STATE OF NEW MEXICO

COUNTY OF SANTA FE

FIRST JUDICIAL DISTRICT COURT

No. D-101-CV-2011-02942

BRIAN 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 NO. D-101-CV-2011-02944
CAUSE NO. D-101-CV-2011-02945
CAUSE NO. D-101-CV-2011-03016
CAUSE NO. D-101-CV-2011-03099
CAUSE NO. D-101-CV-2011-03107
CAUSE NO. D-202-CV-2011-09600
CAUSE NO. D-506-CV-2011-00913

THE EXECUTIVE DEFENDANTS', *SENA* PLAINTIFFS', AND THE *JAMES* PLAINTIFFS' ADDITIONAL WRITTEN CLOSING ARGUMENT REGARDING THE CONGRESSIONAL REDISTRICTING PLAN

The Governor and the Lieutenant Governor (collectively the "Executive Defendants"), the *Sena* Plaintiffs, and the *James* Plaintiffs join in the written closing argument submitted by the

Egolf Plaintiffs in support of these parties' request that the Court adopt the Joint Plan. They also submit this additional closing argument to address additional issues that they believe the Court must consider with regard to redistricting of the United States House of Representatives.

At the close of the Congressional hearing, the Court instructed the parties to address in their respective post-trial briefs the legal standards the Court must apply when deciding between reapportionment plans submitted by various parties, as opposed to addressing challenges to a plan passed by the Legislature and signed into law by the Governor. *See* Cong. Hrg. TR (12/6/11) ("12/6 TR") at 279:21 – 280:4. As one court has explained, "[t]he standards applicable to court-ordered congressional redistricting plans are fairly well-established: Courts must satisfy constitutional and statutory criteria and, to the extent feasible, certain neutral, secondary criteria." *Smith v. Clark*, 189 F. Supp. 2d 529, 538 (S.D. Miss. 2002). The primary constitutional and statutory criteria are nearly as practicable population equality amongst districts, and compliance with the Voting Rights Act. *See, e.g., id.* The secondary criteria include compactness, contiguity, and preservation of political boundaries and communities of interest. *See id.*; *Good v. Austin*, 800 F. Supp. 557, 563 (E.D. & W.D. Mich. 1992). "The constitutional and statutory criteria are mandated by law[,]" and the secondary criteria "serve important nonpartisan interests shared by all of the citizens" of the state in which a court has assumed the reapportionment function. *Id.* In applying these criteria, courts should be mindful that when "required to adopt a congressional districting plan that is entirely the product of judicial action[,]" the Court's redrawing of the district boundaries should be as politically neutral as is possible. *Id.*

The primary constitutional criterion – population equality – and pertinent neutral, secondary criteria – contiguity, respect for precinct boundaries and other political subdivisions,

and preservation of communities of interest – are addressed more fully in the Joint Plan proponents' combined post-trial brief submitted contemporaneously with this memorandum. This brief concentrates on the remaining constitutional and statutory criteria – compliance with the Equal Protection Clause of the United States Constitution and the federal Voting Rights Act – and the principle of partisan neutrality. As explained in detail below, two of the Congressional redistricting concepts presented to the Court fail to satisfy these requirements. The LULAC Plan violates the Equal Protection Clause because it is a racial gerrymander, while the *Maestas* Plan is politically unfair because it is a partisan gerrymander. In light of these shortcomings, this Court need not analyze either the LULAC Plan or the *Maestas* Plan on an equal footing with the Joint Plan. Instead, the Court should adopt the Joint Plan as the only reapportionment concept that passes muster under both the United States Constitution and applicable redistricting law.

I. IT IS UNDISPUTED THAT THE LULAC PLAN WAS DELIBERATELY DRAWN FOR RACIAL PURPOSES IN DEROGATION OF TRADITIONAL REAPPORTIONMENT PRINCIPLES.

As explained in the opening brief, a plan is an unconstitutional racial gerrymander if it places race above legitimate redistricting principles. *See* Exec. Defs.' Pre-Trial Br. at 8-12. The evidence has established that the LULAC concept for Congress is one such plan, for three reasons. First, it has become clear that race was not only the predominate reason for the LULAC plan, it was the ***only*** reason. LULAC made no secret of its desire to create a majority Hispanic district in New Mexico. *See* 12/6 TR at 286:22-287:10, 319:15-320:2 (LULAC's expert, Gabriel Sanchez, testifying that he was contacted by LULAC about the need for a majority-minority Hispanic district in Congress, and race was a predominate factor in creating the LULAC plan). Second, the LULAC plan fails to honor ***any*** constitutional, traditional or race-neutral

redistricting criteria, such as minimal population deviation where, as "nearly as is practicable," one man's vote is worth as much as another's, compactness, contiguity, or respect for political subdivisions. *See id.* at 287:11-15. Indeed, analysis of the LULAC plan has demonstrated that the LULAC approach suffers from the highest populations deviations, the lowest compactness scores under a Polsby-Popper analysis, and more county splits than either the Joint Plan or the *Maestas* Plan. *See* Egolf Ex. 4. Finally, the undisputed racial data for the LULAC plan shows its racial underpinnings. There is no dispute that the LULAC map creates a Congressional district with 52 percent Hispanic voting age population. *See* HB 46 (LULAC) Congressional Map and Data Charts (LULAC Ex. B; SOS Ex. 1); 12/6 TR at 299:16-18, 308:3-7. The fact that the LULAC map creates such a district, combined with the evidence of racial motive and disregard of traditional redistricting principles, establishes that the LULAC plan is a racial gerrymander.

II. THE COURT NEED NOT ADOPT THE LULAC PLAN TO RECTIFY A HISPANIC EQUAL PROTECTION OR VOTING RIGHTS ACT ISSUE.

Because it is a racial gerrymander, the LULAC plan must be analyzed with strict scrutiny under the Equal Protection Clause of the United States Constitution. *See Bush v. Vera*, 517 U.S. 952, 959 (1996). For the LULAC plan to pass constitutional muster, this Court must decide that the plan is justified by a compelling need to comply with Section 2 of the Voting Rights Act, and that it is narrowly tailored to achieve that goal. *See id.* at 976-77; *Shaw v. Reno*, 509 U.S. 630, 642 (1993) (a redistricting plan that "expressly distinguishes among citizens because of their race [must] be narrowly tailored to further a compelling government interest.").

In plain terms, this Court should consider adoption of the LULAC plan only if the Court determines that: a) the LULAC plan is necessary to avoid a violation of Section 2 of the Voting Rights Act; b) the plan actually remedies a Section 2 violation by creating a majority citizen

voting age population district; and c) to the extent possible, the plan does not offend traditional redistricting criteria in order to remedy the purported violation. *See Bush*, 517 U.S. at 977 ("A § 2 district that is *reasonably* compact and regular, taking into account traditional districting principles such as maintaining communities of interest and traditional boundaries, may pass strict scrutiny[.]"). The LULAC plan does not satisfy any of these requirements and accordingly cannot survive constitutional strict scrutiny.

A. LULAC Has Failed To Establish that the *Gingles* Pre-Conditions Are Met for the Relevant Hispanic Population in New Mexico.

As explained in the pre-trial memorandum, LULAC was required to demonstrate the existence of three pre-conditions before it would be appropriate to address whether a Section 2 Voting Rights Act problem exists in New Mexico. Further, even if that threshold is met, the "totality of the circumstances" must support a finding that our State has violated Section 2 with regard to Hispanics. *See* Pre-Trial Br. at 4; *Thornburg v. Gingles*, 478 U.S. 30, 43-45 (1986).[1] LULAC has failed to meet even the preliminary *Gingles* threshold preconditions, much less the "totality of the circumstances" test, for the following reasons.

1. The LULAC Plan Demonstrates that Hispanics Do Not Constitute a Majority of the Citizen Voting Age Population.

To meet the first *Gingles* precondition, it was necessary for LULAC to establish that Hispanics in New Mexico are "sufficiently large and geographically compact" to constitute a majority of ***citizen*** voting age population in a single-member district. *See* Pre-Trial Br. at 5; *Gingles*, 478 U.S. at 50; *LULAC v. Perry*, 548 U.S. 399, 427-29 (2006). LULAC failed to do

[1] LULAC's evidence at trial focused solely on Hispanics in southern New Mexico, apparently contending that the Voting Rights Act requires majority Hispanic districts in specific areas of the state, and that a party seeking such districts need only establish a Section 2 problem in a limited geographic region rather than looking at the evidence statewide. LULAC cites no authority for this proposition, because there is none. Further, it is illogical to suggest, as LULAC does, that this Court should ignore evidence from other parts of the state when Hispanics live in sizeable populations in every county, elect numerous Hispanics in statewide races, and have a long history of electing Hispanics to Congress in Congressional District 3.

so. At trial, the *Egolf* Plaintiffs' expert, James Williams, testified that in order to create an effective majority Hispanic district as requested by LULAC, a plan would need to account for the high number of non-citizen Hispanic residents in the state.[2] *See* Cong. Hrg. TR (12/5/11) ("12/5 TR") at 78:16-82:22. Williams further testified that in order to account for the non-citizen Hispanic population, a district would have to contain at least 54.5 to 55 percent majority voting age ("VAP") Hispanics. *See id.* at 81:8-18. In reality, the percentage of voting age citizens necessary to have an effective Hispanic district probably is closer to 60 percent, but even adopting Williams's stated percentages, the LULAC plan does not reach even this threshold. The best that the LULAC plan can do is create a 52-percent Hispanic voting age majority district, which in reality would only create a 48 percent Hispanic adult district. *See* LULAC Plan (LULAC Ex. B); 12/6 TR at 43:11-44:9. This is not sufficient to establish the existence of a citizen voting age majority. Accordingly, LULAC has failed to demonstrate that Hispanics are large and geographically compact enough to constitute a proper majority in a single district, and the first *Gingles* precondition has not been met in this case.

For this same reason, even if all of the *Gingles* factors were met (they are not) and the totality of the circumstances demonstrated the existence of a Section 2 violation (they do not), the LULAC plan also would not be an acceptable remedy. Williams testified that it would be necessary to overpopulate the Hispanic population in a district in order to deal with the non-citizen issue, and LULAC presented no testimony refuting Williams's opinion. Therefore, even if it were necessary for this Court to remedy a Section 2 problem, the LULAC plan plainly is no cure. Regardless, LULAC has failed to establish that the first *Gingles* precondition has been met in this case with regard to Hispanic New Mexicans.

[2] As Census data demonstrates, in New Mexico citizen voting age Hispanic population is lower than total Hispanic voting age population. *See* American Community Survey information (Egolf Ex. 8).

2. *Any Racial Polarization Is Not Legally Significant Because Hispanic Electoral Success Is More Dependent on Political Affiliation than Race.*

LULAC has also failed to submit sufficient evidence demonstrating that the third *Gingles* precondition – Anglo bloc voting that consistently defeats Hispanic candidates of choice – is met. Racially-polarized voting by the Hispanic and Anglo populations is not, by itself, sufficient. LULAC must show that candidates of choice of the Hispanic population regularly are defeated by Anglo bloc voting, thus impairing Hispanic voters' ability to elect candidates of their choice. *See Gingles*, 478 U.S. at 55-58. The simple fact in this case is that, in New Mexico, the Hispanic candidates of choice win election to Congress more often than candidates who are the choice of Anglo voters. That this is the case is evidenced by testimony at trial.

LULAC's expert, Gabriel Sanchez, conceded that Hispanic candidates consistently win both statewide and Congressional elections. *See* 12/6 TR at 308:25-312:08. Second, political races in New Mexico are dictated by party affiliation, not racial polarization; thus, the Hispanic candidate of choice repeatedly prevails regardless of any evidence of racial bloc voting. The *Egolf* Plaintiffs' expert, Theodore Arrington, analyzed previous political races and his analysis demonstrates that, contrary to going down in defeat, Hispanic candidates of choice are normally Democrats regardless of the race or ethnicity of the candidate, and Democrats more often than not win Congressional elections. *See* 12/6 TR at 35:8 – 37:5, 312:9-13; Ecological Inference Analysis (Egolf Ex. 10b); *see also* 12/6 TR at 318:16-21 (LULAC witness Sanchez testifying that because of noncitizen and undocumented residents, a district drawn with 52 percent Hispanic VAP would actually result in 48 percent Hispanic voting age population in that district.). In light of such evidence, LULAC has not met its burden with regard to the racial bloc voting component of the *Gingles* preconditions.

B. The LULAC Plan Ignores Traditional Redistricting Criteria in Favor of Race.

What makes the LULAC plan a racial gerrymander also prevents it from surviving strict scrutiny under the Equal Protection Clause. The Supreme Court has made clear that a plan necessary to rectify a Section 2 violation cannot freely ignore traditional redistricting criteria such as compactness, political boundaries and preservation of communities of interest. *Bush*, 517 U.S. at 976-77. As explained above, the LULAC plan is bested by every other Congressional plan proposed in this case under empirical, neutral analyses of redistricting criteria, and LULAC has not presented sufficient evidence to the contrary. *See* discussion *supra.* Thus, even if LULAC had established a compelling need for its plan because of Section 2, which it has not, its Congressional map is not narrowly tailored to address an alleged Section 2 violation, and instead all but ignores traditional reapportionment criteria in favor of creating an unnecessary, and inappropriate, Hispanic district in CD 2. The Court must decline the invitation to adopt the LULAC plan because it is unconstitutional.

III. THE MAESTAS PLAN SHOULD BE REJECTED AS A POLITICAL GERRYMANDER.

This Court should also decline to adopt the Maestas plan because it is a political gerrymander. It is appropriate for the Court to refuse to adopt plans because of their partisan effect. *See* Pre-Trial Br. at 12-13; *Larios v. Cox*, 300 F. Supp. 2d 1320, 1337 (N.D. Ga. 2004), *aff'd, Cox v. Larios*, 542 U.S. 947 (2004); *Wyche v. Madison Parish Police Jury*, 769 F.2d 265, 268 (5th Cir. 1985). Instead of wading into the thicket of political or partisan choices when adopting a particular reapportionment plan, the Court should limit its function to "correcting only those unconstitutional aspects of a state's plan .... The rationale for such a 'minimum change' remedy is the recognition that redistricting is an inherently political task" for which courts are "ill suited." *See Johnson v. Miller*, 922 F. Supp. 1556, 1559 (S.D. Ga. 1995) (*citing Upham v.*

Seamon, 456 U.S. 37, 41-42 (1982)). In addition, "[w]hen re-drawing electoral maps, courts take partisan fairness into consideration. When forced to correct defective maps, courts have taken pains to avoid advantaging one political party, lest the court be guilty of gerrymandering." Keith Gaddie & Charles S. Bullock III, *From Ashcroft to Larios: Recent Redistricting Lessons from Georgia,* 34 Fordham L. J. 997, 1004 (2007) (*citing Abrams v. Johnson*, 521 U.S. 74 (1997)).

The partisan bias of the *Maestas* plan is apparent. As political performance analysis demonstrates, the *Maestas* plan increases Democratic election performance by almost a full percentage point in CD 1 verses current performance numbers, and a half percentage point in CD 3. *See* Egolf Ex. 4. While these numbers may not seem large, they could affect tight races, such as in the first Congressional district, which is somewhat more competitive than the other two districts. By contrast, the Joint Plan makes *de minimis* changes to current performance figures, maintaining, as closely as possible, the political *status quo*. *See id.* This "least change" concept is, by far, the most appropriate selection when Congressional districts are redrawn through the courts rather than by the legislative process.

The fact that the *Maestas* plan is less compact and contiguous than the Joint Plan also reveals that the *Maestas* map is a partisan gerrymander. "The compactness requirement specifies that the boundaries of each congressional district shall be as short as possible." *Carstens v. Lamm*, 543 F. Supp. 68, 87 (D. Colo. 1982). The contiguity requirement "specifies that no part of one district be completely separated from any other part of the same district." *Id.* at 88 (internal quotation marks and citation omitted). These criteria are designed, at least in part, to restrain partisan gerrymandering. *See id.* at 87; *see also Arizonans for Fair Representation v. Symington*, 828 F. Supp. 684, 688 (D. Ariz. 1992) ("Districts that are geographically compact and contiguous are less likely to suffer from the ills of gerrymandering [and] assist in

maintaining communities of interest[.]"), *cert. denied*, 507 U.S. 981 (1993). Without dispute, the Joint Plan is more compact and contiguous than the *Maestas* plan.[3] *See* Plan Comparison (Egolf Ex. 4). This is most evident in the *Maestas* plan's proposed CD 1, which takes the shape of a deformed half-doughnut that slides around southern Bernalillo and grafts Valencia County onto a district that includes most, but not all, of Albuquerque. *See* SOS Ex. 1; Egolf Ex. 9a. Such an ugly district shows how much the *Maestas* plan seeks to distort the existing Congressional boundaries for partisan gain. The Joint Plan is the proper map for this Court to adopt because it avoids such partisan inspiration.

CONCLUSION

For the reasons stated above and in the joint closing argument submitted by the proponents of the Joint Plan, the Executive Defendants join with the *Egolf*, *James* and *Sena* Plaintiffs to respectfully request that this Court adopt the Joint Plan submitted by these parties.

Respectfully submitted,

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[3] The *Maestas* Plaintiffs have requested a finding that "The Maestas Congressional Redistricting plan is functionally more compact [than other presented plans and] is totally contiguous." *See* Plaintiff Maestas' Prelim. Prop. Findings of Fact & Concl. of Law (filed 11/28/11) at Finding ¶ 13. Yet the Maestas Plaintiffs failed to submit ***any*** evidence or testimony that, under any measure, the Maestas Plan is somehow more compact or contiguous than the Joint Plan. Pursuant to Rule 1-050 NMRA, then, the Joint Plan's proponents are entitled to judgment as a matter of law on this issue. *See* Rule 1-050 ("If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may: a) resolve the issue against the party; and b) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.").

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of December 2011, I served via electronic mail and filed the foregoing pleading electronically, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

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