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

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

Plaintiffs,

vs. **No. D-101-CV-2011-0-2942**

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:
D-101-CV-2011-02944
D-101-CV-2011-02945
D-101-CV-2011-03016
D-101-CV-2011-03099
D-101-CV-2011-03107
D-101-CV-2011-09600
D-101-CV-2011-00913

PLANTIFF MAESTAS' PRETRIAL BRIEF

REDISTRICTING – AN UNWANTED INVITATION INTO THE LEGISLATIVE ARENA

The need for courts to redistrict in accordance with the Constitution's "one person, one-vote" mandate has aptly been characterized as an "unwelcome obligation"[1] to enter into a "political thicket". *Veith v. Jubelirer*, 541 U.S. 267, 310 (2004)(plurality). In this political thicket where the norm is an ongoing and incessant effort of one political group to gain

[1] *League of United Am. Citizens v. Perry*, 548 U.S. 399, 415 (2006)(internal quotation marks omitted).

political advantage over the other, a court is routinely asked[2] to make political choices. In the process of redistricting, the Court is routinely asked to make political choices in selecting one proposed plan over another, choices couched in terms of "fairness", "neutrality", and "excessive partisan politics" etc., subjects the Court has no standards for deciding in a judicially manageable or judicially acceptable way.

> Some criterion more solid and more demonstrably met than [fairness] seems to us necessary to enable the state legislature to discern the limits of their districting discretion, to meaningfully constrain the courts' discretion, and to win public acceptance of the courts' intrusion into a process that is the very foundation of the democratic decisionmaking.

Veith, 541 U.S., at 291 (emphasis added).

> "The judicial Power" created by Art. III, § 1 of the Constitution is not *whatever* the judges choose to do, . . . or even whatever Congress chooses to assign them. . . . It is the power to act in a manner traditional for English and American courts. One of the most obvious limitations imposed by that requirement is that judicial action must be governed by *standard,* by *rule.* Laws promulgated by the Legislative Branch can be inconsistent, illogical, and ad hoc; law pronounced by the courts must be principled, rational, and based on reasoned distinctions.

Veith, 541 U.S., at 278 (citations omitted and italics in original).

Making decisions absent established standards and rules blurs the distinction between an independent, impartial judiciary and a necessarily partisan legislative branch all to the long term detriment of the judiciary's independent standing in the public eye. The judiciary's impartiality is necessary for public acceptance of its decisions. Thus, a

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> . . . court action that is available tends to be sought, not just where its necessary, but where it is in the interest of the seeking party. And the vaguer the test for availability, the more frequent interest rather than necessity will produce litigation. Is the regular insertion of the judiciary into districting, with the delay and the uncertainty that brings to the political process and the partisan enmity it brings on the courts, worth the benefits to be achieved . . . .

Veith, 541 U.S. at 300-301.

redistricting court must remain focused on the readily and easily decided core issue of "one person, one vote".

The Court's necessary course is therefore to decline to address the collateral political issues inherent in the redistricting process and concentrate instead on the sole issue that brings redistricting process to the Court in the first place, the inequality of voters between districts and the Constitutional mandate of "one person, one vote". The Court's responsibilities in determining "one person, one vote" are simple and straightforward particularly in contrast with the often-requested political decisions it cannot and should not make.

> The easily administrable standard of population equality adopted by *Wesberry* and *Reynolds* enables judges to decide whether a violation has occurred (and to remedy it) essentially on the basis of three readily determined factors – where the plaintiff lives, how many voters are in his district, and how many voters are in the other district; whereas requiring judges to decide whether a districting system will produce a statewide majority for a majority party casts them forth upon a sea of imponderables, and asks them to make determinations that not even election experts can agree upon.

Veith, 541 U.S., at 290.

REDISTRICTING
ISSUES AND NON-ISSUES

A. NON-ISSUES

1. Political Gerrymandering.

Gerrymandering involves the creation a misshapen political district to guarantee a political result inconsistent with the general will of the voters who reside in that general area. Although the Supreme Court in *Davis v. Bandemer,* 478 U.S. 109 (1986)(plurality) held that the Equal Protection Clause granted judges the power and the duty to control political gerrymandering, eighteen (18) years has elapsed without the Court ever being able to establish judicially discernible and manageable standards for adjudicating political

gerrymandering.[3] *See Veith,* 541 U.S., at 280. In the 18 years since *Bandemer*, there has been but a single case in which even preliminary relief was granted, and that preliminary relief which did not involve the drawing of the district lines was later withdrawn by the Court. *See Veith*, 541 U.S., at 279 n.5.

Since *Bandemer*, a plurality of the Court proposed, to overrule Bandemer, and in the future to decline to adjudicate political gerrymandering claims. *See Veith*, 541 U.S., at 306.

Political gerrymandering is not a real issue in any of the redistricting maps submitted to the Court. Political gerrymandering is specifically not an issue in the congressional redistricting case before this Court.

2. Partisan Politics in the Redistricting Process.

While "politics" or "partisan politics" are uniformly decried in all redistricting cases as reasons for invalidating an opponents redistricting plan, politics and partisanship are not a reason for invalidating any redistricting plan because they are inherent in the redistricting process.

> The Constitution clearly contemplates districting by political entities, see Art. I, § 4, and unsurprisingly that turns out to be root–and–branch a matter of politics. . . .[R]edistricting in most cases will implicate a political calculus in which various interests compete for recognition . . . . The reality is that districting inevitably has and is intended to have substantial political consequences.

Veith, 541 U.S. at 285-286 (citations and internal quotations omitted).

> "political considerations will likely play an important and proper role in drawing of district boundaries."

[3] Justice Breyer's statement upon affirming the lower court's decision in *Cox v. Larios* to the effect that Georgia's redistricting constituted a political gerrymander was pure dicta. The lower court decision, which the Supreme Court was affirming, specifically noted that it had dismissed the plaintiff's political gerrymandering claim and the appellant had taken no appeal from that dismissal.

Veith, 541 U.S., at 299 (quoting 541 U.S., at 358 (J. Breyer, dissenting))[4].

Partisan politics is not an issue in the congressional redistricting case before this Court.

3. The Right of Political Parties for Proportionate Political Representation.

> The constitution contains no such principle [that groups, or at least political-action groups have a right to proportional representation]. It guarantees equal protection of the laws to persons, not equal representation in government to equivalently sized groups. It nowhere says that farmers or urban dwellers, Christian fundamentalists or Jews, Republicans or Democrats, must be accorded political strength proportionate to their numbers.

Veith, 541 U.S., at 288.

> Relief [cannot] be based merely upon on the fact that a group of persons banded together for political purposes had failed to achieve representations commensurate with its numbers, or that the apportionment scheme made its winning of election more difficult.

Veith, 541 U.S., at 288 (citing *Davis v. Bandemer*, 478 U.S., at 132).

Proportionate representation is not an issue in the congressional redistricting plans before the Court.

[4] While *Cox v. Larios* was decided specifically on the issue of use of the illegal and discriminatory objectives of regional favoritism and the inconsistent application of incumbency protection in the formulation of Georgia's redistricting plan as it effected the constitutional protections of "one person, one vote", the facts in *Cox* in reality established the outside limits of partisanship in the redistricting process. *See* 542 U.S., at 947-48. In *Cox*, the democratic majority used the prima facie presumption of constitutionality of ten percent deviation from absolute voter equality as a "safe harbor" for the performance of inherently illegal and discriminatory actions. *See id.*, at 949. The prima facie ten percent deviation was not used as the starting point for Georgia's efforts to achieve "one person, one vote", but as its endpoint. The democratic majority made no effort at achieving a lesser deviation from zero, and rejected redistricting plans with deviations of less than ten percent. The democratic majority further admitted ignoring the traditional redistricting principles that would have justified its deviation from "one person, one vote" and again admittedly to constructing its redistricting map with the sole purpose of favoring rural and inner city democratic voters to the detriment of republican suburban voters. *See id.* The Georgia democrats further admitted to freezing their republican counterparts out of the redistrict process while providing incumbency protection almost exclusively for incumbent democrats. *See id.*, at 948-49. Again, while not deciding the case on the issue of partisan politics, it was clear that the redistricting activities of the democratic majority exceeded all permissible bounds.

B. THE ONLY ISSUE BEFORE THE COURT IS "ONE PERSON, ONE VOTE"

After decades of struggling unsuccessfully to get a handle on such issues as political gerrymandering and the inevitable political motives that attend the redistricting process, *Cox v. Larios* brought the fundamental issue of redistricting back into focus:

> **The equal population principle remains the only clear limitation on improper districting practices and we must be careful not to dilute its strength.**

Cox v. Larios, 542 U.S. 947, 949 (2004)(emphasis and bolding added).

Again, the equal population issue is easily decided by the Court.

"[T]he easily administrable standard of population equality adopted by *Wesberry*[5] and *Reynolds*[6] enables judges to decide whether a violation has occurred (and to remedy it) essentially on the basis of three readily determined factors:"[7]

- Where the voters live;
- How many voters are in his district;
- How many voters are in the other district.

See id., at 290.

The Endpoint of the Court's Involvement in the Redistricting Process

Once the Court determines that the constitutional "one person, one vote" mandate has been achieved,[8] the Court's redistricting responsibilities are at an end. Nothing more

[5] 376 U.S. 1 (1964).

[6] 377 U.S. 533 (1964).

[7] *Vieth*, 541 U.S., at 290.

[8] The Supreme Court has been exceedingly clear in requiring courts to balance population among the districts with precision. *See Karcher v. Daggett*, 462 U.S. 725, 734 (1983)(stating "there are no *de minimis* population variations, which could practicably be avoided, but which nonetheless meet the standard of Art. I, § 2 without justification."). *Karcher* simply makes clear that Article I, Section 2 "permits only the limited population variances which are unavoidable despite a good-faith effort to achieve

need to be decided. The Court remains "neutral" or better stated "indifferent" as to the collateral political issues existing in any plan it approves. Absolute zero permits a judge to make no political decisions and is the current state of the law on court-drawn maps.

The Supreme Court's discussion in *League of United American Citizens v. Perry*, 548 U.S. 399 (2006), of the earlier decision[9] of the three federal judge panel, which in 2001 redrew the existing Texas Congressional districting plan, illustrates the fact that achieving "one person, one vote" is the stopping point of a court's redistricting effort. In 2001, the federal three judge court placed two new seats in the high growth areas of Texas's existing congressional districting plan to conform to the "one person, one vote". It then properly stopped and took no further action, "hesitant to undo the work of one political party for the benefit of another" and left the Texas Congressional districting map free of any further change. 548 U.S., at 412 (bracket and internal quotation marks omitted). In doing so, the Court candidly acknowledged that the "practical effect of this effort" was to leave the "shrewdest gerrymander of the 1990s" largely in place as a part of the Court's redrawn plan. *Id.*, at 412.

The point here is that the political ins and outs of any districting plan are separate from the apart from the easily resolved issue of "one person, one vote" and are thus collateral to and legally irrelevant to the Court's constitutional "one person, one vote" districting function. These collateral issues the Court judicially cannot and should not decide.

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absolute equality, or for which justification is shown." 462 U.S. at 730 (citations and quotation marks omitted). As *Karcher* also makes explicit, "absolute population equality" is the "paramount objective" only in congressional reapportionment where Article I, Section 2 "outweighs the local interests that a State may deem relevant in apportioning districts for representatives to state and local legislatures." 462 U.S. at 730.

[9] *See Henderson v. Perry*, 399 F.Supp.2d 756 (2005).

THE MAESTAS PLAN ALONE MEETS THE CONSTITUTIONAL "ONE PERSON, ONE VOTE" REQUIREMENT

The Maestas Plan exactly and precisely satisfies the requirement of "one person, one vote". While virtually all the recorded cases discuss the fact that slight deviations from absolute parity between districts may be tolerated based on the observance of "legitimate state redistricting principles" (such as compactness, contiguity, preservation of core interests, observance of geographical boundaries), those redistricting principles are not substitutes for the constitutional requirement of "one person, one vote", but rather legally acceptable excuses for a State's failure to do so.[10]

Given New Mexico's large geographic area, relatively small population, and only three congressional districts amongst which its population must be apportioned, "one person, one vote" was absolutely achievable.

The Maestas Congressional Redistricting Plan is the single plan did just that, i.e., creating three districts absolute and equal in population. There is no argument from any party that the Maestas Plan does not achieve exact population parity between the districts, or the Egolf Plan does.

Preservation of Precinct Lines is Not an Excuse for Deviation from Absolute Population Equality in the Context of the Redistricting Plans Submitted to this Court for Approval

The Egolf/Executive parties argue that because the deviations from zero in the Egolf Executive Plan are due to Egolf's observances of precinct lines and because the Maestas

[10] Here, the Court is not passing on the failure of the New Mexico Legislature to achieve "one person, one vote" in any legally-passed redistricting plan. Instead, the Court is passing on plans presented by parties suing for the State's failure to pass a plan; parties who are not entitled to any of the presumptions that attend legislative efforts at achieving population equality.

Congressional districting Plan splits 4 precincts, the zero deviation Maestas Congressional Redistricting Plan is somehow legally flawed or deficient.

It is not.

First, neither state nor federal law requires precinct lines to be observed as a precondition of the redistricting process.

Second, while Article I, Section 4 of the United States Constitution leaves to the state legislatures the initial power to draw districts for federal elections, it bestows on Congress the power to "make or alter" those districts as it wishes. Again no federal law requires congressional districts to be established in accordance with precincts lines (the lowest and least permanent form of any state's geographical boundary).

It is notable that while Congress in 1842 provided that representatives be elected from single member districts "composed of contiguous territory" and from compact districts, observing precinct lines has never required as a precondition of congressional redistricting. *Veith*, 541 U.S., at 276 (emphasis added). Today even "compactness" and "contiguity" are no longer legal requirements of federal law. *Id.*, at 276 (emphasis added). Thus, while contiguity, compactness, incumbency protection, observance of precinct lines, etc., remain as traditional redistricting principles; they can be adhered to or ignored without any independent legal consequence for doing so.

Therefore, the Egolf plaintiffs' choice to observe precinct lines at the expense of population deviation was a tactical and legally neutral political choice. However, it was a choice the numeric effect of which has absolute constitutional consequences given the fact that all plans are subject to the ultimate constitutional measure of "one person, one vote". This conscious political choice to observe precincts in the Egolf Plan resulted in its unacceptable deviation from absolute voter equality mandated by the Constitution.

The Maestas Plan ignored precinct lines if precincts lines interfered with obtaining exact voter equality. That decision resulted in exact numeric equality between districts and hence a constitutionally acceptable congressional redistricting plan.

The minimal population difference between the Maestas and Egolf plans.

The fact that the Egolf Plan amounts to a total deviation of only 42 voters is immaterial to the fact that the Maestas Plan satisfies the constitutional mandate of "one person, one vote" and the Egolf Plan does not.

Whether the population deviation is 42, 420, 4,200, or 42,000, the result is the same, the Egolf Plan doesn't achieve "one person, one vote", the Maestas Plan does.

Further, the fact that the deviation is minor or even "minimus" is irrelevant in the context in which this redistricting arises. The plans before the Court are not the products of legislative action. Instead, they have been submitted by invitation from the Court to the parties who sued because the existing congressional districting violated "one person, one vote" and thus is unconstitutional. The plans submitted on the invitation of the Court either meet the "one person, one vote" mandate and remedy the alleged "unconstitutionality" alleged in the parties' underlying suits or they don't. The Maestas Plan does.

Entering judgment for the Maestas Plan based on the fact that it alone has achieved absolute voter equality has the salutary effect in this case and in all future cases of compelling the parties to "cut to the chase" on the "one person, one-vote" issue, which is the only matter really at issue in congressional redistricting, and refrain from spending money and energy on other matters which do nothing more than place the Court in the "political thicket" which it rightfully seeks to avoid.

Zero Deviation from Exact Population Equality – The Resulting Irrelevancy of Least Change and Other Factors

By achieving absolute population equality between the three congressional districts in the Maestas Plan, the Maestas plaintiffs have accomplished the ultimate objective of the redistricting process and brought this congressional redistricting effort to an end. Because zero deviation has been achieved there is no need for the Court to decide which plan represents "least change" (which is now immaterial) or to make any other decision as to the differences between the submitted plans.

"Least change"[11] was a useful rationale used by Judge Allen to avoid making unnecessary political decisions in 2002 in New Mexico, when no plan presented to Judge Allen for approval achieved exact voter equality. Searching for a plan that amounted to "least change" to avoid the need for making essentially political decisions was legitimate

[11] The Egolf Plan labels itself "least change". It is not.

First, and fundamentally, the Egolf Plan departs from New Mexico's long-standing congressional districting policy of maintaining large northern and southern districts surrounding a dense metropolitan core centered in Albuquerque. With the passage of each decade, that metropolitan core has became more dense, two of the three overwhelmingly rural adjoining counties that were initially a part of the central district (DeBaca and Guadalupe) have dropped out of the district in favor of the county adjoining Albuquerque (Valencia) where the census showed significant population increases. The Egolf Plan interrupts that progression (which naturally would have required Torrance County to drop out of the central district in favor of the faster-growing Valencia County) and instead totally separates Valencia from the central metropolitan core of Bernalillo County with which it has been naturally coalescing along I-25 for the past twenty (20) years.

The Egolf Plan then further fragments a portion of Valencia County from its urban core by taking a slice out of it (Meadow Lake) and attaching it to Torrance County, with which it has no connection by culture, economy, or road, Meadow Lake has become a non-contiguous island in the Egolf map.

The Egolf Plan seeks to achieve "least change" by ironically maintaining a split in the Rio Rancho communities, which the entire West Side has objected to for the past twenty (20) years.

The Egolf Plan seeks to achieve "least change" by ignoring the need to reunite Curry and Roosevelt counties with the remainder of the East Side in CD 2, instead it divides Roosevelt County south of Portales and leaves Clovis and Portales with the North in CD 3, where these two cities have no cultural or economic affiliation.

In short, the "least change" reflected by the Egolf/Executive map is achieved only by ignoring the necessary population-driven changes that require the recognition that Bernalillo and Valencia counties are in fact a part of one metropolitan area, that Rio Rancho and the Rio Rancho communities should remain one, and that Clovis and Portales should be located in the same congressional district with the other counties which share the same economy and the same cultural heritage.

and totally appropriate. However, by achieving "one person, one vote", the Maestas Plan eliminates the need to search for a "least change" plan or for some other collateral reason justifying the selection of one plan over another.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2011, **I** filed the foregoing pleading electronically through the tyler tech system, which caused all parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

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