STATE OF NEW MEXICO

COUNTY OF SANTA FE

FIRST JUDICIAL DISTRICT COURT

No. D-101-CV-2011-02942

BRIAN F. EGOLF, JR., *et al.*,

Plaintiffs,

vs.

DIANNA J. DURAN, *et al.*,

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' BRIEF ON REMAND COMMENTING ON THE COURT'S PROPOSED REAPPORTIONMENT PLANS FOR THE NEW MEXICO HOUSE OF REPRESENTATIVES

As explained in their brief filed last week, the Governor and the Lieutenant Governor ("Executive Defendants") respectfully disagree with the Supreme Court's Remand Order, or that any changes are required to this Court's pre-remand Adopted Plan in order to comply with the United States Constitution, the federal Voting Rights Act, and secondary, neutral redistricting principles. That stated, the Executive Defendants recognize that this Court is considering adoption of one of two plans that it has circulated to the parties for comment, and therefore

provide the following comments on those plans without waiving its arguments in opposition to the Supreme Court's Remand Order, corresponding Opinion, and instructions.

The Executive Defendants respectfully request that this Court continue with its original Court Adopted Plan, making only minimal modifications to comply with the Supreme Court's remand instructions. Nevertheless, they are obliged to concede that both maps under consideration, District Court 1 and District Court 2, are consistent with the Supreme Court's Order and Opinion. As discussed in the Remand Brief, the Supreme Court affirmed this Court's decision to adopt a House reapportionment plan that consolidates a district in the North Central portion of the state and protects the voting rights of certain Native American populations. *See* Exec. Defs. Remand Br. (filed 2/15/12) ("Remand Br.") at 4-7; *see also* Order, No. 33, 386 (2/10/12) ("Remand Ord.") at 17; Opinion, S.Ct. Nos. 33,386 & 33,387 (consolidated) (2/21/12) ("Slip Op.") at ¶ 41. Nevertheless, the Supreme Court instructed this Court to craft a new plan that a) considers whether communities of interest such as Deming and Las Vegas should be kept whole in its adopted plan; b) creates a citizen Hispanic majority district for Hispanics in the Clovis area; c) ensures that any Democrat-Republican pairing gives both parties an equal chance to win the district; and d) is "partisan neutral and fair to both sides." *See* Remand Ord. at 19-21; Slip Op. at ¶ 45; Exec. Defs. Remand Br. at 3-4.

The District Court, through its Court-appointed expert, created two reapportionment concepts that address these instructions on remand. However, as explained below, the Executive Defendants have some concerns about the proposed District Court plans that would be alleviated by either adoption of the previous Court Adopted Plan or minor modification of the newly proposed plans prior to adoption.

I. THE DISTRICT COURT PLANS APPROPRIATELY EMPLOY THE COURT ADOPTED PLAN AS A STARTING POINT TO ADDRESS POPULATION SHIFTS AND GENERALLY MAINTAIN LOW DEVIATIONS.

As explained in the Executive Defendants' remand brief, this Court can, and should, employ its Court Adopted Plan as a starting point on remand. *See* Remand Br. at 3-7. It appears to have done so. Further, this Court can, and should, adopt a map that consolidates a district in the underpopulated North Central Region and creates a third district on the Westside of Albuquerque. *See id.* at 4-5. Again, it appears to have done so. As explained in the remand brief, the Executive Defendants, this Court, and the Supreme Court all agree that both the North Central consolidation and third additional Westside district are justified by population changes over the last decade. *See id.* Although the Executive Defendants anticipate that certain parties, such as the Legislative Defendants, will argue against these shifts, there has been and is no basis to depart from them.[1]

Further, the Supreme Court's Opinion and Order do not require a wholesale departure from the population equality requirement, as some parties will undoubtedly argue. The Supreme Court made clear that a court can only diverge from the need to create *de minimis* population districts "for enunciated state policy reasons" such as those recognized by the Supreme Court's instructions. *See* Slip Op. at ¶ 39. This Court's decision to employ the Court Adopted Plan as an apparent starting point ensures that most districts will retain their low deviations, unless a departure from that standard is justified by legitimate and rational state policy recognized by the

[1] The Maestas Plaintiffs concede that consolidation of two North Central districts is proper. *See* Maestas Remand Br. (filed 2/15/12) at 2-4. The Egolf Plaintiffs have also conceded that such a consolidation is appropriate by introducing their Egolf 4 plan at trial, but reversed course on appeal and abandoned Egolf 4. The Egolf Plaintiffs' Remand Brief advocates for the adoption of plans that do not contain a North Central pairing. *See* Egolf Remand Br. (filed 2/15/12) at 19.

Supreme Court. Indeed, the District Court has arrived at plans where the deviations appear to stay close to the ± 1 percent range ***unless*** there is a reason articulated by the Supreme Court for departing from this standard, such as compliance with the Voting Rights Act or reunification of certain communities of interest.[2] In any case, by starting with the Court Adopted Plan, both of the District Court plans appropriately address the state's population changes and generally maintain low deviations, conform with the Supreme Court's remand instructions, and avoid sacrificing other redistricting principles.

II. THE DISTRICT COURT PLANS PROPOSE A CLOVIS HISPANIC DISTRICT THAT CONFORMS TO THE SUPREME COURT'S ORDER.

As explained in the remand brief, this Court can easily draw House District 63 in such a manner that both addresses the Supreme Court's instructions regarding this district and avoids the racial gerrymander proposed by some of the parties to this case.[3] *See* Remand Br. at 24-26. Both of the District Court plans contain such a district. HD 63 in both District Court Plans 1 and 2 is relatively compact, maintains Representative Dodge as its incumbent House member, and, as instructed by the Supreme Court, contains an adult Hispanic population of 57 percent, which, according to the Court's 11-706 expert, is an effective minority voting opportunity district. *See*

[2] The Executive Defendants urge the Court to decline the invitation it will undoubtedly receive from other parties to this case to depart even further from the "one person one vote" standard to make additional changes to its proposed District Court Plans. The deviation departures in the District Court Plans are arguably necessary to address the concerns raised by the Supreme Court; this Court need go no further away from the population equality maxim merely because the parties who were successful before the Supreme Court demand it.

[3] As explained in the Remand Brief, the Executive Defendants continue to assert that no party has established the need to remedy a violation of Section 2 of the Voting Rights Act in the Clovis area by mandating that HD 63 be drawn in a particular manner. As the Supreme Court recognized, this Court may still appropriately reject a particular construction of HD 63 if it makes "specific findings . . . based on the record before the district court that Section 2 Voting Rights Act considerations are no longer warranted." *See* Slip Op. at ¶ 20. The Executive Defendants disagree with the Supreme Court's analysis here because it improperly shifts the burden regarding alleged Voting Rights Act violations. *See Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986); *Bartlett v. Strickland*, 556 U.S. 1, 11-12 (2009) (party claiming Section 2 violation bears burden to establish *Gingles* preconditions and whether violation has occurred based on totality of the circumstances). Regardless, the Supreme Court clearly left it to the discretion of this Court to decline to draw HD 63 in any particular manner pursuant to the Voting Rights Act if the Court articulates the reasons for its decision.

id. Although the Executive Defendants disagree that HD 63 must be drawn in such a manner to comply with the Voting Rights Act, and believe that HD 63 could have been drawn with a lower population deviation,[4] the Executive Defendants concede that both District Court plans are in accordance with the Supreme Court's remand instructions regarding this district and the Clovis Hispanic population.[5]

III. THE DISTRICT COURT'S PLANS REUNIFY DEMING AND LAS VEGAS, AND OTHERWISE APPROPRIATELY CONSIDER THE REUNIFICATION OF MUNICIPAL COMMUNITIES OF INTEREST.

The Supreme Court also instructed this Court to consider reunification of municipal communities of interest such as Deming, Silver City, and Las Vegas. *See* Remand Ord. at 19-20. Both of the District Court Plans reunite Deming and Las Vegas.[6] They do not reunify Silver City, but this is appropriate for two reasons. First, the Supreme Court's instructions only require this Court to "consider" keeping Silver City whole in a state House map, they do not mandate it. *See* Slip Op. at ¶ 45; *see also id.* at ¶ 37 ("With respect to the legislative policy of preserving communities of interest, we recognize that this criterion may be subject to varying interpretations."). Second, the reunification of Silver City necessarily competes with making Deming whole, as the districts surrounding these communities border each other. Indeed, even the current districts adopted by the district court 10 years ago split Silver City. *See* Gov. Ex. 6. Moreover, the reunification of Silver City could force an unnecessary pairing of incumbent

[4] HD 63 in the Court Adopted Plan has a deviation of 0.2 percent.

[5] The Executive Defendants do not waive any of their arguments regarding the constitutionality of the Supreme Court's instruction to this Court to draw House District 63 with a majority citizen Hispanic voting age population when the Court's original findings of fact and conclusions of law stated that "the Court finds no persuasive evidence that Sec. 2 of the Voting Rights Act requires any particular Hispanic majority district to be drawn." *See* Findings of and Fact Conclusions of Law (New Mexico House of Representatives Trial) (1/3/12) ("FOL/COL") at COL ¶ 26.

[6] The Executive Defendants continue to assert that the Court Adopted Plan appropriately dealt with the splits of Las Vegas and Deming, *see* Remand Br. at 7-13, but recognize this Court's discretion to unify these communities pursuant to the Supreme Court's remand instructions.

legislators. *See* Maestas Remand Br. at 4 (proposing that Silver City be kept whole by pairing Representatives Hamilton and Martinez). The Court was likely forced to make a choice between these competing considerations, which is well within its discretion to do.

The Egolf Plaintiffs contend that the Voting Rights Act compels reunification of Silver City. *See* Egolf Remand Br. at 16-17. Yet neither this Court, nor the Supreme Court, agrees with that conclusion. *See* FOF/COL at COL ¶ 26; Slip Op. at ¶¶ 20, 45-46 (concluding that Voting Rights Act requires maintenance of Hispanic community in Clovis area, requiring that this Court only "consider" reunification of Silver City as a community of interest, and finding that all other arguments made by Egolf Plaintiffs are "without merit."). Indeed, the Egolf 5 plan demonstrates that to reunify Silver City, a plan must necessarily split Deming. *See* Egolf Ex. 26 (demonstrating that Egolf 5 map splits Deming between HDs 32 and 39). As the Supreme Court found, the Egolf Plaintiffs' claim that the Voting Rights Act mandates reunification of Silver City is meritless.

In any case, the District Court Plans comply with the Supreme Court's instructions regarding municipal communities of interest. Certainly, there is no need to further modify the District Court Plans to address community of interest splits. As explained in the Executive Defendants' Remand Brief, no House reapportionment plan can avoid dividing municipalities, and every map presented to or considered by this Court necessarily must split municipal communities. *See* Remand Br. at 7-10. Undoubtedly, other parties will ask this Court to go further and reunite even more communities than those identified by the Supreme Court. Yet the Court need not accept every invitation received by every party to this case to reunite additional communities. The District Court Plans comply with the Supreme Court's communities-of-interest instructions and no further modifications are necessary in this area.

IV. THE ALBUQUERQUE DEMOCRAT-REPUBLICAN PAIRING IS PROBLEMATIC.

Although HD 24 is consistent with the Supreme Court's remand instructions, the Executive Defendants respectfully take issue with the Court's formulation of HD 24 because a) it creates a noncompact district; b) it combines disparate communities of interest; and c) it is politically unfair. Under the District Court Plans, the new HD 24 pairs a Republican House member, Plaintiff Conrad James, with a Democratic House member, Al Park.[7] Certainly, nothing in the Supreme Court's Order ***requires*** this Court to craft such a pairing, only that if it pairs a Republican and a Democrat, that district must "provide[] an equal opportunity to either party" to win the district. *See* Remand Ord. at 20.

The HD 24 pairing in the District Court Plans scores a 50 percent Democratic performance on the Brian Sanderoff political index, as is contemplated by the Supreme Court's remand instructions. Yet it achieves this political effect by sacrificing compactness, communities of interest, and partisan fairness. The "eyeball" test clearly reveals that the District Court Plans' HD 24 is not compact.[8] Further, the Court's expert, Brian Sanderoff, testified at trial that the "International Zone" is a distinct community of interest in Albuquerque. *See* 12/13/11 TR at 29:19-25; 188:4-190:4. In the Court's formulation of HD 24, the International Zone is combined with the indisputably different community of interest of the central and far Northeast Heights of Albuquerque. Finally, the Park-James pairing is politically unfair because it transforms a relatively safe Republican performing district into a 50-50 district in which the

[7] No party requested a pairing of Conrad James at trial.

[8] The Supreme Court expressed concerns about creating "oddly shaped" districts for political effect. *See* Slip Op. at ¶ 41.

Democratic incumbent is retiring. In light of Representative Park's announced departure from the Legislature, the only harm to incumbents is to the Republican in this pairing.

Even though the Court's HD 24 concept is arguably consistent with the Supreme Court's Order, this Court should forego this pairing in its final plan. Instead, this Court should avoid a contorted Democrat-Republican pairing and instead employ one of the central Albuquerque Democrat-Democrat pairings suggested by other parties during trial. The Legislative, Egolf, and Sena plans contained a pairing between Danice Picraux (HD 25) and Al Park (HD 26), who have both announced their decision to retire from the Legislature. *See, e.g.,* Gov. Ex. 7, Egolf Ex. 21, Sena Ex. 1. The James and Maestas plans contained a pairing between Mimi Stewart (HD 21) and Al Park (HD 26). *See, e.g.,* James Ex. 1, Maestas Ex. 2. Either of these pairings would be appropriate to include in the Court's final plan. *See* Remand Br. at 23-24.

V. THE COURT SHOULD DECLINE ADOPTION OF THE PROPOSED LUJAN-SALAZAR PAIRING IN DISTRICT COURT PLAN 2 BECAUSE IT IS THE PRODUCT OF IMPERMISSIBLE POST-REMAND EVIDENCE AND IS POLITICALLY UNFAIR.

As the Court noted in its transmission to the parties, the difference between District Court Plans 1 and 2 is that Plan 2 pairs Representative Ben Lujan with Representative Nick Salazar, while Plan 1 pairs Representative Salazar with Representative Thomas Garcia. Presumably, the Lujan-Salazar pairing concept was created in response to a suggestion by the *Maestas* Plaintiffs, who introduced new evidence post-remand, in the form of a newly proposed plan, based on the fact that Representative Lujan was retiring due to illness. *See* Maestas Remand Br. at 2-4, Ex. 1. Not only is such a pairing the product of improper post-remand "evidence[,]" it is unfair because it ensures that the only pairings of any political consequence are the problematic HD 24 pairing

(discussed *supra.*) and the combining of two Republicans in the Roswell area who so far ***both*** plan on running for office.

Regarding the "evidence" issue, both the Supreme Court's Remand Order, and this Court's Order, made clear that this Court could not, and would not, consider evidence that was not submitted at trial when it decided upon a new House plan. *See* Remand Ord. at 18; Order (2/13/12) at 1-2. Indisputably, the Maestas "Remand 1" plan is a new map that was never introduced at trial. Moreover, the fact of Lujan's illness was not presented at trial. Therefore, it would be patently improper for this Court to create a pairing based on "evidence" submitted in contravention of court orders.

Regarding the actual political effect of the pairing, the Lujan-Salazar pairing is not a true pairing due to the announced retirement of one of the incumbents. The Supreme Court made clear that incumbent pairings must be politically fair. *See* Slip Op. at ¶¶ 39-41. By combining two Democrats, one of whom is retiring, only Republicans are left to suffer. Conrad James is forced to run in a contorted, disjointed HD 24, and two Republicans, Dennis Kintigh and Bob Wooley, are forced to run against each other. This Court should therefore decline to adopt District Court Plan 2 because it is both improper and politically unfair.[9]

[9] District Court Plan 1 is also more compact and retains district cores better that District Court Plan 2. Further, Plan 2 combines portions of Santa Fe with Springer, which are clearly different communities of interest. *See* 12/13/11 TR at 27:5-16.

VI. EVEN THOUGH THE DISTRICT COURT PLANS UNNECESSARILY CREATE MORE DEMOCRATIC-LEANING SEATS, THEY CAN BE VIEWED AS A GOOD FAITH EFFORT TO COMPLY WITH THE SUPREME COURT'S INSTRUCTIONS REGARDING THE POLITICAL STATUS QUO AND THE CREATION OF COMPETITIVE SEATS.

The Executive Defendants respectfully disagree with the Supreme Court's Remand Order and Opinion declaring that this Court should have "rejected Executive Alternate 3" or otherwise employed a modified version of that plan to arrive at the Court Adopted Plan because Executive Alternate 3 is somehow partisan and unfair. *See* Slip Op. at ¶ 40. As explained in detail in the remand brief, this Court is well within its discretion to continue with the Court Adopted Plan as a politically fair map because 1) New Mexico's demographic changes make 33 Republican districts appropriate for a new House plan; 2) the political performance numbers can, and should, mirror the current districts as they do in the Court Adopted Plan; and 3) the significance of partisan symmetry analysis of the Court Adopted Plan should not be overemphasized.[10] *See* Remand Br. at 15-24. Although the Executive Defendants' views on this issue differ from those of the Supreme Court, they recognize that this Court's final reapportionment plan for the New Mexico House is constrained by the Supreme Court's Remand Order.

As much as the Executive Defendants disagree with the Supreme Court's instructions on political performance, the District Court Plans can be viewed as consistent with them. The Supreme Court provided two areas of guidance with regard to how this Court must "make the

[10] The Supreme Court has clarified that "partisan symmetry ***may be one consideration***" by a court to determine whether a court-drawn reapportionment plan is a good faith effort to achieve political neutrality. *See* Slip Op. at ¶ 31 (emphasis added). In other words, partisan symmetry is one amongst many tests of political performance that courts may consider. *See id.*; Remand Br. at 22-23. Indeed, the Maestas Plaintiffs – cheerleaders for partisan symmetry analysis throughout this case – now argue that this Court may evaluate the political performance of the plans based on the number of Democratic performing seats created, as this Court has apparently done. *See* Maestas Remand Br. at 6-7. Certainly, this Court retains the discretion to decide how to weigh partisan symmetry evidence, especially when, as demonstrated at trial, it can state that even maps such as the Maestas plans, with high numbers of GOP pairings, are politically fair. *See* FOF/COL at COL ¶ 30.

good faith effort to draw a map that advantages neither political party." *See* Slip Op. at ¶ 43. First, the Court should draw a map that comes as close to the political *status quo* "as is practicable, accounting for any changes in statewide trends."[11] *See id.* at ¶¶ 31, 40. Both of the District Court Plans increase the number of Democratic performing districts over the Court Adopted Plan so that the number of Republican and Democratic performing seats is equal to the number of districts that currently exist. Third, the Court should strive to create politically competitive districts, which the Supreme Court explains are "healthy in our representative government because competitive districts allow for the ability of voters to express changed political opinions and preferences." *See id.* at ¶ 41. The Executive Defendants believe that the Court Adopted Plan fully satisfies this criterion by creating 16 swing districts – one more than the current 15 – and therefore provides every reason for this Court to return to that map rather than drawing a new one. The District Court Plans are not as competitive as the Court Adopted Plan, but could be seen as having some politically competitive features, such as their inclusion of 15 swing districts and an increase of competitive (but leaning Democratic) districts to seven from the three that exist in the current plan.

Regardless, it was not necessary to decrease the number of GOP performing districts to make the Court's map more competitive, as other parties to this case argue. The Court Adopted

[11] As explained in the Executive Defendants' Remand Brief, the *status quo*, based upon a legislative plan advanced by Democratic legislators and employed by the district court in the 2001 round of redistricting litigation, is unfair to Republicans because it has all but ensured Democratic control of the lower chamber. *See* Remand Br. at 15-18. Further, the Supreme Court has recognized that departure from the *status quo* is permissible to account for "changes in statewide trends." *See* Slip Op. at ¶ 31. As explained in the Remand Brief, natural population gains in Republican-leaning areas justify the creation of additional GOP leaning seats. *See* Remand Br. at 14-16. Although the *status quo* is, admittedly, more fair than many of the biased plans submitted by the parties, a *status quo* plan cannot achieve the partisan neutrality that the Supreme Court instructs this Court to make a good faith effort to attain with its final plan. *See* Slip Op. at ¶ 62 (Sutin, J., dissenting). Further, the Supreme Court's Opinion makes clear that the Court Adopted Plan, by accounting for demographic changes, would be perfectly acceptable under the remand instructions. *See id.* at ¶¶ 31, 40.

Plan – with 16 competitive districts instead of 15 in the District Court plans – demonstrates this fact. Moreover, the Supreme Court has expressly disavowed the notion that this Court is required by its Remand Order to "reduce Republican seats in the House[.]" *See* Slip Op. at ¶ 43. This Court should therefore reject any argument by the other parties that the Supreme Court has mandated this Court adopt a more Democratic-leaning map in the name of partisan neutrality. More importantly, this Court should recognize that it is fully within its discretion to return to the Court Adopted Plan because it is consistent with the Supreme Court's desire for a competitive and politically fair state House redistricting map.

The Executive Defendants respectfully disagree with the Supreme Court's "partisan neutral" instructions. They further believe that the Court Adopted Plan need only slight modification to comply with those instructions. Nonetheless, the District Court Plans can be viewed as a good faith effort to comply with the Supreme Court's instructions regarding political effect.

CONCLUSION

Because the Executive Defendants respectfully disagree with the Supreme Court, they do not advocate the adoption of either District Court Plan 1 or Plan 2. They do recognize, however, that this Court is constrained by the Supreme Court's Opinion and Order. They further recognize that the District Court Plans can be viewed as consistent with the Supreme Court' s instructions, however flawed those instructions may be.

The Court can, and should, adopt the Court Adopted Plan as its final map, making only minimal changes to address the Supreme Court's concerns. In the alternative, should the Court elect to adopt one of its District Court maps, District Court 2 should be rejected, and District

Court 1 should be modified in the manner set forth above and in the Executive Defendants' opening Remand Brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of February 2012, 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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