonstrated at trial, only the Joint Plan provides this Court with the careful balance between respect for communities and the ethnic and racial diversity of New Mexico's population, and the constitutional, one-person, one-vote requirement.

B. ALL OTHER PLANS BEFORE THE COURT FAIL TO EQUALIZE THE POPULATION OF DISTRICTS WHILE RESPECTING COMMUNITIES OF INTEREST OR SATISFYING OTHER TRADITIONAL REDISTRICTING CRITERIA.

i. The Executive Plan places population deviations above all-else, resulting in the splitting of important, established communities and communities of interest.

Once again, the Executive Defendants come to Court with the "gimmick" of the lowest population deviations as somehow justifying whatever other harm is done to the rest of the map. As reflected in the Executive map, to create a map solely through the lens of "closest to zero"

deviations, without more, runs roughshod over the decades and centuries of history that are rooted in the traditional redistricting criteria a court must apply. Indeed, relying upon a strained and misguided argument that distorts the facts and holding of *Larios v. Cox*, 300 F.Supp.2d 1320, 1340 (N.D. Ga. 2004), the Executive Defendants will undoubtedly come before this Court and argue that only their plan satisfies the one-person, one-vote standard. However, as has been fully and exhaustively briefed in the New Mexico State House of Representatives trial, the Executive Defendants misinterpret *Larios*, and ignore other case law—affirmed by the Supreme Court—which reject the notion that *Larios* requires zero, or near-zero population deviations in State Legislative redistricting plans. See *Rodriguez v. Pataki*, 308 F.Supp.2d 346 (S.D.N.Y. 2004), *aff'd*, 543 U.S. 997 (2004).

In achieving marginally lower deviations than the Joint Plan, the Executive Plan does significant violence to established communities and communities of interest in New Mexico in such a way that dilutes minority voting strength and indiscriminately, without justification, splits neighborhoods. For example, the Executive Plan does nothing to accommodate the thoughtful and concerted efforts of the Inter-tribal group and Navajo Nation. Again, just relying upon numbers, the Executive Plan creates three (3) NAVAP districts, but without regard to whether those districts keep Pueblos or other, distinguishable Native American communities together. Indeed, the Executive Plan splits Isleta Pueblo into two different Senate Districts.

Furthermore, the Executive Plan shows no respect for established communities in Southwestern New Mexico. In addition to failing to keep Senator Morales in an HVAP district (SD28), and thereby extinguishing the Hispanic majority community's ability to reelect their candidate of choice, the Executive Plan splits Silver City down the middle, without any

justification. Moreover, the Executive Plan splits up Hispanic precincts in Bayard and Hurley, thereby diluting the existing Hispanic community's voting strength in that area.

In relying upon mere statistical numbers—i.e. deviations and statistical makeup of districts—the Executive Plan pays no regard to, and shows no respect for, existing communities and communities of interest. As a consequence, significant harm is done to communities and their ability to elect their Senators of choice. Were redistricting limited to a “numbers game,” where statistics govern above all-else, there would be no careful consideration for a Court to engage in and judicial intervention would be nothing more than a comparison of figures on charts. Clearly, that is not the case and the Executive Plan should not be considered as a serious alternative for this Court in adopting a Senate redistricting plan.

ii. The James Plan dilutes minority voting strength, fails to accommodate growth and anticipated growth in Albuquerque, has the highest population deviations, and demonstrates a strong partisan bias in favor of Republicans.

The James Plan is so radical and harmful on nearly all traditional redistricting measures that it merits no consideration by this Court. First, the James Plan harms minority voting strength in New Mexico by reducing the HVAP majority districts from 16, in the Current Plan, to 15.

Second, the James Plan stretches the constitutional one-person, one-vote requirements to their limit by registering a total deviation at 10%, with mean deviations of 3.8% and median deviations of 4.3%. These high deviations are achieved via the James Plan's utter failure to accommodate population growth and shift patterns. Rather than eliminating a district from the East Side of New Mexico, where population has been lost and continues to not keep pace with growth, the James Plan leaves the East Side districts intact, and therefore fails to create a third

district on Albuquerque's West Side, where growth has and continues to be heavy. One-third of the districts in the James Plan are above 4%, and are all in the Albuquerque Metropolitan Area.

Further, the James Plan stands out as demonstrating a clear and obvious partisan bias in favor of Republicans. In its pairings, the James Plan pairs 3 Democrats in one district (though one of the three is retiring), pair another Democrat with a Republican in a strong Republican district, and has only one Republican-Republican pairing—with one of those Republicans having already retired to accept a job as an oil and gas lobbyist. While the pairings alone demonstrate the strong partisan bias, the shift in performing districts further demonstrates the intent behind the James Plan. While the Current Plan has 23 Democrat performing districts, the James Plan would reduce that number to 19. The James Plan should be seen for what it, quite obviously, is—a blatant attempt to shift the power in the New Mexico Senate in favor of Republicans and to dilute minority voting strength. The James Plan merits no consideration by this Court.

iii. The Sena Plan fails to accommodate the growth and anticipated growth in Albuquerque and, as a consequence, maintains relatively high population deviations and dilutes minority voting strength.

In an apparent attempt at “least change” the Sena plan does little, if anything, to accommodate population shifts that have occurred over the past ten years, and makes no accommodation for projected population shifts. Indeed, while the East Side of New Mexico continues to lose population, or at a minimum fails to keep pace with population growth, the Sena Plan notably fails to consolidate an East Side district. As a consequence, it likewise fails to create a third district on Albuquerque's West Side, thereby failing to accommodate the growth that has occurred in that area, and that continues to occur in that area.

As a consequence, the Sena Plan is notable for having higher deviations than other plans. Indeed, a full one-third of the districts in the Sena Plan are above 4%, and are all in the

Albuquerque Metropolitan Area. The Sena Plan therefore has a total deviation of 9.7% and, interestingly, has relatively high mean and median deviation, 3.0% and 2.8%, respectively.

Moreover, the Sena Plan dilutes minority voting strength by reducing the number of HVAP majority districts by 1. The Current Plan has 16 Senate districts where HVAP is over 50%; under the Sena Plan, that number drops to 15.

Because it fails to accommodate population shifts and projected population shifts, and because it does violence to minority voting strength in New Mexico, the Sena Plan does not warrant consideration by this Court.

III. Conclusion

For the reasons set forth above, the Egolf Plaintiffs and Maestas Plaintiffs jointly, respectfully request that the Court adopt the Egolf 2 Plan to redistrict the New Mexico State Senate.

Respectfully submitted,

Garcia & Vargas, LLC

/s/ Ray M. Vargas, II

Ray M. Vargas, II

David P. Garcia

Erin B. O'Connell

303 Paseo del Peralta

Santa Fe, NM 87501

Phone: (505) 982-1873

ray@garcia-vargas.com

david@garcia-vargas.com

erin@garcia-vargas.com

And

Joseph Goldberg

John W. Boyd

David H. Urias

Sara K. Berger

Freedman Boyd Hollander Goldberg,

Ives & Duncan, P.A.
20 First Plaza Ctr. NW, #700
Albuquerque, NM 87102
Phone: (505) 842-9960
jg@fbdlaw.com
jwb@fbdlaw.com
dhu@fbdlaw.com
skb@fbdlaw.com

And

David K. Thomson
Thomson Law Office LLC
303 Paseo de Peralta
Santa Fe, NM 87501-1860
Phone: (505) 982-1873
Fax: (505) 982-8012
david@thomasonlawfirm.net

John V. Wertheim
Jerry Todd Wertheim
Jones, Snead, Wertheim & Wentworth, P.A.
P.O. Box 2228
Santa Fe, NM 87505-2228
Phone: (505) 982-0011
Fax: (505) 989-6288
johnv@thejonesfirm.com
todd@thejonesfirm.com

I hereby certify that on December 30, 2011, I filed the foregoing 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; all counsel of record were additionally served via email.

/s/ Ray M. Vargas, II