IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

HON. ANTONIO MAESTAS, *et al.*,

Plaintiffs-Petitioners,

vs. Sup. Ct. No. 33,386

HON. JAMES A. HALL,

Respondent,

and,

HON. SUSANA MARTINEZ, *et al.*,

Real Parties in Interest.

GOVERNOR SUSANA MARTINEZ, LIEUTENANT GOVERNOR JOHN SANCHEZ AND THE JAMES PLAINTIFFS' BRIEF IN RESPONSE TO MAESTAS/EGOLF PETITIONERS' JANUARY 27, 2012 "BRIEF IN CHIEF"

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

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Certificate of Compliance

We certify that this brief complies with Rule 12-213(F)(3) NMRA, in that the brief is proportionately spaced and the body of the brief contains 6773 words. This brief was prepared and the word count determined using Microsoft Word.

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I. INTRODUCTION

By the measure of political performance that the Legislature adopted and used while considering and ultimately passing HB 39 during the September 2011 special session, Democrats and Republicans over the past ten years have received approximately 53% and 47%, respectively, of the votes cast in statewide elections. This data was analyzed on a precinct level and used to create performance numbers for all districts in proposed redistricting plans.[1] According to this measurement, the current House plan (in effect since 2002) contains 38 districts with greater than 50% Democratic performance and 32 with greater than 50% Republican performance.

However, Judge Hall did not choose a districting plan for the House on the basis of this or any other political performance metric. Rather, he properly adopted a modified version of Executive Alternative 3 on the basis of other factors: first and foremost, its appropriate resolution of the major population shifts that have occured over the last decade and resulting high level of population equality among districts; its compliance with Voting Rights Act requirements and related respect for Native American communities of interest; and its accommodation -- on balance

[1] Research & Polling, Inc., the Legislature's map consultant, included this political performance data in every standardized "map packet" it created for legislators. The same measure was compiled for every plan submitted to Judge Hall, including Executive Alternative 3 that he ultimately adopted. See, e.g., Legis. Dfdts. 1, 8; Gov. Ex. 9, 32, 33.

the best of all the proposed plans -- of traditional districting considerations including minimization of incumbent pairing.

All districting plans necessarily have political consequences. In his decision Judge Hall correctly noted that as measured by the Legislature's political performance gauge Executive Alternative 3 has 36 districts with higher than 50% Democratic performance and 34 districts with higher than 50% Republican performance, which diverges slightly -- by one seat -- from the existing statewide voting pattern of 47% Republican (70 x 0.47 = 32.9) and by two seats from the existing proportion of Democratic and Republican performing districts (38-32). That is, with the adopted plan, if candidates win in the districts in which their party's political performance numbers are above 50%, Democrats could be predicted to retain a 36-34 majority in the House. Ironically, although other parites have attacked this plan as a radical, pro-Republican plan, its divergence is less than or equal to those of any of the plans proposed by the parties that now challenge Judge Hall's decision. Those plans, which these parties ask this Court to order adopted, result in increases in Democratic performing districts by two, three and five districts in the Legislative, Egolf and Maestas plans, respectively. These increases in Democratic performing districts would lead to predicted political performance of 40, 41 and 43 Democratic seats won, i.e., partisan gain in excess of

the votes historically cast for them in statewide elections according to Research and Polling data.

In their January 27, 2012 opening brief or "Brief-in-Chief" ("Op. Brf. (Maestas)") filed herein,[2] the Maestas Plaintiffs and Brian Egolf pro se ("Maestas/Egolf Petitioners") largely repeat the arguments they advanced in their January 17, 2012 Petition for Writ of Superintending Control: (1) Judge Hall violated their due process rights by permitting the submission of Executive Alternative 3 (along with the Egolf 4 and Maestas Alternative plans) on the last day of trial; and (2) Judge Hall erred in adopting a plan that shows partisan bias as measured by the specific analysis advocated by the Maestas Plaintiffs' expert. Because the Governor and Lieutenant Governor (the "Executive Defendants") have addressed those arguments in their January 27, 2012 Opening Brief, this response brief will attempt to minimize duplication of that rebuttal and instead provide additional grounds for denial of the Maestas/Egolf Petition.

[2] The Maestas/Egolf Petitioners filed an identical brief in the companion proceeding, Jennings v. New Mexico Court of Appeals, No. 33,387. In lieu of making a separate filing in that proceeding, the Executive Defendants and the James Plaintiffs ask the Court to consider this Response Brief in connection with both proceedings.

II. NEITHER PROCEDURAL NOR SUBSTANTIVE DUE PROCESS BARRED JUDGE HALL FROM CONSIDERING AND ADOPTING EXECUTIVE ALTERNATIVE 3. THE MAESTAS/EGOLF PETITIONERS IN ANY EVENT WAIVED ANY CLAIM OF DUE PROCESS VIOLATION.

A. Judge Hall's Consideration of Executive Alternative 3 Did Not Deprive the Maestas/Egolf Petitioners of Any Constitutional Right to Procedural Due Process.

As previously noted in the Executive Defendants' Opening Brief at 26-28, the Maestas/Egolf Petitioners failed to raise their procedural due-process claim in the district court. Indeed, they did not even make a timely and specific objection to the introduction of the Executive Alternative 3 map when it was offered into evidence, nor did they pursue any timely and specific course of action to recall their expert, Jonathan Katz, or to take the Executive Defendants up on their offer to provide further testimony from the map's drawer, John Morgan. Under the clearly established standard for reviewing the district court's application of the rules of evidence, the Maestas/Egolf Petitioners waived appellate review of this issue by failing to properly preserve their objection to Executive Alternative 3 at the time it was introduced. See Rule 11-103(A) NMRA; State v. Varela, 1999-NMSC-045, ¶ 25, 128 N.M. 454, 993 P.2d 1280.

The Maestas/Egolf Petitioners' opening brief cites no authority to support the proposition that the Due Process Clause supplies a free-standing test that both overrides their failure to preserve the issue below and trumps the abuse-of-

discretion standard that normally applies to a district court's evidentiary rulings in this context. Instead, they attempt to construct a novel standard of "scrupulous fairness" derived from a series of unrelated cases involving the termination of parental rights. See State ex rel. Children, Youth and Families Dep't . v. Mafin M., 2003-NMSC-015, ¶ 17, 133 N.M. 827, 70 P.3d 1266 (citing State ex rel. Children, Youth and Families Dep't v. Lorena R. (In re Ruth Anne E.), 1999-NMCA-035, ¶ 22, 126 N.M. 670, 974 P.2d 164); Ronald A. v. State ex rel. Human Servs. Dep't (In re Ronald A.), 110 N.M. 454, 455, 797 P.2d 243, 244 (1990).

None of those cases applied a "scrupulous fairness" standard to a district court's decision to admit and consider a particular exhibit or line of trial testimony in the absence of a timely objection. Rather, the termination-of-parental-rights cases from which the Maestas/Egolf Petitioners derive the phrase "scrupulous fairness" involved more basic issues such as whether it is fair to proceed with a trial in a party's absence, see, e.g., Mafin M., 2003-NMSC-015, ¶ 1; Lorena R., 1999-NMCA-035, ¶ 25, or without timely notifying a party's attorney of when a trial is scheduled to occur, see, e.g., In re Ronald A., 110 N.M. at 455, 797 P.2d at 244. The Maestas/Egolf Petitioners allege nothing of the sort here. They and their attorneys were timely notified of the trial and had the opportunity to be present throughout. They, too, presented an alternative plan at the end of the final day of

trial.[3] Thus, the termination-of-parental-rights cases cited in the Maestas/Egolf Petitioners' opening brief are inapposite.

A closer reading of those cases reveals no free-standing test of "scrupulous fairness," but rather a routine application of the balancing test first articulated in Mathews v. Eldridge, 424 U.S. 319 (1976). "Mathews itself involved a due process challenge to the adequacy of administrative procedures established for the purpose of terminating Social Security disability benefits, and the Mathews balancing test was first conceived to address due process claims arising in the context of administrative law." Medina v. California, 505 U.S. 437, 444 (1992). In the abbreviated context of an administrative tribunal, "ordinarily one who has a protected property interest is entitled to some sort of hearing before the government acts to impair that interest, although the hearing need not necessarily provide all, or even most, of the protections afforded by a trial." Camuglia v. City of Albuquerque, 448 F.3d 1214, 1220 (10th Cir. 2006). Thus, the primary purpose of the Mathews test is to determine whether such an administrative hearing meets the minimum requirements of the Due Process Clause when one or more of the protections afforded be a full trial are absent.

[3] TR 12/22/11 at 204. The labels of the Maestas plans are confusing. "Maestas 2 was offered at the beginning of trial as a substitute for the original Maestas plan that was proposed in November. The Maestas Plaintiffs then offered "Maestas Alternative" on the last day of trial.

It does not follow, however, that an *ad hoc* balancing of interests under the Mathews test provides the appropriate tool for measuring what process is due in the context of a full trial on the merits in district court where all parties and their counsel are present. On the contrary, the United States Supreme Court has "never viewed Mathews as announcing an all-embracing test for deciding due-process claims." Dusenbery v. United States, 534 U.S. 161, 168 (2002).

When a litigant has already been afforded a full trial on the merits governed by established rules of evidence and procedure, a different test applies. See District Attorney's Office for the Third Jud. Dist. v. Osborne, 557 U.S. 52, 129 S. Ct. 2308, 2320 (2009). There is a strong presumption that established rules of evidence and procedure already provide the process that is due at trial in district court, because those rules "'themselves serve the interests of fairness and reliability.'" State v. Rosales, 2004-NMSC-022, ¶ 8, 136 N.M. 25, 94 P.3d 768 (quoting Crane v. Kentucky, 476 U.S. 683, 690 (1986)). Thus, a litigant who has already been afforded a full trial in district court must meet a more rigorous standard to show that the Constitution requires more process at that juncture, and the "State accordingly has more flexibility in deciding what procedures are needed." Osborne, 129 S. Ct. at 2320.

To prevail on a procedural due-process claim after receiving a full trial in district court, a litigant must show that the ruling in question "'offends some

principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or 'transgresses any recognized principle of fundamental fairness in operation.'" Id. (quoting Medina, 505 U.S. at 446, 448). The Maestas/Egolf Petitioners cannot meet this rigorous standard with respect to their claim that the district court erred in admitting and considering Executive Alternative 3.

There is nothing fundamentally inadequate about the procedures by which the district court considered Executive Alternative 3. As previously noted in the Executive Defendants' Opening Brief at 7-8, several parties submitted amended or modified plans to the district court during the trial. This was consistent with practice in other redistricting litigation. See, e.g., Avalos v. Davidson, No. 01-CV-2897, 2002 WL 1895406, at *13 (Colo. Dist. Ct. Jan. 25, 2002) (court adopted over objection one of two amended plans submitted by parties during trial), aff'd sub nom. Beauprez v. Avalos, 42 P.3d 642 (Colo. 2002) (en banc); cf. Carstens v. Lamm, 543 F. Supp. 68, 72 (D. Colo. 1982) (redistricting court adopted own plan without affording any party to comment on it). Some of these modified or amended plans were prepared and submitted at Judge Hall's suggestion to address particular issues raised by other parties during the course of the litigation. Executive Alternative 3 was one such plan.

The district court also heard evidence about Executive Alternative 3 on December 22, 2011, the last day of trial. Specifically, the Legislative Defendants' expert, Brian Sanderoff, TR 12/22/11 at 42 ff., and the Egolf Plaintiffs' expert, James Williams, TR 12/22/11 at 199 ff., not only testified at length about this plan but also prepared exhibits critiquing it. Legis. Dfdts. Ex. 29, 30; Egolf Ex. 24. The Maestas/Egolf Petitioners presumably also could have re-called Professor Katz that day to testify about his partisan symmetry analysis of Executive Alternative 3.[4] Had the Maestas/Egolf Petitioners wished to critique this alternative through cross-examination of map-drawer Morgan or re-calling Katz, at a minimum they should have voiced their concern to Judge Hall at that time and asked to postpone the close of evidence, or alternatively sought leave to re-open evidence sometime before he issued his decision January 3, 2012.[5]

New Mexico courts have long recognized that "invited error will not be the basis for reversal on appeal." Cox v. Cox, 108 N.M. 598, 603, 775 P.2d 1315, 1320 (Ct. App. 1989). Thus, a party cannot forego available opportunities for

[4] The Court should note as well that the Maestas Plaintiffs themselves introduced their Maestas Alternative plan on the same day, December 22, 2011. TR 12/22/11 at 204-05. They apparently did not find a need to ask Professor Katz to present testimony on any partisan symmetry of that plan.

[5] Indeed, the Maestas/Egolf Petitioners had additional time -- until January 17, 2012, when Judge Hall entered his Judgment on the House plan, to alert him to the alleged error regarding their supposed inability to cross-examine Morgan or re-call Katz to testify. It appears that the Maestas/Egolf Petitioners instead busied themselves during this time drafting their writ petition.

objecting to a particular line of testimony or evidence at trial, and then later claim to have been deprived of that opportunity. Similarly, a party cannot forego presenting an evidentiary objection to this Court under the traditional abuse-of-discretion standard, and then claim in the absence of such objections that the district court's evidentiary ruling amounted to a violation of their constitutional right to due process. That approach is foreclosed by the "'enduring principle of constitutional jurisprudence that courts will avoid deciding constitutional questions unless required to do so.'" Allen v. LeMaster, 2012-NMSC-001, ¶ 28, ___ N.M. ___, ___ P.3d ___ (No. 31,100 Dec. 5, 2011) (quoting Schlieter v. Carlos, 108 N.M. 507, 510, 775 P.2d 709, 712 (1989) (collecting additional cases)). Here, as in Allen, the dispositive resolution to the Maestas/Egolf Petitioners' untimely objections is explicitly provided by established rules of evidence and procedure which are themselves designed to assure fairness and reliability. See Rosales, 2004-NMSC-022, ¶ 8. Having failed to present their objections in the timely and specific manner required by those rules, there is no basis for proceeding instead to analyze and decide a constitutional question, and the Court should decline to do so.

B. Judge Hall's Consideration of Executive Alternative 3 Did Not Deprive the Maestas/Egolf Petitioners of Any Constitutional Right to Substantive Due Process.

The same principles cited above also preclude the Maestas/Egolf Petitioners from converting their untimely evidentiary objections into a novel substantive due-

process claim. The standard for showing that governmental conduct is so truly conscience-shocking as to violate the substantive component of the Due Process Clause "is met in only the most extreme circumstances, typically involving some violation of physical liberty or personal physical integrity." Becker v. Kroll, 494 F.3d 904, 923 (10th Cir. 2007); accord City of Cuyahoga Falls v. Buckeye Cmty. Hope Found., 538 U.S. 188, 198 (2003). The Maestas/Egolf Petitioners' brief cites no authority holding that a decision to admit or consider evidence during a trial amounts to such an extreme circumstance.

The readily available remedy for such evidentiary objections is simply to appeal or seek reconsideration of the district court's rulings under existing rules of evidence and procedure, which the Maestas/Egolf Petitioners have failed to do in this instance. "[U]nless the victim of government imposition has pushed its local remedies to the hilt, it ordinarily will not be able to show the necessary substantiality" required to prevail on a substantive due-process claim. Tri County Indus., Inc. v. Dist. of Columbia, 104 F.3d 455, 459 (D.C. Cir. 1997). Where the answer is already provided by established rules of evidence and procedure, it is entirely unnecessary for this Court to decide the novel constitutional issue of whether the district court's consideration of Executive Alternative 3 violates the substantive component of the Due Process Clause. See Allen, 2012-NMSC-001, ¶ 28.

That the trial court acted in the context of a redistricting trial involving voting rights should not change the Court's analysis. To the extent that the Maestas/Egolf Petitioners' substantive due-process argument is premised in some way on their assertion that voting is a fundamental right, that argument is foreclosed by the reasoning of Graham v. Connor, 490 U.S. 386, 395 (1989). When there is "an explicit textual source of constitutional protection" at issue, "that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." Id.; accord Bateman v. City of West Bountiful, 89 F.3d 704, 709 (10th Cir. 1996); Tri County Indus., Inc., 104 F.3d at 459.

The explicit textual source of constitutional protection for the voting rights at issue here is the Equal Protection Clause of the Fourteenth Amendment, and accordingly those claims must be adjudicated according to the established body of law interpreting the Equal Protection Clause in the context of voting rights. See generally Reynolds v. Sims, 377 U.S. 533 (1964). Having failed to achieve their objective under Reynolds and its progeny, Petitioners cannot circumvent the established body of law interpreting the Equal Protection Clause by raising an amorphous and novel claim under the substantive component of the Due Process Clause for the first time at this late juncture.

III. JUDGE HALL PROPERLY CONSIDERED INCUMBENT PAIRING AND OTHER MEASURES OF PARTISAN BIAS, AND OTHERWISE DID NOT ABUSE HIS EQUITABLE DISCRETION IN ADOPTING EXECUTIVE ALTERNATIVE 3 AND REJECTING THE OTHER PROPOSED REDISTRICTING PLANS.

The Maestas/Egolf Petitioners assert that "a district court cannot adopt any plan exhibiting significant partisan bias," Opening Brf. at 16, and urge reversal on the ground that Executive Alternative 3 contains significant partisan bias "under the Partisan Symmetry Standard," id. at 13.

Both prongs of this argument are easily answered. First, and obviously, "every reapportionment plan has some political effect." Prosser v. Elections Bd., 793 F. Supp. 859, 867 (W.D. Wis. 1992); see also Gaffney v. Cummings, 412 U.S. 735, 753 (1973) ("The reality is that districting inevitably has ... substantial political consequences.").[6] Therefore the premise to the Maestas/Egolf Petitioners' argument amounts to impossibility. Further, as the Executive Defendants explained in their January 27, 2012 Opening Brief at 31-35, while a redistricting court generally[7] should not draw or adopt a plan on the basis of its political effect,

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[6] To the Executive Defendants' and James Plaintiffs' knowledge, no court has ever determined that a redistricting plan can have no political consequences, or followed the lead of Peterson v. Borst, 786 N.E.2d 668, 673-75 (Ind. 2003), in concluding that it could not adopt any redistricting plan proposed by a party on the ground that it did not have bipartisan support.

[7] The exception is incumbent pairings. As a constitutional as well as traditional districting consideration, a districting court generally must minimize, and also avoid discriminatory, pairing of incumbents.

it properly can and indeed should be aware of that effect, if for no other purpose than check at the end of the process whether the generally comports with existing statewide voting patterns.[8] The Maestas/Egolf Petitioners misrepresent Judge Hall's analysis when they state that he ruled that "a court tasked with adopting a reapportionment plan must be blind to the partisan consequences of its actions." Opening Brf. at 17. In fact, Judge Hall was not blind to and instead fully understood the political consequences of all the maps, in particular, their party performance and their incumbent pairings. FOF 72, 73, 105, 110, 111. However, in accordance with the case law he concluded that, once he ensured that incumbent pairings were minimized and neutral, he would "not allow partisan considerations to control the outcome." COL 35. The Maestas/Egolf Petitioners, on the other hand, invite this Court to consciously adopt a plan more favorable to the Democratic Party.

Second, as was explained in the Executive Defendants' Opening Brief at 36-41, multiple measures of political fairness or, conversely, bias were presented to Judge Hall. One measure is that developed by Research & Polling, Inc., and then

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[8] See also Avalos, 2002 WL 1895406, at *8-9 ("[T]he Court may not ignore political consequences of adopting a redistricting plan. The final product, no matter what criteria is used, results in a map that profoundly affects Colorado politics for the next ten years."; court reviewed voter registration statistics and noted that the plan it adopted "mirrors, to some degree, the voter registration in Colorado.").

adopted and used by the Legislature during the special session. On the basis of voting in statewide elections over the past ten years, the number of Democrats and Republicans that are likely to be elected with any of the proposed redistricting plans was estimated, and these estimates could be compared to New Mexico's long-term 53-47 Democrat-Republican voting ratio as well as the current plan's estimated 38-32 performance. Another measure used by academics is "responsiveness" or "swing ratio": the extent to which a change in a party's average vote share changes the party's share of seats won. TR 12/20/11 at 28. All of the proffered plans showed comparable responsiveness. TR 12/20/11 at 33. Another measure, also used by academics, is "partisan seats/votes relationship" or "partisan symmetry." Professors Arrington and Katz used variations of this metric and could not agree on all of the various plans' relative biases.[9] Egolf Ex. 8; Maestas Ex. 12. Finally, another measure of political fairness is the extent to which, and how neutrally, plans pair incumbents. Larios v. Cox, 300 F. Supp. 2d 1320, 1333-34 (N.D. Ga.), aff'd, 542 U.S. 947 (2004).

These gauges of plans' political effect produced different results below. In particular, while Katz' "partisan symmetry" analysis indicates that the Executive

[9] Arrington and Katz did agree that of all the plans the James Plan was most heavily favorable to Republicans. This conclusion mirrored the Research & Polling performance data as well as the incumbent pairing comparisons. Gov. Ex. 10. Judge Hall apparently accepted the professors' conclusions to this extent. However, by doing so he was not obligated to accept their opinions on the much closer question of the Executive plans' relative bias. See infra at 17.

Alternative 3 plan is more favorable to Republicans than the Egolf 4 or Maestas Alternate plans, Executive Alternative 3 compares favorably -- that is, is less politically biased -- than the other two plans when the Research & Polling performance formula, Egolf Ex. 24, or incumbent pairing data, Sena Ex. 3; Egolf Ex. 8; FOF 73, 105, 110, 111, are considered. In exercising his equitable discretion Judge Hall could choose which measure was most compelling. He could consider that the Legislature relied exclusively on the Research & Polling metric, and that other courts as well utilize such a common sense comparison to long-term voting patterns. See, e.g., Good v. Austin, 800 F. Supp. 557, 566 (E.D. & W.D. Mich. 1992); Balderas v. Texas, No. 6:01CV158-TJW, 2001 U.S. Dist. Lexis 25740, at *8 (E.D. Tex. Nov. 14, 2001), aff'd mem., 536 U.S. 919 (2002). He also properly could note the overriding importance of incumbent pairing as a constitutional and traditional redistricting requirement. Larios v. Cox, 300 F. Supp. 2d at 1333-34; Bush v. Vera, 517 U.S. 952, 964 (1996). Thus, Judge Hall properly could decline to recognize and rule on the basis of Professor Katz' partisan symmetry analysis. A fortiori, Judge Hall did not err in rendering his decision without first seeking Professor Katz' further opinion on the partisan bias of Executive Alternative 3.[10] The Maestas/Egolf Petitioners wrongly ask this

[10] None of the parties challenging Judge Hall's ruling have cited any authority showing that courts have ruled that partisan symmetry analysis is the only measure of partisan bias that a redistricting court may consider.

Court to substitute its discretion for that of Judge Hall by choosing which of several measures of partisan fairness deserve the greatest weight. That is not the appropriate role of an appellate court or one exercising superintending control.

Professor Katz' opinion was contradicted by the Research & Polling political performance data (which in turn roughly corresponds to the current composition of the House). However, even in the absence of equitable discretion, as an evidentiary matter Judge Hall remained free to credit or discredit Professor Katz' partisan symmetry opinion, whether or not an opposing opinion was offered. "The opinion of an expert although uncontradicted is not conclusive of the fact in issue." Van Orman v. Nelson, 78 N.M. 11, 23, 427 P.2d 896, 908 (1967). "[T]he opinions of an expert even where uncontradicted, are not conclusive on facts is issue and the fact finder may reject such opinions in whole or in part." Sanchez v. Molycorp, Inc., 103 N.M. 148, 153, 703 P.2d 925, 930 (Ct. App. 1985).

Moreover, the testimony of Professors Arrington and Katz regarding partisan bias in fact was confusing, of questionable relevance in New Mexico, and unconvincing. In assessing the plans' relative partisan bias, Judge Hall would have been well within his discretion in declining to accept their opinions in toto. The premise to Professor Arrington's partisan bias analysis is that the number of seats won by a party should reflect the number of votes its candidates receive; the analysis attempts to assess whether there is a disparity between these two figures.

TR 12/19/11, at 30-31; Egolf Ex. 8. While he explained that his starting point is Research & Polling's 53/47 Democrat/Republican ratio for votes cast statewide, he incongruously then assumed that in fact the vote split in every House district is not 53-47 but rather 50-50, labeling this scenario as "normal." TR 12/15/11 at 243-45, 12/22/11 at 31-34. He then calculated the extent to which under each plan the ratio of seats won would diverge from this 50/50 ratio of votes cast; he did not, however, calculate the extent to which the ratio of seats won would diverge from the ratio of votes cast if the latter were, as could be expected more often in New Mexico, 53/47. TR 12/15/11 at 245-52

Professor Katz' opinion was equally cloudy. He admitted that his partisan symmetry analysis made the same starting -- and for New Mexico, implausible -- assumption of a 50-50 Democrat-Republican vote split. TR 12/20/11 at 37. But he further admitted that his resulting calculations of partisan bias were statistically limited to ranges (shown on Maestas Ex. 12 as "grey bars") of possible bias. TR 12/20/11 at 42-44. Consequently, he could not reject the possibility that the original Executive plan and the Maestas 2 plan were equally unbiased, TR 12/20/11 at 43-44, or that the Maestas 2 plan and the James plan (which he previously had characterized as showing "statistically significant pro-Republican bias") had the same bias. TR 12/20/11 at 44, 57-58. In short, Judge Hall had good grounds for discounting Professor Katz' partisan bias opinions, and thus could

have concluded that he did not need those opinions before he decided whether to adopt Executive Alternative 3.[11]

The Maestas/Egolf Petitioners also claim that Judge Hall was presented with evidence tending to impeach the Executive Defendants' map-drawer, John Morgan. Opening Brf. at 14-15. Morgan's testimony in fact was detailed, thorough and very credible. 12/13/11 at 301-02, TR 12/14/11 at 8-83. More fundamentally, in making their point the Maestas/Egolf Petitioners again are simply asking this Court to re-weigh and substitute its own judgment about the evidence, in particular, the credibility of a witness. "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 the witnesses." State v. House, 1999-NMSC-014, ¶ 33, 127 N.M. 151, 978 P.2d 967.

The Maestas/Egolf Petitioners' remaining arguments may be addressed quickly. They claim that the Executive Defendants "misled" Judge Hall and tried to "sneak through" the Executive Alternative 3 plan even though it (like all other

[11] This Court should note a crucial difference between Maestas Ex. 12, the partisan bias plan that Professor Katz presented at trial, and Exhibit C to the Katz affidavit that is attached to the Maestas/Egolf Petitioners' January 17 Petition (as served on the parties herein). Exhibit 12 shows the "grey bars" that reflect the statistical uncertainty in Katz' calculations, i.e., the inability to conclude whether any two plans have different biases. The grey bars are missing from Exhibit C, i.e., Katz is not acknowledging to this Court the uncertainty of his conclusions and the likelihood that he cannot reject the possibility that the Executive Alternative 3 plan and the Maestas Alternative plan show statistically indistinguishable results.

plans) shows some alleged statistical bias. Op. Brf. (Maestas) at 11. The Executive Defendants did nothing of the kind. The Maestas/Egolf Petitioners quote from the Executive Defendants' December 28, 2011 closing argument brief, which referenced Professor Katz' trial testimony that the original Executive plan was unbiased, but this was not misleading because in their brief the Executive Defendants were discussing the original plan and not, as the Maestas/Egolf Petitioners suggest, Executive Alternative 3. Op. Brf. (Maestas) at 11. The Executive Defendants never suggested to Judge Hall that Professor Katz had opined that Executive Alternative 3 was not biased. Moreover, Judge Hall was quite well aware that under the Research & Polling performance measure Executive Alternative 3 would result in a 36-34 Democratic majority, i.e., a small increase in Republican performance over the previous Executive plans. FOF 72. Judge Hall was not misled.

The Maestas/Egolf Petitioners also maintain that any redistricting plan that embodies alleged statistical partisan bias, as calculated by Dr. Katz, violates both the New Mexico and United States Constitutions. Op. Brf. (Maestas) at 18-22. As stated supra at 13, all plans -- both those drawn by legislatures and those drawn by courts -- necessarily show some partisan bias. Courts nevertheless readily approve them. Court-drawn plans are objectionable only if they are drawn for the purpose

of accomplishing some partisan effect, i.e., what this Court is now being asked to do.

The Maestas/Egolf Petitioners can cite to no authority holding that adoption of the modified Executive Alternative 3 plan contravenes any constitutional right to "free and open elections" or "freedom of political belief and association."[12] In fact, the United States Supreme Court to date has, while finding the issue justiciable, expressly declined to uphold a cause of action for political gerrymandering out of a continuing inability to articulate judicially manageable standards. League of United Latin American Citizens ("LULAC") v. Perry, 548 U.S. 399 (2006); Vieth v. Jubelirer, 541 U.S. 267 (2004); Davis v. Bandemer, 478 U.S. 109 (1986).

A fortiori, the Maestas/Egolf Petitioners can cite to no authority for the narrow proposition that they actually seem to be advocating: that proof of their favored measure of partisan bias, Professor Katz' partisan symmetry analysis, renders a redistricting plan unconstitutional. Indeed, this Court can note that, notwithstanding the Maestas/Egolf Petitioners' suggestions to the contrary, the Supreme Court has given partisan symmetry analysis a less than ringing

[12] Nor is there any authority for the proposition that the Governor violates separation of powers principles by participating, and proposing plans in, redistricting litigation following her veto of a plan passed by the Legislature. The authority in fact is to the contrary. See, e.g., Carstens, 543 F. Supp. at 74 (following veto of legislative districting plan, governor was permitted to propose plan in court proceeding).

endorsement. In LULAC v. Perry, after discussing Harvard Professor Gary King's amicus brief touting this tool as the "reliable standard" upon which a plaintiff might show a burden on his representational rights, Justice Kennedy, stating the opinion of the Court, rejected the idea. 548 U.S. at 419-20. Anticipating the gap between an assumed 50-50 Democrat-Republican vote and a different historic voting pattern such as New Mexico's 53-47 split over the past decade, Justice Kennedy observed, "[W]e are wary of adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs.... I would conclude asymmetry alone is not a reliable measure of unconstitutional partisanship." Id. at 420 And even Justice Stevens, partisan symmetry's biggest advocate, acknowledged that it was only "a" as opposed to "the" "measure of partisan fairness," id. at 466, and cautioned that the tool, while "helpful," was "certainly not talismanic," id. at 468 n.9.

The point is that Dr. Katz' version of partisan symmetry analysis is not the exclusive measure of political bias or fairness. In the exercise of his equitable discretion Judge Hall properly could look instead to Research & Polling's performance measure to test whether Executive Alternative 3 could be expected to produce an electoral result that "was roughly proportional to the parties' share of the statewide vote." Id. at 464. (internal quotation marks and citation omitted). The Maestas/Egolf Petitioners' argument reduces to a request that this Court

reweigh the evidence, a substantial amount of which supports Judge Hall's decision. The Court should decline the invitation.

The Maestas and Egolf Petitioners also attempt to discredit Hall's finding that the Executive Defendants' incorporation of the Native American districts into their Alternatives 2 and 3 had the effect of increasing Republican performance in certain districts. They argue that this finding is inaccurate because their plans incorporated the Native American districts without the same effect. This argument is illogical for several reasons. First, the Maestas and Egolf plans are so much more politically aggressive for the Democratic Party than Executive Alternative 3 is for the Republican Party that it is not even a relevant comparison. Second, prior to incorporation of the Native American districts, the Executive plans had adhered to population deviations of less than one percent in the northwest quadrant of the state. Incorporating the significantly underpopulated Native American districts into the Executive plan resulted in removing thousands of people from the northwest quadrant and necessitating their distribution among other districts. As a result, the characteristics of those districts used to even out the population deviations would necessarily change.

Perhaps most telling is the exaggerated nature of Petitioners' claims that the Executive Alternative 3 plan is somehow a dramatic increase in Republican performance over earlier Executive plans. While it is true that the number of

districts with Republican performance over 50% increased from 32 in the current districts to 34 in the Court's adopted plan, those two additional districts over 50% reflect increases of only fractions of a percentage point. For example, House District 32 currently has a Republican performance number of 49.6%. Under Executive Alternative 3, its Republican performance is 50.4%. This is a difference of less than a percentage point and still results in a very competitive district. And while Petitioners complain that certain districts in the Executive Defendants' original plan became more Republican in their performance in Alternative 3, it is critical to understand that many of those districts are still lower in Republican performance than the currently existing districts. In sum, there is simply no basis for any argument that the Executive Alternative 3 plan improperly sought political gain. It did not. And again, it is significant that the Maestas and Egolf plans would have effected an even greater change from current districts in the opposite direction by increasing Democratically performing districts. Thus, they are the parties actually guilty of the motives they attempt to attribute to the Executive Defendants.

IV. THE EGOLF/MAESTAS PETITIONERS' PROPOSED REMEDY IMPROPERLY WOULD HAVE THIS COURT REWEIGH THE EVIDENCE AND SUBSTITUTE ITS EQUITABLE DISCRETION AND JUDGMENT FOR THAT OF JUDGE HALL.

As a "remedy," the Maestas/Egolf Petitioners now[13] ask the Court to remand to Judge Hall with instructions to choose and adopt as the redistricting plan for New Mexico's House of Representatives one of the several plans proposed by the Egolf and Maestas Plaintiffs. Op. Brf. (Maestas) at 24-30. The quick response to this proposal is that, because Judge Hall committed no error in adopting Executive Alternative 3, there is nothing to be remedied. Further, the Maestas/Egolf Petitioners again are asking this Court to reweigh the evidence and substitute its judgment for that of Judge Hall. They not only are presenting this Court with the task of reviewing all of the evidence upon which Judge Hall grounded his decision to adopt Executive Alternative 3, they now also want the Court to review all of the evidence pertaining to six additional maps. The Maestas/Egolf Petitioners effectively are proposing that this Court inject itself as fact finder and review in detail virtually all of the evidence Judge Hall heard and reviewed over the course of eight days of trial. Even assuming this Court were to reverse Judge Hall, the only appropriate remedy would be to remand with instructions to adopt a plan in accordance with this Court's decision. That is, the remedy properly would be

[13] In their January 17, 2012 Petition, the Maestas/Egolf Petitioners sought only remand with instructions to exclude Executive Alternative 3 from consideration.

limited to remanding with instructions to take additional evidence and then to either further modify Executive Alternative 3, select one of the other maps proposed by the parties, or to draw his own map that, for example, could incorporate features of several maps.

The Court can also note the gaping holes in the Maestas/Egolf Petitioners' criteria of acceptability.[14] First, they ignore the paramount constitutional requirement of de minimis population deviation. This factor alone would eliminate most of the Egolf and Maestas plans.

Second, they entirely fail to acknowledge the need under Larios v. Cox for both consolidating districts in a politically even-handed manner and avoiding regional under- and overpopulation. This consideration led to Judge Hall's rejection of HB 39 -- and thus by extension Maestas 2 and all but the last of the Egolf maps -- because they discriminatorily failed to consolidate a district in the North Central part of our state, leaving it instead with substantial underpopulation.

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[14] The Maestas/Egolf Petitioners also make a number of misstatements. While the Maestas/Egolf Plaintiffs note that the Maestas Alternative plan has an average deviation of 1.1%, FOF 108, they have no basis in the record for claiming, see Op. Brf. (Maestas) at 24, that this was the lowest deviation of all the plans. In addition, Executive Alternative 3 did not split the San Ildefonso and Tesuque Pueblos. See Op. Brf. (Maestas) at Attachment 1 n.12. On the contrary, Executive Alternative 3 differed from Executive Alternative 2 precisely because it eliminated these splits. FOF 69. That is why the Multi-Tribal Plaintiffs have stated on the record that they do not oppose adoption of Executive Alternative 3. See Tribal Defendants' January 27, 2012 Opening Brief at 2.

Third, the Maestas-Egolf Petitioners' "partisan bias" criteria in fact looks exclusively to Professor Katz' partisan symmetry measure of bias. It ignores all of the other measures of partisan bias, including Research & Polling's Democratic-Republican performance metric that the Legislature found most appropriate for use in New Mexico redistricting. The reason for this oversight, of course, is that by that measure all of the Egolf and Maestas plans are grossly biased in favor of Democrats.

Fourth, the Maestas/Egolf Petitioners ignore the two key aspects of incumbent pairing. They fail to acknowledge that Judge Hall focused on the fact that all of their plans unfairly paired more incumbent Republicans than Democrats who would be running for reelection. They also fail to acknowledge that, contrary to Larios v. Cox, the Egolf 4 and Maestas Alternative plans discriminatorily -- indeed, vindictively -- eliminated the one Republican district in the North Central region and then paired the incumbent with a Democrat in such a manner as to assure his defeat this fall. This incumbent pairing unfairness contributed to Judge Hall's rejection of these two plans.

V. CONCLUSION

Notwithstanding the extremely expedited nature of these proceedings, following his appointment by this Court Judge Hall gave the parties every opportunity to submit proposed redistricting plans and comment on other parties' plans. The Maestas/Egolf Plaintiffs received all process that was due under the circumstances; in any event they failed to seek leave from Judge Hall in a timely manner to either cross-examine the Executive Defendants' map drawer or re-call their own expert witness to comment on the partisan consequences of Executive Alternative 3.

Executive Alternative 3 is not improperly biased. Judge Hall was not required to attempt the impossible task of drawing or selecting a map that shows no partisan effect. Following his selection of a modified version of Executive Alternative 3 based on the fact that it complied with all legal requirements and most closely hewed to the other redistricting criteria that courts are to consider, he properly noted that the adopted plan was roughly proportional to New Mexico's historic voting patterns and its House of Representatives' current composition. In the exercise of his equitable discretion he was not required to ascertain whether the adopted plan was biased as measured by the statistical gauge of partisan symmetry analysis advocated by the Maestas Plaintiffs' expert.

There are no grounds for reversal of Judge Hall's decision. This Court should deny the Maestas/Egolf Petition and affirm the trial court.

Respectfully submitted,

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