

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

CAUSE NO. D-101-CV-2011-02942

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

Plaintiffs,

-vs-

DIANNA J. DURAN, in her official capacity as New Mexico Secretary of State, SUSANA MARTINEZ, in her official capacity as New Mexico Governor, JOHN A. SANCHEZ, in his official capacity as New Mexico Lieutenant Governor and presiding officer of the New Mexico Senate, TIMOTHY Z. JENNINGS, in his official capacity as President Pro-Tempore of the New Mexico Senate, and BEN LUJAN SR., in his official capacity as Speaker of the New Mexico House of Representatives,

Defendants.

**CONSOLIDATED WITH CAUSE NOS.: D-101-CV-2011-02944; D-101-CV-2011-03016;
D-101-CV-2011-03099; D-101-CV-2011-03107; D-101-CV-2011-02945; D-506-CV-2011-00913; D-202-CV-2011-09600**

**JAMES PLAINTIFFS' RESPONSE IN OPPOSITION TO LEGISLATIVE
DEFENDANTS' MOTION FOR PROTECTIVE ORDER**

Plaintiffs Conrad James, Devon Day, Marge Teague, Monica Youngblood, Judy McKinney and John Ryan ("the James Plaintiffs") respond as follows to Defendants Jennings' and Lujan's ("the Legislative Defendants")¹ November 18, 2011 Motion for Protective Order.

Relevance.

The New Mexico House of Representatives and Senate are, of course, controlled by their Democrat majorities. In turn, so is the Legislative Council Service. The

¹ The James Plaintiffs, two of whom currently serve in the Legislature, reject any suggestion from the "Legislative Defendants" reference that Defendants Jennings and Lujan represent or speak on behalf of the Legislature as a whole.

Legislative Council Service hired Brian Sanderoff and his company, Research & Polling, Inc., to draw redistricting plans for legislators, including the partisan and controversial House (HB39) and Senate (SB33) redistricting plans that passed both chambers (with no Republican support) but were vetoed by Governor Martinez.

The Democrat leadership is now requesting the Court to adopt the Democrat HB39 and SB33 redistricting plans. They have designated Mr. Sanderoff to testify as their expert witness.

Reapportionment of legislative districts is necessary at this time because population growth has been uneven across the state. In particular, Mr. Sanderoff acknowledged in his deposition earlier this week that metropolitan Albuquerque's Westside population is now sufficient to support three additional House seats. Further, because they have grown slowly relative to the state average, three discrete regions -- North Central New Mexico, Eastern New Mexico, and Central and East Albuquerque -- each should lose an entire seat to maintain substantial one man, one vote parity. Mr Sanderoff conceded that eliminating a seat in each of those three regions and moving them to the Albuquerque Westside would reduce the population deviations. It is the obvious approach, particularly given that the Westside continues to grow at a fast pace. See Exhibit 1 attached hereto (deposition excerpts).

The House redistricting plan that the Democrat majority passed, and which their leadership now asks the Court to adopt, did not do this. Instead, it: (1) eliminated a district in predominantly Republican Southeast New Mexico (resulting in the pairing of two Republican representatives), (2) eliminated a vacant (because the Democrat incumbent is not running for re-election) house seat in central Albuquerque, (3)

eliminated no districts in the overwhelmingly Democrat North Central New Mexico region and instead underpopulated (by as much as -5%) that region's districts, (4) created only two new districts on Albuquerque's Westside, and (5) "packed" the balance of the Westside's population growth (equivalent to the third seat) by overpopulating (by as much as +5%) all but one of Albuquerque's House districts. See Exhibit 1.

Mr. Sanderoff did not draw HB33 on his own, and its partisan slant is not the result of purely neutral premises. He and his staff took direction from the bill's Democrat sponsors. Among other communications, the James Defendants want to know what instructions Mr. Sanderoff and his staff received from the bill's sponsors regarding the plan. Specifically, was he instructed to draw the plan so that it would favor Democrats by not eliminating any North Central New Mexico districts and pairing their incumbents, and conversely avoid creating a third district in northwest Albuquerque, which has relatively high Republican registration?

The Legislative Defendants claim the "[c]ommunications between legislators and staff and Mr. Sanderoff and his employees ... are irrelevant to this litigation, as the issue before the Court are whether the plans presented, as drawn, comply with the legal requirements and principles governing redistricting -- not what any individual legislator's motivations or objectives may have been in promoting a particular plan." Motion at 3. They are wrong. In Larios v. Cox, 542 U.S. 947 (2004), the United States Supreme Court affirmed the three-judge district court's consideration of Georgia state legislators' motivations and objectives in passing a legislative reapportionment plan that favored rural South Georgia and Atlanta inner-city voters (generally represented by Democrats) at the expense of suburban Atlanta voters (generally represented by Republicans):

The District Court's findings disclose two reasons for the unconstitutional population deviations in the state legislative reapportionment plans. The first was a deliberate and systematic policy of favoring rural and inner-city interests at the expense of suburban areas north, east, and west of Atlanta. The second was an intentional effort to allow incumbent Democrats to maintain or increase their delegation, primarily by systematically underpopulating the districts held by Democrats, by overpopulating those of Republicans, and by deliberately pairing numerous Republican incumbents against one another.... As a result, while Democratic incumbents who supported the plans were generally protected, Republican incumbents were regularly pitted against one another in an obviously purposeful attempt to unseat as many of them as possible.

....

.... The District Court correctly held that the drafters' desire to give an electoral advantage to certain regions of the State and to certain incumbents (but not incumbents as such) did not justify the conceded deviations from the principle of one person, one vote.

Id. at 947-49 (Stevens, J., concurring) (internal quotation marks and citations omitted).

The Secretary of State's November 22, 2011 Response to the Motion, at 3-4, summarizes the evidence (including testimony of Linda Meggers, the Georgia legislative staff member who, analogous to Mr. Sanderoff's function, drew reapportionment maps for legislators) that led the federal trial court to these conclusions. See also 300 F. Supp. 1320, 1326 (2003).

The parallels between Larios v. Cox and the case at bar are obvious. The James Plaintiffs wish to obtain documents and elicit testimony from Mr. Sanderoff to establish the same point about the Democrat redistricting plans that the plaintiffs in Larios v. Cox established about the Georgia reapportionment plans: the true motivations and objectives behind HB39's and SB33's deviations from one man, one vote parity -- as opposed to other justifications that the Court may be offered -- render them unconstitutional.

Waiver

For the reasons set forth in the Secretary of State's November 22, 2011, Response, which the James Plaintiffs adopt herein by reference, Mr. Sanderoff's and his staff's oral and written communications with legislators during the special session earlier this fall are not privileged. Even assuming, however, the existence of some form of legislative privilege that might encompass these communications, the case law on which the Legislative Defendants themselves rely demonstrates that the privilege has been waived by their affirmative action in deciding to present Mr. Sanderoff as an expert witness at the trial of this matter.

Arizona Indep. Redistricting Comm'n v. Fields, 75 P.3d 1088 (Ariz. App. 2003), involved a challenge on equal protection and other grounds to redistricting plans for the Arizona legislature. Pursuant to the state constitution, the plans were drawn and adopted by a redistricting commission with the assistance of staff and consultants. Id. at 1092, ¶¶ 4, 6. During the ensuing litigation the commission designated the consultants as expert witnesses, Id. at 1093, ¶ 7. When the plaintiffs sought discovery of the consultants' communications with legislators, the commission objected and asserted those communications were protected by a legislative privilege. Id. ¶ 9. The Court recognized a legislative testimonial privilege: "a state legislator engaging in legitimate legislative activity may not be made to testify about those activities, including the motivation for his or her decisions." Id. at 1095, ¶ 17 (emphasis added). Further, the court held that the legislative privilege extended to the commission as well as its staff and consultants. Id. at 1096-98. ¶¶ 20-30. However, the court went on to hold that, just as the work product privilege that attaches to consulting experts retained in litigation is lost once they are designated as testifying experts, the legislative privilege enjoyed by the

commission's consultants was waived once they were designated to testify as experts in the litigation. Id. at 1101-03. "In summary, we hold that by designating consulting experts as testifying experts, the IRC waived any legislative privilege (1) attaching to [written or oral] communications with those experts, or any materials reviewed by them, and (2) relating to the subject of the expert's testimony." Id. at 1102-03, ¶ 50 (emphasis original).

In fairness this Court should reach the same result with respect to disclosure of Mr. Sanderoff's and his company's communications with legislators. Assuming for purposes of argument that a legislative privilege exists with respect to those communications, then the Legislative Defendants in theory could assert that privilege and protect him from being subpoenaed by the litigants herein to produce and testify about the communications. But that is not what the Legislative Defendants are requesting. They want to affirmatively call Mr. Sanderoff to testify about the supposed benefits of the reapportionment plans that they ask the Court to adopt, and at the same time bar the other parties from obtaining discovery about everything he knows about those plans, including Democrats' motivations and objectives in sponsoring them. The Democrat leadership seeks both to proffer the plans and to hide the partisan truth about them.

The Legislative Defendants cannot have their cake and eat it, too. If they want to preserve any privilege that protects their communications with Mr. Sanderoff, then they cannot call him to testify and instead must treat him as a non-testifying expert consultant. Cf. NMRA 2011, Rule 1-026(B)(6). Alternatively, if they wish to call him to testify as an expert, they must permit him to be subject to the same discovery to which the other parties' experts are subject, including his company's communications during the special

session concerning HB39, SB33 and the other redistricting plans that it was asked to draw.

Conclusion

If the Legislative Defendants maintain their intention to call Mr. Sanderoff to testify as an expert, the Court should determine that they have waived any legislative privilege that might exist with respect to Mr. Sanderoff's and his company's communications with legislators during the recent special session and deny the Legislative Defendants' motion for protective order.

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CERTIFICATE OF SERVICE:

WE HEREBY CERTIFY that on the 25th day of November, 2011, we filed the foregoing electronically, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing and we e-mailed a true and correct copy of the foregoing pleading on this 25th day of November, 2011 to the following:

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1 COUNTY OF SANTA FE
2 FIRST JUDICIAL DISTRICT

2

3

NO: D-101-CV-2011-02942

3

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

5

5

Plaintiffs,

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-vs-

7

DIANNA J. DURAN, in her official capacity as New

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Mexico Secretary of State, SUSANA MARTINEZ, in her

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official capacity as New Mexico Governor, JOHN A.

8

SANCHEZ, in his official capacity as New Mexico

9

Lieutenant Governor and presiding officer of the New

9

Mexico Senate, TIMOTHY Z. JENNINGS, in his official

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capacity as President Pro-Tempore of the New Mexico

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Senate, and BEN LUJAN SR., in his official capacity

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as Speaker of the New Mexico House of

11

Representatives,

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Defendants.

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CONSOLIDATED WITH CAUSE NO. D-202-CV-2011-09600

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CONSOLIDATED WITH CAUSE NO. D-506-CV-2011-00913

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CONSOLIDATED WITH CAUSE NO. D-101-CV-2011-02944

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CONSOLIDATED WITH CAUSE NO. D-101-CV-2011-02945

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CONSOLIDATED WITH CAUSE NO. D-101-CV-2011-03016

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CONSOLIDATED WITH CAUSE NO. D-101-CV-2011-03099

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CONSOLIDATED WITH CAUSE NO. D-101-CV-2011-03107

17

-

Volume I

18

DEPOSITION OF BRIAN SANDEROFF

18

19

November 21, 2011

19

9:00 a.m.

20

Tenth Floor

20

500 Fourth Street, Northwest

21

Albuquerque, New Mexico 87102

21

22

PURSUANT TO THE NEW MEXICO RULES OF CIVIL

22

PROCEDURE, this Deposition was:

23

23

TAKEN BY: PAUL J. KENNEDY

24

ATTORNEY FOR DEFENDANT SANCHEZ

24

25



1 whole area has not kept pace with population growth.
2 The state grew by 13.2 percent. These areas have
3 not kept pace. That includes Eastern New Mexico,
4 North Central New Mexico.

5 The Southwest corner of the state has not
6 kept pace with population growth. The Northwest
7 corner of the state has not -- primarily Indian
8 country, not Farmington, Aztec, and Bloomfield, but
9 within the Northwest quadrant has not kept pace with
10 population of the state.

11 The Albuquerque West Side has experienced
12 significant population growth and has exceeded the
13 ideal population of the state significantly.

14 Q. How about the Albuquerque core?

15 A. The Albuquerque Metro area itself has also
16 increased. Has grown at a pace faster than the
17 statewide growth rate.

18 Q. How about in Central Albuquerque,
19 Southeast Albuquerque?

20 A. Central Southeast Albuquerque has not kept
21 pace.

22 Q. All right.

23 A. Generally.

24 Q. So when we're saying it has not kept pace,
25 we're not saying it's lost population in absolute

1 addressing that issue. The Eastern New Mexico is
2 another area.

3 Your question was about -- about --

4 Q. Well, when you were first confronting this
5 situation after you're on contract, you determined
6 that something has to be done to, for lack of a
7 better term, shift districts, I assume?

8 A. Correct.

9 Q. So you looked at the southwest side those
10 three districts there. Now you're telling us about
11 the East Side.

12 A. Right.

13 Q. Which district there are you concerned
14 about?

15 A. Well, the entire eastern half of the
16 state, and I would put into that -- all of Eastern
17 New Mexico.

18 Q. To Lea County through Union County?

19 A. Yes, as a region. You know, there may
20 have been a district here or there that kept pace,
21 but that really doesn't matter. You have to
22 confront the region, and North Central New Mexico, I
23 put in that -- drew a line, the eastern half of the
24 state also did not keep pace, as I said.

25 Northwest had to be addressed, too,

1 terms, but it has not -- it has not increased in
2 population relative to some of these other areas on
3 the West Side, for instance?

4 A. There's only -- correct. There's only a
5 handful of districts in the state that have actually
6 lost population. It's more of an issue of not
7 keeping pace.

8 Q. All right. And when you first
9 considered -- you worked for the legislature during
10 the redistricting session, right?

11 A. Correct.

12 Q. When you first considered redrawing a map,
13 redrawing the map for the House, New Mexico House,
14 in broad terms, what did you think you had to do to
15 redistrict in a proper manner, an appropriate
16 manner?

17 A. In broad terms, something had to be done
18 with various regions of the state. For the
19 Southwest, a decision had to be made to deal with
20 those three House districts that were about
21 .57 percent lower than the ideal population of a
22 district. Those three districts there
23 cumulatively --

24 Q. Are we talking 38, 39, and 32?

25 A. Right. And there are various ways of

1 particularly sensitive because of voting rights
2 issues with the Native American districts. There
3 the problem wasn't as big, but most of the Native
4 American districts did not keep pace and needed to
5 expand their boundaries a bit. It wasn't as
6 dramatic, but it was an issue.

7 Q. Now, when you say you draw a line down the
8 middle of the state and that the East Side is one of
9 the -- one of the areas that didn't keep pace, are
10 you telling us that you consider the North Central
11 region the same region as the East Side?

12 A. No. I consider -- there's some counties,
13 as demographers, that we quibble about what region
14 they're in. Otero County, you always wonder about
15 if it's in the south or the East Side, you know,
16 Colfax, Mora, Union, should we be looking at East
17 Side or North Central or Northern New Mexico, versus
18 North Central and East Side.

19 So there are some counties that are --
20 people will debate whether they're in one region or
21 another. But one could look at the North Central
22 region and define it differently, but it is an area
23 that did not keep pace, and it can be distinguished
24 from the East Side.

25 Q. Can it be distinguished from the East Side

1 BRIAN SANDEROFF
 2 having been first duly sworn, testified as follows:
 3 EXAMINATION
 4 BY MR. KENNEDY:
 5 Q. Mr. Sanderoff, could you tell me what a
 6 map packet is?
 7 A. A map packet for Research & Polling is one
 8 in which we take a bill, during the session at
 9 least, that is introduced into the session, actually
 10 sometimes even before it's introduced, and we
 11 compile the precincts that are comprised within the
 12 various districts for a House or Senate plan, what
 13 have you, into a geographic format where one can
 14 look at the various districts and precincts at
 15 various levels of geography. The map packet also
 16 includes data tables that include various statistics
 17 of population and deviations and partisan
 18 performance measures.
 19 And the way we program the packets is that
 20 if a town is split in some way, it would show up in
 21 the packet. And if a town was not split, it would
 22 not show up, just to try to kill less trees. And so
 23 that's what a map packet is. It includes a
 24 geographic representation of that particular plan,
 25 whether it be House, Senate, PRC, Congress with all

1 the associated stats.
 2 Q. What has presently or recently been
 3 uploaded onto the LCS Web site?
 4 A. As of midnight last night, getting an
 5 e-mail from my staff this morning, I think we're
 6 lacking three items at this time. House District
 7 Maestas, House District James, and Congressional
 8 District Maestas.
 9 Q. And are those map packets that are
 10 uploaded?
 11 A. All the other map packets are loaded, to
 12 my knowledge.
 13 Q. So those are the map packets that you
 14 prepare for the litigation, which I assume reflect
 15 or mirror what you prepared during the legislative
 16 session?
 17 A. Correct.
 18 Q. Now, who, besides yourself, prepare the
 19 map packets, both during the session and to load
 20 them onto the Web site?
 21 A. Well, our staff. Michael Sharp is the
 22 head technical man for Research & Polling. Adam
 23 Hoffman is a map maker. And we have various
 24 database people who perform various functions in
 25 order to allow the map packets to come to fruition.

1 Q. And did you use any sort of software in
 2 particular to prepare these?
 3 A. Yeah, AutoBound software.
 4 Q. I'm sorry what's the name of it?
 5 A. AutoBound.
 6 Q. Is that generally recognized in the field?
 7 A. Yes, that's pretty much the most
 8 sophisticated GIS software. It's not as user
 9 friendly as some of the others, but it has more
 10 capabilities.
 11 Q. Okay. Let me hand you what I've marked as
 12 Governor's Exhibit A to the deposition.
 13 (Exhibit A Marked for Identification.)
 14 Q. And ask you if you can identify that?
 15 A. This appears to be a map packet of current
 16 House districts, of the current districts as they
 17 lie today.
 18 Q. Okay. Reflecting that 2001 Court ordered
 19 map?
 20 A. 2001. Correct.
 21 Q. And the rest of it -- I mean, you're
 22 looking at the top page, but I'm assuming that the
 23 rest of them are what you described to us as a map
 24 packet?
 25 A. Correct.

1 Q. All right. Now, looking at this map
 2 packet, can you explain to me what is -- if
 3 anything, is wrong with it? And when I say "wrong,"
 4 I mean, over the last ten years, has the -- has the
 5 reality in New Mexico changed such that this map,
 6 this map packet, is unconstitutional?
 7 A. Yes.
 8 Q. And why do you say that?
 9 A. Because of the population shifts in New
 10 Mexico. The populations of some of these districts
 11 have become -- greatly exceeded the ideal population
 12 of a district or greatly less than the ideal
 13 population of a district due to population changes
 14 over the state over the past decade. That would be
 15 the primary issue.
 16 Q. Therefore, demanding reapportionment,
 17 redistricting?
 18 A. Correct.
 19 Q. All right. Looking at this map, or this
 20 map packet, where would you contend, where do you
 21 contend that the population has shifted? To where
 22 and from where?
 23 A. The population has shifted from the
 24 eastern half of the state, which, if you were to
 25 take a line down the state in the eastern half, that

1 message, the one I would have sent.

2 Q. First paragraph, the Governor indicates
3 that she is vetoing House Bill 39, sending it back,
4 right?

5 A. Correct.

6 Q. Second paragraph she says, "Rather than
7 shifting districts for the New Mexico House of
8 Representatives fairly, based upon population
9 changes throughout the State, this bill is an
10 example of the Democratic majority using population
11 deviations among districts in order to promote
12 partisan goals to the exclusion of fair
13 redistricting principles."

14 Do you agree or disagree with that
15 statement by the Governor?

16 A. I think the words "partisan goals" I was
17 curious about. Do you want me to talk about my
18 issues?

19 Q. Sure. That's what we're here for.

20 A. Okay. Well, if "partisan goals" means,
21 let's say, a net benefit to the Democrats, then I
22 don't see as it relates to the -- deeper down into
23 the veto message relates to North Central New Mexico
24 and avoiding consolidating a seat and that that
25 created partisan goals or net advantage to the

1 Democrats. Had a North Central seat been
2 consolidated, a new West Side seat would have
3 emerged that would have been a Democratic seat. So
4 to that extent, that consolidation with the
5 deviations would not have been a net gain for the
6 Democrats.

7 Had they consolidated the Los Alamos seat
8 in North Central New Mexico and carved it up among
9 the others to allow the remaining seats to exist,
10 that would have been a net benefit to the Democrats.
11 It would have been a net of two, because the Los
12 Alamos seats, which is Republican, would have been
13 eliminated and a new seat would have emerged in
14 Albuquerque to be Democratic and would have been a
15 net benefit of two. But they did not crunch the Los
16 Alamos seat, which was Republican, and they -- Los
17 Alamos is a distinct community of interest, and they
18 chose not to do so.

19 And so the issue of over- -- what the
20 Governor calls overpopulating the Albuquerque area
21 and, although that's true, appeared not to be done
22 for partisan goals because of the 19 seats in
23 Albuquerque Metro that were in the high end above
24 plus 3 percent deviation, ten of them were
25 Democratic seats, none of them were Republican

1 seats.

2 So as it relates to the partisan goals,
3 there was no net gain by avoiding not consolidating
4 a North Central seat. There would have been a net
5 gain by consolidating Los Alamos, which they chose
6 not to. And there was no net gain by what the
7 Governor calls overpopulating the Albuquerque seats
8 because half of them were D. and half of them were
9 R.

10 So I guess promoting partisan goals is one
11 thing that caught my eye.

12 Q. What do you mean, it caught your eye?

13 A. About whether it was accomplished for that
14 purpose.

15 Q. Do you think it was accomplished for that
16 purpose?

17 A. If by "partisan goals," we mean a net gain
18 in Democratic seats, that did not occur.

19 Q. How about a -- merely a net gain or a
20 status quo in the North as opposed to depriving
21 Albuquerque of an extra seat?

22 A. A net gain, I've looked at that. The
23 implication in the veto message is that by
24 under-populating the North Central seats, a seat was
25 avoided to be paired, and by over-populating

1 Albuquerque a seat -- what word did you use? Was --
2 Albuquerque was deprived, it was the claim.

3 A closer examination of North Central
4 seats that -- in the Democratic majority plan that
5 was adopted by the legislature, is that actually,
6 the underpopulation was minus 41 percent. In other
7 words, if you add up all the pluses and minuses of
8 the 11 North Central seats and you add up all the
9 deviations, it comes to minus .41, or four-tenths of
10 a seat that was saved, if you will, if you want to
11 add up all the deviations.

12 The remaining 60 percent of the seat to
13 retain the 11 districts in North Central New Mexico
14 actually occurred by expanding the boundaries of the
15 district -- of the House 68 and House 50 beyond the
16 existing boundaries that had conformed to those 11
17 districts.

18 So underpopulation does explain part of
19 how they chose not to consolidate a North Central
20 seat, but also a bigger explanation was expanding
21 the boundaries into other counties in Northern New
22 Mexico.

23 Q. Wouldn't -- whether you call it a partisan
24 goal or you call it incumbent protection, isn't the
25 net affect of what happened is that the seats in the

1 page here and we start with the Democrats, since
2 most of them are Democrats.

3 Q. Right.

4 A. House District --

5 MR. STELZNER: Do you want to mark
6 this before you start describing it? It's up to
7 you.

8 MR. KENNEDY: Yeah, I guess we
9 probably should. I think we're at D.

10 (Exhibit D Marked for Identification.)

11 Q. Go ahead.

12 A. Okay. Just looking at this starting at
13 the top, we won't include 65, because that's a
14 Native American country. 46 would be one. That's,
15 you know, Ben Lujan there. And 40 would be another.
16 That's Nick Salazar, and 48 would be in Santa Fe.
17 41 --

18 Q. Who in Santa Fe?

19 A. Lucky Varela.

20 41, the name will come to me in a minute.
21 70, that's Richard Vigil; 42, Bobby Gonzales; 45, is
22 in Santa Fe.

23 Q. Who's that?

24 A. Jimmy Trujillo. 47 is Egolf. 68 is
25 Thomas Garcia. One, two, three, four, five, six,

1 seven, eight, nine.

2 Then we have on the Republican side, we
3 have to add Los Alamos. So that would be 43, 9 is
4 Indian country, 5 is Indian country, 52 is Las
5 Cruces, Doña Ana County, Indian country. 69, 16, 6,
6 33, 34, 12, 39, 10, 13 -- oh, 50. Rhonda King. So
7 one, two, three, four, five, six, seven, eight,
8 nine, ten, and one, those are the ones.

9 Q. So ten Democrat seats and one Republican
10 seat?

11 A. So this is -- I define North Central as
12 Santa Fe on up, including Taos, Mora, San Miguel.
13 And --

14 Q. So --

15 A. So if you were to then take, for example,
16 that minus on 46, the minus 4.87 and add to that the
17 minus 4.78, and so on and so forth, and do that with
18 these 11 districts, that's where my cumulative minus
19 41 percent of the House District is coming from.

20 Q. Okay. So under House Bill 39, then, even
21 as the legislature redrew it, it still comes up with
22 an overall deviation of negative 41 percent, right?

23 A. Correct, negative 41 percent of a
24 district, of a district. And --

25 Q. Of a district.

1 A. -- the 41.9, it may have been closer to
2 42.

3 Q. How about in the region overall, do you
4 have any numbers that would tell us what the
5 negative deviation is in these 11 seats or 10 seats,
6 11 seats?

7 A. Could you repeat your question?

8 Q. Yeah. What's the negative deviation over
9 this region?

10 A. The entire region?

11 Q. Yeah.

12 A. Under this plan, the negative deviation
13 for the entire region would be even higher in the --
14 did you say in the Eastern half?

15 Q. No, sir, just this region here.

16 MR. STELZNER: You're talking North
17 Central?

18 MR. KENNEDY: Yeah, these 11 seats.

19 MR. STELZNER: The 11 seats.

20 A. I'm sorry. The deviation in these 11
21 seats is that minus 41.

22 Q. Okay.

23 A. 41 percent of a Senate District is
24 short -- House District is short. Maybe I'm not
25 understanding your question, I'm sorry.

1 Q. Yeah, maybe we're not. Let me ask you
2 this: Under the current map, what's the negative
3 deviation in this region?

4 A. Under the current map; now I understand.
5 Under the current map, this area in North Central is
6 approximately minus 100 percent of a House District.
7 So, in other words, yeah, 100 percent. If you add
8 up all the pluses and minuses, if you're really
9 referring to the -- what the current deviations are
10 of these existing districts using 2010 census, then
11 you're at about minus 100 percent. In other words,
12 down a House seat.

13 Q. Logic would tell you if you're down a
14 House seat, you eliminate it, right, if you're
15 striving for one person, one vote?

16 A. In this case, 41 percent of a House seat
17 was addressed by -- as I said, and then the other 60
18 was expanding the boundaries to find more
19 population.

20 Q. I understand what you did. I'm just
21 asking that if you're confronted, if a demographer
22 is confronted with a region that he identifies with
23 11 seats, ten Democratic, one Republican, with a
24 negative deviation of 100 percent, logic, looking at
25 it just tabula rasa logic would dictate you just

1 crunch a seat and get rid of it, right?
2 A. That would be a consideration and should
3 be given due consideration.

4 Q. Okay. The next paragraph in the veto
5 message says, quote, "This systematic usage of
6 population deviations to avoid eliminating districts
7 in a Democratic area where the population no longer
8 justifies them is unconstitutional under a
9 recent" -- we just read this, didn't we? I
10 apologize.

11 MR. STELZNER: Yes, you did --

12 MR. KENNEDY: And I apologize.

13 MR. STELZNER: And I objected.

14 MR. KENNEDY: I remember that
15 objection.

16 MR. STELZNER: Is it --

17 MR. KENNEDY: It was an asked and
18 answered objection, wasn't it?

19 Q. Next paragraph, "Upon further evaluation,
20 the intent to use population deviation for purely
21 partisan purposes becomes obvious."

22 Do you agree with that sentence?

23 A. No.

24 Q. And even though you don't agree with it,
25 can you understand how a objective observer would

1 looking at it objectively, that that intent to
2 preserve the effect and the intent to preserve those
3 11 seats could be interpreted as partisan, right?

4 MR. STELZNER: Object to the form.
5 Go ahead.

6 A. As partisan, again, people can
7 interpret -- I believe that people will interpret
8 every one of the maps as the greatest thing since
9 sliced bread and --

10 Q. I understand. All I'm asking you is, that
11 if you define "purely partisan purposes" as simply
12 no change in the number of seats statewide, then you
13 might say that this isn't purely partisan, right?

14 A. Right.

15 Q. But if someone -- if someone else looks at
16 it and says, "I know what he's doing," he being you,
17 "he's preserving those Democratic seats in the North
18 even though the population doesn't support them,"
19 you could see how someone objectively could say that
20 that's partisan?

21 MR. STELZNER: Same objection.

22 Go ahead.

23 A. The fact that the boundaries were extended
24 to preserve these seats is something that's done in
25 every plan. The issue of the minus 41 percent -- or

1 find that there was an intent to use population
2 deviations for purely partisan purposes?

3 MR. STELZNER: Object to the form.

4 A. Again, if by "partisan purposes," we mean
5 a net gain of Democratic seats over Republican
6 seats, I think I've established that that does not
7 occur under this manipulation.

8 Q. I understand that.

9 A. I would agree that -- that a document
10 could be written with that perspective.

11 Q. All right.

12 A. By someone who opposes the bill. I would
13 agree with that.

14 Q. How about someone who is just looking at
15 it objectively?

16 A. Again, if we're defining "purely partisan
17 purposes" as a net gain, that didn't occur.

18 Q. How about if we're defining "purely
19 partisan purposes" as preserving the vast majority
20 of Democratic incumbents in that region?

21 A. All 11 Democratic and -- all ten Democrat
22 incumbents and one Republican in that region were
23 preserved, I agree with that.

24 Q. You concede -- you would agree, would you
25 not, that an objective observer could say, just

1 40 percent of the seat not being able to support the
2 population that exists is a consideration, I agree.

3 Chaves County has sufficient population to
4 support two House seats. Currently, it has four
5 legislators. It's done by expanding the boundaries
6 beyond the county and taking from other counties
7 that then lose voice. They expanded their
8 boundaries. It's part of districting. I will
9 acknowledge, though, that if you accumulate all of
10 the deviations where you had 11 seats, there's
11 sufficient -- the way they drew it, there's
12 sufficient population for 10.6. And then they went
13 elsewhere to extend the boundaries.

14 It could have been drawn differently, and
15 I have spoken for months about the different options
16 of consolidating a North Central seat and Eastern
17 New Mexico seat, and that is a very viable option.

18 Q. Okay. So you would acknowledge, would you
19 not, that it could have been done differently, it
20 could have been drawn differently? And there are
21 probably any number of ways of doing it that would
22 comply with all of the redistricting principles,
23 especially one person, one vote?

24 A. There are many ways of doing it.

25 Q. All right. And all or most are

1 defensible, right?

2 A. Correct.

3 Q. The next sentence says, "For example, the
4 Westside of the Albuquerque/Rio Rancho area grew
5 explosively during the decade and there is
6 sufficient population for three new districts."

7 Do you agree with that sentence?

8 A. Yes.

9 Q. The next paragraph says, "This plan moves
10 one open Democratic district from Central
11 Albuquerque to the Westside, where it will remain
12 Democratic. To provide for a second district, this
13 plan consolidates two Republican districts in
14 southeastern New Mexico and moves one to Rio
15 Rancho."

16 Do you agree with that paragraph?

17 A. Yes.

18 Q. All right. What is the Governor referring
19 to there in terms of -- which districts are we
20 talking about, is she talking about?

21 A. House District 26 in the Southeast
22 Heights, Al Park, is consolidated among various
23 Northeast Heights districts in order to take the
24 pressure off the population east of the river in
25 Albuquerque, and it emerges on the West Side.

1 Q. Does it emerge on the West Side as an
2 independent district under the Legislative Plan?

3 MR. STELZNER: When you say
4 "independent" --

5 Q. I misspoke. Does it emerge as a separate
6 district on the West Side, or does it -- is it
7 merely extended from Al Park's old district?

8 A. Separate.

9 Q. Okay. And that's --

10 A. 26.

11 Q. Okay. And then how about there's a second
12 district referred to in that paragraph. What are we
13 talking about there?

14 A. That's -- there was a consolidation in the
15 Roswell area between, as I recall, House 57 and 66
16 and that one of those numbers then moved also to the
17 West Side.

18 Q. And who were those incumbents that were
19 paired?

20 A. Dennis Kintigh and Wooley.

21 Q. Next paragraph says, "However, for purely
22 partisan reasons, the Democratic leadership refused
23 to consolidate Democratic districts in north central
24 New Mexico to provide the justified third Westside
25 district, even though the north central area

1 experienced nearly identical population loss as the
2 eastern region of the state where the majority party
3 thought it was appropriate to eliminate a Republican
4 seat."

5 Do you agree with that paragraph?

6 A. Well, again, if we're defining partisan as
7 a net gain, there was none. In fact --

8 Q. How about if we're defining partisan some
9 other way, could you see how someone could see it as
10 partisan in some other way?

11 MR. STELZNER: Let him answer his
12 question, and then he'll answer that one.

13 A. Again, if we're referring to preserving
14 the ten Democrats and the one Los Alamos Republican,
15 if that's partisan, then yes.

16 If it's --

17 Q. How between -- I'm sorry, I don't mean to
18 interrupt. Go ahead.

19 A. And again, there's -- the seats were
20 preserved.

21 Q. All right.

22 A. And there was a -- there was a -- and
23 they -- they're Hispanic districts, they respected
24 an incumbent residential incumbancy and preserved
25 the core of existing districts, but they preserved

1 them. There was a population -- that area did not
2 keep pace with population. All of those things are
3 correct.

4 Q. How about if there's a pairing of Kintigh
5 and Wooley, could you see that as being partisan?

6 A. No, because there -- the Kintigh/Wooley
7 pairing, then the district -- it was a safe
8 Republican, both of them are safe Republican seats.
9 The seat that emerged, 66 in Rio Rancho, is safe
10 Republican. So there was no net change in party.

11 The -- Al Park's seat, actually, there was
12 a bit of a change. It went from safe Democrat to
13 lean Democrat as it moved from the Southeast Heights
14 to the West Side.

15 And then there was another pairing in the
16 plan that moved from lean Republican to strong
17 Republican. So actually, the consolidations had a
18 slight partisan benefit for the Republicans.

19 Q. What was the deviation down there with
20 Wooley and Kintigh?

21 A. The deviations of the -- their districts
22 using 2010 census, their current boundaries? I
23 happened to bring a map in case you asked such a
24 question.

25 Q. Well, thanks so much.

1 A. House 57, which is Kintigh, had a
2 deviation of minus 11.4 percent below the ideal
3 population of a district. And Representative
4 Wooley, House 66, was plus 1 percent above the ideal
5 population of the district.

6 Q. That's under the Legislative Plan --
7 that's under the current plan?

8 A. Yes, I'm sorry.

9 Q. No, that's all right. Isn't there a --
10 under the current plan, we've agreed that there is
11 100 percent negative deviation in this North Central
12 region, right?

13 A. Correct.

14 Q. All right. Is there somewhere in the
15 Roswell area a 100 percent negative deviation also?

16 A. There was the 100 percent deviation in
17 North Central.

18 Q. Right.

19 A. And there's about maybe a 110 percent
20 deviation in the East Side.

21 Q. All right.

22 A. And then just someone has to make a choice
23 of where the consolidation occurs.

24 Q. You have anticipated my next question.
25 The legislature chose to pair Kintigh and

1 district in the north central region and providing
2 the appropriate additional new district on the
3 Westside of Albuquerque was to grossly over-populate
4 the Albuquerque districts, while simultaneously
5 under-populating the districts in north central New
6 Mexico."

7 Do you agree with that statement?

8 A. No, that's incorrect.

9 Q. Why do you disagree?

10 A. Well, what it's saying is the only way of
11 avoiding crunching a North Central seat and avoiding
12 providing appropriate seat in the new West Side is
13 by overpopulating Albuquerque. There are other ways
14 of doing it.

15 Q. Okay. There's probably an infinity of
16 ways of doing it, right?

17 A. Yeah, the Egolf Plan avoids pairing a
18 North Central seat and has no accumulation of
19 negative deviations in North Central and no
20 accumulations of positive deviations in Albuquerque
21 and avoids pairing a North Central seat.

22 Q. All right. But let's just talk about --
23 instead of Egolf Plan, let's talk about your plan
24 that you're defending here.

25 A. Sure. I was just referring to "The only

1 Wooley to cure that deviation and move that seat
2 west?

3 A. Correct.

4 Q. The legislature could just as easily have
5 chosen to pair, say, Vigil and Salazar and move that
6 seat to Albuquerque, right?

7 A. Correct.

8 Q. Do you see the selection of the Republican
9 pairing when there was an alternative Democratic
10 pairing as a partisan choice?

11 A. I see it as a political choice.

12 Q. Okay. What's -- where are we? I know
13 what I'm going to do.

14 MR. STELZNER: That's the question of
15 the day.

16 MR. KENNEDY: I'm going to read the
17 same paragraph again.

18 MR. STELZNER: It looks like we're
19 on -- I think it was the "However" paragraph, Paul?

20 MR. KENNEDY: We read that, didn't
21 we?

22 MR. STELZNER: Yeah, you read that.
23 That was the last one.

24 Q. We'll go to the next one.

25 "The only way to avoid eliminating a

1 way" issue.

2 Q. Would you agree with me that under the --
3 under this Legislative Plan, the North Central
4 region that we've been talking about, and we know
5 what the negative deviation is there, would you
6 agree that the core Albuquerque seats -- or all of
7 the Albuquerque seats are positive deviations?

8 A. In the plan that passed the legislature?

9 Q. Yes.

10 A. I would agree that nearly all of them, not
11 all of them.

12 Q. All right. And so when the Governor is
13 referring to "grossly over-populate the Albuquerque
14 districts," would you dis- -- you agree that they
15 are overpopulated, would you agree that they are
16 grossly overpopulated?

17 A. I would agree that each individual
18 district is not grossly overpopulated; in that, it
19 complies with the plus or minus 5 percent deviation.
20 I would agree also that the sum of the cumulative
21 deviations in the Albuquerque area as a whole errors
22 on the side of having many more districts that are
23 overpopulated within that plus or minus 5 percent,
24 yes.

25 Q. So other way to express it, I guess, is

1 that the Albuquerque -- in order to relieve the
2 pressure on the North, the Albuquerque seats are
3 packed?

4 MR. STELZNER: Object to the form.

5 A. Under this plan?

6 Q. Yes.

7 A. Under this plan, the Albuquerque districts
8 are mostly on the high end of the ideal population.
9 And I would agree that a contributing factor to that
10 was the lack of consolidation of a second seat
11 somewhere in the Eastern half of the State,
12 including North Central.

13 It's a contributing factor because there
14 are ways it could have been done, but so --

15 Q. Or the lack of a consolidation of a North
16 Central seat, right?

17 A. Can you repeat it?

18 Q. Right. You said that the overpopulation
19 in Albuquerque was the result of failing to
20 consolidate another East Side seat. It also could
21 be because there was a failure or refusal to
22 consolidate a North Central seat, right?

23 MR. VARGAS: Object to form,
24 mischaracterizes his testimony.

25 MR. STELZNER: Same objection.

1 there was no net gain for the Democrats.

2 Q. That's if you define "partisan" --
3 "partisan purpose" only to -- only looking at
4 "partisan purpose" as a --

5 A. Correct.

6 Q. -- as a net gain or no net gain?

7 A. Right. If we do look at it that way.

8 Q. Right.

9 A. Which typically, in redistricting, people
10 do, who gains and loses seats. But, yes, and that
11 has that assumption in it, yes.

12 Q. Okay.

13 A. "The result...manipulates population
14 deviations for partisan purposes and severely
15 dilutes the voting power of New Mexicans in certain
16 regions."

17 You know, it depends on what you call the
18 word "severe" and if a negative accumulation of
19 41 percent of the seat being missing out of 11 is
20 severe, I -- I would disagree with that degree --
21 that adjective.

22 "This tactic is precisely what...testified
23 to in committee and what was found to be
24 unconstitutional..."

25 Again, Larios has certain points --

1 A. I might have to restate what you said.

2 Whether it be a consolidation of a North
3 Central seat or a consolidation of a Southwestern
4 seat, that then appears on the West Side, there are
5 other plans on the table that did it in different
6 ways. But to bring a new seat into Albuquerque
7 would reduce the high deviations throughout the
8 metro area. It doesn't have to be North Central.
9 Other plans do it in different ways.

10 Q. But if it was taken out of the North
11 Central, that would cure the significant negative
12 deviation in the Legislative Plan, would it not?

13 A. It would.

14 Q. Quote, "The result impermissibly
15 manipulates population deviations for partisan
16 purposes and severely dilutes the voting power of
17 New Mexicans in certain regions. This tactic is
18 precisely what the demographer testified to in
19 committee and what has been found unconstitutional
20 by the United States Supreme Court."

21 Do you agree with that paragraph?

22 A. No.

23 Q. Why not?

24 A. "The result impermissibly manipulates
25 population deviations for partisan purposes," again,

1 certain issues on point here, but the degree is very
2 different than -- that would only be up to a judge
3 to decide whether it's constitutional by that
4 District Court case.

5 Q. Let me ask you this: Assuming that you're
6 the demographer referred to in this paragraph, did
7 you -- is your testimony accurately reflected in
8 this paragraph?

9 A. About the paragraph on the results?

10 Q. No, it says, "This tactic is precisely
11 what the demographer testified to in committee..."

12 A. No.

13 Q. You didn't say that?

14 A. I talked about what happened, but I don't
15 think I talked about a tactic of "impermissibly
16 manipulating population deviations for partisan
17 purposes...severely dilutes the voting power of New
18 Mexicans" answer. I didn't say that.

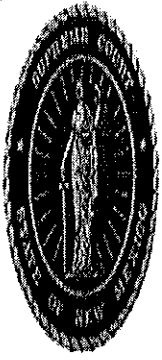
19 Q. Next paragraph says, quote, "This bill was
20 introduced and passed without any meaningful
21 negotiations with Republican legislators, or my
22 office. The bill received bipartisan opposition in
23 the House and Senate and did not receive a single
24 Republican vote. The plan is so detrimental to the
25 Westside of Albuquerque that a Democratic Senator

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