IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

TIMOTHY Z. JENNINGS, *et al.*,

Petitioners,

vs.

Sup. Ct. No. 33,387
Ct. App. No. 31,854

THE NEW MEXICO COURT OF APPEALS,

Respondent,

and,

DIANNA J. DURAN, *et al.*,

Real Parties in Interest.

OPENING BRIEF OF REAL PARTIES IN INTEREST GOVERNOR SUSANA MARTINEZ AND LIEUTENANT GOVERNOR JOHN A. SANCHEZ REGARDING LEGISLATIVE DEFENDANTS' PETITION

On Appeal from the First Judicial District Court, County of Santa Fe
Honorable James A. Hall, No. 0101-CV-2011-02942, Consolidated

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INTRODUCTION AND SUMMARY OF ARGUMENT

On October 12, 2011, this Court issued a Writ of Superintending Control appointing former district judge James Hall to act as Judge *pro tempore* and adjudicate, at the District Court level, the various lawsuits seeking reapportionment of the districts assigned to the United States Congress, the New Mexico Senate, the New Mexico Public Regulation Commission, and the New Mexico House of Representatives. Judge Hall immediately set out to issue a pre-trial and trial scheduling order, and throughout December and early January held multi-day evidentiary hearings on each of the districted offices, permitting all parties to present evidence and witnesses in support of the various plans they submitted to the District Court. At the close of evidence, and after reviewing both pre- and post-trial briefs, the District Court issued comprehensive findings of fact and conclusions of law setting forth the evidence and the legal principles on which it relied to select a plan that passed Constitutional muster, protected minority voting rights, and honored, to the extent reasonable and practicable, traditional secondary neutral redistricting criteria. In short, the District Court employed its equitable discretion and properly applied the redistricting law developed by the United States Supreme Court and other jurisdictions to select a Constitutional, legal and fair state House map.

Petitioners Legislative Defendants consist of two legislators – the Speaker of the House and the President *Pro Tem* of the Senate – who purport to speak for the entire Legislature (but do not) in their quest to have this Court overrule the District Court and select a legislative reapportionment plan that the District Court rejected mainly because it contained an inappropriate geographic bias. The Legislative Defendants claim that their plan nonetheless was entitled to special deference. This clearly is contrary to law, and the District Court appropriately gave the Legislative Defendants' plan the level of consideration warranted for a plan that did not survive the political process following a gubernatorial veto and was never enacted into law. Now the Legislative Defendants seek, through this Court, what they could not accomplish legislatively or before the trial court: an override of the Governor's veto by transforming the District Court's "thoughtful consideration" of the legislative plan into a level of deference that ignores the Equal Protection Clause problems with that plan.

The Legislative Defendants are asking this Court to take extraordinary and perhaps unprecedented action: to toss out Judge Hall's consideration and analysis of the extensive evidence presented to him, to substitute itself as the trial court, and to start from scratch as the fact-finder and the judge of the merits. By inviting this Court to inappropriately "pull rank" on the District Court and select a reapportionment plan that the District Court did not, the Legislative Defendants'

request fails to respect the limitations on extraordinary writ actions that this Court has historically recognized. By asking this Court to mandate that the District Court adopt the Legislative Defendants' reapportionment plan, Petitioners are asking this Court to wrest control of this case from the lower courts, to reconsider the evidence presented to the District Court, and to re-hear and re-decide the state House districts. In other words, Petitioners do not seek appellate review of the District Court's decision, but a usurpation of the entire process that this Court, by appointing Judge Hall as District Court Judge *pro tem*, originally put in place to justly and equitably resolve the redistricting process. This drastic action encouraged by the Legislative Defendants would subvert the restrictions on extraordinary writ jurisdiction that this Court, in its wisdom, has adopted to prevent such injustice.

In addition, and just as importantly, the Legislative Defendants have no substantive basis for requesting that this Court overturn the District Court's state House decision. They claim that the District Court elevated the Constitutional population equality requirement in redistricting above secondary criteria such as "historical New Mexico redistricting principles[,]" when, in reality, the District Court appropriately considered deviations first but also such criteria by accepting less-than-perfect population equality in the map that it adopted. Petitioners further argue – improperly – that a legislative plan, even if it fails the lawmaking process

due to a Governor's veto, should be afforded heightened deference by a District Court equal to a plan passed by a legislature and signed by a governor. This is not the law. Moreover, the legislative plan that Petitioners urge contains impermissible geographic bias in its districts' population deviations that precludes selection by the District Court, this Court, or any other court.

The Legislative Defendants also claim that Judge Hall neglected to play a "limited role" because he departed from the Legislature's ± 5 percent so-called "safe harbor" and declined to select their plan. To the contrary, the District Court honored the well-established "least changed" concept by selecting a plan based on the existing districts. The Legislative Defendants also ask this Court to elevate secondary redistricting criteria above the Constitutional requirement of equal population and the statutory requirement of Voting Rights Act compliance. The District Court refused such an invitation, as should this Court, especially where, as here, the legislative map's geographic bias is unsupported by any constitutional, rational or legitimate policy.

Finally, the Legislative Defendants contend that the District Court's decision to allow the Executive, like other parties, to submit alternative plans during trial sets a "dangerous precedent" that purportedly undermines separation of powers principles and would encourage elected officials to "undermine" the redistricting process by employing "the resulting litigation to finally dictate his or her vision of

the ideal political landscape of the state . . . thereby disrupting our constitutional order of political checks and balances." [*See* Pet. at 19-20]. This argument is not supported by any authority, or any logical interpretation of the separation of powers clause of our Constitution.

Respondents Governor Susana Martinez and Lt. Governor John Sanchez ("the Executive Defendants") seek no relief from this Court. They only request that this Court decline the invitation to overrule the District Court's selection of a constitutional and legally and factually supported redistricting plan for the state House. The relief sought by the Legislative Defendants should not be granted, and this Court either should dismiss the writ, or if inclined to review the decision below, should affirm the District Court's selection of a constitutional, legal and appropriate state House map.

BACKGROUND

In a contemporaneously filed opening brief regarding the Petition filed by the *Maestas/Egolf* Plaintiffs/Petitioners, the Executive Defendants detail the legislative and procedural history of New Mexico's redistricting efforts that led to this Court's current involvement in this dispute. As set forth in that background, the legislative effort failed when the plan endorsed by the Legislative Defendants, in the form of a House Bill, was vetoed by the Governor after the 2011 redistricting Special Session. Shortly thereafter, numerous parties filed suit, and

this Court, pursuant to a Writ, consolidated those cases and appointed Judge Hall to preside as trial judge. After setting forth a detailed pre-trial procedure, and holding multiple days of trial in which numerous parties submitted alternate plans, the Court adopted a plan after issuing detailed findings of fact and conclusions of law, and then issued a judgment. Because of page limitations, the Executive Defendants do not repeat that background here, but instead incorporate by reference the Background Section of the contemporaneously filed Opening Brief Regarding the *Maestas/Egolf* Plaintiffs' Petition, *Maestas, et al. v. Hall*, No. 33, 386.

ARGUMENT

Petitioners' effort to override the decision of the District Court and impose their plan upon New Mexico's House districts is flawed on several levels. Petitioners improperly seek, through the extraordinary vehicle of superintending control, to nullify the District Court's decision and re-litigate issues of fact before this Court. Moreover, Petitioners have an adequate remedy at law, through an expedited appeal, which makes superintending control improper. Indeed, Petitioners apparently seek to evade the standard appellate process, which would impose on them a heavy burden to overturn the discretionary decisions made by and the equitable remedy imposed by the District Court.

Most importantly, Petitioners ask this Court to misapply the law and substitute its judgment for the District Court, when, under an appropriate standard of review, the District Court's decision should be affirmed. The District Court properly: 1) refused to elevate secondary redistricting criteria over the Constitutional requirement of population equality; 2) recognized the need to deviate from precise population equality in court-drawn plans when necessary under federal law and state policy; 3) gave the Legislative Plan "thoughtful consideration" while not granting it deference due to its geographic bias; 4) honored the "least changed" concept by selecting a plan that was based on the current districts; 5) refused to limit the Executive Defendants' ability to, like any other party, propose alternate plans to the District Court; and 6) considered secondary redistricting criteria but appropriately looked first to legal requirements.

I. PETITIONERS HAVE FAILED TO ESTABLISH A BASIS FOR THIS COURT TO EMPLOY ITS SUPERINTENDING CONTROL JURISDICTION.

This Court has granted that portion of the Legislative Defendants' requested Writ seeking expedited consideration of the decision below.[1] [*See* Order (1/17/12)

[1] Of course, this Court can, and should, quash the Writ if it decides that no further review of the District Court's decision below is necessary or warranted at this point.

(Ex. 1)].[2] Petitioners' remaining request should not be granted. Petitioners ask this Court to assume the role of the District Court, and select not just any legally valid map, but the Legislative Defendants' Map. [Pet. at 26]. In other words, Petitioners do not ask for appellate review, but a crude substitution for the District Court's judgment on the merits. Such relief is entirely inappropriate, especially through a superintending control proceeding.

The New Mexico Constitution empowers the Supreme Court with superintending control over all inferior courts. *See* N.M. Const. art. VI, § 3. This Court has made clear, however, that "the superintending power [will] not be exercised except under unusual circumstances." *State Game Comm'n v. Tackett*, 71 N.M. 400, 404, 379 P.2d 54, 57 (1962). It is "to be used with great caution for the furtherance of justice when none of the ordinary remedies provided by law are applicable." *Johnson v. Shuler*, 2001-NMSC-009, ¶ 12, 130 N.M. 144, 20 P.3d 126 (quoting *State ex rel. Harvey v. Medler*, 19 N.M. 252, 259, 142 P.376, 378 (1914)). Thus, a "writ of supervisory control will issue only when a ruling, order, or decision of an inferior court, within its jurisdiction, (1) is erroneous; (2) is arbitrary or tyrannical; (3) does gross injustice to the petitioner; (4) may result in irreparable injury to the petitioner; (5) and there is no plain, speedy, and adequate

[2] Numerical exhibit citations are to Petitioners' Appendix Exhibits, and alphabetical citations are to Respondents' Appendix.

remedy other than by issuance of the writ." *Albuquerque Gas & Elec. Co. v. Curtis*, 43 N.M. 234, 241, 89 P.2d 615, 619 (1939) (internal citation and quotation marks omitted). While a petitioner need not necessarily establish all of these elements, "it is clear that a prudent litigant will address all of them." *Johnson*, 2001-NMSC-009, ¶ 12 (internal citation and quotation marks omitted). Petitioners have not, and cannot, establish that the District Court's redistricting decision below meets ***any*** of these requirements and the extraordinary relief requested should be denied.

A. The District Court's Refusal To Select a Particular House Redistricting Plan Advocated by Petitioners Was Neither Arbitrary, Tyrannical or Clearly Erroneous.

Petitioners plainly fail to demonstrate that the District Court's decisions below rise to the level necessary for this Court to employ its superintending control authority to impose the selection of a redistricting plan the District Court fully considered, gave "thoughtful consideration" to, but rejected. Petitioners claim the District Court erred, but they do not claim that the District Court's decisions were arbitrary, tyrannical or so clearly erroneous that a superintending control writ is warranted. Nor can they. In essence, Petitioners point to two categories of supposed error below: the District Court's decision to admit alternate plans into evidence, [*see* Pet. at 17-20], and the District Court's selection of a modified version of the Executive Alternate 3 plan over the Legislative Defendants'

proposed plan. [*See id.* at 6-17; 21-25.] These are not the types of abusive or manifestly unjust decisions justifying the drastic act of assuming control of the proceedings and mandating a substitute judgment on the merits.

Moreover, Petitioners seek an impermissibly broad scope of review. This Court has made plain that:

> Our Constitution gives us appellate jurisdiction and also original jurisdiction and superintending control, but these powers do not include the power to review de novo the factual basis for the orders and judgments of district courts. The fact-finding process has always been left to the district courts. That is, factual issues are determined either by the trial jury or the trial court sitting without a jury. The weight and credibility of the evidence and of witnesses are left for the trier of the facts and are not subjects of review by this court.

Ammerman v. Hubbard Broad. Inc., 89 N.M. 307, 313, 551 P.2d 1354, 1360 (1976) (internal citations omitted). Yet it is the District Court's factual findings that Petitioners ask this Court to disturb through its superintending control authority. To the extent this Court deems it necessary to retain its jurisdiction over this matter, this case should be subject to appellate review, and nothing more.

The District Court's decisions about which Petitioners complain are no different from rulings that this Court routinely addresses on appeal and to which it affords appropriate deference. Under an appropriate appellate standard of review, the admission of the Executive's Alternate plans "is within the discretion of the trial court. On appeal, the trial court's decision is reviewed for abuse of

discretion." *State v. Hughey,* 2007-NMSC-036, ¶ 9, 142 N.M. 83, 163 P.3d 470. "An abuse of discretion arises when the evidentiary ruling is clearly contrary to logic and the facts and circumstances of the case." *State v. Armendariz,* 2006-NMSC-036, ¶ 6, 140 N.M. 182, 141 P.3d 526. Notwithstanding Petitioners' request, this Court has historically been "wary of substituting its judgments for that of the trial court." *State v. Downey*, 2008-NMSC-061, ¶ 24, 145 N.M. 232, 195 P.3d 1244 (*quoting State v. Alberico*, 116 N.M. 156, 170, 861 P.2d 192, 206 (1993)). This is especially the case where, as here, the "exercise of discretion [is] dependent on the facts of the particular case, such as balancing prejudice against probative value[.]" *State v. Martinez*, 2008-NMSC-060, ¶ 8, 145 N.M. 220, 195 P.3d 1232.

Similarly, the District Court's decision to select a particular map is a finding of fact that this Court normally would not disturb so long as it is supported by substantial evidence. As this Court has explained:

> Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and has been defined as evidence of substance which establishes facts from which reasonable inferences may be drawn. On appeal, all disputed facts are resolved in favor of the successful party, all reasonable inferences indulged in support of the verdict, all evidence and inferences to the contrary disregarded, and the evidence viewed in the aspect most favorable to the verdict. Nor does the fact that there may have been contrary evidence which would have supported a different verdict permit us to weigh the evidence. . . .We must be mindful that it is the

> role of the trial court, and not the appellate court, to weigh the evidence and determine the credibility of witnesses. We will not substitute our own judgment for a determination of the trial court that is supported by substantial evidence in the record.

State v. House, 1999-NMSC-014, ¶¶ 32-33, 127 N.M. 151, 978 P.2d 967 (internal citations omitted). *See also, e.g., Farmers, Inc. v. Dal Mach. and Fabricating, Inc.*, 111 N.M. 6, 8, 800 P.2d 1063, 1065 (1990) ("The trial court's findings of fact are to be liberally construed so as to sustain the judgment[,] [and] [t]he presumption upon review favors the correctness of the trial court's actions."); *Ammerman*, 89 N.M. at 313, 551 P.2d at 1360 ("Our review of the evidence is only for the purpose of determining whether there was substantial evidence to support the trier of the facts.")

Further, and as the Legislative Defendants have admitted, the function of the District Court in this case "is that akin to, if not actually similar to a court of equity[.]" [*See* 12/12/11 TR at 14:24-25 (Ex. 3)]. Courts engaging in redistricting "have the equitable power to formulate a constitutionally-based election plan and require that elections be conducted according to its own plan." *Cent. Delaware Branch, NAACP v. City of Dover*, 110 F.R.D. 239, 241 (D. Del. 1985); *see also Assembly of the State of California v. Deukmejian*, 639 P.2d 939, 952 (Cal. 1982) (noting the "breadth of a court's equitable powers in reapportionment cases"); *Arizonans for Fair Representation v. Symington*, 828 F. Supp. 684, 687 (D. Ariz.

1992) ("Because of the legislative impasse, the court must adopt or draw a plan which complies with the Constitution . . . ."). Thus, because the District Court was acting in equity when it picked a redistricting plan for the state House, its selection of that equitable remedy is reviewed under an abuse of discretion standard. *See Amkco, Ltd. v. Welborn*, 2001-NMSC-012, ¶ 8, 130 N.M. 155, 21 P.3d 24 ("We review a trial court's decision to grant or deny equitable relief for abuse of discretion."); *Continental Potash v. Freeport-McMoran*, 115 N.M. 690, 697, 858 P.2d 66, 73 (1993) (decision regarding equitable relief "within the sound discretion of trial court and will not be reversed on appeal unless clear abuse is shown[.]") (internal citation omitted); *see also, e.g., Connor v. Finch*, 431 U.S. 407, 414 (1977) ("The essential question here is whether the District Court properly exercised its equitable discretion in reconciling the requirements of the Constitution with the goals of state political policy."); *Mahan v. Howell*, 410 U.S. 315, 333 (1973) ("[W]e cannot say that the District Court abused its discretion in fashioning the interim remedy of combining the three districts into one multimember district. We, therefore, affirm the order of that Court insofar as it dealt with the State Senate."); *Shirt v. Hazeltine*, 461 F.3d 1011, 1017 (8th Cir. 2006) (holding that district court's remedial order imposing plaintiffs' legislative redistricting plan "is reviewed for an abuse of discretion.").

As explained in detail below, there is no basis to contend that the District Court abused its discretion, or that its findings were unsupported by substantial evidence. While there have been unfortunate cases in the past where this Court has needed to substitute its judgment for that of an inferior court, this is clearly not one of those cases. There is nothing in the record suggesting that the Court acted in an arbitrary or tyrannical manner, or committed any error of the sort suggesting that this Court should reach in and override the judgment of the District Court through its writ authority.

B. Petitioners Have Failed To Establish Irreparable Injury or Gross Injustice.

Petitioners have also failed to establish that the District Court's selection of a particular redistricting plan caused them irreparable injury or gross injustice. Although this Court has not squarely articulated what a petitioner must establish to meet this standard, "[w]hat the Court properly seems to require is the kind of burdensome injury that is truly irreparable and unique." Richard C. Bosson & Steven K. Sanders, "The Writ of Prohibition In New Mexico," 5 N.M. L. Rev. 91, 126 (1974) (citing *State ex rel. De Moss v. District Court*, 55 N.M. 135, 227 P.2d 937 (1951)). Petitioners claim error by the District Court below, but make no claim that its decision creates any injury or injustice that cannot be resolved through appellate review. Merely because Petitioners claim that this case

implicates matters of public interest, *see* [Pet. at 4], does ***not*** mean that such questions cannot be resolved *via* this Court's appellate jurisdiction. Although this Court has, in the past, vacated or modified district court decisions, it has done so only when a writ was necessary to "prevent irreparable mischief, great, extraordinary or exceptional hardship, costly delays, or unusual burdens in the form of expenses." *See Concha v. Sanchez*, 2011-NMSC-031, ¶ 46, __ N.M. __, 258 P.3d 1060. As explained in detail throughout this brief, this is simply not a case where the District Court acted "without any semblance of due process" or created an "ongoing grave injustice" that would justify this Court stepping in and assuming the role of the trial court by re-litigating the case below and selecting a different plan. *See id* ¶ 47. Indeed, Petitioners' requested writ relief would create the very injustice they claim their requested writ is necessary to prevent by requiring the parties in the proceedings below to re-litigate this matter afresh before this Court after expending substantial attorneys' fees and costs to address the matter in the trial court. Presumably, this is exactly the kind of burden and expense this Court was attempting to avoid by consolidating the redistricting litigation before a single trial judge. Regardless, the case does not fall within the extraordinary circumstances warranting this Court's exercise of its superintending control authority over the final judgment rendered below.

C. Petitioners Have Failed To Avail Themselves of the Adequate Remedy of an Expedited Appeal.

This Court has made clear that it "should not use our prerogative writs as a substitute for appeal[.]" *Baca v. Burks*, 81 N.M. 376, 378, 467 P.2d 392, 394 (1970); *see also Tackett*, 71 N.M. at 404, 379 P.2d at 57 (A court's power of superintending control "will not be invoked merely to perform the office of an appeal."). Yet this is exactly the relief sought by Petitioners. They ask this Court to substitute, and, indeed, eliminate, the appellate process in this case by asking the Court to start the litigation afresh by picking a plan. Although this Court has exercised its superintending control power when an appeal is technically available but will not afford a litigant a speedy or cost effective remedy to reverse "ongoing grave injustice", *see Concha,* 2011-NMSC-031, ¶ 47, such is not the case here and the Court should not employ its authority to substitute its judgment for that of the District Court, as Petitioners ask. *See Chappell v. Cosgrove*, 1996-NMSC-020, ¶ 6, 121 N.M. 636, 916 P.2d 836 ("We agree with the Neighborhood Association that matters entrusted to the trial court's discretion ordinarily are not matters over which this Court should exercise its jurisdiction to grant extraordinary relief."). The proper remedy for Petitioners is appellate review, not an extraordinary writ issued under this Court's original jurisdiction.

II. THE DISTRICT COURT'S SELECTION OF A HOUSE REDISTRICTING PLAN IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

Under an appropriate appellate review, the District Court's decision to adopt a modified version of the Executive Alternate 3 Plan should be upheld, for the following reasons:

A. The District Court Properly Recognized that Population Equality Is the Most Important Redistricting Standard but Did Not Sacrifice Other Reapportionment Principles in the Name of Zero Deviations.

The Legislative Defendants attack the District Court's decision that any plan adopted by the judiciary must strive to achieve *de minimis* population deviations amongst its districts, unless justified by rational state policy. [*See* Pet. at 6-12]. They claim that instead, so long as the deviations amongst the selected districts fall within a range of ± 5 percent from the ideal, a court-ordered plan is afforded a safe harbor under which a court need not justify the basis for a lack of population equality. [*See id.*]. As the District Court recognized, and as explained below, the Legislative Defendants' untenable position is based on a misapprehension of the law.

As the Legislative Defendants recognize, "[t]here is no doubt that the primary task in redistricting is adherence to the [C]onstitutionally-mandated standard of 'One Person, One Vote.'" [*See* Pet. at 8.]. What the Legislative Defendants consistently fail to appreciate, however, is that a court, whether state or

federal, must adhere to a stricter population deviation standard in litigation than must a state legislature engaged in policymaking. *See* discussion *infra*.

This does not mean that the population equality standard must be adhered to in derogation of all other redistricting standards or considerations. As the District Court recognized, a court-adopted redistricting map must "***ordinarily***" achieve *de minimis* population deviations amongst its districts, unless there is a "persuasive justification[ ]" such as a "historically significant state policy" to deviate from *de minimis* deviations. [*See* House FOF/COL (Ex. 2) at COL ¶¶ 6-8, 17 (emphasis added), citing *Chapman v. Meier*, 420 U.S. 1, 26 (1975)]. The Court then ruled that its adopted map needed to deviate from exact population equality in order to comply with Section 2 of the federal Voting Rights Act and the "furtherance of significant state policies" in relation to New Mexico's Native American population. *See id.,* at COL ¶¶ 17-25, 28. Rather than militantly constraining itself to zero population deviation, as Appellants appear to argue, the Court found it necessary to deviate from the population equality standard in order to address state policies and concerns regarding Native American communities. As explained in detail below, the District Court's ruling was correct and should not be disturbed.

1. Population Equality Is the First and Most Important Redistricting Criterion.

The starting point for any state House redistricting plan, whether drawn by a court or enacted into law by a legislature and a governor, is ensuring that each person's vote is counted equally. *See Gray v. Sanders*, 372 U.S. 368, 380-81 (1963) ("The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing – one person, one vote."). A plan which does not strive for population equality, as its primary goal, risks offending the Equal Protection Clause of the United States Constitution. *See Reynolds v. Sims*, 377 U.S. 533, 568 (1964) ("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."). If 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. Therefore, a state, whether through the legislative or judicial process, must "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; *see also Larios v. Cox*, 300 F. Supp. 2d

1320, 1337 (N.D. Ga. 2004), *aff'd, Cox v. Larios*, 542 U.S. 947 (2004) (legislative seats must "be apportioned equally, so as to ensure that the constitutionally guaranteed right of suffrage is not denied by debasement or dilution of the weight of a citizen's vote."). This statement of the law is undisputed. [*See* Pet. at 8].

2. Unlike Legislatures, State Courts Must Strive for de Minimis Deviations When Enacting Redistricting Maps.

Despite the arguments of the Legislative Defendants to the contrary, a court-ordered plan, whether state or federal, is held to a more stringent standard when it comes to population deviations. As the District Court recognized, [*see* FOF/COL (Ex. 2) at COL ¶¶ 6-10], the United States Supreme Court has made it clear that:

> A court-ordered plan . . . must be held to higher standards than a State [Legislature]'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[3]; *see also Sanchez v. King*, Civil No. 82-0067-M (D.N.M., filed Aug. 8, 1984) (FOF/COL at 130-31) ("The Court is mindful that not even a variance of 5.95 percent [less than ± 3%] is necessarily acceptable in a

[3] Petitioners' attempt to distinguish *Chapman*, [*see* Pet. at 10-11], is unavailing. The *Chapman* court's mention of "other state bodies[,] 420 U.S. at 26-27, was clearly in reference to the fact that 13 states redistrict through non-partisan commissions rather than through state legislatures, and seven other states involve commissions in the reapportionment process. *See* Nat'l Conference of State Legislatures, *Redistricting Law 2010*, at 161-62 (2009).

court-ordered plan."); *King v. State Bd. of Elections*, 979 F. Supp. 582, 603 (N.D. Ill. 1996), *vacated for reconsideration on other grounds*, 519 U.S. 978 (1996) ("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.") The Legislative Defendants would have this Court read *Chapman* as applying only to federal courts, [*see* Pet. at 7], but as another court 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); *accord Burling v. Chandler*, 804 A.2d 471, 478 (N.H. 2002).[4]

[4] The Legislative Defendants would have this Court believe that *Burling* overruled *Below* by accepting higher than *de minimis* deviations in a Court-ordered reapportionment plan. [*See* Pet. at 11-12.]. Instead, the *Burling* court only

The higher standard applied to court-ordered redistricting plans arises from the fact that "reapportionment is primarily the duty and responsibility of the State through its legislature or other body," rather than a court's. *Chapman*, 420 U.S. at 27; *Connor*, 431 U.S. at 415 (describing the task of judicial redistricting as an "unwelcome obligation of performing in the legislature's stead").[5] Contrary to the Legislative Defendants' claims, [*see* Pet. at 8], this distinction arises not just from federalism concerns, but from the institutional differences between courts and legislatures.[6] *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."). As

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accepted higher deviations to honor traditional state policies and unique features of New Hampshire, such as "the small population" of New Hampshire, "the unusually large size of its house of representatives," and its "State Constitution[.]" *See* 804 A.2d at 485. As explained below, this is no different than the deviation ranges accepted by the District Court to comply with the Voting Rights Act and honor state policy toward New Mexico's Native Americans. *See* discussion *infra.*

[5] Legislative Defendants misread *Connor*, and its dissent, by claiming that *Connor* limits the *Chapman* ruling to only federal courts. [*See* Pet. at 7, n.1]. No such distinction exists in *Connor*, and Justice Powell's dissent makes clear that he was referring to state legislatures, not state courts. *See* 431 U.S. at 431.

[6] Contrary to the Legislative Defendants' arguments, [*see* Pet. at 11], *Growe v. Emison*, 507 U.S. 25, 33 (1993) did not address *Chapman*'s applicability to state courts but rather whether federal courts should defer from adjudicating a state's reapportionment when that process is still working its way through the state court system.

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 reduce population disparities to an absolute minimum, ***unless***, as was the case here, the Voting Rights Act or other state policy dictates otherwise.

In support of their claim that state courts are more akin to state legislatures when drawing redistricting maps, the Legislative Defendants rely on a single published concurring opinion from another state court, *In re Apportionment of State Legislature - 1982*, 321 N.W.2d 565 (Mich. 1982) (Levin and Fitzgerald, JJ. concurring), and the decade-old unpublished decision of the district court in *Jepsen v. Vigil-Giron*, D-0101-CV-2001-02177 (Jan. 24, 2002) (Ex. A), which had in turn relied on *In re Apportionment*. [*See* Pet. at 7-8.].

As the District Court ruled below, [*see* FOF/COL (Ex. 2) at COL ¶ 14], the concurring opinion in *In re Apportionment of State Legislature* is readily distinguishable, because 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, alternative plans were to be submitted directly to the

Michigan Supreme Court. *See* Mich. Const., art. 4, § 6. The Michigan Supreme Court would then determine "which plan complies most accurately with the constitutional requirements." *In re Apportionment* 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, by contrast, the District Court did not, and could not, act in a similar capacity to that of the Michigan Court. Under the New Mexico Constitution, reapportionment authority is vested in the state legislature, and "judicial relief becomes appropriate only when a State Legislature fails to reapportion according to federal constitutional standards[.]" N.M. Const. art. IV, § 3(D); *Sanchez v. King*, 550 F. Supp. 13, 15 (D.N.M. 1982) (citing *Reynolds*, 377 U.S. at 586). This is not the type of shared authority that exists in Michigan. As a result, *In re Apportionment* does not apply to this action, and the District Court was correct to recognize the need to minimize population deviations in any court-adopted plan.

3. *The District Court Appropriately Recognized the Need To Depart from Exact Population Equality To Address Voting Rights Act Issues and State Policy Regarding Native Americans.*

Perhaps the most fundamental flaw in the Legislative Defendants' contention that the District Court erred in its choice of redistricting plans is their claim that the District Court improperly applied the *de minimis* standard and blindly constrained itself from selecting certain plans. [*See* Pet. at 6-7]. In reality, the District Court found that a court-adopted redistricting map must ***"ordinarily"*** achieve *de minimis* population deviations amongst its districts, unless there is a "persuasive justification" such as a "historically significant state policy" to deviate from *de minimis* deviations. [*See* FOF/COL (Ex. 2) at COL ¶¶ 6-8, 17 (emphasis added), citing *Chapman*, 420 U.S. at 26].[7] The District Court ruled that its adopted map must deviate from exact population equality in order to comply with Section 2 of the federal Voting Rights Act[8] and, pursuant to "thoughtful consideration" of the

[7]"[A]ny 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, such as those proposed by the Legislative Defendants, [*see* Pet. at 16-17 n.2] make insufficient excuses for failing to achieve population equality. *See* discussion *infra.*

[8] Section 2 of the Voting Rights Act of 1965, 42 U.S.C. §§ 1973, prohibits the imposition of a voting qualification, standard, practice, or procedure that results in the denial or abridgment of a citizen's right to vote on account of race, color, or

Legislative plan, the "furtherance of significant state policies" regarding New Mexico's Native American communities. [*See id.,* at COL ¶¶ 17-25, 28.] Thus, the Court selected a modified version of Executive Alternate 3, which had *de minimis* deviations ***except*** in those districts where it is necessary to comply with the Voting Rights Act and honor state policy concerning Native American populations.[9] [*See id.*, at FOF ¶¶ 56, 70.]. It bears repeating that the District Court arrived at this conclusion ***because*** of its "thoughtful consideration" of the Legislative plan, not in spite of it.

In addition to Voting Rights Act compliance, the Court found that "furtherance of significant state policies," most notably "maintaining tribal communities of interest to the extent practicable" and "respect for tribal self-determination" in how majority Native American districts should be drawn. justified population deviations in certain districts. [*See* FOF/COL (Ex. 2) at COL ¶¶ 24, 33-34.] Unlike the District Court's adopted plan, the Legislative plan did ***not*** adopt the Native American districts exactly as requested by some of the Native American litigants, and therefore failed to fully address the state policy issues

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status as a member of a language minority group. *Id.* § 1973(a). None of the Petitioners dispute the District Court's finding that it was necessary to draw House Districts 2-5, 9, 65 and 69 as requested by the Native American litigants in order to comply with the Voting Rights Act.

[9] The deviation range for the Court-adopted plan is from -4.5% to +1.7%. [*See* App. (Ex. B)].

raised by parties representing those interests. [*See* 12/12/11 TR at 160:14-164:1; 12/13/11 TR at 106:1-21; 12/20/11 TR at 148:8-150:11; 12/21/11 TR at 258:9-262:3 (Ex. 3)]. Rather than militantly constraining itself to minimal population deviation, as the Legislative Defendants argue, the District Court properly exercised its discretion to select a low-deviation plan that, where necessary, departed from a strict *de minimis* population equality principle in order to protect the rights of Native Americans under the Voting Rights Act, and to address state policies toward Native Americans. This was wholly appropriate under the law, and is ***not*** blind adherence to *de minimis* deviations as the Legislative Defendants claim.

B. The District Court Afforded the Legislative Plan Thoughtful Consideration but Appropriately Declined To Defer to Its Geographic Bias.

In redistricting litigation, plans proffered by the either the legislative or executive branch are "entitled to thoughtful consideration[.]" *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 197 (1972). The Legislative Defendants concede that "thoughtful consideration" is "less than absolute deference[.]" [*See* Pet. at 12.] Nevertheless, they contend that their plan must be adopted, despite gubernatorial veto and the existence of competing plans proposed by other parties because "thoughtful consideration" of legislative plans in redistricting litigation somehow means "special consideration[,]" or even, "the full

deference accorded to redistricting plans adopted into law." [*See* Pet. at 12-17; FOF/COL (Ex. 2) at COL ¶ 13]. In short, the Legislative Defendants advocate a "special consideration" standard, which they claim "requires" adoption of a vetoed legislative plan unless "it is inconsistent with law[,]" contains "radical or partisan change[,] or otherwise fails to respect "other traditional redistricting principles[.]" [*See* Pet. at 12-13].

The problem with the Legislative Defendants' "special consideration" standard is twofold. First, there is no such standard, because a vetoed legislative plan is entitled to no particular deference, and certainly no more deference than a map proposed by the Executive. Second, even if such a standard existed, the Legislature's map would still not survive, because of the geographic bias in the Legislative plan that the District Court found unacceptable.

1. "Thoughtful Consideration" Does Not Mean "Special Consideration" or Deference When a Legislative Plan Did Not Survive the Political Process.

The issue before this Court is not whether the District Court gave "thoughtful consideration" to the Legislative Defendants' reapportionment plan. The District Court indisputably afforded the legislative map "thoughtful consideration[.]" [FOF/COL (Ex. 2) at FOF ¶¶ 25-26, 32-41, COL ¶¶ 11-14, 27-28]. The District Court did not, however, give the Legislative plan the "special"

deference sought by the Legislative Defendants because it was vetoed by the Governor and exhibits geographic bias. *See id.*

Had the Legislature passed a House redistricting plan and the Governor signed that plan into law, that plan would have been entitled to deference by the courts. *See Perry v. Perez*, Nos. 11-713, 11-714 and 11-715, 2012 U.S. Dist. Lexis 908, at *10 (Jan. 20, 2012), ("[A] district court should take guidance from the State's recently enacted plan" in drafting its own plan.);[10] *White* v. *Weiser,* 412 U.S. 783, 795-96 (1973) (following state policy of reapportionment plan passed by legislature and signed by governor); *see also Terrazas v. Clements*, 537 F. Supp. 514, 528 (N.D. Tex. 1982) (basing court-drawn map on plan adopted by Texas's state Legislative Redistricting Board that included governor and state legislative leaders). This is not the situation that currently exists. Although courts have not specifically defined "thoughtful consideration[,]" they have made it clear that legislative plans vetoed by a governor are entitled to no more deference than plans submitted by the governor or other executive branch officials. *Beens*, 406 U.S. at 197; *Carstens v. Lamm*, 543 F. Supp. 68, 79 (D. Colo. 1982) (refusing to defer to a

[10] To the extent the Legislative Defendants intend to rely on this case for their contention that even vetoed plans are entitled to deference, the *Perry* case makes clear it is ***only*** referring to "enacted" plans. *See id.* Further, *Perry* applies only to the adoption by a court of an interim plan prior to the Department of Justice's preclearance of the Texas redistricting plan under Section 5 of the Voting Rights Act, which is not at issue here. *See id.*, at 1-3.

vetoed legislative plan because, under constitutional language nearly identical to New Mexico's Constitution, both the state governor and the state legislature were "integral and indispensable parts of the legislative process"); *O'Sullivan v. Brier*, 540 F. Supp. 1200, 1202 (D. Kan. 1982) (redistricting plan passed by legislature and vetoed by Governor entitled to "thoughtful consideration" but not complete deference by a court).[11] Further, the United States Supreme Court has indicated that, when a state constitution provides for executive veto authority, the state legislature is without authority to create representative districts "independently of the participation of the governor as required by the state constitution with respect to the enactment of laws." *Smiley v. Holm*, 285 U.S. 355, 373 (1932). Under our Constitution, a redistricting plan passed by the Legislature cannot become law unless signed by the Governor; or, if vetoed, an override of the Governor's veto by a two-thirds majority vote. N.M. Const. art. IV, § 22. "Although the Legislative Plan is entitled to thoughtful consideration, it is not entitled to any particular

[11] The Legislative Defendants' arguments rely on *Shayer v. Kirkpatrick*, 541 F. Supp. 922, 932 (W.D. Mo. 1982), but that court warned against deference toward legislative plans that did not survive the legislative process, because "the failure of a bill to be enacted evidences a legislative policy that the bill is ***not*** desired by the legislature. Therefore, we cannot simply embrace as our own the bill that went the furthest or that experts believe would have or could have passed. Such action would be a massive intrusion into the legislative process. ***We would, in effect, be amending the rules for enacting legislation***." (Emphasis added.).

deference in this case because it was not enacted into law."[12] [*See* FOF/COL (Ex. 2) at COL ¶ 11].

Were the law otherwise, "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." *See Carstens*, 543 F. Supp. at 79. It is undisputed that the New Mexico Legislature has not taken it upon itself to override the Governor's veto of the Legislative plan. Neither the District Court, nor this Court, should "override the governor's veto when the [Legislature] did not do so." *Id.*

This should especially be the case where, as here, the legislature is controlled by one political party, and the executive is controlled by another. *Cf. Dunnell v. Austin*, 344 F. Supp. 210, 217 (E.D. Mich. 1972) (stating that courts should avoid "entering the underbrush of that political thicket" when drawing plans). "Partisan disputes over redistricting can be expected within and between the legislative and executive bodies of government." *Peterson v. Borst*, 786 N.E.2d 668, 672 (Ind. 2003). In such situations, a court should select a plan based

[12] Even the district court 10 years ago declined to afford the Legislative plan the total deference that the Legislative Defendants demand in this case. Although the *Jepsen* court employed the legislative map as its starting point, it heavily modified it to account for Native American concerns that the legislature declined to include in its plan. [*See* Legis. Ex. 6 at FOF ¶ 17 (Ex. A)]. Moreover, the Legislative Defendants' Petition neglects to mention that the *Jepsen* court refused to defer to the legislature's 2001 reapportionment plan for the Congress and adopted a different map than the legislative plan that was vetoed by the Governor. [*See* FOF/COL, *Jepsen v. Vigil-Giron* (1/2/02) (Ex. C), at FOF ¶ 20.]

only on "the unchallenged principle of judicial independence and neutrality [and] must consider only the factors required by applicable federal and State law." *Id.*

2. The Geographic Bias of the Legislative Plan Was a Defect that Precluded its Selection by the District Court.

Even if it were appropriate to afford the Legislative plan some type of "special consideration[,]" the District Court appropriately declined to accept that plan because it found that the "systematic under population of districts" contained in the legislative map "results in a significant regional imbalance between districts. Such an imbalance is not justified by any consistently applied neutral state interest." [*See* FOF/COL (Ex. 2) at FOF ¶¶ 32-41].

The District Court's findings were correct. The evidence was clear during trial that the majority party in the Legislature treated the 10 percent population deviation range as safe harbor within which they could draw districts in any way they chose. [TR 12/13 at 140:7-141:2; TR 12/21 at 265:6-15, 284:18-285:17 (Ex. 3)]. There is no such safe harbor under the law.[13] It was also clear that the reason for the high deviations, at least in part, was because the Speaker of the House, Representative Ben Lujan, decided early on that he refused to allow the Legislature's demographer to eliminate a Democratic district in the North Central

[13] The Legislative Defendants suggest that such a safe harbor is part of New Mexico redistricting policy because of past redistricting efforts. [*See* Pet. at 16.] This argument forgets that these efforts all occurred before the courts' decisions in the *Larios* cases.

region of the state even though that region was under-populated to the same degree as two other regions of the state where the Democratic majority recognized that it was necessary to eliminate districts. [TR 12/12 at 219:13-220:8 (Ex. 3); Legis. Ex. 14 (Ex. 4)].

In light of these problems, the District Court had every reason to reject the Legislative Defendants' plan. The United States Supreme Court has "underscored the danger of apportionment structures that contain a built-in bias tending to favor particular geographic areas or political interests or which necessarily will tend to favor, for example, less populous districts over their more highly populated neighbor[s]." *Abate v. Mundt*, 403 U.S. 182, 185-86 (1971). "However complicated or sophisticated an apportionment scheme might be, it cannot, consistent with the Equal Protection Clause, result in a significant undervaluation of the weight of the votes of certain of a State's citizens merely because of where they happen to reside." *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 653 (1964).

Geographic bias was more recently invalidated by the courts in *Larios*, 300 F. Supp. 2d at 1338. In *Larios*, a state legislative plan that used a ten percent safe harbor population deviation to obtain partisan benefits was rejected because its "deviations were systematically and intentionally created (1) to allow rural southern Georgia and inner-city Atlanta to maintain their legislative influence even as their rate of population growth lags behind that of the rest of the state; and (2) to

protect Democratic incumbents." *Id.* 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. Thus, the court found that because that plan systematically and intentionally created population deviations favoring the representational interests of citizens from a particular geographic area over others, it violated the Equal Protection Clause. *See id.* at 1338-39.

Similarly, the District Court in this case found, the Legislative Defendants' plan consistently underpopulates the districts in the North Central portion of the State, thus protecting Democratic incumbents in that area, and as a consequence, bolsters the voting power of the residents of those districts. [*See* FOF/COL (Ex. 2) at FOF ¶¶ 32-41.] Specifically, of the eleven currently underpopulated Democratic districts in the North Central portion of the state, the Legislative Defendants' plan leaves ten of those districts intact and grossly underpopulated.[14] [*See* Legis. Ex. 1

[14] As the District Court recognized, "while some deviations from the equal-population principle are permitted in state legislative reapportionment when they are based on 'legitimate considerations incident to the effectuation of a rational state policy,' geographic interests do not fall within this category of legitimate considerations." *Larios*, 300 F. Supp. 2d at 1343-44 (quoting *Reynolds*, 377 U.S. at 579-80). In the present case the District Court found that higher deviations were justified in the Native American districts pursuant to the Voting Rights Act and legitimate state policy, but the high deviations contained in the legislative plan's

(Ex. 4); 12/13/11 TR at 44:3-23; 12/21/11 TR at 162:14-163:14 (Ex. 3); Legis. Ex. 25 (Ex. D)]. In short, the Legislative Defendants avoided the proper consolidation of these Democratic districts to the detriment of other geographic areas of the state. [12/12/11 TR at 164:15-23].

This was exactly the issue tackled by the court in *Larios*; indeed, the Legislative plan looked much like the plan invalidated in *Larios* when it comes to its geographic bias and population deviations. [12/14/11 TR at 225:21-229:18, 231:6-234:19 (Ex. 3); Exec. Exs. 12-17 (Ex. E)]. Given the likelihood that the Legislative Defendants' plan is constitutionally suspect, if not *per se* invalid, the District Court appropriately declined to select it, or to afford it any particular deference in this case.

C. The District Court Appropriately Considered the State Policy of "Least Change" by Starting with the Current Districts and Appropriately Adjusting them for Population Shifts While Maintaining District Characteristics.

The Legislative Defendants also contend that the District Court breached its "limited role" in redistricting by refusing to adopt the Legislative plan. [*See* Pet. at 21-26]. The Legislative Defendants are correct that courts, in their limited reapportionment roles, can employ a "least change" principle when required to adopt a redistricting map for a state. *See Johnson v. Miller*, 922 F. Supp. 1556,

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non-Native American districts were geographically biased and therefore unjustified. [*See* FOF/COL (Ex. 2) at FOF ¶¶ 33-41; COL ¶ 27].

1559 (S.D. Ga. 1995) ("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 v. Seamon,* 456 U.S. 37, 41-42 (1982)). But they are mistaken as to how this "least change" concept is applied.

Courts can and do recognize that, under the "least change" concept, an appropriate starting point for a court-drawn plan is the "last legal map for the jurisdiction." Keith Gaddie & Charles S. Bullock III, *From Ashcroft to Larios: Recent Redistricting Lessons from Georgia*, 34 Fordham L.J. 997, 1005 (2007); *Alexander v. Taylor*, 51 P.3d 1204, 1211-13 (Okla. 2002) (affirming the trial court's selection of a plan proposed by the Governor of Oklahoma in litigation because it "more nearly continu[ed] the legislative policies of the" previously existing plan). Here, of course, the last legal map for New Mexico's state House districts is the current plan. It is not, as Legislative Defendants contend, their vetoed plan because that plan is not a legally adopted map for the state. *See* discussion *supra.* at II (B)(1). Because the District Court adopted a modified form of Executive Alternate 3, the District Court's plan used the current plan as its starting point. [12/14/11 TR at 9:19-23 (Ex. 3); FOF/COL (Ex. 2) at COL ¶¶ 33-36]. The Executive Alternate 3 plan made changes to current districts as was necessary to adjust for population shifts, but otherwise attempted to honor, to the extent practicable, existing district lines. [*See* 12/14/11 TR at 9:19-23, 15:24-

20:24, 28:15-29:7 (Ex. 3); FOF/COL (Ex. 2) at COL ¶¶ 29, 36]. Thus, and contrary to the Legislative Defendants' claims, the District Court appropriately recognized its "limited" role, [*see id.*, at COL ¶ 5], and honored the redistricting *status quo* by, to the extent practicable, selecting a plan based on the current districts.

D. The District Court Considered Secondary Neutral Redistricting Criteria but Properly Refused To Elevate that Criteria Above the Constitutional and Legal Requirements.

The Legislative Defendants' final argument is, in essence, that their map outscores the Court-selected plan in neutral secondary redistricting criteria, and therefore should have been selected over the District Court's plan. [*See* Pet. at 24-26]. This argument suffers from two defects.

First, as explained above, secondary redistricting criteria do not override a District Court's mandate to comply with the Equal Protection Clause and the Voting Rights Act, which the District Court accomplished with its court-adopted plan. Once a court has ensured that the plan it intends to adopt complies with the foregoing requirements, it can, and should, take into consideration other secondary, neutral redistricting criteria, such as: (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 Reynolds*, 377 U.S. at 578; *Arizonans for Fair*

Representation, 828 F. Supp. at 688. However, a court cannot elevate such secondary criteria above the Constitutional protections of the Equal Protection Clause and the statutory protections of the Voting Rights Act. *See, e.g.*, *Karcher v. Daggett*, 462 U.S. 725, 734, 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); *see also 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"); *Chen v. City of Houston*, 206 F.3d 502, 517 n.9 (5th Cir. 2000) (court must "caution against general over-reliance on the communities of interest factor."); *cf. Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 660 (N.D. Ill. 1991) (describing the communities of interest concept as "both subjective and elusive of principled application" and that the "courtroom is not the proper arena for lobbying efforts regarding the districting concerns of local, nonconstitutional communities of interest."). This is especially the case where, as here, the Legislative Defendants' plan favors one geographic region of a state over another in contravention of the Equal Protection Clause; although traditional

criteria can permit some divergence from exact population equality, geographic bias is not an appropriate basis to do so. *See Larios*, 377 U.S. at 1338.

Second, the Legislative Defendants point to no evidence proffered below that would establish that their plan bested the Court-adopted plan in all categories of secondary redistricting criteria, as their argument suggests. The bulk of the evidence cited by the Legislative Defendants compared earlier versions of the Executive Defendants' plans to the Legislative plan, not the modified version of Executive Alternate 3 adopted by the District Court. [*See* Pet. at 24-25]. For example, the Legislative Defendants claim that their plan scores better on a core retention metric than the Court-adopted plan, but cite to evidence comparing the Executive Defendants' original plan, not the modified version of Executive Alternate 3 that the Court selected. [*See* Pet. at 25; Exec. Exs. 10, 30 (Ex. 5)]. Moreover, the Legislative Defendants claim that their plan splits fewer communities of interest than the Court-adopted plan, [*see* Pet. at 24], but cite to no evidence, and attach none, establishing that this is the case.[15] Where the Legislative Defendants do cite evidence comparing the adopted plan, there is nothing in that evidence, appropriately viewed in the light most favorable toward the District Court's decision, supporting their claim that the Legislative plan bested

[15] Indeed, the Legislative Defendants' own trial expert, Brian Sanderoff, conceded that all the plans before the Court split communities of interest. [*See* 12/13/11 TR at 9:13-14; 12/22/11 TR at 55:6-11(Ex. 3)].

the Court-adopted plan. For instance, the Legislative Defendants claim their plan is the most "politically fair[,]" ignoring the fact that their plan creates two additional safe Democratic districts than what exists currently.[16] [Exec. Exs. 10, 30 (Ex. 5); TR 12/21 at 181:16-182:14 (Ex. 3)]. In addition, the Legislative Defendants claim that their plan is fair toward incumbents of both parties, despite evidence that the Legislative Defendants instructed their demographer to avoid consolidating districts in order to protect Democratic incumbents. [*E.g.*, TR 12/12 at 219:13-220:8 (Ex. 3)].

Based on such evidence, the District Court appropriately found that "[n]o plan can perfectly address all traditional redistricting principles[,]" and therefore essentially found that all plans honored the secondary redistricting criteria on a close to equal basis. [FOF/COL (Ex. 2) at FOF ¶¶ 29-31]. The Legislative Defendants have not, and cannot, point to any evidence below justifying disturbance of the District Court's findings in this regard. Certainly, the Legislative Defendants' inadequately supported "traditional criteria" claims are no

[16] As the District Court found, and as admitted by the Legislative Defendants' expert, the incorporation of the Democrat-heavy Native American districts into the Executive plan necessarily created a "ripple effect" whereby Republican-leaning precincts would need to be dispersed across the map, thus creating a "limited effect" on the Democratic performance in those districts. [*See* FOF/COL (Ex. 2) at COL ¶ 35; 12/22/11 TR at 117:9-118:1 (Ex. 3)]. There was no evidence of a partisan intent behind this "ripple effect[,]" however, and the Court, by remaining politically neutral, appropriately refused to overemphasize this issue. [FOF/COL (Ex. 2) at COL ¶¶ 35-36; 12/22/11 TR at 119:1-2 (Ex. 3)].

basis for this Court to re-weigh the evidence and mandate that the District Court select the Legislative plan.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY PERMITTING ALL PARTIES TO PARTICIPATE IN THE LITIGATION EQUALLY BY ALLOWING ALTERNATE PLANS.

The Legislative Defendants claim that separation of powers principles somehow constrained the Court from considering plans that were not "vetted" by the legislative process, and further prohibited the District Court from inviting alterations to existing plans submitted by the Executive Defendants. [*See* Pet. at 17-21]. The argument misunderstands the New Mexico Constitution and the parties' respective roles in redistricting litigation.

The legislative process, and limitations on parties' ability to act within that process, ended when the Governor vetoed the Legislative plan and the Legislature failed to override the Governor's veto. Once a case is in litigation, there is no requirement or expectation that plans submitted by any party have been "vetted" by the legislative process before a court may consider them. *See* discussion, *infra*, II (B)(1) (establishing that plans passed, or "vetted," by a state legislature are not entitled to any particular deference, and that legislative and executive plans are equally entitled to "thoughtful consideration"). Indeed, courts that chose to consider a panoply of plans almost universally permit litigants to submit one or more proposed plans, whether previously introduced into the state legislature or

created solely for the purpose of litigation. *See, e.g.*, *Alexander*, 51 P.3d at 1207, 1213 (noting that the trial court had before it five plans submitted by a variety of parties, and affirming the court's decision to choose a plan proposed by the state governor over a plan passed by the state senate); *League of United Latin Am. Citizens v. Perry*, 457 F. Supp. 2d 716, 718 (E.D. Tex. 2006) (stating that, following a remand from the U.S. Supreme Court, the court directed "the parties and *amici* to submit proposed plans" and provided an opportunity for the filing of responses); *Perrin v. Kitzhaber*, 83 P.3d 368, 370-71 (Or. App. 2004) (recounting that the trial court below adopted a "plan advanced" by certain of the individual plaintiffs and intervenors because, *inter alia*, it "minimize[d] disruption of the existing . . . districts").

Furthermore, because that process has concluded, there are no separation of powers concerns with the Executive Defendants – or any party who is also a state official – fully participating in this litigation after being named as defendants or filing suit as plaintiffs.[17] As a party in litigation, the Executive Defendants are no longer limited to their Constitutional role of signing or vetoing legislation, just as the Legislative Defendants are no longer limited to seeking passage of a plan

[17] Notably, the Legislative Defendants do not take issue with the District Court's admission of alternate plans submitted into evidence by individual legislators, such as Representatives Antonio Maestas and Brian Egolf, even though there was no evidence that such plans were "vetted" through the legislative process or were constitutionally approved by the entire Legislature by a proper vote.

through the House and Senate before proposing it to the Court. And even if the Legislative Defendants' argument was supported by any authority (it is not),[18] it neglects the fact that the entire Legislature has not been named a party to this case. The Legislative Defendants – the House Speaker and the President *pro tem* – were as free as the other individual Legislators who are parties to this case to propose their own plans, or make amendments to existing plans pursuant to the District Court's invitation. Thus, just like any other party in this case, the Governor, the Lieutenant Governor, the Speaker and the President *Pro Tem* are all free to proffer amended plans responsive to the concerns of other parties representing various interests in this case. Because none of these parties are constrained from submitting alternate plans, due process is not threatened by the District Court's decision to allow alterations, or to invite them, from any party.[19]

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[18] The cases cited by the Legislative Defendants relate to the Governor's legislative and rulemaking powers, not to her ability to fully participate in civil litigation in which she was named as a Defendant. [*See* Pet. at 18-20].

[19] The Legislative Defendants also make the unsupported and illogical argument that the District Court's failure to prohibit the Executive Defendants from submitting plans creates a "dangerous precedent" that would encourage future governors to rely solely on litigation for the redistricting of New Mexico's House districts. [*See* Pet. at 19-20]. Respondents can think of no civil case in which a party has been able to, as Legislative Defendants claim, "dictate" the result such that it would be a better strategy to litigate rather than attempt to obtain a plan through legislation.

CONCLUSION

The record below reveals that the District Court, recognizing its limited but important role as the arbiter of this redistricting dispute, engaged in a careful, thorough, and fair process that was open and available to all litigants. Petitioners ask this Court to ignore these facts, toss out the District Court's reasoned decision, and substitute its own judgment as to which redistricting map is "superior" for the New Mexico House of Representatives. [*See* Pet. at 26]. Granting the Petition would create dangerous precedent, whereby any party to future redistricting litigation in New Mexico could apply directly to this Court for substantive relief in derogation of the Rules of Civil Procedure, the Rules of Evidence, the Rules of Appellate Procedure, and the "great caution" by which this Court has historically exercised its extraordinary writ authority, *see Medler*, 19 N.M. at 259-60, 142 P. at 378 (1914), simply because that party is unhappy with the map selected below. Because this untenable result is not only unsupported by, but is in direct contravention of well established law, the relief sought by the Legislative Defendants should not be granted, and to the extent necessary, the judgment below should be affirmed.

For the reasons stated above, this Court should decline to employ its original jurisdiction to mandate that the lower courts adopt the Legislative Defendants'

plan, deny the requested relief sought by Petitioners, and affirm the ruling of the District Court.

Respectfully submitted,

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We hereby certify that a copy of the foregoing OPENING BRIEF OF REAL PARTIES IN INTEREST GOVERNOR SUSANA MARTINEZ AND LIEUTENANT GOVERNOR JOHN A. SANCHEZ REGARDING LEGISLATIVE DEFENDANTS' PETITION was emailed to the following counsel of record this 27th day of January, 2012:

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