

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

No. D-101-CV-2011-02942

BRIAN F. EGOLF, JR., *et al.*,

Plaintiffs,

vs.

DIANNA J. DURAN, *et al.*,

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 ON REDISTRICTING
THE NEW MEXICO PUBLIC REGULATION COMMISSION**

The New Mexico Public Regulation Commission (hereinafter “PRC”), as a representative body divided by districts, is subject to the same legal standards employed by this Court to create the United States Congressional, the State House of Representatives, and the State Senate districts. As this Court has already recognized in its State House Findings of Fact and Conclusions of Law (filed 1/3/12), “[a] court’s role in adopting or drawing a reapportionment plan is limited and different from the role of the Legislature[.]” *See id.* at COL ¶ 5. Thus, as the Court ruled in the state House case, this Court must first ensure that the Equal Protection Clause is honored to its fullest extent by adopting PRC districts that are as equal in population as is

practicable, with little more than *de minimis* variation. *Id.* at COL ¶ 6. This is the sole and undisputed Constitutional criterion. This Court must then ensure that minority voting rights are protected. Finally, but only after these first two constitutional and statutory requirements are met, may the Court consider a plan based on the secondary neutral criteria such as compactness, core retention, incumbent protection, communities of interest preservation, and political fairness. In doing so, “[t]he Court is obligated to follow the legal priorities and not allow partisan considerations to control the outcome.” *See id.* at COL ¶ 35.

Pursuant to this methodology, the Court will again discover that both the Executive Defendants’ PRC Plans – the Least Change Plan and the County Restoration Plan – balances the competing factors more appropriately than other proposed plans. The Executive Defendants propose redistricting plans that achieve the most minimal population deviation ranges and protect minority voting strength, while honoring the secondary principles of redistricting.

I. IT IS UNDISPUTED THAT THE EXECUTIVE DEFENDANTS’ PLANS CONTAIN THE LOWEST POPULATION DEVIATION.

Based on information gained during the 2010 Federal Census, the current districts for the PRC have deviations from the ideal population ranging from -8.1 percent to 8.4 percent, for a total range of deviation of 16.5 percent. *See* PRC Districts Chart (Gov. Ex. 6). As in the congressional and legislative redistricting, the malapportionment of the PRC, and the failure of the legislative process to arrive at a plan, justify and require this Court to redraw the State’s PRC districts. *See* House Findings and Conclusions (1/4/12) at COL ¶ 3-4. Similarly, the Court must start with what the Equal Protection Clause of the Fourteenth Amendment requires of all representative districts -- that the districts for the PRC be apportioned on an equal population basis so that every New Mexican’s vote counts the same. *See Reynolds v. Sims*, 377 U.S. 533, 568 (1964); *see also* House Findings and Conclusions (1/4/12) at COL ¶ 6. No party can dispute

the fact that, once again, the Executive Defendants have presented the Court with the best and most complete remedy to the currently malapportioned districts by submitting plans that, as much as is possible, maintain a *de minimis* difference between the number of persons assigned to each district.

The Executive Defendants' PRC Redistricting Plans (hereinafter referred to as the "Least Change Plan" and the "County Restoration Plan") correct this malapportionment by achieving near zero population deviations and contain the lowest range of population deviations among the plans presented to the Court. Specifically, the Least Change Plan contains a population deviation between -0.07 percent and 0.15 percent, for an overall range of 0.22 percent. *See* Summary of Deviation Factors by Proposal (Gov. Ex. 14). Using the 2010 Federal Census, the Least Change Plan's most populous district contains only 1,243 people more than its least populous district. Unlike other plans submitted to this Court, *none* of the districts under the Least Change Plan contains a deviation above one percent. *See* Relative Deviation Chart (Gov. Ex. 19). Similarly, under the County Restoration Plan, which was created to reduce the number of divided counties, contains an overall population deviation range of only 1.72 percent. Thus, regardless of the objectives of a PRC plan, *de minimis* population deviations are achievable and there is simply no excuse for higher population deviations. Certainly, there is no reason to employ ± 5 percent total deviation as a goal in any PRC plan. *See Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 365 (S.D.N.Y. 2004) ("[I]n light of recent technological changes, there is a reason not to allow the state systematically to dilute the votes of certain classes of citizens simply because the state is able to keep its discrimination within a ten-percent deviation.").

The Legislative Defendants, by contrast, continue to ignore the legal requirement that the redrawn PRC districts must achieve near population equality. The Legislative Defendants again

rely on the fact that their plan has an overall range of population deviations that are less than, but close to, 10 percent. *See, e.g.*, 2011 Legislative Redistricting Guidelines (Legis. Ex. 2). Their Plan, which narrowly passed the New Mexico Legislature as Senate Bill 24 (“SB 24”)¹ and was vetoed by Governor Martinez, proposes PRC districts with a deviation range of 8.56 percent. *See* Summary of Deviation Factors by Proposal (Gov. Ex. 14). This equates to a total population imbalance of 62,765 people. *Id.* Moreover, the Legislative Defendants’ Plan is not a substantial improvement over the existing malapportioned PRC districts, since it only reduces the current population deviations by approximately half. *See* Summary Table 1 (Gov. Ex. 11).

Thus, the Executive Defendants propose PRC redistricting plans that demonstrate the relative ease in which districts can be drawn that achieve near zero population deviations in compliance with the Constitutional requirement of one person, one vote. As will be demonstrated at trial, the Legislative Defendants’ Plan favors the representational interests of the citizens in some districts over those of other citizens who reside in different districts. For that reason alone, this Court should adopt one of the Executive Defendants’ plans for the PRC.

II. THE EXECUTIVE DEFENDANTS’ PLANS COMPLY WITH THE VOTING RIGHTS ACT AND PROTECT MINORITY VOTING STRENGTH.

The Executive Defendants maintain, as they have in the congressional and state legislative redistricting hearings, that a greater than near-zero deviation is not necessary to create any minority-majority districts under the Voting Rights Act. As the Court recognized in the House trial, in New Mexico there is “no persuasive evidence that Sec. 2 of the Voting Rights Act requires any particular Hispanic majority district be drawn.” House Findings and Conclusions (1/3/12) at COL ¶ 26. Nevertheless, the Executive Defendants’ Least Change Plan and County

¹ Similar to other redistricting legislation passed by the New Mexico Legislature, SB 24 barely passed either chamber and received bipartisan opposition in both chambers. SB 24 passed the Senate by only seven votes, 24 to 17, and passed the House of Representatives by a mere two votes, 36 to 34.

Restoration Plan each maintain a district with at least 50 percent Hispanic voting age population, the same as all other plans proposed to this Court. *See* Summary Table 2 (Gov. Ex. 12).

Furthermore, the Executive Defendants will establish at trial that it is statistically and geographically impossible to create a single majority Native American state PRC district in New Mexico to ensure compliance with Section 2 of the Voting Rights Act or for any other reason. *See* Summary Table 2 (Gov Ex. 12). In any case, and as will be demonstrated at trial, the Executive Defendants' Plans provide voting opportunities for Native Americans greater than or equal to that provided by another other plan proposed to this Court. Indeed, the only fundamental dispute between the Executive Defendants and the Navajo Intervenors is regarding PRC District 4, and the difference between the Executive Defendants' Least Change Plan's 28.8 percent and County Restoration Plan's 28.3 percent non-Hispanic Native American voting age population versus the Navajo Intervenors' Plan's 31.3 percent non-Hispanic Native American voting age population in District 4. *See* L. Gorman Dep. (11/23/2011) at 158:13-159:3 (discussing the Least Change Plan), 162:1-3 (discussing the County Restoration Plan).²

Accordingly, the Executive Defendants will show at trial that their Plans comply with Section 2 of the Voting Rights Act and perform equal to or better than the other plans presented to this Court with regard to the preservation of minority voting strength.

III. THE LEAST CHANGE PLAN PROVIDES THE BEST SOLUTION TO HONOR THE LAST CLEAR EXPRESSIONS OF STATE POLICY.

In developing its PRC districts, it is appropriate for this Court to look to the last clear expression of state policy, as embodied by the current district statute, and favor plans that resemble, as closely as is possible, the current PRC districts. *See White v. Weiser*, 412 U.S. 783,

² Leonard Gorman, the crafter of the Navajo Intervenors' Plan, testified that the "Navajo Nation has expressed very, very strong concerns about even a percent difference, where it believes that it would be a benefit to the Navajo people in maintaining even that one percent difference." L. Gorman Dep. (11/23/11) at 139:8-11.

795 (1973) (stating that a federal court, “in the context of legislative reapportionment, should follow the policies and preferences of the State, as expressed in statutory and constitutional provisions”). As previously acknowledged by this Court in the Congressional redistricting trial, a plan can be “superior” to another “because it maintains respect for existing Congressional boundaries and because it places the fewest number of voters in new Congressional districts.” Congress Findings and Conclusions (12/29/11) at COL ¶ 16. By following previous successful redistricting law, a redistricting plan will automatically accommodate several traditional districting criteria, such as the preservation of district cores and communities of interest, and the avoidance of incumbent pairings.

The current PRC districts were the result of legislation passed in 2001 by a Democrat-controlled Legislature and signed into law by a Republican Governor. *See* NMSA 1978, §§ 8-7-6 to 8-7-10 (2001). Thus, the current districts embody the last clear expression of New Mexico state policies regarding the PRC districts and best represent what a successful legislative process can produce with regard to how New Mexico’s PRC districts should be drawn. The Executive Defendants’ Least Change Plan was intentionally designed to mimic, as closely as is possible, the current PRC districts while adjusting populations necessary to correct the current malapportionment. Thus, the Least Change Plan also best preserves the states traditional districting criteria embodied in the last expression of state policy.

A. The Least Change Plan Preserves the Existing District Cores and Communities of Interest Embodied by the Last Clear Expression of State Policy and Avoids Incumbent Pairing.

Pursuant to its inherent goal, the Least Change Plan retains the core of existing districts better than any of the plans submitted to this Court. Specifically, the Least Change Plan preserves New Mexico’s existing districts in most cases by maintaining continuity with existing

district lines. *See* Summary Table 1 (Gov. Ex. 11). As a result, the Executive Defendant's Least Change Plan prevents unnecessary disruptions to the smooth efficient administration of the PRC elections, such as voter confusion, while best adjusting districts to accommodate population changes and to minimize population deviation.

While the Executive Defendants have fully briefed their concern that court-ordered redistricting plans must avoid improper elevation of the subjective and elusive communities of interest criterion, *see* Executive Pre-Trial Brief on the New Mexico House of Representatives Redistricting at pp. 27-29, the Executive Defendants acknowledge that maintenance of communities of interest is a legitimate and traditional goal in redistricting. *See Bush v. Vera*, 517 U.S. 952, 977 (1996). Notably, the Least Change Plan, by relying on and preserving to the best extent possible the existing district lines, honors the last clear expression of legislative policy regarding communities of interest. The existing PRC districts reflect a successful legislative process in which communities of interest were considered as part of the policy and political decisions embodied in the legislative process. The existing districts received bipartisan approval, as the State Legislature at the time was Democrat-controlled and the Governor was Republican. Accordingly, the Least Change Plan sought to and succeeded in honoring the communities of interest reflected in the existing districts by maintaining, as closely as is possible, existing district lines.

Similarly, by maintaining current district lines, the Least Change Plan also contains no incumbent pairings and, therefore, is the best plan in this category. *See* Summary Table 1 (Gov. Ex. 11); *Bush v. Vera*, 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). By containing no incumbent pairings, the Least Change Plan is politically fair.

B. The Least Change Plan is the Most Compact of All Plans

The evidence and testimony will reveal that the Least Change Plan satisfies both the “eyeball” and statistical approach required by law with regard to the contiguity and compactness of its districts. First, under the informal “eyeball” approach, *see Bush*, 517 U.S. at 960, the Least Change Plan shows smooth boundaries for its proposed districts. *See Executive PRC Map* (Gov. Ex. 9). Under the statistical measurements, specifically the Reock score, the Least Change Plan is the most compact. *See Summary Table 1* (Gov. Ex. 11). Specifically, the Least Change Plan scores a 0.52 under the Reock analysis, better than any other plan presented to the Court and the same score as the existing PRC districts.

The Least Change Plan proposed by the Executive Defendants constitutes a simple and empirically supported realignment of the existing districts that best preserves and honors secondary traditional redistricting criteria. Moreover, it is the only plan that does so while maintaining near-zero population deviations among the districts. Accordingly, the Least Change Plan is the type of plan that should be adopted by a Court exercising a limited role and applying neutral redistricting criteria.

IV. THE COUNTY RESTORATION PLAN ALSO ACCOMMODATES TRADITIONAL REDISTRICTING CRITERIA.

As an alternative to the Least Change Plan, the Executive Defendants offer for the Court’s consideration the County Restoration Plan. This Plan was the product of an intentional realignment of existing PRC districts to minimize the division of counties to the greatest extent possible. *See County Restoration Plan Map Packet* (Gov. Ex. 10). As with the other Executive

proposal, the County Restoration Plan maintains near-zero population deviations in its districts, with an overall deviation range of 1.72 percent. Summary Table 1 (Gov. Ex. 11).

Preservation of counties and other political subdivisions is a common priority in redistricting representative districts. *See* Congress Findings and Conclusions (12/29/11) at COL

¶ 14. As explained by Justice Stevens:

Subdivision boundaries tend to remain stable over time. Residents of political units, such as townships, cities, and counties often develop a community of interest, particularly when the subdivision plays an important role in the provision of governmental services. In addition, legislative districts that do not cross subdivision boundaries are administratively convenient and less likely to confuse the voters.

Karcher v. Daggett, 462 U.S. 725, 758 (1983) (Stevens, J. concurring). Preserving existing political subdivisions can be accomplished by attempting to minimize, as much as is 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 a plan that respected pre-existing political subdivisions); *Jensen v. Ky. State Bd. of Elections*, 959 S.W.2d 771, 775-76 (Ky. 1997); Congress Findings and Conclusions (12/29/11) at COL ¶ 15.

Of all the plans submitted to this Court, the Executive Defendants' County Restoration Plan splits the least number of counties and specifically contains only eight county splits and only three divided counties. *See* Summary Table 1 (Gov. Ex. 11). The Legislative Defendants' Plan, by contrast, contains 19 county splits and eight divided counties. *Id.*

As with the Least Change Plan, the Executive Defendants' County Restoration Plan scores well in other categories of traditional redistricting criteria. For example, the County Restoration Plan does not contain any incumbent pairings, while the Legislative Defendants' Plan pairs two incumbents. *See* Summary Table 1 (Gov. Ex. 11). In addition, the County Restoration Plan is one of the more compact plans presented to this Court. *See* Summary Table 1

(Gov. Ex. 11) (the Plan scores 0.34 under the Polsby-Popper analysis). The County Restoration Plan is the only plan presented to this Court that can accommodate these traditional redistricting criteria while maintaining near-zero population deviations.

CONCLUSION

As the Executive Defendants will demonstrate at trial, the Court should adopt either of the Executive Plans because they are the most neutral of the plans presented to the Court, in that they achieve the constitutionally and statutorily required goals of *de minimis* population equality, while adhering to traditional redistricting principles.

Respectfully submitted,

By: \S\ Jessica Hernandez
Jessica M. Hernandez
Matthew J. Stackpole
Office of the Governor
490 Old Santa Fe Trail #400
Santa Fe, NM 87401-2704
Telephone: (505) 476-2200

-and-

Paul J. Kennedy
201 12th Street NW
Albuquerque NM 87102-1815
Telephone: (505) 842-0653

Attorneys for Susana Martinez, in her official capacity as New Mexico Governor

PEIFER, HANSON & MULLINS, P.A.

By: approved by email 1/6/12
Charles R. Peifer
Robert E. Hanson
Matthew R. Hoyt
PO Box 25245
Albuquerque NM 87125-5245
(505) 247-4800

Attorneys for Defendant John A. Sanchez, in his official capacity as New Mexico Lieutenant Governor and presiding officer of the New Mexico Senate

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of January, 2012, 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.

The Honorable James A. Hall
James A. Hall LLC
505 Don Gaspar Ave
Santa Fe, NM 87505-4463
(505) 988-9988
jhall@jhall-law.com

Robert M. Doughty, III
Judd C. West
Doughty & West, P.A.
20 First Plaza NW, Suite 412
Albuquerque, NM 87102
(505) 242-7070
rob@doughtywest.com
susan@doughtywest.com
yolanda@doughtywest.com

Attorneys for Defendant Dianna J. Duran, in her official capacity as New Mexico Secretary of State

Jessica M. Hernandez
Matthew J. Stackpole
Office of the Governor
490 Old Santa Fe Trail #400
Santa Fe, NM 87401-2704
(505) 476-2200
jessica.hernandez@state.nm.us
matthew.stackpole@state.nm.us

Paul J. Kennedy
201 12th Street NW
Albuquerque NM 87102-1815
(505) 842-8662
pkennedy@kennedyhan.com

Attorneys for Defendant Susana Martinez, in her official capacity as New Mexico Governor

Ray M. Vargas, II
David P. Garcia
Erin B. O'Connell
Garcia & Vargas, LLC
303 Paseo del Peralta
Santa Fe, NM 87501
(505) 982-1873
ray@garcia-vargas.com
david@garcia-vargas.com
erin@garcia-vargas.com

Joseph Goldberg
John W. Boyd
David H. Urias
Sara K. Berger
Freedman Boyd Hollander
Goldberg & Ives
20 First Plaza Ctr. NW, #700
Albuquerque, NM 87102
(505) 842-9960
jg@fbdlaw.com
jwb@fbdlaw.com
dhu@fbdlaw.com
skb@fbdlaw.com

Attorneys for Plaintiffs in Egolf v. Duran, D-101-CV-2011-02942; Holguin v. Duran, D-101-CV-2011-0944; and Castro v. Duran, D-101-CV -2011-02945

Patrick J. Rogers
Modrall, Sperling, Roehl, Harris & Sisk P A
P.O. Box 2168
Albuquerque, NM 87103
(505) 848-1849
pjr@modrall.com

Duncan Scott
Paul Kienzle
Paul Spear
Scott & Kienzle, P.A.
1011 Las Lomas NE
Albuquerque, NM 87103
(505) 246-8600
duncan@DScottlaw.com
paul@kienzlelaw.com
spear@kienzlelaw.com

Attorneys for Plaintiffs in Sena v. Duran, D-506-CV-2011-00913

Casey Douma
Attorney at Law
PO Box 812
Laguna NM 87026-0812
(505) 552-5776
cdouma@lagunatribe.org

Teresa Leger
Cynthia Kiersnowski
Nordhaus Law Firm LLP
1239 Paseo de Peralta
Santa Fe NM 87501-2758
(505) 982-3622
tleger@nordhauslaw.com
ckiersnowski@nordhauslaw.com
Attorneys for Plaintiffs in Pueblo of Laguna v. Duran, D-101-CV-2011-03016

David K. Thomson
Thomason Law Firm
303 Paseo de Peralta
Santa Fe NM 87501-1860
(505) 982-1873
david@thomsonlawfirm.net
Attorney for Plaintiffs in Maestas v. Duran, D-101-CV-2011-03099 and Maestas v. Duran, D-101-CV -2011-03107

Stephen G. Durkovich
Law Office of Stephen Durkovich
534 Old Santa Fe Trail
Santa Fe, NM 87505-0372
(505) 986-1800
sonya@durkovichlaw.com

John V. Wertheim
Jones, Snead, Wertheim & Wentworth, P.A.
PO Box 2228
Santa Fe, NM 87505-2228
(505) 982-0011
johnv@thejonesfirm.com
todd@thejonesform.com
Attorneys for Plaintiffs in Maestas v. Duran, D-101-CV-2011-03107

Henry M. Bohnhoff
Rodey, Dickason, Sloan, Akin & Robb, P.A.
PO Box 1888
Albuquerque NM 87103
(505) 765-5900
hbohnhoff@rodey.com

Christopher T. Saucedo
Iris L. Marshall
Saucedo Chavez P.C.
100 Gold Ave. SW, Suite 206
Albuquerque NM 87102
(505) 338-3945
csaucedo@saucedochavez.com
imarshall@saucedochavez.com

David A. Garcia
David A. Garcia, LLC
1905 Wyoming Blvd. NE
Albuquerque NM 87112
(505) 275-3200
lowthorpe@msn.com
Attorneys for Plaintiffs in Representative Conrad James v. Duran, D-202-CV-2011-09600

Luis G. Stelzner
Sara N. Sanchez
Stelzner, Winter, Warburton, Flores, Sanchez & Dawes, P.A.
PO Box 528
Albuquerque NM 87103
(505) 988-7770
lgs@stelznerlaw.com
ssanchez@stelznerlaw.com

Richard E. Olson
Jennifer M. Heim
Hinkle, Hensley, Shanor & Martin, LLP
PO Box 10
Roswell NM 88202-0010
(575) 622-6510
rolson@hinklelawfirm.com
jheim@hinklelawfirm.com
Attorneys for Defendants Timothy J. 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

Patricia G. Williams
Jenny J. Dumas
Wiggins, Williams & Wiggins
PO Box 1308
Albuquerque NM 87103-1308
(505) 764-8585
pwilliams@wwwlaw.us
jdumas@wwwlaw.us

Dana L. Bobroff, Deputy Attorney General
Navajo National Department of Justice
PO Box 2010
Window Rock AZ 86515
dbobroff@nndoj.org
Attorneys for Navajo Intervenors

Santiago E. Juarez, Esq.
1822 Lomas Blvd., NW
Albuquerque, NM 87104
(505) 246-8499
santiagojuarezlaw@gmail.com
Attorneys for Plaintiff Intervenors New Mexico League of United Latin American Citizens (NM LULAC), Paul A. Martinez, J. Paul Taylor, Peter Ossorio, Christy L. French, Matt Runnels, and Rae Fortunato in Holguin v. Duran, D-101-CV-2011-02944

OFFICE OF THE GOVERNOR

By: /S/ Jessica Hernandez
 Jessica Hernandez