IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

HON. ANTONIO MAESTAS and HON. BRIAN EGOLF, members of the New Mexico House of Representatives, and JUNE LORENZO, ALVIN WARREN, ELOISE GIFT and HENRY OCHOA,

Plaintiffs-Petitioners,

vs. No. 33,386

HON. JAMES A. HALL, District Judge *Pro Tempore* of the First Judicial District Court,

Respondent,

vs.

HON. SUSANA MARTINEZ, in her capacity as Governor of New Mexico, et al.,

Real Parties in Interest,

and

MAURILLO CASTRO, BRIAN F. EGOLF, JR., MEL HOLGLUIN, HAKIM BELLAMY and ROXANE SPRUCE BLY,

Intervenors.

EGOLF PLAINTIFFS-INTERVENORS' RESPONSE BRIEF

Joseph Goldberg
John W. Boyd
David H. Urias
Freedman Boyd Hollander Goldberg
Ives & Duncan, P.A.
20 First Plaza NW, Suite 700
Albuquerque, NM 87102
Phone: (505) 842-9960

and

Ray M. Vargas, II
David P. Garcia
Erin B. O'Connell
Garcia & Vargas, LLC
303 Paseo de Peralta
Santa Fe, NM 87501
Phone: (505) 982-1873

Attorneys for Egolf Plaintiffs

TABLE OF CONTENTS

TABLE OF AUTHORITIES

NEW MEXICO CASES

FEDERAL CASES

OTHER STATE CASES

I. Introduction

In defense of the plan adopted by the district court, the Executive Defendants and other parties make a number of arguments that are incorrect on the facts and/or not supported by law. For instance, the Executive Defendants erroneously argue that, in adopting one of their proposed plans, the district court properly refused to elevate "secondary" redistricting criteria over the pursuit of population equality. *See* Executive Defendants' Opening Brief at 37. The Executive Defendants also assert that the district court properly considered minority interests in its adoption of the Executive Defendants' plan and carefully considered and addressed potential violations of the Voting Rights Act. *See id.* at 25-27. As we discuss in our opening brief and further below, there is nothing secondary about the maintenance of Hispanic voting interests in New Mexico, and the Executive Defendants and the district court misread the law pertaining to the extent to which the district court should favor exact population equality over the preservation of historic minority voting interests. Finally, criticisms of the plans proposed by the Egolf Plaintiffs or the plan upon which they were based are without merit, as the Egolf plans did not contain geographical or political bias and were free from any other impermissible considerations, but instead are the only plans that adequately protect the voting interests of Hispanic communities throughout New Mexico.

II. Standard of Review

The Executive Defendants assert, without citing to case law, that the standard of review applicable to this Court's review of the district court's decision to adopt one of their proposed plans is the "clearly erroneous" standard. *See* Executive Defendants' Opening Brief at 9. The correct standard of review here, however, is the *de novo* standard of review, because a review of the district court's determination in this case will require this Court "to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles." *State v. Attaway*, 117 N.M. 141, 144, 870 P.2d 103, 106 (N.M. 1994) (citing *United States v. McConney*, 728 F.2d 1195 (9th Cir. 1984) (en banc), *overruled on other grounds by Estate of Merchant v. C.I.R.*, 947 F.2d 1390 (9th Cir. 1991)); *see Old Person v. Cooney*, 230 F.3d 1113, 1119 (9th Cir. 2000). Because the dispositive issue before the Court in this appeal is a legal question, the standard of review is *de novo*. *See State v. Garcia*, 2005-NMSC-017, ¶ 27, 138 N.M. 1, 116 P.3d 72. Moreover, a *de novo* standard is appropriate here because the district court misapprehended the law upon which its discretionary rulings were based. *See State v. Martinez*, 2008-NMSC-060, ¶ 10, 145 N.M. 220, 195 P.3d 1232 ("A misapprehension of the law upon which a court bases an otherwise discretionary evidentiary ruling is subject to de novo review.").

III. Argument

The district court erred when it adopted Executive Defendants' Alternate Plan 3 based almost entirely on the court's observation that, among all the other plans proposed at trial, the Executive Defendants' plan had the closest to zero population deviations. As explained more fully in our opening brief, the district court misunderstood the law with regard to the requirement of the one-person one-vote principle. This misinterpretation of law resulted in the district court's undue emphasis on extremely low population deviations and a disregard for the historic interest of the protection of the voting strength of Hispanic communities of interest, which are of particular importance in New Mexico.

Unlike any other state in the country, New Mexico's Hispanic population constitutes almost half of the State's population.[1] New Mexico, also unlike any other state in to the country, has a rich and diverse Hispanic culture and community that have contributed to the social, economic and governmental interests of the area from the time the State was a territory of Spain, through the period in which it constituted the far northern reaches of Mexico, and into

[1] *See* U.S. Census Bureau at http://quickfacts.census.gov/qfd/states/35000.html (providing New Mexico Hispanic population constitutes approximately 47% of the State's population).

statehood. The history and evolvement of the New Mexico Hispanic culture has resulted in a number of cohesive and compact Hispanic communities, including those in Southeast and Southwest New Mexico. And, of course, these Hispanic communities have suffered from longstanding discrimination and impediments to effective exercise of their voting rights, especially in Southern New Mexico.[2] Despite the existence of these traditional Hispanic communities, which were recognized and respected in prior redistricting decisions in both federal and state courts,[3] the district court here set aside the Egolf Plans, which protected these historical interests in favor of the Executive Plan, which did not, simply to favor somewhat smaller population deviations. The district court misapprehended the law and its decision must be reversed.

A. The Republican Parties' Suggestion of the Over-Riding Necessity for "Near Zero" Population Deviations Misreads the Law.

The Executive Defendants emphasize that the district court adopted their plan, *inter alia*, because it had the lowest population deviations. Executive Def's Opening Brief at 16, 33. Their arguments reflect the district court's expressed view that it adopted the Executive Alternative Plan 3 because it "places the highest

---

[2] *See, e.g., Sanchez v. King*, No. 82-0067-M (D.N.M., filed Aug. 8, 1984) (Findings of Fact and Conclusions of Law).

[3] *See id.*; *see also Jepsen v. Vigil-Giron*, D-0101-CV-2001-02177 (First Judicial Dist. Ct. Jan. 24, 2002) (Findings of Fact and Conclusions of Law).

priority on population equality and compliance with the Voting Rights Act as required by law." COL 34.

These statements by the Executive Defendants and the district court reflect a misapprehension of the law that resulted in the adoption of a redistricting plan that, as discussed below, needlessly divided communities of interest and harmed the voting interests of Hispanics in Clovis, Deming and Silver City. The Executive Defendants' and the district court's misapprehension of the law may be understandable, given the United States Supreme Court's vague (but never contradictory) holdings regarding population deviations in court-ordered redistricting of state legislatures. The fundamental principles established by the Supreme Court, that give guidance regarding population deviations, which the district court failed to grasp when it adopted a plan that had the lowest population deviations, are these:

1). The reapportionment of state legislatures is not subject "to the same strict standards applicable to reapportionment of congressional seats." *White v. Regester*, 412 U.S. 755, 763 (1973).

2). A legislature that adopts a redistricting plan has a qualified safe harbor if its total deviations are less than 10%. This means that a legislature's plan whose deviations are less than 10% cannot be successfully challenged unless the person challenging the plan can establish that the deviations, although below 10%,

are the result of unconstitutional considerations or irrational decisions. *See Rodriguez v. Pataki*, 308 F.Supp.2d 346, 365 (S.D.N.Y. 2004) (three-judge court) (analyzing Supreme Court decisions, including *Karcher v. Daggett*, 462 U.S. 725, 740-44 (1983)). The Supreme Court has held that a non-Congressional redistricting plan with less than a ten percent deviation simply does not raise equal protection concerns. *See Gaffney v. Cummings*, 412 U.S. 735, 740-741 (1973) (holding that simply because an alternative plan had a lower deviation was no constitutional basis to require that it be accepted in preference to an existing plan with a higher deviation that cut fewer town lines, where both plans' deviations were under ten percent).

3). In adopting the foregoing "less than 10% deviation" rule, the Supreme Court and lower courts have denominated deviations of less than 10% as "minor" or "*de minimis*." *See Chapman v. Meier*, 407 F.Supp. 649, 664 (D.N.D 1975), *on remand after reversal in Chapman v. Meier*, 420 U.S. 1 (1973); *Connor v. Finch*, 431 U.S. 407, 413 (1977).

4). A legislative plan that *exceeds* 10% in its total deviations is prima facie unconstitutional as violative of one-person-one-vote. The proponent of a legislative plan with greater than 10% deviations has the burden of demonstrating "a satisfactory explanation" for the deviations that is "grounded on acceptable state policy." *Brown v. Thomson*, 462 U.S. 835, 842-43 (1983). Applying this

principle, the Supreme Court has held that a state may be able to justify even a 16% total population deviation simply to preserve political boundaries. *Mahan v. Howell*, 410 U.S. 315, 324-25 (1973); *see also Voinovich v. Quilter*, 507 U.S. 146, 160-62 (1993).

5). The Supreme Court has held that, when a state legislature fails to redistrict, and a court must therefore perform the task, the court is held to a "higher standard" of population deviation than a state legislature. *Perry v. Perez*, 565 U.S. ___, slip op. at 8 n.2 (2012), but it has never stated what it meant by this other than to require that deviations in court-adopted plans be kept to "*de minimis*." [4]

There is no decision from the United States Supreme Court or any other court that suggests – much less requires – that a court with the responsibility for redistricting should favor one plan over another, simply because it has the lowest deviations, when all of the available plans have population deviations that are within the "*de minimis*" standard of plus or minus 5%.

---

[4] The California Supreme Court recently analyzed the Supreme Court's decisions on this issue, and identified the contours of what this means for purposes of state legislative redistricting. In *Vandermost, v. Bowen*, __P.3d __, 2012 WL 246627 (2012), the California Court first noted that the Supreme Court had held that, in a legislatively-adopted redistricting plan, a "16.4% deviation 'may approach tolerable limits.'" *Id.* (quoting *Mahan*, 410 U.S. at 329), and then concluded that, under Supreme Court precedent, court-adopted plans do not have that latitude but must comport with the Supreme Court's "*de minimis*" standard. *Id.* The Supreme Court's *de minimis* standard, as the cases cited above establish, is a standard that requires less than 10% total deviation.

The Supreme Court has left unstated what it means by the "higher standard" of population deviations to which courts are held when they adopt redistricting plans. Certainly it has never said, nor do its decisions imply, that courts should select the plan with the lowest deviation when it has a number of plans from which to pick and all of the plans are within the "plus or minus 5%" deviation range. The logic of the Supreme Court's holdings seems to be this: Any plan whose total deviations are less than 10% (i.e., plus or minus 5%) meets the Supreme Court's "*de minimis*" or "minor deviation" standard. Courts should not select a plan whose deviations are above that standard, i.e., more than 10%, even though legislatures may do so when justified. If a court is faced with competing plans that are all within the *de minimis* population deviation standard, the court should exercise its discretion to select the plan that does the best job of redistricting, as defined by adherence to neutral redistricting principles, including the protection of the voting strength of ethnic minorities, keeping communities of interest together, keeping communities together and adhering to any other redistricting criteria of the particular state.

If this is the correct analysis of the Supreme Court's intent — and we believe it is — then it necessarily follows that a trial court errs when its selects a plan because its population deviations are the lowest of all the plans and not because that plan does the best job of addressing the unique circumstances of

ethnic groups and communities within the state. That is what the district court did in this case when it selected the Executive Defendants' Alternative 3 plan and this Court should reverse.

B. The District Court Erred in Not Considering Minority Voting Interests as a Basis to Deviate from Exact Population Equality.

Throughout this litigation, in both their legal arguments before this Court and in the plans they proposed to the district court, the Executive Defendants have ignored the interests and needs of New Mexico's unique and historical Hispanic communities and have instead focused on advancing redistricting plans that present the lowest deviations possible, arguing that the law supports only the adoption of such plans. As noted above, the district court erroneously accepted this proposition, and adopted the Executive's proposed plan because of its low deviations.

The James Plaintiffs, representing Republican interests and supporting the district court's decision below, concede that a number of courts, including the United States Supreme Court, have recognized that it is acceptable to deviate from exact population equality in the advancement of certain important and traditional state interests. *See Abrams v. Johnson*, 521 U.S. 74, 98 (1997) (providing deviations are allowed upon the enunciation of unique features or historically significant state policies); *Voinovich*, 507 U.S. at 161 (explaining that the objective to achieve substantial population equality "is not an inflexible one"); *Brown*, 462

U.S. at 842 ("some deviations from population equality may be necessary to permit the States to pursue other legitimate objectives").

In *Voinovich v. Quilter*, for example, the Supreme Court accepted as a justification for population deviations in excess of 10% the preservation of Ohio's interest in preserving county boundaries. *See Voinovich*, 507 U.S. at 161-62. Similarly, in *In re Apportionment of State Legislature 1982*, 321 N.W.2d 585 (Mich. 1982), the Michigan Supreme Court deviated from exact population deviations and justified a redistricting plan with a 16.4% population deviation in order to accommodate what had been recognized as an important state interest in Michigan – the preservation of municipal and county boundaries. *See id.* at 583. A similar result also occurred in *Mellow v. Mitchell*, 607 A.2d 204 (Pa. 1992), where the Pennsylvania Supreme Court approved a trial court's adoption of a redistricting plan that did not contain the lowest population deviations of all the plans proposed to the court, but instead reflected consideration of other traditional redistricting principles, noting that the "extremely small deviations in district populations may be justified by, *inter alia*, a desire to avoid splitting of political subdivisions and precincts, to provide adequate representation to a minority group, and/or to preserve communities of interest." *Id.* at 52-53. And in *Graham v. Thornburgh*, 207 F.Supp.2d 1280 (D. Kan. 2002), a federal district court concluded that a redistricting plan would be upheld, even though plans with lesser deviations

were possible, because the deviation in the plan was minimal and existed only as a result of the attempt to follow traditional redistricting principles that protected the integrity of political subdivisions. *See id.* at 1293-96. Importantly, these cases refute the Executive Defendants' arguments that the near-zero population deviations can be relaxed *only* to avoid violations of the Voting Rights Act. *See* Executive Defendants' Opening Brief at 19-20. In none of the cases cited above was the relaxation of population deviations justified by violations of the Voting Rights Act. Rather, the justification was respect for other traditional redistricting principles.

Given New Mexico's unique and culturally rich history, it cannot be disputed that the protection of Hispanic voting interests and the maintenance of traditional Hispanic communities are as compelling state interests as the preservation of county or municipal boundaries. The Executive Defendants appear to argue that population equality is absolutely paramount, subject only to violations of the Voting Rights Act, and that any other considerations must fall to such concerns. No published case stands for such a proposition. If the Executive Defendants were correct, then there would never exist a situation where other state interests would be considered, which has never been contemplated by the Supreme Court, because redistricting would simply be a mathematical exercise that could be accomplished by a computer program that split populations evenly into the number

of districts in a jurisdiction. There would be no need to mention, much less consider neutral redistricting criteria and traditional redistricting principles, because perfectly equal populations could easily be created if such criteria were simply ignored.

1. The District Court Did Not Recognize the Need To Depart From Exact Population Equality to Address the Interests and Needs of New Mexico' Hispanic Communities.

Apparently recognizing, at least for a moment, that the goal of population equality must be balanced with the interests of minority communities, the Executive Defendants claim that in deciding to adopt their proposed redistricting plan the district court "appropriately recognized the need to depart from exact population equality in order to address voting rights issues and state policy regarding Native Americans." *Id.* at 25. While this may be true with regard to Native American communities, it is hardly the case that the district court (or the Executive Defendants) showed any concern whatsoever for the Hispanic communities that were relocated, dissected and separated in the plan adopted by the district court in blind pursuit of exact population equality. *See* Egolf Plaintiffs' Opening Brief at 30-46. In fact, the district court did the opposite and ignored the fact that the Executive Defendants' plan dismantled a Hispanic majority district in Curry County (devastating the voting strength of Hispanic residents of Clovis), diminished the voting strength of Hispanic residents in Deming by pairing them

with another Hispanic community sixty miles away in order to give the appearance of a Hispanic "majority" district, and failed to reunite the Hispanic community in Silver City. *See id.* The district court gave very little attention to Hispanic interests, which necessitates reversal in this case.

2. By Ignoring Hispanic Communities of Interest, the District Court Adopted a Plan That Violates the Voting Rights Act.

Although the district court determined that the plan it would adopt complied with the Voting Rights Act, it did so with very little analysis and by summarily and erroneously concluding that it found "no persuasive evidence that Sec. 2 of the Voting Rights Act requires any particular Hispanic majority district be drawn." *See* FOF COL at ¶ 26. Even assuming that the district court was correct in determining that no particular majority Hispanic district was required to be created, the district court failed to recognize that the Voting Rights Act also precludes the *dilution* of Hispanic voting strength, which is exactly what will occur to the Hispanic communities in Clovis, Deming and Silver City if the plan adopted by the district court is allowed to take effect. *See Shaw v. Hunt*, 517 U.S. 899, 914 (1996) ("*Shaw II*") ("Our precedent establishes that a plaintiff may allege a § 2 violation in a single-member district if the manipulation of districting lines fragments politically cohesive minority voters among several districts or packs them into one district or a small number of districts, and thereby dilutes the voting strength of members of the minority population."); *see also Thornburg v. Gingles*, 478 U.S.

30, 50-51 (1986); *Growe v. Emison*, 507 U.S. 25 (1993); Egolf Opening Brief at 33-47. The question is not simply whether additional majority Hispanic districts were required, but whether the plan submitted by the Executive Defendants and adopted by the district court resulted in the dilution of Hispanic voting strength in Clovis and in parts of Southwest New Mexico – the answer to which can only be answered in the affirmative. *See id.*

In its Findings of Fact and Conclusions of Law, the district court did not sufficiently consider the voting rights of Hispanics in New Mexico and, when it did, it failed to understand the law with regard to the impermissible dilution of Hispanic voting power. For instance, although the district court could not avoid finding that the Hispanic community in Clovis was "sufficiently large and geographically compact to constitute a majority in a single-member district;" that Hispanics in Clovis were "politically cohesive;" and that Anglo bloc voting still existed in this part of New Mexico, *see* FOF and COL at ¶¶ 64, 65, the court concluded that any potential voting rights violations were addressed by the alternate plan proposed by the Executive Defendants, which the court ultimately adopted, because that plan "provides for a Hispanic majority VAP district in and around Clovis." *Id.* at ¶ 66.

However, as discussed in the Egolf Plaintiffs' Opening Brief, the district court was wrong when it determined that the Voting Rights Act allowed for the

relocation of the Hispanic community in Clovis from a district in which Hispanics had been effective in electing their candidate of choice and constituted a majority of the citizen voting age population to a district in which they did not constitute a majority of the citizen voting age population. *See* Egolf Plaintiffs' Opening Brief at 35-40 (citing *LULAC v. Perry*, 548 U.S. 399 (2006)). Nevertheless, the district court justified its decision to favor the Executive Defendants' Alternate Plan 3 by noting that the plan included "thirty districts with a Hispanic VAP over 50%," which according to the district court "maintain[ed] the highest number of districts with a Hispanic VAP over 50%." FOF and COL at ¶ 71.

There are two glaring problems with this observation by the district court. First, the law is clear that the dilution of the voting strength of one group of Hispanics is not justified by the creation or maintenance of other Hispanic majority districts. *See LULAC*, 548 U.S. at 437 ("[T]he right to an undiluted vote does not belong to the 'minority as a group,' but rather to 'its individual members.'") (quoting *Shaw II*, 517 U.S. at 917). Second, for reasons unknown, the district court failed to acknowledge that the redistricting plans submitted to the district court by the Egolf Plaintiffs consisted of just as many Hispanic majority districts (while protecting the voting interests of Hispanics in Clovis, Deming and Silver City) and, when taking into account citizen voting age population as required,

actually surpassed the number of effective Hispanic majority districts created by the adopted Executive Defendants' Alternate Plan 3.[5]

In sum, the Egolf Plaintiffs' proposed plans were superior to the plan adopted by the district court because they took into consideration the interests of the Hispanic communities of New Mexico while maintaining *de minimis* population deviations.

C. Other Criticisms of the Legislative Plan Upon Which the Egolf Plans Were Built Either Do Not Apply to the Egolf Plans or Are Without Merit.

1. The Plans Proposed by the Egolf Plaintiffs Were Not Geographically or Politically Biased.

In their opening briefs, three of the parties representing Republican interests - the Executive Defendants, the James Plaintiffs and the Sena Plaintiffs - argue that the district court properly rejected the Legislative Defendants' plan (HB 39) because it constituted a partisan gerrymander and was geographically biased. *See* Sena Plaintiffs' Opening Brief at 10; James Plaintiffs' Opening Brief at 31-32; Executive Defendants' Opening Brief at 28. Without explication, however, the district court held that the Egolf plans failed to "completely" cure the geographic

[5] *Compare* Egolf Ex. 21 (Egolf 2) *with* Gov. Ex. 33 (Exec Alt 3) *with* James Ex. 9 (showing difference between total voting age population and citizen voting age population by county). When citizen voting age population is considered, Executive Alternative Plan 3 (adopted by the district court) contains approximately twenty one (21) majority Hispanic citizen voting age population districts, while Egolf 2 contains approximately twenty four (24) majority Hispanic citizen voting age population districts.

bias in the Legislature's plan. The evidence reflects otherwise, as Dr. Williams testified.

2. There Was No "Least Change Plan" for The Court to Adopt.

The parties supporting the adoption of the Executive Defendants' redistricting plan also proclaim that the district did not err in favoring that plan because it was the "least change" plan based on the New Mexico House districts as they stood after the 2000 redistricting cycle. By favoring a plan that started with the malapportioned districts, however, the district court erred in believing this constituted the "least change" plan. *See* TR 12/15/11 at 87-91 (Testimony of Dr. Williams) (explaining that redistricting plans utilizing the current malapportioned districts as a starting point could not constitute the "least change" plans). In addition, the Supreme Court has recently brought into question the propriety of using a current malapportioned map as a starting point where there has been significant population growth and population shifts such that "no semblance of the existing plan's district lines can be used, [because] that plan offers little guidance to a court drawing an interim map." *Perez*, 565 U.S. __, slip op. at 4. According to the Supreme Court, in such situations "[t]he old map gives no suggestion as to where those new districts should be placed." *Id.* "Thus, if the old state districts were the only source to which a district court could look, it would be forced to make the sort of policy judgments for which courts are, at best, ill suited." *Id.*

In this case, given New Mexico's large population growth over the last decade,[6] and the undisputed shift of the population that occurred during the same period, the redistricting map created a decade ago was not the ideal starting point for redistricting.

IV. Conclusion

Because the plans submitted by the Executive Defendants achieved unnecessarily low population deviations at the expense of historical racial and ethnic minority voting interests in Southeastern and Southwestern New Mexico, the decision of the district court in choosing the Executive Defendants' Alternative 3 Plan should be reversed. The trial court erroneously emphasized low population deviations at the expense of traditional redistricting principles and in so doing erred as a matter of law. This Court should reverse the trial court's selection and instruct it to implement Egolf Plan 2 or Egolf Plan 5, which achieved significantly low population deviations and, critically, provided greater protections than the Executive Defendants' plans with respect to racial and ethnic minority voting interests.

---

[6] New Mexico grew in population by 13.2% between 2000 and 2010, while the national population growth was only 9.7%. *See* U.S. Census Bureau, available at http://quickfacts.census.gov/qfd/states/35000.html.

Respectfully submitted,

Joseph Goldberg
John W. Boyd
David H. Urias
Freedman Boyd Hollander Goldberg,
Ives & Duncan, P.A.
20 First Plaza Ctr. NW, #700
Albuquerque, NM 87102
Phone: (505) 842-9960
jg@fbdlaw.com
jwb@fbdlaw.com
dhu@fbdlaw.com

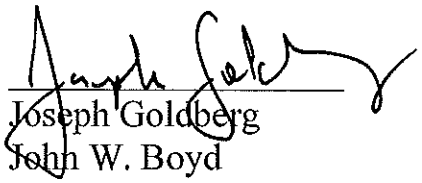
And

Ray M. Vargas, II
David P. Garcia
Erin B. O'Connell
Garcia & Vargas, LLC
303 Paseo del Peralta
Santa Fe, NM 87501
Phone: (505) 982-1873
ray@garcia-vargas.com
david@garcia-vargas.com
erin@garcia-vargas.com

I hereby certify that on January 31, 2012, the foregoing was served on all counsel of record by e-mail.

Joseph Goldberg

Respectfully submitted,

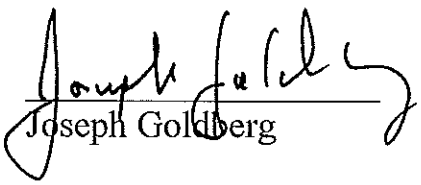


Joseph Goldberg
John W. Boyd
David H. Urias
Freedman Boyd Hollander Goldberg,
Ives & Duncan, P.A.
20 First Plaza Ctr. NW, #700
Albuquerque, NM 87102
Phone: (505) 842-9960
jg@fbdlaw.com
jwb@fbdlaw.com
dhu@fbdlaw.com

and

Ray M. Vargas, II
David P. Garcia
Erin B. O'Connell
Garcia & Vargas, LLC
303 Paseo del Peralta
Santa Fe, NM 87501
Phone: (505) 982-1873
ray@garcia-vargas.com
david@garcia-vargas.com
erin@garcia-vargas.com

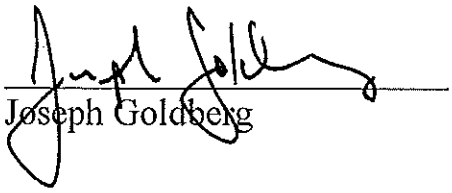
I hereby certify that on January 31, 2012, the foregoing was served on all counsel of record by e-mail.



Joseph Goldberg

CERTIFICATE OF COMPLIANCE

As required by Rule 12-213(G) NMRA, we certify that this brief complies with Rule 12-213(F)(3) NMRA in that the brief is proportionately spaced, in 14-point font and the body of the brief contains 4,248 words. This brief was prepared and the word count determined using Microsoft Office Word 2007.



Joseph Goldberg