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

Plaintiff-Petitioners,

v.

D101-CV-2011-02942
D101-CV-2011-02944
D101-CV-2011-02945
County of Santa Fe
First Judicial District Court
(CONSOLIDATED)

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, JR., in his official capacity as Speaker of the
New Mexico House of Representatives,

Defendant-Respondents.

THE MAESTAS PLAINTIFFS' CLOSING BRIEF FOR REDISTRICTING THE NEW MEXICO HOUSE OF REPRESENTATIVES

COMES NOW, the Maestas Plaintiffs by and through Counsel, and as directed by the Court, respectfully submit the post-trial brief for the redistricting of the New Mexico House of Representatives. The Maestas brief demonstrates – based on the evidence presented at trial – why the Court should adopt the Maestas 2 Plan or Maestas Alternative Plan, both which of maintain low deviations while recognizing traditional redistricting principles, maintaining partisan neutrality and the long-standing state and federal policies of tribal self-determination.

I. Introduction

Article. IV, § 3 of the New Mexico Constitution establishes a State House of Representatives with 70 seats. In redistricting those 70 seats, an apportionment plan must conform to the standards established by the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution*, U.S. Const. amend XIV* ("Equal Protection Clause"), the New Mexico Constitution and the Voting Rights Act of 1965, 42 U.S.C. §§1973-1973gg-10 ("Voting Rights Act"). The ideal State House of Representatives district based upon the 2010 census has a population of 29,417.

As stipulated to by the parties to this litigation (Joint Stipulation December 4, 2011) the current plan, from 2002, is unconstitutional under the Fourteenth Amendment and the New Mexico Constitution Art. II, Section 18. Because of the suits filed, the current plan is enjoined from use in future elections.

During the 2012 Special Session called by the Governor, the Legislature passed House Voters and Elections Committee Substitute for House Bill 39 ("House Bill 39") to provide for the redistricting of the New Mexico House of Representatives ("state House"), which was consequently vetoed by the Governor on October 7, 2011 in House Executive Message No. 11 (*Maestas exh. 10*). While redistricting is primarily a legislative duty, courts must intervene in the redistricting process when no redistricting law is enacted. *White v. Weiser*, 412 U.S. 783, 794-95 (1973). As established in *Growe v. Emison,* state courts – as opposed to federal courts - are particularly appropriate for this task. *Id.,* 507 U.S. 25 (1993). The law, however, as applied to plans drawn or adopted by state courts contain specific mandates more strict than the those of the Legislatively-drawn maps and less strict than those binding the federal courts (for reasons of more limited jurisdiction). This court is

now presented with the complex challenge of drawing or adopting a plan to redress the constitutional violation of malapportionment (Joint Stipulation filed December 4, 2011).

Maestas Plans Invoke the Best of All Plans

In opening statements, Mr. Thomson described the Maestas 2 Plan as the court's "cafeteria plan," meaning that if the court were to chose the best attributes of all the plans submitted, the court would be left with the Maestas 2 Plan. And by instruction from the court, the Maestas Alternative improved on the Maestas 2 Plan with even lower deviations, a pairing in north central and elimination of the triple incumbent pairing in Roswell. From the evidence presented at trial, either Maestas plan should be adopted under the constraints of the court's discretion and discernable standards of law. The Maestas plans are superior because the evidence demonstrates that they are the *only* plans that contain *de minimis* deviations (Maestas 2 has an average deviation of 1.3%; Maestas Alternative has an average deviation of 1.1%), conform to traditional redistricting principles, have been declared partisan fair, proportionally district new seats in areas of clear growth and underrepresentation, and recognize the well-established state policy of tribal sovereignty and self-determination.

II. Argument

A. Maestas Plan Strong From the Beginning and Alternate Plan Was Least Changed

In the trial of the New Mexico House of Representatives reapportionment, the court was initially presented with six complete plans and two partial plans. Over

the course of the trial, however, the parties to the litigation introduced a number of amended and alternative plans, often at the request of the court, bringing the total number of complete plans to at least 14. These amended and alternative plans attempted to conform to concerns expressed by your Honor namely, to comply with the Multi-tribal Plaintiffs' and Navajo Intervenors' proposed partial plans and to eliminate a seat in North central New Mexico.

The Maestas Plaintiffs proffer two plans – the Maestas 2 Plan and the Maestas Alternative Plan. The Maestas 2 Plan, which was introduced prior to the beginning of trial, already incorporated Native American preferences expressed through the partial plans. However, the Maestas Plaintiffs did proffer an alternative plan (see Maestas Exh. 23 entitled "Maestas Alternative Plan"), which eliminated a district in North central and moved the seat to the Chaves County / Roswell area in order to redress an unsightly (but justified by Sanderoff testimony Dec. 12, "There are currently 4 seats in Roswell, when they are only entitled to two.") triple incumbent pairing. Although the Maestas Plaintiffs assert that no north central pairing was necessary and that the late introduction of maps was problematic, the Maestas Plaintiffs do offer the Maestas Alternative Plan as a viable and promising option for the court. The Alternative makes only a *minimal change* to the Maestas 2 Plan, which was disclosed before trial and fully litigated. In the Maestas Alternative, the plan pairs Rep. King (D-50, Santa Fe) and Rep. Hall (R-43, Los Alamos), which was the only possible pairing in the region with the constraints of express tribal preferences, including one of the Maestas Plaintiffs. (See Direct Examination of Governor Lovato, Dec. 20, 2011 and the Direct Examination of Alvin Warren.) While

the pairing affects other districts, the population shifts are minimal in the north central, but sufficient to bring the mean deviation down .2%. Further, the number of Democratic-performing districts remains the same as in the Maestas 2 map. Lastly, the map retains its most attractive features – conformance to Native American preference, new seat in Dona Ana, partisan neutrality, three seats for the west side and high levels of compactness.

Other parties also offered alternative plans mid-litigation. The court should note, however, that at least one party abused the opportunity to submit alternative plans by introducing plans that simply advance partisan political interests under the guise of complying with your Honor's request. The Executive Defendants proffered Executive Alternative Plans 3 and 4 in the final week of trial. Most experts testifying at trial did not have an opportunity to review or present evidence on these alternative plans. However, on the final day of trial, Dr. Jim Williams exposed the tactic to the court when he noted that *at least two additional* Republican performing districts were created in Executive Alternatives 2 and 3. In terms of recognizing Native American preferences, Executive Alternative 2 does not conform to the Multi-Tribal Plaintiff partial plan. The record is unclear whether Executive 3 adopts both partial plans in full. Assuming it does, the Executive 3 Plan still falls short of respecting tribal self-determination as it continues to fracture trial boundaries in the north central portion of the state. These fractures include splitting Ohkay Owingeh between House District 40 and 41 and separating the majority of Ohkay Owingeh's population from its current representative, Rep. Nick Salazar (D-40, Espanola).

The Maestas Plaintiffs assert that unless an alternative plan makes only minimal changes to a fully litigated plan it is difficult for the other litigants, let alone the court, to wholly analyze a map to determine the best option for what could be the next decade of elections. In a judicial redistricting, the litigation process exposes the benefits and drawbacks of each map. This may be the judicial equivalent to the deliberative process in the legislature. Without the vetting of litigation or some evidence or assertion of minimal change, a clear danger exists that parties will exploit the short time frame to garner significant partisan advantage (as at least the Executive Defendants do with Executive 3).

B. Legal Standard

While court-drawn or –adopted plans must conform to the same governing authorities as the legislature, legislatures are granted much more deference in deviations because of its well-established policy-making role. Courts, on the other hand, are bound to a stricter standard when left with the task of redistricting. *Connor v. Finch*, 431 U.S. 407 (1977). From review of these plans and the evidence presented, this court is asked to ferret out findings and make conclusions of law in order to choose the appropriate reapportionment for the state House. Certainly, the court plan will comply with one person, one vote *de minimis* requirement of the Equal Protection Clause[1] as well as § 2 of the Voting Rights Act[2]. However, consideration for state policy as expressed in statutory or constitutional provisions cannot be ignored even when a court is reluctantly involved in redistricting. In fact,

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[1] *Chapman v. Meier*, 420 U.S. 1, 27-27 (1975)(stating that a court-ordered plan

[2] While the court in Abrams v. Johnson, 521 U.S. 74 (1997) assumes a court should comply with § 2 of the Voting Rights Act, no court plan has ever been held to violate § 2.

a judicial reapportionment plan should reflect policy decisions made by the legislature even when the legislature has abdicated its responsibility to redistrict. *Abrams v. Johnson,* 521 U.S. 74, 79 (1997) ("When faced with the necessity of drawing district lines by judicial order, a court, as a general rule, should be guided by the legislative policies underlying the existing plans, to the extent those policies do not lead to violations of the Constitution or the Voting Rights Act."). New Mexico state policy clearly expresses a respect for Native American sovereignty and self-determination, which in redistricting points to a deference for Native American preferences. Such state policy considerations also extend to traditional districting principles including compactness, contiguity, retaining the core of existing districts, avoiding contests between incumbents[3], and protecting communities of interest.

For the reapportionment of state legislatures, the Equal Protection Clause rather than Article I, Section 2 of the U.S. Constitution is the legal foundation for the one person one vote requirement. This is an important difference because in contrast to Congressional districting where precise population equality is the preeminent – if not the sole – concern, the court acknowledges "leeway in the equal-population requirement" for a legislative reapportionment plan. *Chapman v. Meier*, 420 U.S. 1, 23 (1975). To a different degree, that leeway is permissible in both legislatively-enacted maps and court-drawn maps. While a legislature may adopt a state House plan with deviations of up to ten percent (the controversial and unsettled "safe harbor" articulated in *White v. Regester*, 412 U.S. 755 (1973)) without violating the

[3] Colleton County Council v. McConnell, 201 F.Supp.2d 618, 647 (D.S.C. 2002) (finding incumbent protection to be a traditional state interest); Prosser v. Elections Bd., 793 F.Supp. 859, 871 (W.D. Wis. 1992) (discussing incumbent pairings as avoidance of "perturbation in the political balance of the state.")

Equal Protection Clause, court-drawn plans are held to a much higher standard. *Connor,* 431 U.S. 407. Unfortunately, there is no threshold deviation binding the courts with a defined standard. *Id.* The only clear direction for a court-drawn state legislative redistricting map is *approximate* population equality or *de minimis* deviation. *Id.* Constrained by this *de minimis* standard, courts seem to adopt or draw maps with average deviations below the +/-5% or total deviation of 10% that often guides Legislatures. If a plan tends towards the upward range of the +/- 5%, the plan may be considered beyond *de minimis* deviation or approximate population equality and a court may justify those deviations with an "enunciation of historically significant state policy or unique features." *Chapman*, 420 U.S. at 26.

For a court to diverge from *de minimis* deviation, a court must justify those deviations in its findings. The court has the burden to "elucidate the reasons necessitating any departure from approximate population equality and articulate clearly the relationship between the variance and the state policy furthered." *Id.* at 24. Because the state court is uniquely situated to understand the nuances of New Mexico and well-versed in the application New Mexico law, this court should be compelled to recognize Native American sovereignty and self-determination as significant state policy in order to implement the proper redistricting solution for the state House.[4]

In the Maestas 2 Plan and the Maestas Alternative Plan, the average and mean deviations are 1.3% and 1.1%, respectively. (See Maestas Exh. 2 and 23 and Direct

[4] It is clear from the evidence presented at trial that Native American sovereignty and self-determination are a significant state policy in New Mexico. During the trial, the court took judicial notice of laws recognizing such, including the State-Tribal Collaboration Act. (See Maestas Exh. 3)

Examination of Rep. Moe Maestas, Dec. 20 and Dec. 22) The median deviation in both plans is 1.1%. (see Executive Exh. 20) The Maestas Plaintiffs submit that this deviation is *de minimis*. The range of deviation, however, (defined as the difference between the most overpopulated and the most under-populated districts) is 8.6 in the Maestas 2 Plan and 7.1 in the Maestas Alternative Plan, which parties will argue may require significant state policy to justify. If the court adopts this line of thinking, the Maestas Plaintiffs argue that its higher deviation districts can be accounted for by both plans' adherence to Native American preferences and avoiding Voting Right Act liability. The Maestas 2 and Maestas Alternative plans maintain the six majority Native American districts adopted by the 2002 court in *Jepsen* and increase the Native American voting age population percentage in those districts to above 65%. Both Mr. Sanderoff and Dr. Engstrom testified that this high Native American VAP percentage results in effective majority-Native American districts where Native Americans have a sufficient opportunity to elect candidates of their choice. Thus, the range of deviation in the Maestas Plans correspond to furthering significant state policies – tribal sovereignty and self-determination recognizing the special status of tribes and avoiding § 2 liability of the Voting Rights Act because of the historical dilution of minority voting power.[5] *Chapman*, 420 U.S. at 24.

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[5] The Jepsen Court found that a population deviation as high as + 4.8% was acceptable in order to create a majority Native American seat "to remedy the dilution of Native American voting rights." *Jepsen*, Finding 35, at 7. If this deviation represented both the underrepresented and overrepresented extremes used to calculate overall deviation, the overall deviation would be 9. 6. The deviation was not subservient to neutral redistricting principles. The deviation was also justified by natural, political and traditional boundaries.

The judicial power created by U.S. Const. art. III is limited by the requirement "that judicial action must be governed by standard, by rule. *Vieth v. Juberlirer*, 541 U.S. 267, 278 (2004) (talking about political gerrymandering as grounds for challenging legislatively-passed maps.) This is the inherent difference, however, between laws promulgated by the legislature and laws pronounced by the courts. Laws passed by the legislature "can be inconsistent, illogical, and ad hoc." *Id.* In contrast, laws pronounced by the courts must be "principled, rational and based on reasoned distinctions." *Id.* It is with ease that this court should find that the legitimate and important state policy of self-determination may justify higher deviation districts provided that those deviations are proportional to furthering the state policy recognized.

C. Tribal Self-determination

New Mexico is uniquely situated in that it encompasses 19 pueblos and three reservations. The Maestas Plaintiffs assert that this is a unique feature of New Mexico sufficient to justify higher population deviations under *Chapman.* Native Americans in New Mexico constitute 10.7% of the overall population of the state. Both the state and the federal government recognize the special status of tribes as sovereign nations, often described as "domestic dependent nations." The federal government granted tribal sovereignty through treaties, Congress and the courts. There is a long line of cases precluding states from interfering with tribal nations' sovereignty. *Montana v. U.S.* , 452 U.S. 911(1981); *Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134 (1980); *U.S. v. Mazurie,* 419 U.S. 544

(1975). In 2009, the Legislature passed the New Mexico State-Tribal Collaboration Act, which codified state recognition of tribal self-determination. *NMSA 1978 §§ 11-18-1 to 15 (2009).* This is a clear expression of New Mexico state policy, which the court took judicial notice of during trial. Self-determination is a key aspect of Native American sovereignty and should be recognized particularly in regard to participation in the state political process.

As presented by Alvin Warren at trial, many tribes collectively formed a collaborative body to attempt to assert their participation in the redistricting process for the first time in the history of New Mexico. (See Direct Examination of Alvin Warren.) The Native American Redistricting Workgroup (NARWG) met throughout the 2011 interim to establish principles for redistricting Native American voters and endorses partial redistricting maps conforming to tribal preferences. The NARWG presented these principles and maps to the Legislative Redistricting Committee. This was an important step in the enfranchisement of Native Voters, but should also be considered an expression of Native American policy. Ultimately, the reason to recognize tribal preference is not the fact that Native Americans are a race classification protected under the Voting Rights Act, but because of the special political status of tribes and tribal lands granted by the federal government and recognized by the state of New Mexico. Because tribes are recognized as sovereign governments, tribal membership is a political classification that is an expression of the tribe's self-governance not a racial classification. *Morton v. Macari*, 417 U.S. 535, 553-54 (1974). In light of federal and state policies recognizing the sovereignty and self-determination of Indian tribes, it should be a

mandate of this court to recognize the tribes' exercise of self-determination in asserting preferences for redistricting as a significant state policy in New Mexico. This significant state policy may justify greater than de *minimis* deviations tailored to advance the interest.

D. Voting Rights Act

First, the courts recognize a state interest in compliance with § 2 of the Voting Rights Act. *Bush v. Vera*, 517 U.S. 952, 990 (1996). Provided that these interests are not subordinate to traditional redistricting principles, race-based factors may be considered as long as they are narrowly tailored. *Shaw v. Reno*, 509 U.S. 630 (1993); *Bush,* 517 U.S. 952. The state – including this court - can and should make reasonable efforts to avoid § 2 liability. *Abrams,* 521 U.S. 90 at 90. ("We will assume courts should comply with [§ 2] when exercising their equitable powers to redistrict.") This compliance with § 2 mandates this court to maintain six majority Native American districts containing significant voting age populations so as to avoid dilution of Native American voting strength as well as pay special attention to the 1984 creation of House District 63 a majority-Hispanic district in Clovis.

Thornburg v. Gingles ("Gingles") establishes the test for a violation of § 2 of the Voting Rights Act. In order to demonstrate a violation, three preconditions must be established*. Id.,* 478 U.S. 30, 50-51 (1986). The *Gingles* preconditions require (1) a particular racial group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the racial group is politically cohesive; and (3) the majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate*. Id.* The court heard evidence of two

populations that meet the Gingles preconditions: House District 63 in Clovis and the Native American statewide.

For the Hispanic population in Clovis, the court heard ample evidence of a history of voter discrimination and disenfranchisement and bloc voting by the anglo population. (See Direct Examination of Sanderoff, Dec. 12, 2011) In fact, in 1984, the court created this district specifically to remedy violation of the Voting Rights Act. Id. During the Legislative redistricting hearings, the Legislative Redistricting Committee heard evidence of the continued practice of discrimination and bloc voting causing House District 63 to be crafted with care in the legislative proposals, specifically House Voters and Elections Committee Substitute for House Bill 39 which is currently be considered by this court. *Id.* While the Maestas Plaintiffs do not assert that the Hispanic population statewide meets the Gingles test, the evidence clearly isolates the Clovis-Portales area of the state and requires a majority-Hispanic district be maintained there. The Maestas Plans keep House District 63 in tact and a Hispanic-majority district mirroring the proposal by Legislative Defendants.

For Native Americans statewide, the Maestas Plaintiffs argue each of the preconditions are met because 1) the Native American population in the northwest quadrant is large and compact enough to create six compact majority Native American districts; 2) the Native American population is politically cohesive; and 3) that racial bloc voting is sufficient to defeat the candidate of choice for the Native Americans. The evidence clearly establishes the preconditions. Once established,

the court must consider the totality of circumstances. *Id.* at 46. The court heard evidence of a history of discrimination of Native Americans and pervasive electorate disenfranchisement. In fact, the state of New Mexico denied the Pueblo and Navajo people living on tribal lands the right to vote in state elections until 1948 and 1962, respectively. (See Direct Examination of Alvin Warren.) The courts have recognized that New Mexico has a history of racially-polarized voting against Native Americans. *Jepsen v. Vigil-Giron*, Findings 11 & 12, No. D-101-CV-2001-02177, at 14 (N.M. 1st Judicial Dist. Jan. 24, 2002); *Sanchez v. King*, No. 82-0067-M at 20-25 (D.N.M. Aug. 8, 1984). The court also heard evidence of districting practices that would inhibit the recent progress of Native American participation in the state political process, such as pairing House District 40 or 41 in the north central fracturing the core character of the districts (See Direct Examination of Governor Lovato and Alvin Warren, respectively). A number of Native American witnesses spoke to why asserting preference was important – because tribes build relationships with communities within the district to accomplish goals, because sacred sites should be districted with those interested in protecting those sites and because Native Americans have worked diligently to educate particular incumbents. (See Multi-Tribal Plaintiffs and Navajo Interveners case in chief). There is ample evidence in the record that the Maestas Plans comply with the Native American preferences through complete adoption of the partial maps and maintaining the core character of existing districts in north central New Mexico.

Further, the *Jepsen* court mandated a redistricting map that contained six majority Native American districts. *Jepsen*, Finding 34, at 7.[6] The Native American Redistricting Working Group requested the maintenance of those six districts. (See Maestas Exh. 4) Effective majority Native American districts were defined as districts in excess of 60% non-Hispanic Native American voting age population. *Jepsen*, Finding 26, at 5. (See also Direct Examination of Sanderoff) While effective majority-minority districts do not mean the minority candidate will always be elected, the 60% threshold seems to provide a reasonable opportunity for Native Americans in those districts to elect the candidates of their choice. The "ultimate right of § 2 of the Voting Rights Act….is equality of opportunity, not guarantee of electoral success for minority-preferred candidates of whatever race." *Johnson v. De Grandy*, 512 U.S. 997 (1994).

The Maestas Plans contain six majority Native American districts. Each of these districts are comprised of a Native American voting age population of over 65%, higher than the percentages identified as an effective threshold by the *Jepsen* court. Further, the Maestas Plaintiffs ensure there is no voter dilution among Native American populations who do not make up the majority in a district but, as a group, influence the outcome of an election.[7] Currently, Native Americans comprise 10.7%

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[6] The six majority Native American House districts in the current map are 4, 5, 6, 9, 65 and 69.

[7] Representative Nick Salazar in District 40 is an example of a candidate of choice for Native Americans who comprise a significant percentage of voters in his district. Representative Salazar lives on Ohkay Owingeh, is married into the Tribe and has served in the legislature since 1973. Evidence will be presented that Representative Salazar has been a stalwart supporter of Native American issues and particularly responsive to the needs of Ohkay Owingeh, the only Native American constituents

of the population, but only 4% of the House members. "Dilution cannot be inferred from the mere failure to guarantee minority voters maximum political influence." *Johnson*, 512 U.S. at 997. However, this court should consider the impact of all Native Americans when redistricting.

Under *Gingles v. Thornburg*, the court is bound to keep the six majority Native American districts.[8] All the plans submitted to the court, with the exception of the James Plan, contain six majority Native American districts. However, some of the maps stop here. Of the maps that create the six majority Native American districts, the Executive Defendants and the Sena Plaintiffs fail to recognize Native American preferences in where to be districted. This is the predominant legal failure in both plans.

E. Distinguishing Community of Interest Features of the Maestas 2 Plan and the Maestas Alternative Plan (collectively, the "Maestas Plans") as compared to other maps

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he represents. District 40 is roughly 14% *non-Hispanic* Native American, which is sufficient for the Native American population to be able to influence elections in District 40. The Maestas Plaintiffs preserve this seat essential to the representation of the Native American population in the New Mexico House of Representatives. (See Direct Examination of Governor Lovato)

[8] Proportionality is a relevant consideration in redistricting consistent with the Voting Rights Act. LULAC, 548 U.S. 399. Proportionality is defined as the number of districts in which "a minority group forms an effective majority is equal to its share of the population." *Johnson*, 512 U.S. at 1000.

The court is likely struggling with which proposed redistricting plan to adopt. While the evidence established that the Maestas Plans conform to Native American preferences and address § 2 liability for House District 63 in Clovis, the court heard abundant evidence on how to district in other parts of the state. The Maestas Plans contain the attributes the evidence deemed necessary.

By proportionally drawing lines according to population growth patterns in the state and considering the geographic and subdivision lines around communities of interest, the Maestas plan maintains deviations as low as practicable under the constraints discussed above. The court heard evidence of the two highest areas of growth in the state: Albuquerque's west side and urban Dona Ana county. (See Direct Examination of Sanderoff and Maestas) For Dona Ana County, the Maestas Plans are the only plan that draws an additional seat in Dona Ana County that is comprised of a majority urban population in the north west, where the growth occurred over the last decade. For the west side of Albuquerque, which has been historically underrepresented, the Maestas Plans create new seats, proportional to the 335% growth that occurred in the last decade. (See Direct Examination of Maestas, Dec. 20, 2011). While other plans, particularly the Executive 1 and 2 as well as some of the Egolf Alternatives, purport to also create three new west side districts, the Maestas Plans are the only plans which use the Rio Grande as the districts' boundaries. In fact, in the Maestas Plans no districts cross the river from U.S. 550 in the north to the far south valley. (See Maestas Exh. 2 and 23 and Direct Examination of Maestas) Evidence was presented that there is a clear delineation in identity and character of the Albuquerque's west side as defined by the Rio Grande.

(See Direct Examination of Maestas) This evidence was not rebutted. Other plans create districts on the west side by unnecessarily borrowing population from the from the east side of the river, dividing the interests of two distinct communities. (See Egolf Alternative Plans and the Executive Plans)

In terms of Hispanic majority districts, the Maestas Plans are strong. Both create 28, one more than current plan. (See Egolf Exh. 7) While the Egolf 1 Plan and the Executive 1 and 2 Plan create 29 majority-Hispanic districts, those plans as well as the Maestas Plans are on an even playing field with 26 *effective* Hispanic districts. (See Direct Examination of Arrington) Further, the Maestas Plans contain more total majority-minority districts than any other plan proffered. (See Executive Exh. 29 for least number of majority non-Hispanic white VAP districts) These factors are important because while the Maestas Plaintiffs do not assert that the evidence has established the Gingles preconditions for Hispanics statewide, majority-Hispanic districts should substantially reflect the Hispanic voting age population in the state.

The Maestas Plans share these attributes established at trial. The distinguishing feature between the two maps is the pairing in north central. (See Maestas Plaintiffs findings of fact and conclusions of law for findings on the constraints on pairings revealed during trial) The Maestas Alternative makes the pairing between House District 43 and 50 (an R-D pairing in a Democratic performing district) enabling the return of a Republican-performing district in House District 59 to Roswell. (See Maestas Exh. 21 for performance measures) While a ripple effect of expanded or shrinking districts overall pushed the mean deviations slightly lower to 1.1, the changes made from the Maestas 2 Plan were

minimal. The Maestas Plaintiffs chose to pair House District 43 and 50 because of the constraints of the tribal boundaries and preferences in the north central. As the court learned during trial, it is difficult to get fast answers from tribal governments particularly when requesting consensus on the political future of a tribe. The northern pueblos are districted in 46,40, 41, 42 and 43 and House District 65 constrains the west. The impracticality of garnering tribal approval or risking offending stated preferences limited the Maestas Plaintiffs options (and it appears the Egolf Plaintiffs in Egolf 4 who made the same pairing). The court heard evidence of tribal preferences to stay in current districts and to not split pueblos from Governor Lovato (Ohkay Owingeh in House District 40), Alvin Warren (Santa Clara in House District 41), the Governor of Tesuque Pueblo (in House District 46) as well as from the Multi-Tribal Plaintiffs on House District 65. Thus, the Maestas Plaintiffs assert the Maestas Alternative as a strong and viable option for this court. Because the Alternative makes only minimal changes from the fully-litigated Maestas 2, it is a promising option for the court.

F. Traditional Redistricting Principles

Traditional redistricting principles may be considered in a judicial redistricting. *O'Sullivan v. Brier*, 540 F. Supp. 1200, 1203 (D. Kan. 1982) That said, the court likely struggles with how much weight to give traditional redistricting principles within the context of this complex litigation. Conformity to traditional redistricting principles seems to be necessary, but the variations of range within conformity are likely not dispositive in judicial redistricting. The court recognizes that traditional redistricting principles – as a state policy – can justify some level of

population deviation when those principles are applied in a consistent and non-discriminatory manner. *Larios,* 300 F. Supp. 2d at 1331.

Certainly, failure to conform to traditional redistricting principles is likely problematic. For instance, an odd-shape might provide a prima facie Voting Rights Act or other justiciable claim. But overall, a comparison of maps on traditional redistricting principle to extract legal findings may be unmanageable because no one principle supersedes another.

While the evidence demonstrated that Maestas 2 Plan ranks or scores at the top of each measurable characteristic of redistricting principles as briefly discussed below, the Maestas Plaintiffs recognize the difficulty of the court's position and again, assert that the court should draw or adopt a reapportionment plan that provides for adherence to legitimate and clear state policies (i.e. tribal self-determination, compactness, etc.) with the lowest possible deviation. The Maestas Plans provide the court with two maps that accomplish that goal as well as conforming to all traditional redistricting principles.

<u>1. Contiguity and Compactness</u>

Section 2-7C-3 NMSA 1978 requires that the House of Representatives "be elected from districts that are contiguous and that are as compact as is practical and possible." Further, compactness has been called "a procedural safeguard against partisan gerrymandering." Daniel R. Posby & Karl Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 Yale L. & Pol'y Rev. 301, 339-51 (1991) (discussing measures of compactness). Because of

this clear state policy mandating contiguity and compactness, the Maestas Plaintiffs pay special care in ensuring both are important considerations in the Maestas Plan.

First, contiguity dictates that all parts of the district are connected geographically. The Maestas Plan adheres to the contiguity requirement by apportioning in such a way that constituents are able to travel from one end of a district to another without leaving the district.

Second, compactness relates to the minimum distance between all parts of the constituency. The court has recognized at least three ways to measure compactness; 1) the "eyeball" approach; 2) a Polsby-Popper analysis, a statistical compactness measurement; 3) a Reock or smallest circle score. *Bush,* 517 U.S. at 960 and *Vieth,* respectively. Under the eyeball test, the Maestas Plans demonstrates strong overall compactness. Further, a Polsby-Popper measurement comparing all maps reveals the Maestas2 Plan is the second most compact map proffered (0.32), after only the Sena map (0.33), which does not contain many of the other attributes in the Maestas map. (See Egolf Exh. 8) Lastly, the Reock or smallest circle score in the Maestas 2 Plan is .40, the second strongest after the Sena Plan. (See Executive Exh. 10). Evidence of compactness often provides a court with an additional demonstration of prima facie partisan fairness. Posby, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering.* Although the Maestas Plaintiffs offered the only expert witness on partisan fairness who declared the Maestas Plans partisan neutral, the compactness score is simply another indicator.

<u>2. Preservation of Political Subdivisions</u>

The court recognizes that states have a legitimate interest in maintaining the integrity of political subdivisions in state legislative maps. *Reynolds v. Sims*, 377 U.S. 533 (1964). This can be accomplished by minimizing – to the extent possible – the number of counties, municipalities and political subdivisions split between districts. *Rodriguez v. Pataki*, No. 02 Civ. 618, 2002 U.S. Dist. LEXIS 9272 (S.D.N.Y. 2002). There was no evidence presented that the Maestas Plans split political subdivisions unnecessarily. This is an important consideration because local governmental entities are frequently charged with responsibilities incident to the operation of state government, including serving as fiscal agents, passing and implementing local ordinances and a responsibility for local fire and police services. *Reynolds*, 377 U.S. at 580-581.

3. Incumbent Pairings

Bush v. Vera acknowledges that incumbency protection or avoiding contests between incumbents as a legitimate state goal. *Id., 517 U.S. at 977.* A court should ensure that such pairings are politically fair such that they do not advantage one political party over another. *Larios,* 300 F. Supp. 2d. at 1347. The pairings made in the Maestas Plans are commensurate with the population growth rate in the areas where pairing occurred. Further, the Maestas Plans pairings do not advantage a particular party because where Republican incumbents are paired, the Masetas Plan moves those districts to Republican-performing districts elsewhere in the state. (See Direct Examination of Maestas, Dec. 20 and 22.) The Maestas 2 Plan was criticized for pairing three incumbents in Roswell (District 59-66-57) despite moving those districts to Republican performing districts on Albuquerque's west

side, where population growth is accelerating. The Maestas Plaintiff assert that the pairings were justified because evidence demonstrates that Chaves County and Roswell experienced below-average population growth over the last decade and Mr. Sanderoff testified that Roswell Chaves County area would only be entitled to two seats under one person one vote. (See Direct Examination of Sanderoff.) However, the Maestas Alternative Plan restores a seat to the Roswell area with a Democratic-performing district in Los Alamos. (See Maestas Exh. 21.)

4. Communities of Interest

In New Mexico because of its unique geography and shared boundaries with tribal lands, this court is uniquely situated to find that communities of interest should be preserved and respected. The recognition of communities of interest is a legitimate and traditional goal in redistricting. *Bush,* 517 U.S. at 977. Although the term "community of interest" is difficult to define, the Maestas Plaintiffs submit communities of interest are groups of people with similar economic attributes and values connected to or divided from other communities by geographic boundaries or urban / rural characteristics.

Certainly, the pueblos and reservation lands are obvious and easily derived communities of interest, particularly considering the special political status of tribes and tribal lands. (See Direct Examination of Sanderoff, Engstrom and Adair) Further, political subdivisions (like townships, cities and counties) can form communities of interest, particularly when the subdivision plays an important role in the provision of governmental services. *Karcher v. Daggett*, 462 U.S. 725, 758 (1983). Lastly, communities that self-identify by a particular landmark or

geographic boundary are communities of interest, like the "West Side" of Albuquerque. (See Direct Examination of Maestas) The Maestas Plans apportion seats in a way that corresponds to communities of interest, including conforming to the preferences of tribes, creating new seats where population growth demands new seats (Dona Ana and the historically underrepresented "West Side" of Albuquerque).

While ideally these choices are made by the Legislature, the court may be forced to make some of these choices because of differences in individual maps. Fortunately, the Maestas Plaintiffs offered evidence at trial that tribal boundaries, geographic boundaries and defining economic and lifestyle characteristics as bright-line criteria for communities of interest.

F. Partisan Bias

In the opening the Court was warned that confronted with the strengths of the Maestas plan, other plan proponents would make conclusory, unsubstantiated allegations that the Maestas plans were partisan-unfair. The undeniable conclusion of most experts including Dr. Katz – the only expert that applied a peer reviewed methodology for partisan fairness – concluded the Maestas plans were faire.

The many plan proponents focused on odd anecdotal evidence such as the amount and type of pairings. For example the touted the three Republican pairings in the Maestas plans and then fell back when confronted with the fact that the seats created by those pairing were moved to population growth areas and remained republican performing seats. In fact no expert came to the conclusion that the Maestas plan had impermissible partisan gerrymanders.

The Court's focus on such a nebulous concept and political fairness is not advised. As described in a Maryland District Court decision, Fletcher v. Lamone 2011 WL 6740169, 14 (D.Md.) (D.Md.,2011) quote,

> Since it first recognized the issue's justiciability in *Davis v. Bandemer,* 478 U.S. 109 (1986), the Supreme Court has struggled to define the parameters of a successful partisan gerrymandering claim. Recent cases have reaffirmed the conceptual viability of such claims, but have acknowledged that there appear to be "no judicially discernible and manageable standards for adjudicating political gerrymandering claims." *Vieth v. Jubilirer,* 541 U.S. 267, 281 (2004) (plurality opinion of Scalia, J.); *see id.* at 307–08 (Kennedy, J ., concurring); *see also LULAC,* 548 U.S. 447 (op. of the Court by Kennedy, J.) (finding no "reliable measure of impermissible partisan effect"). Faced with "an unbroken line of cases declining to strike down a redistricting plan as an illegal partisan gerrymander," *Henderson v. Perry,* 399 F.Supp.2d 756, 761 (E.D .Tex.2005), all of the lower courts to apply the Supreme Court's *Vieth* and *LULAC* decisions have rejected such claims. *See, e.g., Perez, et al. v. Texas,* No. 11–360, slip. op. at 21–22 (W.D.Tex. Sept. 2, 2011); *see also Radogno v. Ill. Bd. of Elections,* No. 11–4884, slip op. at 5–7 (N.D.Ill. Nov. 22, 2011) (reviewing seven proposed standards the Supreme Court has rejected).

H. Deference to a Legislative Plan

Generally, "Thoughtful Consideration" not Deference is the standard for State Legislative Plans that passed both chambers and were vetoed by the Governor. The problem is that "thoughtful consideration" is premised on allowing for a legislation that has not been signed into law to be offered as "proffered" state policy. New Mexico in no way recognizes legislative history and therefore the concept of "proffered state policy" is a Federal invention without foundation in this State.

The Court should refer to *O'Sullivan v. Brier*, 540 F.Supp. 1200 (D.C. Kan 1982) for guidance on point. In *O'Sullivan* the Court considered first whether it owe deference either to the plan passed by the legislature and vetoed by the Governor,

or to the plan supported by the Governor but rejected by the legislature. Relying on Supreme Court precedence the O'Sullivan Court states,

> Congressional redistricting is primarily the state legislature's task, but becomes a judicial task when the legislature fails to redistrict after having an adequate opportunity to do so. White v. Weiser, 412 U.S. 783, 794-95, 93 S.Ct. 2348, 2354, 37 L.Ed.2d 335 (1973). Although a federal court should defer to any enacted, constitutionally acceptable state redistricting plan, id. at 795, 93 S.Ct. at 2354, we are not required to defer to any plan that has not survived the full legislative process to become law. See Sixty-Seventh Minnesota State Senate v. Beens, 406 U.S. 187, 197, 92 S.Ct. 1477, 1484, 32 L.Ed.2d 1 (1972). In Beens, after the Minnesota legislature had reapportioned state legislative districts and the Governor had vetoed the legislation, a three-judge panel adopted a reapportionment plan. The Supreme Court, though disapproving the panel's plan, agreed with the panel that it was not required to defer to either the legislature's or the Governor's plan: "The present Governor's contrary recommendation, though certainly entitled to thoughtful consideration, represents only the executive's proffered current policy, just as the reapportionment plan he vetoed ... represented only the legislature's proffered current policy." Id. In accordance with Beens we are bound to give only "thoughtful consideration" to plans that were passed by the state legislature but subsequently vetoed by the Governor, or to plans urged by the Governor. See Carstens v. Lamm, —- F.Supp. —— at —— - —— Nos. 81-F-1713, - 1870, slip op. at 11-13 (D.Colo. Jan. 4, 1982).
> *O'Sullivan v. Brier*, 540 F.Supp. 1200 (D.C. Kan. 1982)(citations in original).

Both the Governor and the Legislature are integral components of the legislative process; thus any plan that does not survive this process to become law must be regarded as "proffered current policy" which, though entitled to thoughtful consideration, cannot be deemed a clear articulation of established state goals. *See Sixty-Seventh Minnesota State Senate v. Beens,* 406 U.S. 187, 92 S.Ct. 1477, 32 L.Ed.2d 1 (1972); *Carstens v. Lamm,* 543 F.Supp. 68 (D.Colo.1982); *Shayer v. Kirkpatrick,* 541 F.Supp. 922 (W.D.Mo.1982) (three-judge court); *O'Sullivan v. Brier,* 540 F.Supp. 1200 (D.Kan.1982) (three-judge court). Courts have nonetheless recognized that the farther a bill progresses in the legislature, the more probative it is of a discrete state

policy. *Shayer v. Kirkpatrick; Skolnick v. State Electoral Board,* 336 F.Supp. 839 (N.D.Ill.1971) (three-judge court). However, that cannot be true for New Mexico a State that has clearly established that there is such thing as legislative history and that a only duly enacted legislation is the law not a partially drafted statute.

The Court in *Regents of University of New Mexico v. New Mexico Federation of Teachers,* 125 N.M. 401 (N.M. 1998) indicated there is no such thing as "legislative history" especially as it regards statements by legislators stating,

> The statements of legislators, especially after the passage of legislation, cannot be considered competent evidence in establishing what the Legislature intended in enacting a measure. *United States Brewers Ass'n,* 100 N.M. at 218–19, 668 P.2d at 1095–96 (quoting *Haynes v. Caporal,* 571 P.2d 430, 434 (Okla.1977)). If the testimony of actual legislators is not recognized as competent, then statements from citizens who drafted early versions of legislation are even less competent. The same can be said of descriptions by labor representatives of what their constituents desired from a particular piece of legislation. Further, we can see no point in attempting to construct the language of statutory provisions that were never enacted. The exclusion of such provisions from the final statute tells us nothing dispositive about the Legislature's intentions; such exclusions are not even necessarily indicative of what the Legislature did *not* intend.
> *Id* at 412.

In sum, the Supreme Court "will therefore not consider any of the evidence presented by any party as "legislative history" of redistricting*. Id*., and this Court should not either. Because there is no legislative history, there can be no proffered state policy and therefore no "thoughtful consideration" to any proposed legislative plan.

The precedent it would set could discourage partisan legislatures from compromise and offer a majority party with a minority governor an inherent motivation to pass a partisan redistricting plan knowing that the Court would give

deference. Likewise, a Governor would be encouraged to veto a more balanced bill hoping for a judicial preference when the Governor turns to the courts for remedy.

III. Conclusion

In light of the legal standards for the state court's exercise of jurisdiction over state legislative reapportionment, the Maestas 2 Plan and the Maestas Alternative Plan are the only viable options for the court. The Maestas Plans have the lowest deviations possible while recognizing the expressed preference of Native Americans as a significant state policy. The Maestas Plans also create majority-minority districts proportional to the voting age population of the corresponding to protected minority groups (six Native American; 28 Hispanic), boast high compactness scores, have been declared partisan neutral and recognize communities of interest. The Maestas Plaintiffs assert that these facts conform to the correct definable and measurable standards under current law. The Maestas Plaintiffs respectfully request that this Court adopt the Maestas Plan or Alternative Plan as submitted.

Respectfully submitted,

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Certificate of Service

I HEREBY CERTIFY that on this 28 day of December, the foregoing was served by electronic means pursuant to the First Judicial Court E-filing system to counsel of record:

_____________/s/______________
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