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

THE EXECUTIVE DEFENDANTS' PRE-TRIAL BRIEF REGARDING THE NEW MEXICO HOUSE OF REPRESENTATIVES REDISTRICTING PLAN

At the close of the Congressional hearing, the Court instructed the parties to address in their respective trial briefs the legal standards the Court must apply when deciding between reapportionment plans submitted by various parties, as opposed to addressing challenges to a

plan passed by the Legislature and signed into law by the Governor. *See* Cong. Hrg. TR (12/6/11) ("12/6 TR") at 279:21-280:4. As Executive Defendants stated in their Additional Written Closing Argument Regarding the Congressional Redistricting Plan, "[t]he standards applicable to court-ordered congressional redistricting plans are fairly well-established: Courts must satisfy constitutional and statutory criteria and, to the extent feasible, certain neutral, secondary criteria." *Smith v. Clark*, 189 F.Supp.2d 529, 538 (S.D. Miss. 2002). The standard for state legislative districts is no different. Specifically and as discussed herein, the Court must first satisfy constitutional requirements of equal population, while complying with the requirements of the Voting Rights Act. The Court can then consider secondary criteria, such as traditional redistricting principles and partisan neutrality. The Executive Defendants' plan is constitutional, complies with Voting Act Requirements, and is consistent with the secondary criteria, because was guided by principles of equal population and neutrality, without decisions based upon partisanship, and thus most closely adheres to the standards applicable to court ordered redistricting of the state legislature. By contrast, the Legislative Defendants, and the *Egolf*, *Maestas*, Navajo, and Laguna Pueblo Plaintiffs, would have this Court believe that a) Court-drawn plans are provided the same population deviation flexibility (10 percent total deviation) as legislatively drawn plans; and b) ± 10 percent total deviation is a "safe harbor" in which an apportionment plan architect can create a plan for any reason, including for partisan reasons, without consideration of the fundamental goal of population equality. Neither of these things is true, however. The United States Supreme Court has made clear that "a court-ordered reapportionment plan of a state legislature [***must***] achieve the goal of population equality with little more than *de minimis* variation." *See Chapman v. Meier*, 420 U.S. 1, 26 (1975). Further, "[t]he 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 v. Sims*, 377 U.S. 533, 577 (1964). Further, "[w]hatever the means of accomplishment, 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." *Id.* at 579. Thus, the Supreme Court has rejected ***any*** attempt to "weaken the one-person, one-vote standard by creating a safe harbor for population deviations of less than 10 percent, within which districting decision could be made for any reason whatsoever." *Cox v. Larios*, 542 U.S. 947, 949 (2004).

It is undisputed in this case that the Executive Defendants' plan for reapportionment of the state House districts has a total population deviation of less than ± 1 percent among districts, and that no other plan comes close. More than any other plan before this Court, the Executive Defendants' state House redistricting map meets the legal goal of constructing districts of as nearly equal population as practicable with *de minimis* population deviation, while at the same time honoring traditional and neutral redistricting criteria. This is in stark contrast to other presented plans, which consistently employ high deviations, many times for partisan reasons, and make district consolidation decisions based upon party affiliation rather than to achieve population equality. The parties proposing these plans attempt to excuse their maps' partisan effects by claiming that because their deviations are less that ± 5 percent, they can make district boundary changes for whatever reason they wish. The law says otherwise. *See Larios*, 542 U.S. at 949.

Furthermore, the Executive Defendants' plan achieves close-to-zero deviations amongst its proposed districts and combines districts as justified by population changes, without sacrificing traditional redistricting criteria. The Executive Defendants' plan honors, to the

greatest extent practicable, traditional redistricting criteria by proposing districts that protect minority voting rights; avoid racial gerrymandering; are compact and contiguous; preserve, to the extent practicable, existing political subdivisions and communities of interest; avoid unnecessary or politically motivated incumbent pairings; and otherwise does not put the "thumb on the scale" in favor of one political party over another. Where it became necessary to move districts or district populations, the Executive Defendants' plan applies neutral rather than partisan principles, consolidating or eliminating districts in areas that have not kept pace with statewide population growth and increasing the number of districts where population growth makes it necessary. Rather than be persuaded by improper deviation arguments and subjective arguments that threaten to toss this case into the political thicket of policy-oriented redistricting choices, this Court should employ neutral, empirical criteria and select the Executive Defendants' plan for New Mexico's House of Representatives.

BACKGROUND

On September 6, 2011, after receiving data from the United States Census, the Governor issued a proclamation calling the Legislature into special session to deal with, among other things, reapportionment of the New Mexico House of Representatives. This reapportionment became necessary after census data revealed major population changes across the state over the last decade. As a result of population growth in the urban areas of Albuquerque's Westside and Rio Rancho, numerous districts became drastically overpopulated. For example, one district on the Westside (House District 29) became overpopulated by 100.9 percent, and others in that part of the city (House Districts 12, 13, 44 and 60) became overpopulated by 31.6 percent, 79.3 percent, 73.5 percent, and 40.1 percent, respectively. Together, these districts have a total positive deviation of more than 300%. In other words, there is enough excess population to

justify three entirely new seats in this area. The majority of these Westside seats are currently held by Republicans.

While West Albuquerque and Rio Rancho saw rapid growth much greater than the state-wide level, other parts of the state saw relative population loss because they did not keep pace with state-wide growth. There are three clearly identifiable groups of districts in the state in which the population decline or relatively slow growth was so significant that the area now has enough population to justify one fewer House district that it presently has. When one looks at a state-wide map, these three areas are evident: 1) North Central New Mexico; 2) the mid-heights area in Albuquerque; and 3) Southeastern New Mexico. North Central New Mexico has eleven adjacent districts that only have enough population to justify ten districts (districts 40, 41, 42, 43, 45, 46, 47, 48, 50, 68, and 70 have a cumulative deviation of approximately negative 92%). Ten of these eleven districts are held by Democratic incumbents. The mid-heights of Albuquerque has eleven adjacent districts that only have enough population to justify ten districts (districts 10, 11, 14, 18, 19, 21, 24, 25, 26, 28, and 30 have a cumulative deviation of approximately negative 104%). Southeastern New Mexico has twelve adjacent districts that only have enough population to justify eleven districts (districts 51, 54, 55, 56, 57, 58, 59, 61, 62, 63, 64, and 66 have a cumulative deviation of approximately negative 95%). Eleven of these twelve districts are held by Republican incumbents.

Such deviation patterns lend themselves to a logical result in which one seat from each of the three underpopulated areas should move to the overpopulated areas on Albuquerque's Westside and Rio Rancho, which collectively warrant three new districts. However, after the special session began on September 6, 2011, it became readily apparent that the Legislature had no intention to consolidate the North Central districts in order to create an appropriate number of

new seats on the Westside and Rio Rancho. Defendant Ben Lujan, Sr., Speaker of the New Mexico House of Representatives, gave the Legislature's demographer, Brian Sanderoff, specific instructions not to consolidate any districts in the North Central region. Instead, the Democrats in the House decided that, so long as a plan maintained a total deviation between ± 5 percent, it was free to reapportion New Mexicans among the 72 House districts for any reason whatsoever, and that it could place partisan interests in front of neutral redistricting principles. Although many bills were introduced during the legislative process, all others were tabled and it became clear that the House Democrats and their leadership had one plan in mind: House Voters and Elections Committee Substitute for House Bill 39 ("HB 39"). Convinced that, so long as they kept deviations at ± 5 percent, they could draw a House map for any reason, the House Democrats passed a plan that did not consolidate a district in the North Central region and that, as a result, under-populated the Democrat-heavy North Central districts and over-populated districts in the core of Albuquerque. Although refusing to consolidate a seat in the North Central region, HB 39 consolidated seats in the two other areas with nearly identical negative deviations: the Republican area in the Southeast and the area in the mid-heights of Albuquerque where a Democratic incumbent had announced his intention to leave the Legislature to run for another public office.

HB 39 passed the New Mexico House by only two votes, and received bipartisan opposition. Both Plaintiffs Brian Egolf and Antonio Maestas voted in favor of HB 39. The bill then went to the Senate, and although HB 39 also passed that chamber, it again had bipartisan opposition. HB 39 did not receive a single Republican vote in either chamber.

HB 39 then went to the Governor. Because HB 39 failed to honor "one person, one vote principles[,]" and failed to apply neutral principles to address population shifts, the Governor

exercised her authority under the New Mexico Constitution and vetoed the legislation on October 17, 2011. *See* Veto Msg. (Gov. Ex. 8).

Meanwhile, other interested persons began crafting their own House plans. Representative Egolf, through his demography expert, James Williams, chose to draw a House plan that, while different from HB 39, used the HB 39 map as its starting point. *See* J. Williams Dep. at 27:11-15. Rep. Antonio Maestas also chose to take a stab at drafting a House plan, but like the Legislature he chose to craft a map with distinct partisan advantages for his Democratic party. Clearly designed to ensure a Democrat majority in the House for the next decade, the Maestas plan eliminates six GOP leaning districts, and increases the number of Democratic leaning districts by five, and raises the number of strong (greater than 54% Democrat voting performance) Democrat seats by three. *See* B. Sanderoff House Plans in Litigation Summary (Dep. Ex. DG-U).[1]

Because the Legislature was unable to pass a House redistricting plan that the Governor could sign into law, the responsibility to reapportion New Mexico's state House districts falls to this Court. However, unlike the Legislature, this Court can, and should, take a less political role in the redistricting process, and need only decide which plan best complies with the United States Constitution, applicable reapportionment law, and neutral, objective redistricting principles. As the Executive Defendants will demonstrate, their plan best meets such criteria.

ARGUMENT

The Executive Defendants' State House plan should be adopted because it is the most neutral of the plans presented to the Court, in that it achieves the legally required goal of *de minimus* population equality, adheres to traditional redistricting principles, and is the most politically fair.

[1] By contrast, the Executive Plan maintains the current 32 strong Democratic districts. *See id.*

I. THE EXECUTIVE DEFENDANTS' PLAN ACHIEVES THE LEGALLY REQUIRED GOAL OF *DE MINIMIS* POPULATION EQUALITY.

Unlike any other plan presented to this Court, the Executive Defendants' Plan keeps population deviations to an absolute minimum. The Executive Defendants' plan is the only proposal that keeps every district within one percent of ideal population. While population equality alone justifies its adoption, the Executive Defendants' plan also achieves population equality while adhering to traditional districting principles and political fairness and neutrality. No other plan accomplishes this.

The Supreme Court in *Reynolds v. Sims*, 377 U.S. 533 (1964), held that equal protection principles "require 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*." *Id.* at 577 (emphasis added). No one in this case disputes, nor can dispute, that *Reynolds* sets forth the standard the State has to meet when adopting a reapportionment plan. Instead, the parties opposing the Executive Defendants' plan argue that this Court should apply the same standards that apply to a state legislature when it draws a plan, and further, claim that so long as a map stays within ±5 percent deviation, that map, whether adopted by a court or passed by a legislature, is legal. Neither of these arguments is accurate.

A. Court-Ordered Plans Are Required to Meet More Stringent Population Requirements Than Legislatively Drawn Plans.

1. The Stricter Standard Exists Because of the Court's Limited Role in Redistricting and Because of Separation of Powers Principles.

A court ordered reapportionment plan of a state legislature is held to a higher standard than a legislatively drawn map and "must ordinarily achieve the goal of population equality with little more than *de minimus* variation." *Chapman v. Meier*, 420 U.S. 1, 26-27 (1975); *see*

Connor v. Finch, 431 U.S. 407, 414-17 (1977). The United States Supreme Court, in *Chapman*, makes it clear that:

> A court-ordered plan, however, must be held to higher standards than a State [Legislatures]'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.

Chapman, 420 U.S. at 26-27; *see also Sanchez v. King*, Civil No. 82-0067-M (D.N.M., filed Aug. 8, 1984) (Findings of Fact and Conclusions of Law at 130-31) ("The Court is mindful that not even a variance of 5.95 percent [less than ± 3%] is necessarily acceptable in a court-ordered plan."). As another state court further explains:

> The degree to which a state legislative district plan may vary from absolute population equality depends, in part, upon whether it is implemented by the legislature or by a court. State legislatures have more leeway than courts to devise redistricting plans that vary from absolute population equality. . . . With respect to a court plan, *any* deviation from approximate population equality must be supported by enunciation of historically significant state policy or unique features. Absent persuasive justifications, a court-ordered redistricting plan of a state legislature must ordinarily achieve the goal of population equality with little more than *de minimis* variation. The latitude in court-ordered plans to depart from population equality thus is considerably narrower than that accorded apportionments devised by state legislatures. . . . The senate and senate president argue that because we are a state court, we should use the standard applied to state legislatures rather than the standard applied to federal district courts. We disagree.

Below v. Gardner, 963 A.2d 785, 791 (N.H. 2002) (internal quotation marks and citations omitted) (emphasis in original); *accord Burling v. Chandler*, 804 A.2d 471, 478 (N.H. 2002).

The higher standard applied to court-ordered redistricting plans arises from the Supreme Court's recognition that "reapportionment is primarily the duty and responsibility of the State through its legislature or other body," rather than through a court. *Chapman*, 420 U.S. at 27; *Reynolds*, 377 U.S. at 586; *Connor*, 431 U.S. at 415 (describing the task of judicial redistricting

as an "unwelcome obligation of performing in the legislature's stead"). This distinction arises not from federalism concerns, but from institutional differences between courts and legislatures. *See Connor*, 431 U.S. at 415 ("the court's task is inevitably an exposed and sensitive one that must be accomplished circumspectly"); *Abrams v. Johnson*, 521 U.S. 74, 101 (1997) ("The task of redistricting is best left to state legislatures, elected by the people and as capable as the courts, if not more so, in balancing the myriad factors and traditions in legitimate districting policies.").

The separation of powers doctrine also requires this Court to apply the strict standard of *Chapman*. *See, e.g., King v. State Bd. of Elections*, 979 F. Supp. 582, 603 (N.D. Ill. 1996), *vacated*, 519 U.S. 978 ("If a lesser standard is applied to court-ordered redistricting plans under these circumstances, the checks and balances inherent in our constitutional framework will be gravely injured in this discrete area."); *Bd. of Educ. v. Harrell*, 118 N.M. 470, 484 (1994) (discussing generally the separation of powers principles of the New Mexico Constitution). The New Mexico Constitution leaves to the Legislature, and the Governor through her veto power, subjective policy decisions regarding redistricting decisions, such as the protection of certain communities of interest over others. In this state, "[c]ourts are not designed to perform the task of reapportionment and judicial relief becomes appropriate only when a State Legislature fails to reapportion according to federal constitutional standards, after having had an adequate opportunity to do so." *See Sanchez v. King*, 550 F. Supp. 13, 15 (D.N.M. 1982) (citing *Reynolds*, 377 U.S. at 586). Because the Constitution limits this Court's role to construing the law, this Court must apply neutral, objective criteria, and, further, must construe those criteria strictly so that the Court's role in redrawing New Mexico's political maps is limited. *See, e.g., Balderas v. Texas*, Civil Action No. 6:01 CV 1581 (E.D. Texas Nov. 14, 2001) (holding that court's role in

redistricting is limited to curing statutory or constitutional defects in a state reapportionment plan).

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 . . . 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 to eliminate population differences between districts or, if this is somehow impossible, reduce population disparities to an absolute minimum.

2. Stricter Standards Apply Because the Legislature Failed to Enact a New Districting Plan and the Legislative Defendants' Plan Is 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, and that such failure requires the Court to employ stricter standards in developing a redistricting plan. In *Smiley v. Holm*, 285 U.S. 355 (1932), the Supreme Court held that, when a state constitution provides for executive veto authority, the state legislature is without authority "to create congressional districts independently of the participation of the governor as required by the state constitution with respect to the enactment of laws." *Id.* at 373. The New Mexico Constitution explicitly provides that every bill passed by the Legislature shall be signed by the Governor before it becomes law; or, if vetoed, both chambers of the Legislature can override a veto by a two-thirds majority vote. N.M. Const. art. IV, § 22. Accordingly, the Court should not defer to HB 39, or any plan proposed by a party that claims entitlement to deference, as valid expressions of state policy. The Court must ensure compliance with the strict mandates of population equality, rather than defer to failed expressions of proposed state policy.

The principle stated in *Smiley* was further developed and applied to legislative redistricting plans by *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187 (1972). In *Beens*, 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 the either the legislative or executive branch were "entitled to thoughtful consideration," found that they represented "only the legislature's proffered current policy." *Id.* at 197. Accordingly, the Court found that it was not required to defer to either the legislature or the governor's plans. *Id.*

Although courts have not specifically defined what constitutes "thoughtful consideration[,]" courts have made it clear that legislative plans vetoed by a governor pursuant to her constitutional power are entitled to no more deference than plans submitted by the governor or other executive branch officials. For example, in *Carstens v. Lamm*, 543 F. Supp. 68 (D. Colo. 1982), the United States District Court for the District of Colorado similarly 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 state 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 id.* 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) (stating that courts should avoid "entering the underbrush of that political thicket" when drawing plans). 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.

This same principle has been utilized by state courts to require stricter standards to be applied to state courts where a legislature's redistricting bill was subject to an executive veto. For example, in *Below v. Gardner*, 963 A.2d 785 (N.H. 2002), the Supreme Court of New Hampshire was tasked with establishing a redistricting plan for the state legislature after a plan was passed by both houses of the legislature, vetoed by the governor of the state, and the legislature failed to overcome the veto. After a number of parties argued that the court could apply the more flexible population deviation standards provided to legislatively enacted redistricting plans, the court held that "[a]ll courts called upon to make redistricting decisions are governed by the same measure of restraint." *Id.* at 791. Therefore, the court concluded "that the high standard that governs a federal court-enacted redistricting plan applies to any plan we adopt." *Id.*

Similarly, in *Peterson v. Borst*, 786 N.E.2d 668 (Ind. 2003), the Supreme Court of Indiana considered a judicial redistricting plan for the City Council, after a mayoral veto

prevented the passage of the City Council's own redistricting plan. *Id.* at 670. The court, noting that "[p]artisan disputes over redistricting can be expected within and between the legislative and executive bodies of government[,]" held that it was bound by "the unchallenged principle of judicial independence and neutrality [and] must consider only the factors required by applicable federal and State law." *Id.* at 672. As a result, the court held that judges must "write on a clean slate." *Id.*

Accordingly, HB 39, or any plan proposed by a party that claims entitlement to deference, is entitled only to "thoughtful consideration" and the Court should not defer to them as valid expressions of state policy. Furthermore, the failure of the legislature to develop a redistricting plan that survived executive veto requires the Court to adhere to the strict standards of population equality imposed upon federal courts. To do otherwise would allow partisan disputes to be injected into what must be a neutral enterprise by this Court.

3. The Court Should Be Guided by Neutral Criteria such as "One Person One Vote" Rather than Subjective Policy Choices Between Plans.

Importantly for this Court, the deviations that may be permitted in legislatively drafted plans do not apply to plans drawn or adopted by a court, unless that court can "articulate precisely" why it cannot adopt districts with minimal population variation. *See Chapman*, 420 U.S. at 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 Below*, 963 A.2d at ("Unlike legislatures, courts engaged in redistricting primarily view the task through the lens of the one person/one vote principle and all other considerations are given less weight."). In particular, "any deviation from approximate population equality must be supported by enunciation of historically significant state policy or unique features." *Chapman*, 420 U.S. at 26. "Where important and significant state considerations rationally mandate departure from [population

equality] standards, it is the reapportioning court's responsibility to articulate precisely why a plan . . . with minimal population variance cannot be adopted." *Id.*

The "articulate precisely" requirement recognizes that most proffered policies make insufficient excuses for failing to achieve population equality. *See, e.g.*, *Reynolds*, 377 U.S. at 567 ("The fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote"); *Karcher v. Daggett*, 462 U.S. 725, 7334, n.5 (1983) (stating that preserving political subdivisions, "while perfectly permissible as a secondary goal, is not a sufficient excuse for failing to achieve population equality without [a] specific showing"); *Bush v. Vera*, 517 U.S. 952, 967-70 (1996) (stating that incumbency protection must give way to the higher priority of minimizing population deviations and protecting minority rights). Accordingly, any party presenting this Court with a plan that allows a population deviation greater than any other party must meet the heightened threshold to "articulate precisely" the historically significant state policy or unique features that prevent the Court from adopting a plan with minimal deviation. Subjective policy arguments will not suffice.

Here, none of the parties have submitted evidence of any "historically significant state policy or unique features" that would justify the population deviations in their plans. *See Chapman*, 420 U.S. at 26. Furthermore, some proffered policies are inherently suspect. For example, a state legislative reapportionment plan that systematically and intentionally creates population deviations among districts in order to favor one geographic region of a state over another violates the one person, one vote principle firmly rooted in the Equal Protection Clause. "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. A state's plan cannot dilute or debase the

vote of certain citizens based merely on the fortuity of where in the state they reside any more than it can dilute citizens' votes based upon their race, gender, or economic status. Where 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.

4. There is No Rational Basis for Applying Different Standards to Federal and State Court Plans.

Courts should formulate redistricting plans according to the same principles regardless of whether the court is a federal court or a state court. This principle has been recognized historically by the Supreme Court. *See Maryland Committee for Fair Representation v. Tawes*, 377 U.S. 656, 674 (1964) ("in determining the validity of a State's reapportionment plan, the same federal constitutional standards are applicable whether the matter is litigated in a federal or state court."). Although it should go without saying, state courts have explicitly recognized that the strict federal standards documented above apply equally to redistricting plans developed by state courts. *See, e.g.*, *Peterson v. Borst*, 786 N.E.2d 668, 672-73 (Ind. 2003) (acknowledging that the strict federal standards apply to a state court's drafting of a redistricting plan for the city council).

For example, in *Below v. Gardner*, 963 A.2d 785 (N.H. 2002), the New Hampshire Supreme Court was tasked with developing a redistricting plan for the state legislature after a legislative plan was vetoed by the state governor. The legislative plaintiffs in that case argued that because the plan was being reviewed in state court, the court could use the looser standards applicable to state legislatures, rather than the standard applied to federal district courts. *Id.* at 791. The court disagreed, stating as follows:

> All courts called upon to make redistricting decisions are governed by the same measure of restraint. Unlike legislatures, courts engaged in redistricting primarily view the task through the lens of the one person/one vote principle and all other considerations are given less weight. The framers in their wisdom entrusted this decennial exercise to the legislative branch because the give-and-take of the legislative process, involving as it does representatives elected by the people to make precisely these sorts of political and policy decisions, is preferable to any other. We believe, therefore, that we too must accomplish our task circumspectly, and in a manner free from any taint of arbitrariness or discrimination, and that the high standard that governs a federal court-enacted redistricting plan applies to any plan we adopt.

Id. (internal quotation marks and citations omitted).

During New Mexico's last redistricting litigation in 2001, Judge Frank Allen relied upon a Michigan Supreme Court Decision to conclude that a state court "is not constrained by the de minimus standard of population deviation imposed upon federal courts in drafting or adopting a state legislative redistricting plan." *See Jepsen v. Vigil-Giron*, D-0101-CV-2001-02177 (Jan. 24, 2002) (Findings of Fact and Conclusions of Law Concerning State House of Representatives Redistricting, Conclusion of Law No. 6). The decision cited by Judge Allen, *In re Apportionment of State Legislature 1982*, 321 N.W.2d 565 (Mich. 1982) (Levin and Fitzgerald, JJ. concurring), was a concurring opinion and was inapposite to the situation faced in the current New Mexico redistricting litigation.

Primarily, in *In re Apportionment of State Legislature*, the Michigan redistricting litigation involved a substantially different state constitutional process than the one present in New Mexico. The Michigan constitution provided that a state commission was to establish legislative districts, but if a majority of the commission could not agree upon a reapportionment plan, the alternative plans were to be submitted directly to the Michigan Supreme Court. Michigan Constitution, art. 4, § 6. The Michigan Supreme Court would then determine "which

plan complies most accurately with the constitutional requirements." *In re Apportionment of State Legislature*, 321 N.W.2d at 566. As the two concurring justices explained:

> Although a legislature is ordinarily given the power to reapportion itself, Michigan is among the states that have allocated the power to apportion the legislature to a body other than the Legislature. This Court has construed the Michigan Constitution and found within it the authority to declare the policies which should govern state legislature apportionment and to implement them.

Id. at 594. Accordingly, under the Michigan system, the Michigan Supreme Court was an integral part of the state's reapportionment scheme and acted more in a legislative, rather than judicial, capacity.

Here, however, the Court is not acting in a similar capacity to that of the Michigan Supreme Court. Under the New Mexico Constitution, reapportionment is a legislative function. N.M. Const. art. IV, § 3(D); *see Sanchez v. King*, 550 F. Supp. 13, 15 (D.N.M. 1982) ("judicial relief becomes appropriate only when a State Legislature fails to reapportion according to federal constitutional standards") (citing *Reynolds*, 377 U.S. at 586). As a result, the concurring opinion of *In re Apportionment* should not apply to this action and there is no rational basis for ignoring the body of federal case law on state legislative redistricting.

B. ±5 Percent Deviation Is *Never* a Safe Harbor Whether a Plan Is Adopted by a Court or Passed by a Legislature.

So called "Safe Harbor" deviations dilute the "one person, one vote" standard by providing a party license to freely utilize otherwise prohibited redistricting criteria in developing legislative redistricting plans. While a certain amount of deviation is sometimes acceptable in a legislatively drawn plan, s*ee Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964); *Reynolds*, 377 U.S. at 577, the Court should consider a deviation to be "tainted by arbitrariness or discrimination" if it is not supported by a legitimate interest. *Larios v. Cox*, 300 F. Supp. 2d 1320, 1338 (N.D. Ga.

2004), *aff'd*, *Cox v. Larios*, 542 U.S. 947. As discussed below, the "safe harbor" population deviation advocated by the Legislative Defendants cannot survive constitutional scrutiny.

In *Larios v. Cox*, 300 F. Supp. 2d at 1326, the Georgia legislature created redistricting plans with the specific goal of maintaining 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.'" *Id.* at 1341 (citations omitted; omissions and ellipses in original). Ultimately, the District Court found that the Georgia plans violated the Equal Protection Clause. *Id.* at 1338.

In its summary affirmance of the District Court's decision, the United States Supreme Court 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. at 949. 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)). Thus, the "safe harbor" population deviation advocated by the Legislative Defendants is no longer a valid principle to apply where the task of redistricting is performed by a court.

C. The High Population Deviations Proposed by the Legislative Defendants, and the *Egolf* and *Maestas* Plaintiffs, Are Not Justified by Concerns Under Section 2 of the Voting Rights Act.

With regard to their legislative redistricting plans, no party has come forward with sufficient evidence establishing that any plans' population deviations are necessary to rectify concerns under the Voting Rights Act. Section 2(a) of the Voting Rights Act "prohibits the imposition of any electoral practice or procedure that 'results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color." *Bush v. Vera*, 517 U.S. 952, 976 (1996) (quoting 42 U.S.C. § 1973(a)) (omission and ellipsis in original). To establish a Section 2 violation, a party must establish three threshold conditions: (1) that the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) that the minority group is "politically cohesive"; and (3) "that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Growe v. Emison*, 507 U.S. 25, 40 (1993) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 50-51

(1986)) (these are the "*Gingles* factors")[2]; *Sanchez v. Colorado*, 97 F.3d 1303, 1310-13 (10th Cir. 1996) (discussing the three *Gingles* factors). These are "necessary preconditions" that a plaintiff must establish. "Only when a party has established the *Gingles* requirements does a court proceed to analyze whether a violation has occurred based on the totality of the circumstances." *Bartlett v. Strickland*, 556 U.S. 1, 21-22 (2009) (citations omitted); *accord Growe*, 507 U.S. at 40-41.[3]

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[2] With regard to the third *Gingles* factor, the question "is not whether white residents tend to vote as a bloc, but whether such bloc voting is 'legally significant.'" *LULAC v. Clements*, 999 F.2d 831, 850 (5th Cir. 1993) (citing *Gingles*, 478 U.S. at 55). In other words, it must be shown that the lack of electoral success of a minority group is due to racially significant bloc voting, rather than merely voting by partisan affiliation. *Id.* at 850-53. Thus, the mere "'lack of success at the polls' is not sufficient to trigger judicial intervention." *Id.* at 853. "Courts must undertake additional inquiry into the reasons for, or causes of, these electoral losses in order to determine whether they were the product of 'partisan politics' or 'racial vote dilution,' 'political defeat' or 'built-in bias.'" *Id.* at 853-54.

[3] Courts are guided in this respect by the factors listed in the Senate legislative history regarding the Voting Rights Act, which states that typical factors are:

> (1) the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> (2) the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> (3) the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> (4) if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> (5) the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
>
> (6) whether political campaigns have been characterized by overt or subtle racial appeals;
>
> (7) the extent to which members of the minority group have been elected to public office in the jurisdiction;
>
> (8) whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; and
>
> (9) whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Gingles, 478 U.S. at 36-37; *Clements*, 999 F.2d at 849 n.22.

In New Mexico, Hispanic citizens have participated successfully in elections to political offices at all levels since the adoption of single-member districts in 1968 and have a long history of electing their candidates of choice in statewide and district elections. New Mexico's long history of electing individuals of Hispanic descent includes all levels of government, including national, legislative and state government offices.

As to the state legislature, Ben Lujan Sr., the current Speaker of the New Mexico House of Representatives, is Hispanic, as was his predecessor Raymond Sanchez, who served as the Speaker for 16 years. The last two presidents pro tempore, Senators Richard Romero and Manny Aragon, also are Hispanic. This pattern is also reflected in the state executive branch. The current Governor, Secretary of State, and State Auditor are all Hispanic. Moreover, the previous Governor, Secretary of State, Attorney General, Treasurer, and state Auditor are Hispanic. Hispanics also hold a substantial share of the judicial branch, as evidenced by the fact that three out of the five current Supreme Court justices are Hispanic.

As of the 2000 census, New Mexico is approximately 46.3 percent Hispanic, 40.5 percent non-Hispanic white, 8.5 percent Native American, and 3.2 percent other races. Historically, Hispanic preferred candidates regularly win election in districts which are not majority Hispanic voting age population. Furthermore, Hispanics have no difficulty being elected in both high and low information races. This trend in this state to elect Hispanics to office demonstrates that electoral success in New Mexico is far more dependent upon personal characteristics of the candidate and "partisan political" factors rather than race. *See* Voting Analysis (Egolf Ex. 17); Arrington Dep. (11/21/11) at 46:12-47:4, 48:15-49:10; B. Sanderoff Dep. at 95:12-96:16 (all discussing that Hispanics tended to vote on partisan lines, rather than on race).

In this litigation, there is no current evidence of legally significant racially polarized voting in New Mexico elections where bloc voting by Anglo voters consistently defeat Hispanic candidates. *See Gingles*, 478 U.S. at 100-01 (O'Connor, J., Concurring). Instead the opposite is true. The preferred candidate for Hispanics in New Mexico, usually a Democrat or if a Republican, Hispanic, tends to defeat Anglo Republican candidates. *See* T. Arrington Dep. (11/21/11) at 48:6-49:10; Egolf Ex. 17; B. Sanderoff Dep. (11/21/11) at 95:12-96:16; *see also id.* at 276:23-25 (testifying that there is not statewide racial bloc voting in New Mexico). Thus, the statistical evidence of racial voting patterns presented to this Court fails to establish the racial bloc voting preconditions of *Gingles* are met in this case. *See*, *e.g.*, *id*.; *see also* T. Arrington Dep. (11/29/11) at 28:16-29:9 (testifying that he doesn't "see a *Gingles* problem, I don't see a voting rights problem" with regard to State House reapportionment.).

Moreover, while it is unnecessary to create majority Hispanic state House districts in New Mexico to ensure compliance with Section 2 of the Voting Rights Act, the Executive Defendants' plan contains 29 districts with at least 50 percent Hispanic voting age population, an increase of two districts. *See* B. Sanderoff Dep. Ex. DG-U at 7; *Bartlett*, 556 U.S. at 36 (concluding that numerical majority of voting age population – more than 50 percent – is threshold for satisfying Section 2 of Voting Rights Act); *see also*, *e.g.*, B. Sanderoff Dep. (11/21/11) at 115:17-24 (testifying that "any district over 50 percent adult Hispanic is given credit for being a Hispanic district."); *see also id.* at 278:15-19 (agreeing that Executive Defendants' state House Plan is sensitive to racial voting issues.). The Executive Defendants' plan accomplished this while maintaining population deviations within one percent. The plans proposed by the Legislative Defendants, and the Egolf and Maestas Plaintiffs, however, utilized substantial population deviations to create or maintain minority districts.

With regard to Native Americans, the Executive Defendants' plan maintains the existing six districts of at least 50 percent Native American voting age population, and at least three of these exceed 64 percent Native American Voting Age population. *See* B. Sanderoff Dep. Ex. DG-U at 7. Other plans presented to this Court do not create this number of Native American majority districts, or keep the voting age percentages within these districts as high as does the Executive Defendants' plan. *See, e.g.*, R. Engstrom Dep. (12/1/11) at 66: 13-24 (criticizing Maestas House plan for dropping Native American voting age populations in Native American majority districts). The Executive Defendants' plans provide an opportunity for Native Americans to elect their candidates of choice greater than or equal to that of any other plan proposed to this court. *See, e.g.*, R. Engstrom Dep. (12/1/11) at 61:3-62:16 (agreeing that executive defendants' plan equal or better than Native American plan in providing Native Americans opportunity to elect candidates of choice).

D. ±5 Percent Deviation Was Inappropriately Employed by the Legislative Defendants for Partisan Purposes in Violation of *Larios v. Cox*.

Under the guise of the ±5 percent safe harbor deviation, the Legislative Defendants' plan, HB 39, runs afoul of *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004), *aff'd*, *Cox v. Larios*, 542 U.S. 947. As discussed above, in *Larios*, a state legislative plan was rejected by the District Court, which held that the plan:

> was an intentional effort to allow incumbent Democrats to maintain or increase their delegation, primarily by systematically underpopulating the districts held incumbent Democrats, by overpopulating those of Republicans, and by deliberately pairing numerous Republican incumbents against one another.

Id. at 1329. 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 United States Supreme Court summarily affirmed the District Court's rejection of such a safe harbor deviation, noting that within that safe harbor "districting decisions could be made for any reason whatsoever." *Cox v. Larios*, 542 U.S. at 949.

Here, ignoring *Larios*, the Legislative Defendants have consistently underpopulated the districts in the North Central portion of the state, thus protecting Democratic incumbents in that areas, and as a consequence, bolstering the voting power of the persons who reside within these districts. Specifically, the Legislative Defendants' plan underpopulates 11 districts in the North Central portion of the state, and 10 out of these 11 districts are currently occupied by Democratic legislators. *See* B. Sanderoff Dep. (11/21/11) at 39:9-40; 93:5-95:23. The result of this North Central underpopulation effort avoided the proper consolidation of these mostly Democratic districts. *See id.* at 22:21-23:3, 9-11; 34:11-35:18; 39:9-40:17; 43:17-44:21; 51:7-52:8; 93:5-95:23. In fact, in developing their plan, the Legislative Defendants purposefully avoided consolidating Democratic districts in the North Central region, despite population changes that justified consolidation. *See* B. Sanderoff Dep. (12/8/11) at 67:7-68:12. In particular, the Legislative Defendants, through Speaker of the House Lujan, explicitly instructed its demographer not to consolidate these districts. *Id.* at 68:9-25, 71:22-72:2. The population deviations, therefore, were specifically employed by the Legislative Democrats as a gerrymandering tool to discriminate in favor of certain geographic areas such as New Mexico's North Central to the detriment of other areas of the state.

The Legislative Defendants' plan seeks to pass scrutiny by simply maintaining a deviation range of 9.83 percent. This plan has an average relative deviation of 3.47 percent which equates to a population imbalance of 71,511 persons. 71,511 people is greater than the

population of Santa Fe, and of the populations of Alamogordo and Clovis combined. Under this plan, all but three districts are under or overpopulated by more than 1 percent. Furthermore, numerous Albuquerque districts in the Legislative Defendants' plan are overpopulated by four percent or more. Such overpopulation unfairly and impermissibly dilutes the votes of Albuquerque's residents.

Accordingly, the Legislative Defendants' House plan sacrifices *de minimis* population variance in order to create tangible benefits for selected regions of the state and for the party currently in control of the State House. This tactic is forbidden by *Larios* and a violation of the "one person, one vote principle."

II. THE EXECUTIVE DEFENDANTS' PLAN HONORS TRADITIONAL REDISTRICTING CRITERIA.

Of all plans offered by parties to this suit, the Executive Defendants' plan best promotes and preserves the traditional redistricting principles of: (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). It also does so without sacrificing equal population equality. Although these traditional principles are not constitutionally required, the Executive Defendants have successfully employed them to ensure that its proposed districts are 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. Furthermore, some of these criteria are explicitly recognized by New Mexico statutory 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. This Court Should Not Select A Plan Based Upon Subjective Criteria Such as Communities of Interest; Regardless, the Executive Plan Preserves Communities to the Best Extent Practicable.

While the maintenance of communities of interest is a legitimate and traditional goal in redistricting, *see Bush*, 517 U.S. at 977, it is not a concept that is subject to easy definition or measurement. *See, e.g.*, *Carstens v. Lamm*, 543 F. Supp. 68, 96-97 (D. Colo. 1982); *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) (these cases define "communities of interest" to include not only political, racial, ethnic, cultural, language and religious interests, but also income level, education, housing patterns, living conditions, shared broadcast and print media, and public transport infrastructure). Indeed, all of the plans submitted to this Court have split the various communities of interest in some fashion or another. *See* B. Sanderoff Dep. (11/21/11) at 62:7-13.

Because of the "inherently subjective nature of the concept, it would seem that reasonable people might disagree as to what constitutes a community." *Chen v. City of Houston*, 206 F.3d 502, 517 n.9 (5th Cir. 2000), *cert. denied*, 532 U.S. 1046 (2001). As a result, courts "caution against general over-reliance on the communities of interest factor." *Id.*; *see also Prejean v. Foster*, 227 F.3d 504 (5th Cir. 2000) (discussing and following *Chen*'s caution "against relying too heavily on communities of interest"). Concerns over preservation of communities of interest are not subservient to the Constitutional requirement that district plans must contain only *de minimis* population deviations. *See Reynolds*, 377 U.S. at 577 ("The fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote.").

Moreover, because of the communities of interest concept is "both subjective and elusive of principled application[,]" they should not be a part of the court ordered redistricting process. *Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 660 (N.D. Ill. 1991); *see id.* ("The courtroom is not the proper arena for lobbying efforts regarding the districting concerns of local, nonconstitutional communities of interest."). Therefore, the Executive Defendants urge this Court to avoid choosing one community of interest over another. Such policy or political decisions are best left to the legislative process. Because the legislative process did not produce a redistricting plan for the New Mexico House of Representatives, this Court should instead employ other, more objective and empirical criteria when selecting a reapportionment plan.

This is not to say that communities of interest are unimportant, or that some plans handle the communities of interest issue better than others. Notably, the Executive Defendants' Plan constitutes a good faith effort to protect existing communities of interest. For example, unlike other plans, the Executive Defendants Plan maintains certain communities of interest within Albuquerque and maintains appropriate communities of interest between West and East Las Vegas, New Mexico. *See, e.g.*, B. Sanderoff Dep. (11/21/11) at 66:19-68:17 (testifying that legislative plan combines disparate East Mountain and Kirtland Air Force Base communities of interest in House District 22), *id.* at 131:4-17 (Executive Defendants' plan mostly maintains Westside Albuquerque's communities of interest); *id.* at 153:9-154:19 (Executive Defendants' plan splits Las Vegas on East-West line thereby maintaining those communities of interest). This is contrasted with other plans that inappropriately split communities of interest, or combine disparate communities of interest. *See, e.g.*, B. Sanderoff Dep. (11/21/11) at 175:24-176:2, 177:11-16 (testifying that Maestas plan combines Las Vegas, Ruidoso, and Carrizozo, which are different communities of interests); *id.* at 76:17-77:15 (agreeing that Legislative Defendants'

proposed House District 68 contains significantly different communities of interest than current district). Accordingly, this Court should avoid undue consideration of communities of interest advocated by parties and, instead, utilize neutral and empirical data when selecting an apportionment plan.

B. The Executive Defendants' Plan Scores Better Than, or at Least as Well as, Other Plans with Regard to Compactness, Core Preservation, Preservation of Political Subdivisions, and Incumbent Pairing.

The evidence and testimony reveals that the Executive Defendants' Plan satisfies both the "eyeball" and statistical approach required by law with regard to the compactness of its districts. While Courts generally evaluate compactness and contiguity together, the term "compactness" has historically been used to relate to the minimum distance between all parts of the constituency and contiguity requires that all parts of a district be connected geographically with the rest of the district. There are multiple ways to measure whether districts are compact or not, including certain statistical measures and a more informal "eyeball" approach. *See Bush*, 517 U.S. at 960. As part of the "eyeball" approach, compactness can be evaluated by measuring how smooth or contorted the boundaries of a proposed district are. The statistical measurement is known as the Polsby-Popper score. The Polsby-Popper test computes the ratio of the district area to the area of a circle with the same perimeter. The measure is always between 0 and 1, with 1 being the most compact.

Under a Polsby-Popper analysis, the Executive Defendants' plan scores 0.31, only behind the Maestas (0.32) and Sena plans (0.33) as the most compact. By contrast, the Egolf and Legislative Defendants' plans are the least compact, scoring at 0.28 and 0.29 respectively. *See* Gov. Ex. 10. Further, there are certain districts within the plans presented that are particularly non-compact. For example, the Egolf Plaintiffs' own expert, Ted Arrington, has testified that the

Egolf Plan's proposed District 63 is "pretty ugly." *See* T. Arrington Dep. at 53:19-23. Also, the Egolf Plan's proposed District 24 is "more contorted" than District 24 in the Executive Defendants' map. *See* B. Sanderoff Dep. (11/21/11) at 140:20-141:12. And, in the Legislative Defendants' plan, House District 52 has "compactness issues." *See id.* at 73:11-25. By contrast, an "eyeball" of the Executive Defendants' plan demonstrates that it is overall a compact map. *See, e.g.*, B. Sanderoff Dep. (11/21/11) at 126:24-127:5 (testifying that "generally speaking" the Executive Defendants' "state map has a compact look to it" and looks "relatively compact" in map's rural areas); *id.* at 128:1-17, 129:10-25 (noting that Executive Defendants' proposed House Districts 63, 49, 57, 60, 29 and 26 are compact districts).

In addition, the Executive Defendants' plan also preserves the core of the existing districts and protects core constituencies. The preservation of district cores recognizes that there is significant value in continuity of present district lines. *See Karcher v. Daggett*, 462 U.S. 725, 758 (1983) (Stevens, J. concurring). When new areas join a district, new constituencies must be addressed, new contacts made, and new concerns addressed. Plans that fail to preserve the core of existing districts threaten to disrupt the smooth and efficient administration of New Mexico's elections, and can cause voter confusion. *Id.* Core retention and continuity can be measured by determining what percentage of a current district continues to exist in a proposed new district.

The Executive Defendants' state House plan preserves New Mexico's existing state House districts in most cases by maintaining continuity with existing districts. *See, e.g.*, B. Sanderoff Dep. (11/21/11) at 143:15-19 (testifying that Executive Defendants' plan makes the least changes to existing districting in the Silver City area); *id.* at 175:24-176:2, 178:8-13 (noting that Maestas plan's House District 70 fails to include Guadalupe County even though that county

is part of current district.); *id.* at 185:23-186:9 (observing that Maestas plan's House District 40 stretches more than current district).

The Executive Defendants' plan also preserves political subdivisions where practicable. Protection of political subdivisions 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 S.W.2d 771, 775-76 (Ky. 1997). Preserving political boundaries must, however, give way to efforts to minimize population deviations among districts. *Karcher*, 462 U.S. at 734, n.5 (stating that preservation of political subdivisions is a "secondary goal" and is not normally a "sufficient excuse for failing to achieve population equality.").

Specifically, of all of the plans submitted to this Court, the Executive Defendants' Plan splits the least number of counties, containing only 106 county splits, and only 23 divided counties. By contrast, the Legislative Defendants' plan contains 121 county splits and 26 divided counties, the Maestas plan 120 county splits and 28 divided counties, and the Egolf plan 119 county splits and 26 divided counties. *See* Gov. Ex. 10.

Finally, the Executive Defendants' Plan minimizes 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[.]") (citations omitted). Where incumbents must be paired, the 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 1347-48.

The Executive Defendants' and Legislative Defendants' proposed plans each pair two Democrats, two Republicans, and one Democrat with one Republican. The Egolf plan pairs four Democrats and two Republicans. By comparison, the Maestas plan pairs three Republicans with each other, as well as two Republicans with each other, for a total of five paired GOP members and two paired Democratic members. Thus, the Executive Defendants' Plan minimizes the overall effects of pairing of party incumbents and, for those pairings that are necessary, does not provide an advantage of one political party over the other.

III. THE EXECUTIVE DEFENDANTS' PLAN IS POLITICALLY FAIR.

The Executive Defendants' plan also comes the closest to maintaining the political *status quo* from past elections and thus does not tend to give one political party an advantage. Political or representational fairness should 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); *see also Peterson v. Borst*, 786 N.E.2d 668, 673 (Ind. 2003) (holding that if the legislative and executive "branches cannot reach a political resolution and the dispute spills over into an Indiana court, the resolution must be judicial, not political.").

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*, 456 U.S. 37).

Currently, there are 38 state House districts that either lean Democratic or are safe Democrat seats (50 percent or greater Democratic performance in previous elections), and 32 seats that either lean Republican or are safe Republican. The Executive Defendants' plan comes the closest to maintaining this *status quo*, and thus does not tend to give one political party an advantage over another. Specifically, the Executive Defendants' plan creates 39 safe Democratic or lean Democratic seats, and 31 safe or lean Republican seats. *See* Summary Table (Gov. Ex. 10). By contrast, the Legislative Defendants' plan creates 40 safe or lean Democratic seats, the *Egolf* Plan 41 safe or lean Democratic seats, and the *Maestas* plan 43 safe or lean Democratic seats. *See id.*; B. Sanderoff Dep. (11/21/11) at193:20-194:3. Thus, under the *Maestas* Plan, Democratic performing districts are increased from 38 to 43, strong Democratic districts are increased from 32 to 35, and lean Republican districts are reduced by six. *See* B. Sanderoff Dep. (11/21/11) at 168:11-19. The necessary conclusion is that, of the plans before this Court, the Executive Defendants' plan best keeps partisan interests out and is the most politically fair.

CONCLUSION

The Court should adopt the Executive Defendants' State House plan should be adopted because it is the most neutral of the plans presented to the Court, in that it achieves the legally required goal of *de minimus* population equality, while adhering to traditional redistricting principles and maintaining political fairness.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of December 2011, I served via electronic mail and filed the foregoing pleading electronically, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

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