

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

BRIAN F. EGOLF, JR., HAKIM BELLAMY,)	
MEL HOLGUIN, MAURILIO CASTRO, and)	
ROXANE SPRUCE BLY,)	
)	NO. D-101-CV-2011-02942
Plaintiffs,)	
)	CONSOLIDATED WITH:
v.)	D-101-CV-2011-02944
)	D-101-CV-2011-02945
DIANNA J. DURAN, in her official capacity as)	D-101-CV-2011-03016
New Mexico Secretary of State, SUSANA)	D-101-CV-2011-03099
MARTINEZ, in her official capacity s New)	D-101-CV-2011-03107
Mexico Governor, JOHN A. SANCHEZ, in his)	D-202-CV-2011-09600
official capacity as New Mexico Lieutenant)	D-506-CV-2011-00913
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.)	

**LEGISLATIVE DEFENDANTS’ POST-TRIAL BRIEF AND CLOSING
 ARGUMENT CONCERNING REDISTRICTING OF
 THE NEW MEXICO PUBLIC REGULATION COMMISSION**

The Court has now received evidence concerning the four (4) redistricting plans for the Public Regulation Commission (PRC) which are before the Court: the Legislative Defendants’ Plan, the Navajo Nation Plan, the Maestas 2 Plan, and the James 3 Plan.¹ Of all those plans, only the Legislative Defendants’ Plan was developed through the public and transparent legislative process and represents the will of the people as expressed by a majority vote of their representatives in both houses of the Legislature. As such, it alone is entitled to thoughtful consideration by the Court. Moreover, the Legislative Defendants have demonstrated that their

¹ After trial, the James Plaintiffs withdrew their James 2 Plan from the Court’s consideration.

plan best adheres to traditional redistricting principles and long-established state policy, by embodying districts which unify and honor New Mexico's communities of interest while staying within the presumptively constitutional population deviation of 10% from the ideal. More than any other plan before the Court, the Legislative Plan respects municipal and county boundaries and draws five regional districts that will offer New Mexicans the best opportunity for responsive representation on the PRC. For all these reasons, the Legislative Defendants' Plan should be adopted by the Court as the redistricting plan for the New Mexico Public Regulation Commission for this decennium.

I. The Legislative Defendants' PRC Plan Alone is Entitled to a Heightened Degree of Consideration by the Court, as it is the Only Plan Developed through the Legislative Process and Passed by both Houses of the Legislature.

In previous briefing before the Court in these consolidated redistricting cases, the Legislative Defendants have cited extensive authority for the proposition that a redistricting plan which has been passed by a state legislature – even if vetoed by the Governor – is entitled to heightened or “thoughtful” consideration, in comparison to plans which did not emerge from that process. *See, e.g.*, Legislative Defendants' Omnibus Pretrial Brief at pp. 3-10; Legislative Defendants' Post-trial Brief for Redistricting of the New Mexico House of Representatives, at pp. 3-6. The Legislative Defendants hereby incorporate those briefs by reference here.

In the PRC Redistricting Trial, the Legislative Defendants established that their PRC plan is entitled to the same degree of thoughtful consideration as their House and Senate Plans. The legislative plan for the PRC was developed through the same public process as those other legislative plans, beginning with the bi-partisan Legislative Council's adoption of Redistricting Guidelines, the appointment of a bi-partisan Interim Redistricting Committee, and the numerous

public hearings that were held throughout the state in the summer of 2011 in order to present concept maps (including concepts for redistricting the PRC) and to obtain public input and comment. *See* Tr. 1/12/12 at pp. 41, 69-70 (B. Sanderoff). Mr. Sanderoff testified that the concerns and desires expressed by the public at those meetings were honored in the Legislative Defendants' plans. *See, e.g.,* Tr. 1/12/12 at pp. 69-71 (B. Sanderoff, testifying about wishes of community members from El Dorado, Albuquerque's West Side, and Rio Rancho which were expressed at public hearings and accommodated in the legislative plan).

The legislative plan, also known as Senate Bill 24 ("SB 24"), was developed during the 2011 special session and was ultimately passed by a majority vote of both Houses of the Legislature. *Id.*, pp. 53-54 (B. Sanderoff). The plan which ultimately evolved into SB 24 was initiated by a request from Rep. Al Park, who requested that Research and Polling draw a plan with 55% Democratic performance in District 1; maximize Native American population in District 4; keep District 3 a Democrat-performing seat and clean up lines; keep District 2 a Republican-performing seat and clean up lines; and to keep all of Dona Ana County unified in District 5. *See* Exec. Def's Exh. 32; Tr. 1/12/12 at pp. 78-79 (B. Sanderoff). Mr. Sanderoff explained that it is typical for both Democratic and Republican legislators to begin a request for a map by including some political performance objectives. *Id.* He also testified that when he informed Rep. Park that his request for 55% Democratic performance in District 1 would necessarily involve violating communities of interest and drawing lines that do not make sense for New Mexicans, Rep. Park abandoned that political performance goal. *Id.* However, the objectives for drawing the other districts were achieved and the end result of Rep. Park's request was a map with rational features which improved adherence to traditional redistricting principles,

which comported with the requests of citizens around the state that their communities remain intact, and which were approved by a majority vote in both houses. *Id.* at 80-81.

II. By Contrast, the Executive Defendants' Approach to Redistricting the PRC Reveals a Cavalier Attitude that Disrespects New Mexico's Communities and Separation of Powers Principles.

Just as they did with respect to redistricting the New Mexico House and Senate, the Executive Defendants did not participate in the public legislative process for redistricting the PRC. The Governor did not present any maps or proposals in the interim or at the special session. Tr. 1/12/12, p. 42 (B. Sanderoff). The Governor then vetoed SB 24 purportedly because of its population deviations (the plan has an overall deviation of 8.6% from the ideal). Legis. Def's Exh. 4 (veto message). However, at the same time the Governor signed into law the Legislature's redistricting plan for the Public Education Commission, which contains an overall deviation of over 9.0%. Legis. Def's Exh. 17; Tr. 1/12/12, pp. 85-86 (B. Sanderoff).

Once litigation commenced, the Governor finally and for the first time proposed plans for redistricting the PRC, which the Executive Defendants referred to as the "Executive Least Change" plan and the "Executive County Restoration Plan." Exec. Def's Exhs. 9 and 10. These plans were drawn by a consultant from Vermont who admits that he has virtually no knowledge about New Mexico's communities, geography, politics, Native American tribes or communities, or other unique features of the state. *See* Deposition of Clark Bensen at pp. 29-30, 40-42, 43, 50 (designated in full by the Executive Defendants prior to trial). The Executive Defendants submitted those plans to the Court on November 9, 2011, and maintained their support for them for over two months, through discovery and the first day of trial.

Then, on the morning of the second day of the PRC trial, the Executive Defendants abruptly abandoned both of their plans and threw their support behind the Navajo Nation plan

(the Executive Defendants also said they would not oppose adoption of the James 3 plan). Tr. 1/12/12, p. 5 (P. Kennedy). Mr. Sanderoff, who had reviewed the Executive plans in preparation for his testimony at trial, testified that both of those plans were troubling because they violated communities of interest and traditional redistricting principles in order to increase Republican performance. Tr. 1/12/12, pp. 88-89 (B. Sanderoff).

In sum, the evidence demonstrates that the Executive Defendants stood on the sidelines during the legislative process. The Governor then vetoed the legislatively passed plan for reasons wholly inconsistent with her actions in signing a PEC plan with even higher population deviations, thereby forcing this matter into litigation. The Executive Defendants then pursued a litigation strategy whereby their attorneys and out-of-state consultants developed two plans which do violence to New Mexico's long-established redistricting policies. After forcing the other parties to conduct discovery and prepare for a trial on those plans, the Executive Defendants abandoned them at the last minute, mid-way through trial. The Court should not condone the Executive Defendants' conduct in this case, and certainly should not give any additional consideration to either the Navajo plan or the James 3 plan simply because the Executive Defendants belatedly and mid-trial decided to back those plans.

III. The Legislative Defendants' PRC Plan Best Adheres to Traditional Redistricting Criteria While Remaining Within a Presumptively Constitutional Deviation Range of Plus or Minus Five Percent from the Ideal – Unlike the Other Plans which Sacrifice those Traditional Criteria in Pursuit of Extremely Low Population Deviations.

As a state court in the role of adopting a redistricting plan for a statewide body, this Court is constrained only to adopt a plan which achieves "substantial" population equality. *In Re Apportionment of State Legislature*, 321 N.W. 2d 585 (Mich. 1982), *appeal dismissed for want of a substantial federal question sub. nom. Kleiner v. Sanderson*, 459 U.S. 900 (1982) (Levin and

Fitzgerald, J.J., concurring); *Jepsen v. Vigil-Giron*, Case No. D-0101-CV-02177, January 24, 2002 (Findings of Fact and Conclusions of Law Concerning State House of Representatives Redistricting, Finding No. 8) (per Allen, J.). Courts have defined substantial population equality as districts which contain only “minor deviations,” or population deviations within ten percent of the ideal. *See Brown v. Thomson*, 462 U.S. 835, 842 (1983) (quoting *Gaffney v. Cummings*, 412 U.S. 735, 745(1973)); *see also Voinovich v. Quilter*, 507 U.S. 146, 160-162 (1993). This relatively flexible standard stands in sharp contrast to the *de minimis* population deviation standard applicable to *federal courts* adopting court-ordered redistricting plans for a state entity. *Chapman v. Meier*, 421 U.S. 1, 24 (1975); *Connor v. Finch*, 431 U.S. 407, 414 (1977). In the interest of judicial economy, the Legislative Defendants hereby incorporate by reference their extensive previous briefing on this subject. *See* Omnibus Pretrial Brief at pp. 6-7, 13-18; Post Trial brief for Redistricting of the New Mexico House of Representatives at pp. 26-28.

The Legislative Defendants’ PRC plan, with its overall deviation of 8.6% from the ideal, is presumptively constitutional. *See Brown*, 462 U.S. at 835; *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004). Moreover, the Legislative Defendants have demonstrated that their plan, better than any plan before the Court, adheres to traditional districting principles, including unifying political subdivisions (municipalities and counties) and respecting communities of interest. The legislative plan splits fewer municipalities and fewer counties than any other plan before the Court. *See* Legis. Def’s Exhs. 13, 14; Tr. 1/12/12, p. 55 (B. Sanderoff). The legislative plan does a better job than any other plan of drawing five regional districts which best adhere to New Mexico’s unique communities of interest and keep like areas together in the same district. Tr. 1/12/12, pp. 59-61; 82-83 (B. Sanderoff). In particular, the legislative plan keeps North Central Hispanic areas, who have shared religious, cultural, geographic and economic

interests, together in District 3. *Id.* at 57, 60-61, 67-69, 82-83. The legislative plan alone respects the different communities of interest on either side of the Rio Grande in Bernalillo County, by using the river as a hard boundary and minimizing the number of times the West side of Albuquerque and Rio Rancho are split. *Id.* at 61-62.

At trial, the Legislative Defendants demonstrated that the other plans before the Court (Navajo, Maestas 2, and James 3) all split more municipalities and more counties than the legislative plan. *See* Legis. Def's Exhs. 13 and 14. While some of the counties and municipalities split by those plans are split under the current PRC districts, Mr. Sanderoff explained that those splits were drawn ten years ago in order to accommodate the state's population distribution at that time. Tr. 1/12/12, p. 55. Rather than needlessly perpetuate those municipal and county splits for another decade, the Legislature took the opportunity to improve the map and unify cities, towns, villages and counties where possible. *See, e.g.,* Legis. Def's Exhs. 1, 13, 14; Tr. 1/12/12, p. 55.² By contrast, the four other plans, in their quest to achieve extremely low population deviations, continue to divide even some of New Mexico's tiniest communities. *See, e.g.,* Legis. Def's Exh. 13 (demonstrating that, for example, the Navajo plan splits Magdalena village (pop. 938) and Mountainair (pop. 928); Maestas 2 splits those

² As has been explained in prior briefing by the Legislative Defendants, courts have sought to adopt redistricting plans which closely approximate current districts in order to avoid making policy decisions better left to the political branches. *See Wright v. City of Albany*, 306 F. Supp. 2d 1228, 1237 (M.D. Ga. 2003); *Markham v. Fulton County Bd. of Registration & Elections*, 2002 WL 32587313, *6 (N.D. Ga May 29, 2002). However, courts do so in the absence of legislatively passed plans. *See id.* at *2. The law is clear that where legislatively passed plans are available to the court, even where they have not fully survived the legislative process to become law, the court is bound to give the policy decisions embedded in those plans heightened consideration. *See Johnson v. Mortham*, 926 F. Supp, 1460, 1488-89 (N.D. Fl. 1996). Because of this requirement, there is no basis in law for choosing other plans over the legislature's plan, especially when as in this case, there is no countervailing executive policy which is entitled to thoughtful consideration. *See* discussion at Part II *supra*.

municipalities plus Pecos Village (pop. 1392) and Carrizozo (pop. 996); James 2 and 3 split Taos Ski valley village (pop. 69) and James 3 splits San Ysidro village (pop. 193)).

It should be noted that the James 3 Plan not only unnecessarily splits New Mexico communities, but also violates traditional redistricting principles in order to increase Republican performance in the two PRC “swing” districts. Tr. 1/12/12, pp. 89-95 (B. Sanderoff). The map-drawer for the James Plaintiffs’ maps, Senator Adair, acknowledged that seeking to achieve near-zero population deviations caused him to create unusual borders among districts and split several small municipalities and communities of interest in creating his plan. Tr. 1/11/12, pp. 59-60, 62-64 (R. Adair). By elevating political performance above neutral districting policies, the James plans lump unlike communities together, thereby disenfranchising communities and reducing the chances that New Mexicans in those districts will have PRC Commissioners who are responsive to their needs. *Id.*, pp. 89-95 (B. Sanderoff). The James 3 Plan also represents a relatively dramatic departure from the current PRC districts. *Id.*, pp. 97-98 (B. Sanderoff) (over 400,000 people moved into a new PRC district under James 3 plan).

The James 3 Plan does not properly consider traditional redistricting principles. Senator Rod Adair testified that a primary goal in drawing the James maps was to achieve more politically competitive districts in Districts 1 and District 5. Tr. 1/11/12, pp. 27-28, 34-35; 37 (R. Adair). To do so, he increased Republican performance in these two districts. Tr. 1/11/12, pp. 58, 62, 72 (R. Adair). Senator Adair conceded that he split communities of interest in order to obtain what he deemed more politically competitive districts. Tr. 1/11/12, pp. 29-30 (R. Adair). The James 3 Plan splits eighteen (18) incorporated municipalities, far more than any other plan before the Court, Tr. 1/11/12, p. 68. (R. Adair); Tr. 1/12/12, p. 95 (B. Sanderoff), and unnecessarily splits communities of interest in Albuquerque, such as the University area and the

North Valley, in the name of increasing competitiveness. Tr. 1/12/12, pp. 93-94 (B. Sanderoff). It is improper to subordinate traditional redistricting principles in favor of non-traditional principles, such as seeking to maximize Republican performance or political competitiveness.

The evidence is clear that the legislatively passed plan does a better job than any other plan before the Court of unifying New Mexico's communities, towns, cities and counties, and respecting communities of interest. In other words, the legislative plan's five PRC districts make the most sense for New Mexico. Mr. Sanderoff explained at length why it is important for PRC districts to embody homogenous regions of the state, to the extent possible, in order to maximize the chances that those regions will have responsive PRC commissioners who are knowledgeable about their region's needs in the areas of telecommunications, utilities, transportation, fire services, and other matters. Tr. 1/12/12, pp. 43-46; 56 (B. Sanderoff). The Court should not adopt a plan that violates those principles or needlessly splits New Mexico's communities in order to achieve a *de minimis* population deviation which is neither compelled under the law nor consistent with New Mexico's established redistricting policy.

IV. The Legislative PRC Plan Complies with the Voting Rights Act and Provides Native Americans with a Strong Influence District Similar to That Which is Included in the Navajo Plan.

There has been no allegation in this litigation that the Legislature's PRC plan violates the Voting Rights Act. To the contrary, the legislative plan does a good job of preserving minorities' voting strength, as it contains two majority-minority districts and one Hispanic VAP majority district – the same configuration of the current PRC districts. And, the legislative plan's Hispanic majority district has the highest Hispanic VAP percentage of any plan before the Court. *Compare* Legis. Def's Exh. 1 (53.3% Hispanic VAP) *with* James Exh. 4 (45.6% Hispanic VAP), Navajo Nation Exh. 1 (51.7% Hispanic VAP) and Maestas 2 (52.5% Hispanic VAP).

The legislative plan's PRC District 4 does not exactly match the contours of the District 4 proposed by the Navajo Nation and included in the Maestas 2 and James 3 plans. However, the outlines of the districts are similar. Tr. 1/12/12, pp. 57-59 (B. Sanderoff). The total non-Hispanic Native American VAP for the legislative plan's District 4 is 30.6%, while the VAP for the Navajo Nation's proposed District 4 is 31.3%, a difference of only 0.7%. Legis. Def's Exh. 1; Navajo Nation Exh. 1. The Navajo Nation did not present any evidence to demonstrate how a difference of 0.7% VAP could impact Native American influence in PRC District 4 in any meaningful way. Indeed, Mr. Gorman testified for the Navajo Nation that a 29% Native American VAP is a threshold percentage necessary to meet the Nation's preferences with respect to PRC District 4. Tr. 1/11/12, pp. 14-15 (L. Gorman). Moreover, even if it could be determined that the legislative plan fails to provide a Native American influence district, the law is clear that a lack of an influence district cannot form the basis of a Voting Rights Act violation. *See Georgia v. Ashcroft*, 539 U.S. 461, 482 (2003). In other words, the very slightly lower Native American VAP in the legislative plan's District 4, and the district's slightly different contours from the Navajo Nation's proposed District 4, should not form a basis for rejecting the Legislative Defendants' PRC plan. Furthermore, the Navajo Nation's map-drawer, Leonard Gorman, testified that his concern in drawing his map was essentially with respect to the contours of PRCD 4, and that he did not consider the interests of individuals outside that area, for instance, those affected by his decisions of where to draw the line between PRC District 5 and District 2. Tr. 1/12/11, p. 36 (L. Gorman).

V. Conclusion

In sum, Court should give thoughtful consideration to the Legislature's PRC plan, as it alone was developed through the public process which reflects the will of the people, expressed

through their elected representatives. Because the Legislature's PRC plan is fair, complies with all legal requirements, adheres to the neutral Redistricting Guidelines adopted unanimously by the bi-partisan Legislative Council, and best balances competing interests to unify communities and provide PRC districts which most closely adhere to New Mexico's regions, thoughtful consideration counsels that the Court is bound to adopt the Legislature's PRC plan.

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CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2012, I caused a true and correct copy of LEGISLATIVE DEFENDANTS' POST-TRIAL BRIEF AND CLOSING ARGUMENT CONCERNING REDISTRICTING OF THE NEW MEXICO PUBLIC REGULATION COMMISSION to be e-mailed to all parties or counsel of record as follows, along with this Certificate of Service to be filed 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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