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

BRIAN F. EGOLF, JR., HAKIM BELLAMY, MEL HOLGUIN, MAURILIO CASTRO, and ROXANE SPRUCE BLY, Plaintiffs, v. DIANNA J. DURAN, in her official capacity as New Mexico Secretary of State, SUSANA MARTINEZ, in her official capacity s 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.	)	NO. D-101-CV-2011-02942 CONSOLIDATED WITH: D-101-CV-2011-02944 D-101-CV-2011-02945 D-101-CV-2011-03016 D-101-CV-2011-03099 D-101-CV-2011-03107 D-202-CV-2011-09600 D-506-CV-2011-00913

LEGISLATIVE DEFENDANTS' POST-TRIAL BRIEF AND CLOSING ARGUMENT REGARDING STATE HOUSE OF REPRESENTATIVES REDISTRICTING

I. INTRODUCTON

Now that this Court has heard all of the testimony provided by the parties, the Legislative Defendants submit this, their Post-Trial Brief and Closing Argument. The following points are offered to assist the Court's decision in this case, urging that the Court adopt the Legislature's plan for redistricting the New Mexico House of Representatives:

First, the Court should give thoughtful consideration to the Legislature's plan, deviating from the Legislature's plan only where and to the extent necessary to correct a constitutional or statutory violation. This standard gives proper respect to the legislative process which produced

the Legislature's plan, and protects the proper balance of power between the legislature and courts. *See* Argument, Point II(A), *infra.*

Second, the Legislative Plan has not been shown to violate any constitutional or statutory standard or to deviate substantially from past redistricting practice; rather, it is a fair plan which represents an appropriate balancing of legitimate and traditional state concerns, embodies least change principles, and adheres to the 2011 Redistricting Guidelines unanimously adopted by the Legislature's bi-partisan Legislative Council. *See* Argument, Point II(B), *infra*.

Third, the Executive Defendants' plans are not entitled to similar thoughtful consideration and should not be adopted, because (a) the Executive Defendants eschewed the political process and ignored important input from New Mexico's citizens and sovereign nations; (b) their plans are based on an inaccurate characterization of the requirements of one-person, one-vote in the context of state legislative redistricting; (c) the Executive Defendants disregard the importance of New Mexico's traditional districting principles in order to achieve near-zero deviations, a practice which is wholly unnecessary and unprecedented in New Mexico redistricting history; (d) their self-proclaimed "neutral and objective" approach is belied by the Republican bias in their original plan and even more so in their second and third amended plans, which significantly increase Republican performance; and (e) adoption of any of their plans would violate separation of powers principles and would set a precedent that diminishes the important role of the Legislature and incentivizes the Executive to by-pass the political process and impose its own redistricting policy through the courts. *See* Argument, Point II(C), *infra.*

Finally, the limited role this Court must play in this matter, as emphasized by the Executive Defendants themselves, is best adhered to by application of least change principles and the avoidance of a radical departure from past redistricting policy. Due regard for the

limitations on the Court's equitable powers should also preclude adoption of any iteration of the Executive Defendants' plans, given their dramatic departure from four decades of redistricting policy in the State of New Mexico. *See* Argument, Point II(D), *infra.* For all these reasons, the Court should adopt the Legislature's plan for the redistricting of the New Mexico House of Representatives for the next decennium.

II. ARGUMENT

A. The Court should give thoughtful consideration to the Legislature's plan, deviating from it only where and to the extent necessary to correct a legal violation. This standard gives proper respect to the legislative process which produced the plan, and protects the proper balance of power between the legislature and courts.

1. The Legislative plan merits thoughtful consideration, arising as it did from the rigors of the legislative process.

The Court is bound to give thoughtful consideration to the Legislature's plan and should avoid deviating from this plan unless and only to the extent necessary to remedy constitutional and statutory violations. Such is made clear by the United States Supreme Court case of *White v. Weiser*, 412 U.S. 783 (1973). In that case, the district court struck down a state's Congressional districting plan which failed to comply with the much stricter one-person, one-vote requirements applicable in that context. *Id.* at 793. The district court was then faced with the choice of adopting two constitutionally-compliant plans. *Id.* One plan, deemed "Plan B," "represented an attempt to adhere to the districting preferences of the state legislature while eliminating population variances [consistent with the strict requirements of congressional redistricting]." *Id.* at 796. The other, "Plan C," "ignored legislative districting policy and constructed districts solely on the basis of population considerations." *Id.* The Supreme Court held that the district court erred in selecting the plan which ignored the districting preferences of the state. *Id.* In doing so, the Court stated, "Given the alternatives, the court should not have imposed Plan C

with its very different political impact, on the State. It should have implemented Plan B, which most clearly approximated the reapportionment plan of the state legislature, while satisfying constitutional requirements." *Id.* Similarly, in *Upham v. Seamon*, 456 U.S. 37 (1982) the Supreme Court held that the District Court erred in substituting its own reapportionment preferences for those of the state legislature. *Id.* at 40.

Courts may not ignore policy choices embodied in a legislatively passed plan even where the legislature's plan was vetoed. Such was explicitly recognized in *Johnson v. Mortham*, 926 F. Supp. 1460 (N.D. Fla. 1996). In that case, the court overturned a plan created by a federal three-judge panel in part because the plan failed to defer to legislative judgments contained in a plan submitted by the state legislature, even though the plan fell short of being enacted into law. *Id.* 926 F. Supp. at 1488; *see also White*, 412 U.S. at 795 (stating that a court, "in the context of legislative reapportionment, should follow the policies and preferences of the State, as expressed in statutory and constitutional provisions *or in the reapportionment plans proposed by the state legislature*, whenever adherence to state policy does not detract from the requirements of the Federal Constitution") (emphasis added); *O'Sullivan v. Brier*, 540 F. Supp. 1200, 1202 (D. Kan. 1982) (holding that plans passed by the Legislature but vetoed by the governor are entitled to thoughtful consideration); *Terrazas v. Clements*, 537 F.Supp. 514, 528 (N.D. Tex. 1982) (Plans "derived from the plans adopted by the legislature, are the result of a legislative process which we should recognize as an expression of legitimate legislative activity.").

That courts are bound to give thoughtful consideration to legislatively passed plans was also expressly recognized by this Court ten years ago in the *Jepsen* redistricting litigation. In reaching this conclusion, Judge Allen noted, "[i]n evaluating the plans submitted by the parties, it is appropriate that the Court give thoughtful consideration that [the legislatively passed plans]

are plans developed through a process which reflects the will of the people, expressed through their elected representatives." Findings of Fact and Conclusions of Law Concerning State House of Representatives Redistricting, Finding No. 40, January 24, 2002, Case No. D-0101-CV-2001-02177. And in fact, other parties to this litigation concede that the Legislature's plan is entitled to thoughtful consideration. *See The Executive Defendants' Pre-Trial Brief Regarding the New Mexico House of Representatives Redistricting Plan* at p. 12; *Egolf Plaintiffs' New Mexico State House of Representatives Trial Brief* at p. 2.

Like the Legislature's plan presented in the *Jepsen* litigation, the Legislature's plan presented in this litigation was developed through a rigorous and transparent public process which reflects the will of the people, expressed through their elected representatives. More specifically, the plan was the product of the legislative process following an intensive effort to gain input from the public, which included multiple public meetings during the interim in locations all over the state including Farmington, Gallup, Rio Rancho, Santa Fe, Clovis, the Pueblo of Acoma, Las Vegas, Roswell, Las Cruces and Albuquerque, and after committee and floor hearings during the special session. Tr., 12/12/11. Part 2, pp. 22-36 (B. Sanderoff); Tr, 12/21/11, Part 2, pp. 78-79 (K. Martinez). The Legislature worked closely with Native Americans leaders in an effort to preserve the voting strength of the various tribes and pueblos in Northwest New Mexico, to respect their communities of interest, and to accommodate their preferences. Tr. 12/21/11, Part 2, pp. 90-91 (K. Martinez); Tr. 12/19/11, Part 3, p. 35 (C. Chino); Tr. 12/19/11, Part 2, pp. 7, 17 (L. Reval); Tr. 12/19/11, pp. 61-62 (A. Warren). The Legislature also carefully considered the preferences of others, such as citizens in Alamogordo, Los Alamos, Rio Rancho, Albuquerque's International District, Eldorado and Grants, who expressed a desire that their communities remain intact, Tr., 12/12/11, Part 2, pp. 27-30 (B. Sanderoff); Tr.,

12/13/11, Part 3, pp. 56-67 (B. Sanderoff), as is evidenced, in part, by the fact that the Legislature's plan splits fewer incorporated municipalities than any other plan before the Court. Tr. 12/12/11, Part 4, pp. 7-8 (B. Sanderoff); Legis. Def's Exh. 14. Using redistricting guidelines which were adopted unanimously by the bi-partisan Legislative Council, Tr., 12/21/11, Part 2, pp. 75-76 (K. Martinez), the Legislature carefully weighed and balanced sometimes competing but legitimate goals and desires in an effort to develop a plan which overall best serves the interests of the people of New Mexico. Tr. 12/21/11, Part 2, pp. 98-100 (K. Martinez). This is in sharp contrast to the many plans which have been submitted by the Executive Defendants and the other parties, as is discussed more fully in Part C below.

2. <u>According thoughtful consideration to the Legislature's plan also protects the proper balance of power between the legislature and courts.</u>

This approach of giving thoughtful consideration to legislatively passed plans is crucial to preserving the delicate balance of power under our tripartite system of government and to preserving the strength of our representational system. The Legislature is constitutionally charged with the task of redistricting in the first instance, *see* N.M. Const. art. IV, § 3(D), and is the institution best-suited to do so because state legislators are popularly elected, are closest to the people who select them, and are otherwise uniquely equipped to perform the task. *See* Tr. 12/21/11, Part 2, pp. 101-102 (K. Martinez) (discussing the special role of the Legislature's transparent and public process); *see also Connor v. Finch*, 431 U.S. 407, 414-15 (1977) ("[A] state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality."); *Butcher v. Bloom*, 203 A. 2d 556, 569 (Pa. 1964) ("The composition of the Legislature, the knowledge which its members from every part of the state bring to its deliberations, its techniques for gathering information, and other factors inherent in the

legislative process, make it the most appropriate body for the drawing of lines dividing the state into …[legislative districts]."); *see also Jensen v. Wisconsin Elections Bd.,* 249 Wis.2d 706, 639 N.W.2d 537, 540 (2002) ("The framers [of the Wisconsin Constitution] in their wisdom entrusted [redistricting] to the legislative branch because the give-and-take of the legislative process, involving as it does representatives elected by the people to make precisely these sorts of political and policy decisions, is preferable to any other."). The New Mexico Constitution and courts recognize that it is the particular domain of the Legislature "as the voice of the people" to make public policy. *Torres v. State*, 119 N.M. 609, 612, 894 P.2d 386, 389 (1995); *State ex rel Taylor v. Johnson*, 1998-NMSC-015, ¶ 21, 125 N.M. 343, 961 P.2d 768 ("We also have recognized the unique position of the Legislature in creating and developing public policy.").

The courts, in contrast, are not well-suited to the task of redistricting, and it is not the province of the courts to second-guess legitimate policy judgments made by the legislature. *Jensen v. Wisconsin Elections Bd.*, 249 Wis. 2d 706, 713, 639 N.W.2d 537, 540 (Wis. 2002) ("Courts called upon to perform redistricting are, of course, *judicially legislating*, that is, *writing* the law rather than *interpreting* it, which is not their usual – and usually not their proper – role."); *Town of Brookline v. Sec'y of Com.*, 417 Mass. 406, 421, 631 N.E.2d 968, 977 (1994). ("It is not a judicial function to decide whether a plan can be designed which is superior to the one designed by the Legislature. Rather, it is our duty to determine whether the legislative plan complies with constitutional requirements.").

Because of the institutional differences between legislatures and courts, the Legislative Defendants agree with the Executive Defendants that the Court should avoid making sensitive political judgments better left to the political branches. However, the Executive Defendants are incorrect in suggesting that the Court could avoid making such decisions by simply adopting one

of their plans. *See* Tr. 12/12/11, Part 1, p. 9 (J. Hernandez). "Politics and political considerations are inseparable from districting." *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973), and the Executive Defendants made choices to subordinate consideration of communities of interest, Hispanic and Native American voting rights, the core of existing districts, and other redistricting principles in order to lower deviations and preserve partisan performance numbers, as is discussed more fully in Part C below. By adopting any of the Executive Defendants' plans, the Court would necessarily choose to subordinate traditional redistricting policies in contravention of the legislature's choice to adhere to those principles. The Court should decline to do so, as it would result in a radical departure in redistricting policy for the state.

Additionally, Executive Defendants are incorrect to suggest that their efforts to lower deviations are inherently neutral and objective. *See* Tr. 12/14/11, Part 1, p. 7 (J. Morgan). As was acknowledged by the experts in this case, including Mr. Morgan, lowering deviations does not prevent the creation of a plan with discriminatory effect or partisan bias, Tr. 12/14/11, Part 1 p.126 (J. Morgan); Tr. 12/19/11, Part 1, p. 19 (T. Arrington), and ignoring communities of interest can be used to weaken the effectiveness of certain interests within the state. *See* Tr. 12/19/11, Part 3, pp. 67-68 (R. Engstrom). In fact, Brian Sanderoff testified that Executive Defendants' Alternative 2 and Alternative 3 Plans, both evidently aimed, in part, at addressing Native American concerns for the Northwest section of the state, did so with a significant and systematic bias in favor of increasing Republican performance numbers in altered districts. Tr. 12/22/11, Part 1, pp. 49-60 (B. Sanderoff); Legis. Def's Exh. 30. In fact, the Executive Defendants' Alternative 2 and Alternative 3 Plans both increased Republican performance in 9 swing districts; the Executive Defendants' Alternative 2 Plan created 3 more Republican

majority seats and the Alternative 3 Plan created 4 more Republican seats than their original map. *Id.*

Therefore, the Court does not avoid making policy choices or avoid policy implications by simply adopting a plan with lower deviations than the Legislature's passed plan. Indeed, the Executives' plans embody a dramatically different redistricting policy for New Mexico, where our Legislature and courts have used a deviation of plus or minus five percent for the last four decennials. The Court best avoids making its own policy decisions by giving due consideration to the choices made by the people's representatives in the Legislature. The Court is bound to give thoughtful consideration to the Legislature's House Plan and adopt it because, as made clear in Part B that follows, that plan properly balances legitimate and traditional concerns in full conformity with all legal requirements.

B. The Legislative Plan has not been shown to violate any constitutional or statutory standard and in fact represents a fair and proper balancing of legitimate and traditional concerns within legal constraints.

In an effort to conjure up a "one person one vote" violation in the Legislative House plan, the Executive Defendants try to analogize that plan to the Georgia House and Senate plans struck down by the federal district court in *Larios v. Cox*, 300 F.Supp.2d 1320 (N.D. Ga. 2004). However, the evidence at trial confirms that the facts of the *Larios* case are completely distinguishable from the Legislature's House plan and have no application here. Instead, the facts of this case are strikingly similar to those in *Rodriguez v. Pataki*, 308 F. Supp. 2d 346 (S.D.N.Y. 2004) *aff'd*, 543 U.S. 997, 125 S. Ct. 627, 160 L. Ed. 2d 454 (2004), a case decided after *Larios*, in which the court granted summary judgment in favor of the New York State Legislature on claims that the New York Legislature violated the one-person, one-vote principles announced in *Larios*. To the extent that *Larios* has any precedential value in this proceeding, it merely reinforces that the Legislative plan, with deviations below ten percent that are justified by

rational state policies and traditional districting principles, is constitutional and cannot be rejected on the basis of one person, one vote.

The *Larios* case expressly recognized and adopted what has become known as the "ten percent rule" in legislative redistricting. *Id.* at 1339; *see also Brown v. Thomson*, 462 U.S. 835, 842 (1983) (overall deviations below ten percent are minor and do not by themselves trigger a state's burden to justify them). This rule means that, where a plan's overall deviation is below that range, it is presumptively constitutional. *Larios* at 1339, citing *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973). In order to overcome this presumption, a plaintiff "must prove that the redistricting process was tainted by arbitrariness or discrimination." *Fairley v. Hattiesburg, Miss.*, 584 F.3d 660, 675 (5th Cir. 2009); *see also Larios*, 300 F.Supp.2d at 1340. To do so, plaintiffs "have the burden of showing that the 'minor' deviation in the plan results solely from the promotion of an unconstitutional or irrational state policy" and "that the asserted unconstitutional or irrational state policy is the actual *reason* for the deviation." *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F.Supp. 1022, 1032 (D. Md. 1994); *Rodriguez*, 308 F.Supp. 2d at 365. To meet this heavy burden, plaintiffs must affirmatively show that the minor population deviation is *not* caused by the promotion of legitimate state policies. *Id.* As is stated in *Rodriguez*, "If the burden on the plaintiffs in minor-deviation cases were anything less than this substantial showing, then the plaintiffs would be able to challenge any minimally deviant redistricting scheme based upon scant evidence of ill will by district planners, thereby creating costly trials and frustrating the purpose of *Brown* 's 'ten percent rule.'" *Id.*

Larios involved egregious facts, resulting from what the Executive Defendants' own expert Dr. Gaddie describes as "a blatant exercise of power by a political majority bent on self-perpetuation." Tr. 12/14/11, Part 3, p. 120; R. Gaddie, *From Ashcroft to Larios: Recent*

Redistricting Lessons from Georgia, 34 Fordham Urb. L.J. 997 (April 2007) at 1. The legislative plans in *Larios* aggressively used population deviations and the pairing of incumbents to target Republican legislators and to maintain or increase the Democratic majority. *Larios*, 300 F.Supp.2d at 1326-27; *see also Rodriguez*, 308 F. Supp. 2d 346, n. 27 (noting that "*Larios* involved the wholesale distortion of district lines throughout the state in order to target and oust members of the minority political party"). For example, 66% of Georgia House seats and 50% of the Senate seats were drawn with deviations greater than plus or minus 4%. *Id*. at 1327. In both the Georgia House and Senate plans, the majority of the under-populated districts in the inner-city and certain rural areas were Democrat-leaning, and the majority of overpopulated districts in the suburbs were Republican-leaning. *Id*. at 1326-27. The House plan paired 47 incumbents, 37 of whom were Republicans. *Id*. at 1326; *see also id.* at 1329 ("Republican incumbents were regularly pitted against one another in an obviously purposeful attempt to unseat as many of them as possible). The Senate plan paired 12 incumbents, 10 of whom were Republicans. *Id*. at 1327.

Moreover, the Georgia legislators who drew and passed the House and Senate plans in *Larios* failed to cite *any* traditional districting principles or rational state policies in support of their plans. To the contrary, legislators testified that they did not consider compactness, contiguity, preserving political subdivisions, or communities of interest in drawing their plans. *Id.* at 1325, 1331-1334. Some legislators testified they did not value or even understand the traditional districting criteria. *Id.*, 1332-1333.

It is undisputed that the New Mexico Legislature's House plan now before the Court does not suffer from *Larios*'s blatant partisan manipulation or disregard for traditional districting criteria. On cross-examination, Dr. Gaddie conceded that he "did not detect" the partisan

elements of *Larios* in the Legislative Defendants' plan. Tr. 12/14/11, Part 3, p. 121; *see also* Tr. 12/19/11, Part 1, pp. 9-10 (T. Arrington) (no partisan bias in Legislative plan); Tr. 12/20/11, Part 1, pp.36-37(J. Katz) (same). Dr. Gaddie also admitted, as the evidence has unequivocally shown, that the deviations in the Legislative House plan are spread among Democratic and Republican districts and do not have a partisan bias. *Id.* at p. 121-124; *see also* Tr. 12/12/11, Part 3, pp. 52-58 (B. Sanderoff); Tr. 12/13/11, Part 3, pp. 50-51. Dr. Gaddie further acknowledged that the incumbent pairings present in the Legislative plan do not have a partisan bias, as the plan pairs two Democrats, two Republicans, and a Democrat and a Republican. Tr. 12/14/11 Part 3, p. 113; *see also Rodriguez*, 308 F. supp. 2d 346, n. 23 (finding no constitutional violation where only two incumbent pairings resulted even though both involved pairing members of the minority party, finding "there is no pernicious pattern of Senate Republicans manipulating population deviations in order to manufacture the pairs or oust large numbers of Democrat incumbents").

Indeed, the evidence of the Legislative plan's partisan fairness is overwhelming. Much to the consternation of the Executive Defendants' political science expert Mr. Brunell, Republicans benefit from deviations below the ideal as much as Democrats do under the Legislative plan. Tr. 12/21/11, Part 2, pp. 17-19 (T. Brunell). The deviations above the ideal in the Legislature's plan also have no partisan bias. Tr. 12/12/11, Part 3, pp. 52-58 (B. Sanderoff). And, the Legislature's incumbent pairings actually result in a gain for Republicans. *See* Tr. 12/12/11, Part 4, pp 9-11 (B.Sanderoff) (explaining that as a result of the legislative plan's three pairings, a strong Democratic district became a Democratic-leaning district; a Republican-leaning district became a strong Republican district; and a strong Republican district remained strong). By contrast, although the Executive Defendants' pairings appear on the surface to be bi-

partisan, in fact their pairing of Representative Park with a Republican legislator converts what was a Democratic district into a Republican one. Tr. 12/12/11, Part 4, pp. 12-14 (B. Sanderoff). This, in combination with the Executive Defendants' significant improvement in Republican performance in their second and third alternative plans, shows that the Legislature's plan better embodies partisan fairness than the Executive's. Moreover, the Legislature's plan could have – but, significantly, did not – consolidate the Republican Los Alamos district in the North Central in order to create a new Democrat district on the West side of Albuquerque. Tr. 12/12/11, Part 3, pp. 27, 32 (B. Sanderoff); Tr. 12/13/11, Part 3, pp. 50-51 (B. Sanderoff).[1] Finally, Dr. Gaddie gave the Legislative plan good marks on adherence to traditional redistricting criteria, including compactness, core retention, splitting of municipalities, and other factors. Tr. 12/14/11, Part 3, pp. 112-116; Gov.'s Exh. 30.

Despite their own expert's conclusion that the partisan problems of *Larios* are not present in the Legislative plan, the Executive Defendants attempt to apply *Larios* by relying solely on that case's findings regarding geographic differences in deviations. However, when viewed in its entirety and on its facts, it is clear that the regional deviation issues in *Larios* were driven by the gross partisan manipulations of the legislative majority in that case. First, the *Larios* court does not attempt to separate the partisan differences in deviations from the regional differences. To the contrary, the court directly links them. *See* 300 F.Supp.2d at 1326-1327 (noting that the underpopulated districts in the south and urban areas are predominately Democratic and the overpopulated areas in the suburbs are mostly Republican). Second, in its findings, the *Larios*

[1] One of the alternative plans recently proposed by the Egolf plaintiffs does consolidate the Los Alamos district in order to create a new Democratic district, further demonstrating that the Legislative plan better embodies partisan fairness than the Executive plan, the Sena plan, and even this alternative Egolf plan.

court makes clear that the regional differences in deviations are a symptom of the majority's partisan tactics, not a separate problem:

> After thorough review of the entire record in this case, we cannot escape the conclusion that the population deviations were designed to allow Democrats to maintain or increase their representation in the House and Senate through the underpopulation of districts in Democratic-leaning rural and inner-city areas of the state and through the protection of Democratic incumbents and the impairment of the Republican incumbents' reelection prospects.

Id., 1334; *see also id*. at 1328 ("[i]n an unambiguous attempt to hold onto as much of that political power as they could . . . the plans' drafters intentionally drew the state legislative plans in such a way as to minimize the loss of districts in the southern part of the state."). Finally, Dr. Gaddie, who testified in *Larios* and has studied it at length, concedes that the regional deviations in Larios are tied to the partisan issues in that case.[2] *See* Tr., 12/14/11, Part 3, p. 121.

Moreover, unlike the legislators in *Larios*, the Legislative Defendants have affirmatively presented clear evidence of the rational state interests served by the minor deviations present in the Legislative plan in several respects. First, the deviations below the ideal in the Northwest quadrant of the state are justified by the Legislature's respect for Native American voting rights and communities of interest, and the corresponding need not to expand district boundaries far beyond Native American communities. Tr. 12/12/11, Part 3, pp. 20-23 (B. Sanderoff).

Second, the deviations below the ideal in the North Central part of the state serve to protect recognized communities of interest in Los Alamos, Pueblo communities, and traditional

[2] The Executive Defendants also exaggerate the United States Supreme Court's treatment of regional or geographic deviation patterns, and take language from that Court's decisions out of context. Other than *Larios*, which stands as a wholly unique exception, cases which condemn regional bias in deviations involve wildly disparate treatment of regions, not the minor variances seen in the Legislative plan. *See, e.g., Reynolds v. Sims*, 377 U.S. 533 (1964) (reapportionment had not occurred in 60 years, proposed plan would have meant population variances among districts of up to 5-to-1, and only 39 of the 106 House seats were actually to be distributed on a population basis).

Hispanic districts and to preserve the core of existing districts and avoid the pairing of incumbents. *Id.* at pp. 24-27; Tr. 12/21/11, Part 2, pp. 85-88 (K. Martinez). The Legislative plan dealt with underpopulation in this area appropriately by expanding district boundaries to the east. *Id.* at 35-37 (B. Sanderoff); Tr. 12/15/11, Part 3, pp. 64-65; Leg. Exh. 25. The Executive Defendants, Sena Plaintiffs and James Plaintiffs make much of the fact that the Legislative plan does not consolidate a district in North Central New Mexico. However, Mr. Sanderoff explained that a North Central consolidation was merely one option for redistricting the House, and in fact there were at least three other acceptable options for dealing with underpopulation in that area. Tr., 12/12/11, Part 3, pp. 30-37; Legis. Def's Exh. 25. Representative Martinez testified about the unique traditional communities in that area and the need for preserving the cores of those districts, Tr., 12/21/11, Part 2, pp. 85-88, and the questionable fairness of pairing two more Democratic representatives than Republican representatives (the Legislatively passed plan pairs three of each).[3] *Id*. at pp. 139-140. Notably, Mr. Sanderoff explained that the Legislature could have consolidated the Los Alamos area, which would result in the loss of a Republican seat and the gain of a Democratic seat in Albuquerque, but chose not to do so out of deference to the Los Alamos community of interest. Tr.12/13/11, Part 4, pp. 50-51.

Third, the deviations below the ideal in the Southeast region serve to protect Court-created majority Hispanic districts, such as HD 63 and HD 58 and to avoid pairing additional

[3] Representative Martinez testified that initially, the House Democrats and Republicans had agreed on a balanced approach, pairing two Republicans in the Southeast, two Democrats in Albuquerque, and then a Democrat and Republican in the Southwest. It was only later in the session that Republican leaders insisted on also pairing two Democrats in the North Central region, which would have eliminated a Democratic seat and favored Republicans. Tr. 12/21/11, Part 2, pp. 92-96 (K. Martinez).

incumbents in that area.[4] Tr. 12/12/11, Part 3, pp. 28-29 (B. Sanderoff). The deviations above the ideal in the Legislative plan are primarily located in the area of Albuquerque east of the Rio Grande, which is a low growth area and where it makes sense to keep districts on the high side of the ideal. *Id.* at pp. 49-51.[5] Finally, deviations in the Legislature's plan are also justified by an effort to avoid splitting municipalities. Citizens around the state expressed their desire that their municipalities remain intact, Tr. 12/13/11, Part 3, pp. 56-67 (B. Sanderoff), and the Legislature's plan splits fewer incorporated municipalities than any other plan presented in this litigation. Tr. 12/12/11, Part 4, pp. 7-8 (B. Sanderoff); Legis. Def's Exh. 14. By contrast, these redistricting principles were not applied in *Larios*, where partisan motivations drove the process. *See Larios*, 300 F.Supp.2d at 1334; Tr. 12/14/11, Part 3, p. 121-122 (R. Gaddie).

Seeking to avoid the proper analysis of *Larios* and the overwhelming evidence before this Court that distinguishes this case in significant ways from *Larios*, the Executive Defendants would untie the geographic deviations in that case from their essential moorings in the grossly partisan manipulation of the plan at issue in that case. A similar claim was made and rejected in *Rodriguez*, a case decided after *Larios*, and for the same reason it failed there it must fail here. In *Rodriguez*, the plaintiffs asserted that the New York Legislature's Senate plan "impermissibly and arbitrarily discriminate[d] against 'downstate' residents … by systematically overpopulating

[4] The Legislative Defendants also cannot be deemed to have "favored" the Southeast region, as their plan consolidates and moves a district from that region to a high-growth area in Rio Rancho.

[5] In high growth areas on the West side of Albuquerque, the Legislature's plan generally employs low deviations, as evidenced, for example by the Legislature's proposed House District 16, which has a deviation of -0.12% and House District 69, which has a deviation of -2.06%. Tr. 12/12/11, Part 3, pp. 46-48 (B. Sanderoff). Population numbers in other districts in this area are kept near to the ideal. *Id*. at pp. 48-49.

all of the 'upstate districts' and argued that defendants "adhered to the 'ten percent rule' (just barely) because they believed it to be a 'safe harbor.'" *Rodriguez*, 308 F. Supp. 2d at 366.

The *Rodriguez* court rejected such a conclusion out of hand, holding that "defendant's conscious use of the 'ten percent rule' cannot, without more, support an inference that no legitimate state policies accounted for a minor deviation in a districting plan[6] or that adherence to the 'ten percent rule' was a mere pretext for impermissible considerations." *Id.* at 367.

The Court in *Rodriguez* observed—in a manner fully applicable here—that a plaintiff merely begs the question in making repeated assertions that some overpopulation and underpopulation deviations reflect an illegitimate aim to over-represent a region of the state at the expense of another region which had grown more substantially. In doing so, the court perceptively noted that: "[j]ust as in the racial context where courts must deal with the overlap of racial identity and partisan identification . . . so in the one-person, one-vote context must the plaintiffs who challenge a plan with less than a ten-percent deviation present some evidence that the districting can be traced to impermissible considerations." *Id.* at 368.

No evidence has been produced in this case which signals an attempt on the part of the Legislature to underpopulate or overpopulate certain regions for an arbitrary or discriminatory purpose; to the contrary, the evidence supports those deviations as serving good, fair and sufficient state redistricting policies. Finally, as the *Rodriguez* decision makes clear, where there is evidence that a Legislature considers such traditional redistricting principles in connection with drawing districts, the plaintiff cannot meet his or her burden to show that the deviations resulted from impermissible considerations. *Id.* at 368.

[6] Notably, the *Rodriguez* court was considering a Senate plan with overall deviations of 9.78%. *Id.* at 356.

In sum, not only have the Executive Defendants (or any other party) wholly failed to rebut the Legislative plan's presumptive constitutionality under the ten percent rule, but the evidence affirmatively establishes that the Legislature's deviations are fair and are justified by adherence to traditional districting principles and promotion of rational state policy. Accordingly, Legislature's House plan complies with the principle of one person, one vote, and cannot be rejected on that basis.

C. The Executive Defendants' plans are not entitled to thoughtful consideration and should be rejected because they were created in isolation, outside of the political process, and are based on an erroneous characterization of the legal standard for equal population requirements for legislatures and courts in this context.

1. The Executive Defendants' approach improperly disregards the expressed concerns of New Mexicans and ignores the Traditional Districting Principles that have guided legislative districting in this state for generations, and is not entitled to thoughtful consideration.

The Executive Defendants have claimed that all four of the plans they submitted to the Court are entitled to receive thoughtful consideration on par with the Legislature's plan.[7] However, their repeated revisions reveal a litigation tactic of ignoring public input and New Mexico's redistricting history, Voting Rights Act issues, and other traditional redistricting principles in order to present a plan with minimal deviations to garner the Court's approval. Such litigation tactics — and plans which change from day to day throughout trial — are not the sort of careful policy considerations which are entitled to receive thoughtful consideration as "proffered executive policy." *See O'Sullivan v. Brier*, 540 F. Supp. 1200, 1202 (D. Kan. 1982)

[7] In his argument in opposition to the Legislative Defendants' Motion to Strike the Executive Defendants' Amended Plans, counsel for the Governor appears to have conceded that the Executive Defendants are not entitled to thoughtful consideration. *See* Tr. 12/22/11, Part 1, pp. 10-11 (P. Kennedy). However, counsel for the Governor wrongly asserted that no plans are entitled to thoughtful consideration.

(Governor supported a plan in litigation that was "very close to a bill unsuccessfully urged upon the Kansas legislature by the Democratic minority"); *Carstens v. Lamm*, 543 F. Supp. 68, 79 (D. Colo. 1982) (Governor had presented proposed plan to legislators for consideration and possible compromise before and during litigation).[8]

The Court has heard undisputed evidence that the Executive Defendants did not participate in the transparent public process of redistricting that was undertaken by the Legislature. *See, e.g.*, Tr. 12/14/11, Part 1, pp. 76-77, 82-83 (J. Morgan). Unlike the legislatively-passed House plan, neither the Governor's original plan nor any of her "alternative" plans for the House were subject to the political process or any public comment, compromise, debate or vote. *See id*. (testifying that his instructions for drawing the Executive plan came from lawyers, and the plan was not introduced in the special session); *see also*, Tr. 12/21/11, Part 2, pp. 97, 100, 102 (K. Martinez) (testifying that the Governor's plan was never brought before the Legislature and the Governor's representatives never said anything to him before or during the Session about a need or desire for deviations within plus or minus 1%); Tr. 12/13/11, Part 3, pp. 55-56 (B. Sanderoff) (Executive's plan never presented as a concept map in public hearings).

Instead, the Executive Defendants waited on the sidelines, ignored the important public concerns put forward by Native American sovereigns and other groups before and during the Special Session, and came forward with a plan constructed in isolation by their lawyers and

[8] Additionally, there is no authority for the proposition that the Lieutenant Governor or the Secretary of State is entitled to any special consideration in this context. Nor do the plans of any of the Plaintiffs merit any special consideration. Notably, although the Egolf plan originally was modeled closely on the Legislature's plan (and the Egolf plaintiffs accordingly sought to benefit from the thoughtful consideration to which the Legislature's plan is entitled), subsequent iterations of the Egolf plan have moved further away from the Legislative plan. Thus, to the extent that the Egolf plaintiffs could have claimed that their original plan has a right to thoughtful consideration, their alternative plans are certainly not so entitled.

Republican map drawer from Virginia, only after litigation had commenced. Tr. 12/14/11, Part 2, p.2 (J. Morgan). The Executive Defendants inexcusably and repeatedly ignored and failed to listen to the redistricting wishes and needs of the Native American nations within our state's borders. Leaders from a number of tribes repeatedly attempted to communicate with the Governor's office prior to and during the special session to convey their preferences but received no response from the Governor's office. Tr. 12/19/11, Part 2, pp. 16-17 (L. Reval); Tr. 12/19/11, Part 2, pp. 38; 65 (C. Dorame). The Executive Defendants ignored input from the public and disregarded New Mexico's redistricting history, Voting Rights Act issues, and our traditional redistricting principles in order to present a plan to the Court which contains minimal deviations but more Republican-leaning seats than the plan which was passed by the Legislature. The Executive Defendants have repeatedly tried to correct these defects in their plan while trial is ongoing, in an effort to gain Court approval.

The Executive Defendants' disregard for the unique concerns of New Mexico is best illustrated in connection with their plans' treatment of the Hispanic community in Clovis and Native American districts in the northwest region of the state. Specifically, the evidence has shown that the Executive Defendants' original plan splits the Hispanic community of Clovis into two districts, neither of which have majority Hispanic voting age populations. Tr., 12/12/11, Part 4, pp. 19-20 (B. Sanderoff). Such a plan would violate section 2 of the Voting Rights Act by diluting the voting strength of Hispanics in Clovis and unlawfully impede their opportunity to elect a candidate of their choice. Tr., 12/12/11, Part 4, pp. 19-35 (Sanderoff); Legislative Def's House Trial Exhs. 18–22. The Hispanic community in Clovis was united in 1984 by a three-judge panel of the United States District Court to address Voting Rights Act violations, and has consistently elected Hispanic representatives to the Legislature since then. *See* Legislative Def's

House Trial Exh. 5; Court's Findings of Fact and Conclusions of Law, August 7, 1984, issued in *Sanchez v. King,* U.S. Dist. Ct. for the Dist. of New Mexico Case No. 82-0067-M (Consol.) (Hon. Juan Burciaga) at p 137; Legis. Def's Exh. No. 18 (election results for HD 63 since 1984). However, the Executive Defendants' map drawer testified that he was not informed of this history in connection with his efforts to draw the Executive Defendants' original map. Tr. 12/14/11, Part 1, pp. 79-80 (J. Morgan).

The Executive Defendants' disregard for unique and traditional state concerns is also evident in their treatment of Native American districts. Native Americans not only comprise a minority group which is protected under the Voting Rights Act, but also comprise very identifiable and distinct communities of interest within the state. Tr. 12/19/11, Part 4, pp. 6-12 (R. Engstrom); Tr. 12/21/11, Part 2, pp. 84-88 (K. Martinez). The Executive Defendants' initial plan unnecessarily split various Native American communities of interest and ignored extensive input provided by tribal leaders. Tr. 12/19/11, Part 2, pp. 8-9; 16-17 (L. Reval). The Executive Defendants' first alternative plan, submitted on the eve of trial, made changes to the northwest corner of the state but which were not made in consultation with the tribes or their representatives and still departed significantly from Native American preferences in that area, Tr., 12/19/11, Part 2, pp. 8-9, in large part because of their map drawer's persistent pursuit of his mandate to maintain deviations within a plus or minus 1% deviation – a practice unprecedented in New Mexico redistricting history. The Executive Defendants amended their plan for a second time during litigation to address concerns raised by Native American tribes who are parties to the litigation, but declined to consider the interests of non-party Pueblos, *see* cross-examination of Charles Dorame by Paul Kennedy, Tr. 12/19/11, Part 2, pp. 73-74, continuing to split the Pueblo of Tesuque and the Pueblo of San Ildefonso. The Executive Defendants then submitted yet

another amendment to their plan uniting these splits, but only after a witness testified on behalf of those Pueblos in court about the preferences of those pueblos. *See generally* testimony of C. Dorame, Tr. 12/19/11, Part 2. The Executive Defendants have thereby demonstrated that their sole concern is to avoid specific criticisms raised in this litigation in an effort to have their plan adopted, rather than engaging in careful consideration of the interests of all New Mexicans, including the sovereign nations within our state's borders.

The testimony of the Executive Defendants' map-drawer, John Morgan, highlights the Governor's complete disregard for other communities of interest in New Mexico, as Mr. Morgan testified that he was unfamiliar with New Mexico communities of interest, Tr. 12/14/11, Part 1, pp. 82-83, and made decisions about where to draw lines after consolidating districts primarily with an aim to preserve partisan performance numbers and minority population numbers between current and newly-created districts, Tr., 12/14/11, Part 1, pp. 10-11, 39-46, 53, 94, 97-98, 101-102, 104-105, 116-117 (J. Morgan). In the Executive Defendants' second and third alternative plans, they have taken the notable step of using this revision as an opportunity to improve Republican performance in numerous swing districts in the state. Tr. 12/22/11, Part 1, pp. 49-60 (B. Sanderoff); Legis. Def's Exh. 30 (showing that Executive Defendants' Alternative 2 and Alternative 3 Plans increased Republican performance in 9 swing districts; the Alternative 2 Plan created 3 more Republican majority seats; and the Alternative 3 Plan created 4 more Republican seats than their original map). These changes to their plan belie their claimed motives of "rising above politics" and presenting the Court with a "neutral" and "non-partisan" plan.

In sum, the Executive Defendants failed to consider the input of the public and avoided subjecting their plan to the scrutiny, debate, and compromise inherent in the legislative process. As a result of these failures, the first plan they presented to the Court contained both unlawful

and ill-considered features (such as unnecessarily splitting communities which have historically been unified and/or have expressed a strong request to be unified) which have been pointed out by parties to this litigation and prompted the submission of numerous amended plans. Subsequent revisions of their plans reveal that the Executive Defendants do not seek to implement careful and principled policy choices, and in fact that they are using these revisions as an opportunity to advance Republican interests while trying to maintain a façade of neutrality. The Executive Defendants' approach is reactive and opportunistic, seeking to only address specific concerns raised by the parties to this litigation to gain Court approval, and does not represent the type of considered policy choices which are entitled to "thoughtful consideration."

2. The Executive Defendants' approach is based on a misreading of the federal mandate concerning the equal population principle applied to state legislative districting and a state Court's ability to accommodate traditional state legislative policy in the absence of an enacted plan.

a. One-person, one vote requires "substantial equality of population" in the context of state legislative redistricting and recognizes the rights of states to accommodate legitimate policy in their plans.

There is no doubt that the primary task in redistricting is adherence to the constitutionally-mandated standard of "One-Person, One Vote." And it is well understood that by virtue of the force of Art. I, § 2 of the United States Constitution, congressional districts must achieve population equality "as nearly as practicable." *Westbury v. Sanders,* 376 U.S. 1, 7-8 (1964). But that is a much more exacting standard than that required for state legislative redistricting. From the beginning of modern redistricting, the Supreme Court made clear that federally mandated requirements in the state legislative context derive from the Equal Protection Clause of the Fourteenth Amendment, *Reynolds v. Sims*, 377 U.S. 533, 568 (1964), requiring "*substantial equality* of population among the various districts," and may contain deviations which are "based on legitimate considerations incident to the effectuation of a rational state

policy…." *Id.* at 579 (emphasis added).[9] However, "minor deviations" among districts are insufficient to require justification by the State. *Brown v. Thomson,* 462 U.S. at 842 (quoting *Gaffney v. Cummings,* 412 U.S. 735, 745(1973)); *see also Voinovich v. Quilter*, 507 U.S. 146, 160-162 (1993). The Supreme Court has made clear that overall deviations of less than ten percent are minor deviations which do not, by themselves, trigger a state's burden to justify them as necessary to serve substantial and legitimate state concerns. *Brown*, 462 U.S. at 842.

Thus, a pervasive difficulty with the Executive Defendants' entire approach begins with their opening statement to the Court, that what they are urging on this Court is an attempt to construct districts in both houses of the legislature with deviations "*as nearly a population* [sic] *as is practicable.*" Exec. Defs. Opening Statement (12/12/11 Tr. at 50) (emphasis added). In doing so, they are seeking to conflate the standard for state legislative districting with the much stricter congressional standard, in contravention of the different constitutional standards which derive from different provisions in the federal constitution.

In accordance with this well-established law governing the "substantial equality" standard in state legislative redistricting, New Mexico's bi-partisan Legislative Council unanimously adopted redistricting Guidelines which called for districts with population deviations no greater than plus or minus 5% of the ideal:

> State districts shall be *substantially equal in population*; no plans for state office will be considered that include any district with a total population that deviates more than plus or minus five percent from the ideal.

[9] While the *Reynolds* Court was also concerned with practicability, it recognized that unlike with respect to Congress, "it is a practical impossibility to arrange [state] legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement." 377 U.S. at 577. That is why the Court in *Reynolds* made explicit that, under the 14th Amendment, "[s]omewhat more flexibility may therefore be constitutionally permissible with respect to state legislative apportionment than in congressional districting." *Id.* at 578.

Legis. Def's Exhibit 2 (emphasis added); Tr., 12/21/11, Part 2, pp. 75-77 (K. Martinez). When asked by the Court about the meaning of this guideline, Representative Martinez, who serves on the Legislative Council and was a member of the Redistricting Committee, said that he understood that districts with deviations within the plus or minus 5% range were "substantially equal" for the purpose of legislative redistricting, Tr. 12/21/11, Part 2, pp. 137-138, which is thoroughly consistent with the law. *See, e.g., Reynolds,* 377 U.S. at 579 (the Equal Protection Clause requires "substantial equality of population among the various districts" and that deviations be "based on legitimate considerations incident to the effectuation of a rational state policy…."); *Brown,* 462 U.S. at 842 (overall deviations of less than ten percent are minor deviations which are presumptively constitutional and do not by themselves require a state to provide justification for the deviations).[10]

The Executive Defendants have sought to characterize the use of deviations as an improper attempt to diminish the voting efficacy of some citizens at the expense of others, and would have the Court restrict the state's flexibility to use deviations to accommodate traditional state policy. However, as was testified to by a number of political scientists in this litigation, traditional redistricting principles, such as respect for communities of interest and preservation of the core of existing districts can often be used to provide more effective representation for citizens who have historically had their voting power diluted. Tr. 12/19/11, Part 3, pp. 67-68 (R. Engstrom); Tr. 12/19/11, Part 1, pp. 4-5 (T. Arrington); *see also Carstens v. Lamm*, 543 F. Supp. 68, 91 (D. Colo. 1982). ("A plan "which provides fair and effective representation for the people

[10] Representative Martinez's testimony is also consistent with the other overwhelming testimony on the subject (reviewed above), which demonstrates that the ten percent rule served to aid the Legislature in the implementation of significant and legitimate state policies, including respect for minority voting rights and sovereign nations, preserving communities of interest, and maintaining the cores of existing districts to allow for continuity of representation.

of [the state] must identify and respect …communities of interest within the state."); *Arizonans for Fair Representation v. Symington*, 828 F. Supp. 684, 688 (D. Ariz. 1992) *aff'd sub nom. Hispanic Chamber of Commerce v. Arizonans for Fair Representation*, 507 U.S. 981, 113 S. Ct. 1573, 123 L. Ed. 2d 142 (1993) ("A court can determine if the proposed lines preserve communities of interest.").

Moreover, ignoring communities of interest can seriously diminish citizens' voting efficacy, because residents of communities divided between districts, or disparate communities united in one district, may be substantially hampered in their ability to physically meet with their representatives. This problem can be seen, for example, in the Executive Defendant's plans which combine far-flung Carlsbad and Chaparral precincts into one district. Tr. 12/14/11, Part 1, pp. 86-87 (J. Morgan); *see also Arizonans for Fair Representation*, 828 F. Supp. at 688 ("This principle [of preserving communities of interest] is important because it recognizes the importance of shared local experiences and the ability of groups and candidates to 'network' within their communities."). The harm resulting from a lack of consideration for traditional state policy and redistricting principles in a slavish attempt to lower deviations is further evidenced by the Executive Defendant's initial plan's Voting Rights Act violations, ill-considered splits of Native American Pueblos, and failure to honor Native American wishes, as discussed more fully below.

b. This court, as a state court, is not bound to apply a de minimis standard to population deviations.

While some federal courts apply a more narrow deviation standard where forced to adopt plans in the absence of new state redistricting laws, state courts are not so constrained. *In Re Apportionment of State Legislature*, 321 N.W. 2d 585 (Mich. 1982) (Levin and Fitzgerald, J.J.

concurring), *appeal dismissed for want of a substantial federal question sub. nom. Kleiner v. Sanderson,* 459 U.S. 900 (1982). As explained by justices in that case:

> When a federal court apportions a state legislature, there is a risk that legitimate state policies will be ignored or misunderstood. To limit encroachment by the federal judicial on state sovereignty, the United State Supreme Court limited the discretion of the federal courts by requiring greater population equality in federal court-ordered plans. *This concern is not present where the court ordering the plan is not a federal court but a state court which has declared and acts to enforce state policy.*

Id. at 593 (emphasis added). The opinion in that case carefully distinguished the holdings of cases such as *Chapman* and *Connor* which announced a *de minimis* standard for "court-ordered" plans on the ground that those cases were adopting *a prudential rule* – not a constitutional rule—to help federal courts from invading state sovereign interests in redistricting state political boundaries. *Id.* These principles led Judge Allen in the *Jepsen* litigation to rule that the New Mexico District Court was "constrained only by the 10% population deviation standard . . . ." (*Jepsen* State House Redistricting Finding 8).

Cases cited by others in this litigation for a contrary view are unavailing. Specifically, no case cited to by the Executive Defendants (see *Executive Defendants' Preliminary Proposed Finding of Fact and Conclusions of Law for the New Mexico House of Representatives Hearing, Conclusion 9*) for the proposition that *Chapman*'s *de minimis* rule is compelled by the Fourteenth Amendment even suggest that such is the case, and a reading of *Chapman* quickly dispels that claim. Moreover, if a *de minimus* rule were <u>constitutionally</u> compelled, then it would have to apply to every governmental body, including the legislature as well as reviewing courts. That is because all federal constitutionally compelled doctrines bind *all branches of government*, including state legislative and state judicial bodies. *See, e.g., Parents Involved in Community Schools v. Seattle School Dist. No. 1,* 551 U.S. 701 (2007) (holding school districts, as well as federal and state courts, to the same exacting federal constitutional standards in school

desegregation context). And, the U.S. Supreme Court has long held that for legislative redistricting, the Fourteenth Amendment requires only "substantial equality." If this is what the Constitution requires for state legislatures drawing district lines, the same constitutional standard must apply to state courts undertaking that task.

While the Supreme Court of New Hampshire, in *Below v. Gardner*, 963 A.2d 785, (N.H. 2002), held that state courts were bound by a *de minimis* deviation standard citing to *Chapman* and *Connor*, the court in that case did not carefully analyze the prudential source of the *de minimis* rule as did the justices in the Michigan case. The latter provides a more principled approach grounded in the differences between federal and state courts.

Thus, the Executive Defendants are palpably in error when they suggest that the one-person, one vote standard requires that this Court adopt a plan with the lowest possible level of deviations from the ideal, without sufficient consideration of important state interests contained in that state's traditional districting principles. *See* Tr. 12/12/11, Part 1, p. 50 (J. Hernandez). Such a position, if successful, would preclude the court from considering traditional districting principles that must be undertaken in a fair judicial formulation of state legislative districts. Furthermore, as discussed further in Section II.D, below, the Court's limited discretion precludes adoption of the Executive's plan (in any iteration) precisely because its extremely low deviations represent a dramatic departure from New Mexico's redistricting policy over the last four decades and deviates from least change principles to which the Court must adhere.

3. Adoption of the Executive Defendants' approach would undermine the legislative process and would upset the balance of power between our branches of state government.

As discussed above, the Governor failed to participate in the legislative process, waited on the sidelines throughout the interim and the special session, ignored the important public concerns put forward by Native Americans and other groups before and during the Special

Session, and came forward with a plan constructed without any public input and only after litigation had commenced. Then, less than a day before the trial for redistricting the House was to begin, the Governor changed her plan in an attempt to correct Voting Rights Act violations and other serious defects in her original plan that were identified by the Legislative Defendants' expert and others in discovery. Since then, the Executive Defendants have repeatedly submitted amendments or alternatives to their plans when other objections have surfaced during the trial. This strategy by the Executive Defendants demonstrates that their proffered plans are not the result of careful weighing of well-established districting principles, but rather constitute litigation tactics designed to gain the upper hand at trial, and as such are not entitled to any special consideration by the Court. The same might well be said of the plans of the Egolf and Maestas Plaintiffs that were amended and resubmitted throughout the litigation.

The Legislature is constrained to act in accordance with constitutional and statutory procedure in connection with endorsing redistricting legislation, and is unable to make amendments to its plan without following that procedure. *See, e.g.*, N.M. Const., Art. IV, § 17 (no bill shall be passed except by a majority of members present in each house); Id. at § 15 (restricting amendment or alteration of a bill). The Executive Defendants seek now to take advantage of the Legislature's inability to make changes to its plan in litigation in order to have their plan adopted. The Executive branch is also subject to constitutional constraints in the context of the legislative process, so as to preserve the balance of power between the Executive and Legislative branches. *See State ex rel. Clark v. Johnson*, 120 N.M. 562, 575, 904 P.2d 11, 24 (1995) (Governor's role with respect to passed legislation is limited to approving or vetoing the legislation); N.M. Const., Art. V, §8 (Lieutenant Governor shall be president of the senate but shall only vote in the event of a tie). However, the Executive Defendants are now using this

litigation as an end-run around those constraints in order to dictate redistricting in New Mexico without participating in the political process. Similar efforts by the Executive to circumvent the legislative process have been condemned by New Mexico courts. *See State ex rel. Taylor v. Johnson*, 1998-NMSC-015, 125 N.M. 343, 352, 961 P.2d 768, 777. ("By implementing [the Executive's public assistance] plan through … regulations rather than through the required legislative process, [the Executive branch members] made these core policy choices themselves, thereby preventing the constitutionally required input of the people's elected law-making representatives."); *see also State ex rel. Stewart v. Martinez*, [slip op. dated December 14, 2011], NMSC Docket No. 33,028 (holding that Governor's partial veto was unconstitutional and noting that the partial veto is the power to disapprove, and "is not the power to enact or create new legislation by selective deletions" of parts of a bill) (internal citations omitted).

Given these constraints on the legislative and executive branches, the Executive Defendants' plans are not entitled to thoughtful consideration and they should be rejected by the Court. Adopting the Executive approach would set a terrible precedent that would provide a judicially approved roadmap for any future Governor who disagrees with the Legislature to undermine the entire political process of redistricting that is mandated by our constitution and laws. This approach, if sanctioned by this Court, would allow – nay, encourage – such future Governors to stand aside from the political process; veto whatever is passed by the legislature; and use the resulting litigation to finally dictate his or her vision of the ideal political landscape of the state without the opportunity or any regard for public participation and transparency that are the hallmark of our democratic tradition—thereby disrupting our constitutional order of political checks and balances. That is why those courts which have given "careful consideration"

to legislatively passed plans, including Judge Allen in New Mexico's 2002 redistricting litigation, are correct and should be followed in this instance.

Similarly, adoption of a *de minimus* standard like the one employed by the Executive Defendants in this proceeding may have a perverse and disruptive effect on the legislative process. Despite the fact that the law clearly allows state legislative districts to deviate up to 10% from the ideal in order to accommodate important policy goals, legislatures doing the hard work of redistricting would be deterred from addressing those important policies as articulated in their traditional districting principles, for fear that a plan that legitimately balances those important interests, after Gubernatorial veto, may be rejected by a court for failure to slice the pie as thin as a plan prepared for litigation by the Governor or other special interest groups. Such a possibility could result in a gross distortion of the legislative process. The evidence at trial has clearly shown the dangers of ignoring communities of interest, minority voting rights, and other critical factors in a relentless pursuit of low deviations. The Court should not set a precedent that will unnecessarily constrain future legislatures and deter them from following their own guidelines and implementing legitimate state policy. Indeed, the people of the State of New Mexico would not be well-served by a legislature that redistricts with an eye toward litigation, rather than making sensible policy choices which respond to the needs of the citizenry and honor long-recognized values.

D. The limited role the Court must play in this matter counsels the avoidance of radical departure from past redistricting principles, and that is best achieved by adherence to least change principles and adoption of the Legislature's plan.

The law is clear that courts, when called upon to draw redistricting plans in the absence of an enacted statute, should stray no further than necessary from established state policy, as embodied in current districts, in order to bring those districts into compliance with governing

law. *See Wright v. City of Albany*, 306 F. Supp. 2d, 1228, 1237 (M.D. Ga. 2003) ("[N]ew redistricting maps should reflect the least change, when the least amount of change does not conflict with governing federal principles"); *Markham v. Fulton County Bd. of Registrations & Elections*, 2002 WL 32587313, *6 (N.D. Ga. May 29, 2002) (Court is required to change only the faulty portions of the benchmark plan, as subtly as possible, in order to make the new plan constitutional").[11] That is why adherence to districting principles that are concerned with preserving *pre-existing* communities of interest, maintenance of the core of *pre-existing* districts, moving the fewest number of people to preserve *pre-existing* relationships between constituents and their current representatives, and avoiding electoral clashes between *pre-existing* incumbents are such important considerations that both preserve the status-quo and preclude the court—even inadvertently—from making new state policy choices in the guise of neutrality.

Accordingly, a court's equitable powers to adopt or draw a redistricting plan in the absence of an enacted statute are limited. "The remedial powers of an equity court must be adequate to the task, but they are not unlimited." *Upham v. Seamon*, 456 U.S. 37, 42-43 (1982). Courts facing such a task must not "intrude upon state policy any more than necessary." *White v. Weiser*, 412 U.S. at 794-95. Here, the Court should act with restraint to take into account state redistricting policy, both as expressed in previous decades, by the plans adopted by the

[11] Notably, these cases involve facts in which no plan was passed by the governing body charged with redistricting in the first instance. As discussed above in Part A, where a plan has been passed by the legislature, even where vetoed, the Court is bound to give that plan thoughtful consideration and defer to lawful policy choices therein. *See White,* 412 U.S. at 795, stating that a court, "in the context of legislative reapportionment, should follow the policies and preferences of the State, as expressed in statutory and constitutional provisions *or in the reapportionment plans proposed by the state legislature*, whenever adherence to state policy does not detract from the requirements of the Federal Constitution") (emphasis added).

Legislature and those implemented by the courts, and as expressed by the Fiftieth Legislature in HB 39 which is now before the Court.[12]

These important principles and limitations on the court's role are embodied in the "least change" doctrine, which further supports judicial adoption of the Legislative Plan. Indeed, that is why Judge Allen, in the 2001 *Jepsen* litigation, found it appropriate to apply least change principles so as to avoid making political decisions that should properly be made by the political branches. (*Jepsen* Congressional Redistricting Finding 20; *Jepsen* State House of Representatives Redistricting Finding 39.). In doing so, Judge Allen recognized the limited role of the courts in drawing redistricting plans in the absence of an enacted statute, and rejected plans which represented a significant or unnecessary change in state redistricting policy.

The Executive Defendants' House plan, which disregards traditional New Mexico redistricting principles and minority voting rights in a quest for near-zero population deviations, represents a dramatic departure from the long-standing policies of the State of New Mexico with respect to redistricting in 1982, 1991, 2001 and 2011, when plans accommodated legitimate state considerations within an overall ten percent deviation standard. Tr. 12/22/11, Part 1, pp. 64-66 (B. Sanderoff).[13] The Court this decennial should not condone the Executive Defendants' continual retooling of their near-zero deviation plan in an effort to meet some minimum standard of consideration for New Mexico communities of interest and Voting Rights Act issues. Such an

[12] The Court may also consider equitable doctrines, such as estoppel and unclean hands, which would counsel against adoption of the Executive Defendants' plans, as those plans emerged only after the legislative redistricting process was over and ignored the voices of New Mexico's communities and sovereign nations.

[13] Similarly, the Egolf plaintiffs, by striving for very low deviations in their alternative plans, depart signi ficantly from New Mexico's districting policies that have been consistently applied over the last four decades.

approach both improperly ignores the thoughtful consideration to which the Legislature's plan is entitled, and also would endorse radically new redistricting policy in violation of the Court's limited role in this arena. Indeed, given the Court's limited role, the Court ought not to adopt any of the Executive plans, precisely because they embody a dramatic departure from the state's established redistricting policy.

The Legislature's plan allows the Court to adhere to least change principles, as its plan shifts sufficient population to fully comply with equal population mandates yet avoids drastic population shifts and thereby preserves long-recognized communities of interest, preserves the core of existing districts, avoids pairing incumbents, is fair from a partisan standpoint, and otherwise complies with applicable law. The Legislature's House plan shifts fewer people into new districts than all of the various plans submitted by the Executive Defendants and the Egolf Plaintiffs; indeed it shifts fewer people than any plans presented except the Sena Plan, which has a host of other difficulties. *See* Leg. Def's Exh 16. [14] The Legislature's House plan has an average core retention of 70.5%, more than any other plan in the litigation other than the Sena plan, and the Legislature's House Plan maintains the same compactness score as the current plan under the Reock measure. Gov. Exh. 10. Additionally, the Legislature's House plan splits fewer incorporated municipalities than any other House plan presented in the litigation and, unlike the Executive Plans, *see supra* pp. 12-13, pairs incumbents in a fair manner and in only three places. Gov. Exh. 10.

[14] The Evidence presented by the Legislative Defendants illustrates the multiple problems with the Sena plan, including a failure to accommodate Native American preferences and unnecessary community splits. *See* Tr. 12/12/11, Part 4, pp. 49-53 (B. Sanderoff). The Sena plan was also created with the express objective of institutionalizing the "high water mark" of the Republican seats in the House for over 40 years, which is not a recognized legitimate redistricting principle. *See* Tr. 12/13/11, Part 4, pp. 49-50 (B. Sanderoff).

III. CONCLUSION

The Legislative Plan for the New Mexico House of Representatives is the only plan before the Court which satisfies all constitutional and statutory legal requirements, adheres to traditional redistricting principles, honors New Mexico's sovereign Native American nations and other communities of interest, and was developed through a rigorous and transparent process involving months of public input from citizens all over the State. The Legislative Plan alone is entitled to thoughtful consideration as the embodiment of the will of the people expressed through the majority vote of their elected representatives.

By contrast, the Executive Defendants failed to participate in the public redistricting process and instead submitted to the Court a plan drawn in isolation by attorneys and an out-of-state demographer which, with its unprecedented adherence to minimal deviations, represents a dramatic departure from four decades of redistricting policy in New Mexico. As shown above, the extremely low population deviations in the Executive Defendants' plans are not compelled by the law and, given the Court's limited role and separation of powers considerations, adoption of such plans would be an untoward exercise of this Court's limited discretion.

Adoption of the Legislative Plan—more than any of the other plans submitted—allows the Court to avoid making new policy choices for the state, to honor the expressed wishes and needs of New Mexican communities and sovereign Native American nations, and to satisfy all the legal requirements and traditional principles that govern the redistricting process. After giving the Legislature's plan the thoughtful consideration to which it is entitled, and in light of the Court's limited role in adopting redistricting policy for the State of New Mexico, the Court should adopt the Legislature's Plan for purposes of redistricting the New Mexico House of Representatives.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 28, 2011, I caused a true and correct copy of Legislative Defendants' Post Trial Brief and Closing Argument Regarding State House of Representatives Redistricting to be e-mailed to all parties or counsel of record as follows and caused a copy of Legislative Defendants' Post Trial Brief and Closing Argument Regarding State House of Representatives Redistricting and this Certificate of Service to be filed electronically through the Tyler Tech System, which caused all parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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