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

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

Plaintiffs,

vs. **No. D-101-CV-2011-0-2942**

DIANNA J. DURAN, in her official Capacity as New Mexico Secretary of State, SUSANA MARTINEZ, in her official Capacity as New Mexico Governor, JOHN A. SANCHEZ, in his official capacity as New Mexico Lieutenant Governor and presiding Officer of the New Mexico Senate, TIMOTHY Z. JENNINGS, in his official Capacity as President Pro-Tempore of the New Mexico Senate, and BEN LUJAN, Sr., In his official capacity as Speaker of the New Mexico House of Representatives,

Defendants.

THE MAESTAS PLAINTIFFS' REPLY IN SUPPORT OF PARTIAL SUMMARY JUDGMENT (CONGRESSIONAL REAPPORTIONMENT)

The Court directed that responses to the Maestas Plaintiffs' Motion for Partial Summary Judgment (Congressional Reapportionment) be contained in the pre-trial briefs filed on Friday, December 2, and the Executive Defendants and Egolf Plaintiffs did respond. Consequently, the Maestas Plaintiffs, by and through undersigned counsel, state their Reply as follows:

I. THERE ARE NO PERMISSIBLE *DE MINIMIS* DEVIATIONS IN CONGRESSIONAL REDISTRICTING AS JOINT PROPONENTS CLAIM.

The Executive Defendants and Egolf Plaintiffs admit that their Joint Plan deviates from the ideal in CD1 by -2 persons, in CD2 by 27 persons and in CD3 by -25 persons, for a total

cumulative deviation of 54 persons.[1] The joint proponents say this deviation does not matter because it is not "statistically significant," (Executive Cong. Pretrial Brief), and is "near-zero," (Joint Proponents [Egolf] Cong. Pretrial Brief). While this position may have superficial appeal—to the casual observer 54 persons would appear minuscule over New Mexico's seven figure population—the United States Supreme Court has explicitly rejected this eye-ball approach. *See Karcher v. Daggett*, 462 U.S. 725, 734 (1983) ("there are no *de minimis* population variations, which could practicably be avoided, but which nonetheless meet the standard of Art. I, § 2 without justification."). Similar to the joint proponents here, the losing side in *Karcher* claimed that a congressional redistricting statute was constitutionally permissible because evidence at trial showed that the deviation fell below the statistical error in the census. *Id.* Yet, the showing failed to save the plan, despite its having been passed by both houses of the New Jersey legislature and signed into law by the governor. *Id.*

A. Only the Maestas Congressional Plan Achieves the Constitutional Standard of "Precise Mathematical Equality" when Such is "Practicable."

At the outset, then, gut instinct leads us badly astray when testing congressional redistricting plans against the rigors of Art. I, § 2, which requires that congressional districts be apportioned to "**achieve precise mathematical equality,**" if such precision is "**practicable.**" *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969) (emphasis supplied) (citations omitted). Lawyers are unaccustomed to such an unforgiving standard, and so it bears examination why the Maestas Plaintiffs have pushed so hard on the issue of zero deviation. In making this examination, however, let us not overstate the rigors of Art. I, § 2. The Maestas Plaintiffs do not argue that a deviation in the neighborhood of 54 persons is *per se* unconstitutional.

[1] The LULAC congressional plan deviates from the ideal in CD1 by -56 persons, in CD2 by 18 persons and in CD3 by 38 persons, for a total cumulative deviation of 112 persons. (LULAC Congressional Map Packet).

In the context of court review of a congressional redistricting plan actually enacted into law, courts sometimes permit deviations in the range of the Joint Plan under Art. I, § 2. *See, e.g.*, *Larios v. Cox*, 300 F. Supp. 2d 1320, 1355 (N.D. Ga. 2004) (adjudging that a 72 person cumulative deviation contained in a congressional redistricting statute, passed by both houses of the Georgia legislature and signed into law, did not violate Art. I, § 2). Understandably, courts are reluctant to go about "interfering with the legislative process of reapportionment," if that process has met with success. *Id.* at 1338. So congressional plans enacted into law receive deference on their deviations, and giving deference makes good sense because lawfully enacted plans are the statutory embodiment of state interests as applied to a particular plan. If those interests are legitimate, they can sometimes justify a (still very small) deviation. Additionally, the United States Constitution gives state legislatures primary responsibility for congressional redistricting. U.S. Const. art. I, § 4, cl. 1. However, when the legislative process fails—as it did completely in New Mexico this year with regard to congressional redistricting—and the task of doing congressional redistricting falls to the judicial branch, the statutory embodiment of state interest disappears and, with it, the usual, and perhaps sole, source of justifications for deviation under Art. I, § 2.

Although in theory a court tasked with drawing a congressional redistricting plan could scour the trial record to justify a deviation with some "legitimate goal," as mandated by *Karcher* and other jurisprudence, in practice courts do not and instead budge very reluctantly off the zero point. *See Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 644 (N.D. Ill. 1991) (rejecting plans offered by other litigants and adopting the so-called Hastert plan, which possessed zero deviation in 18 of 20 Illinois congressional districts and deviations of 1 person in the remaining two districts). That the Court should move from zero only with reluctance and clear justification

fits well within the nature of the task before it. In this case, the deviations from the ideal in the Joint Plan are the result of private decisions among the Executive Defendants and the Egolf Plaintiffs, with the acquiescence of some other parties. But the right to "absolute population equality," *Karcher* at 731, derives from the Constitution; it is an organic and public right.

Apropos to this point, *Hastert* is the one of the few published opinions that tests the deviations of litigants under Art. I § 2, where, as in this case, a court was forced to do congressional redistricting because the legislature "failed to undertake its constitutional obligation to devise a new congressional districting scheme for the state." *Id.* at 37. By contrast, almost all opinions in the domain, like *Karcher* and *Larios*, weigh the constitutionality of population deviations in legislatively enacted congressional plans, which by nature result in a vetting of the public rights through a commensurately public legislative process. Because of this difference between the legislative and judicial roles, "court-ordered districts are held to higher standards of population equality" than those enacted into law. *Abrams v. Johnson*, 521 U.S. 74, 98 (1997) (affirming a court-drawn congressional redistricting plan for Georgia that had been necessitated by the striking down of a legislatively enacted plan).

B. Only the Zero Deviation Maestas Plan Should be Adopted as Constitutional under the Sound Reasoning of the Three Judge Panel in *Hastert.*

Not only does the failure of the Illinois legislature to adopt a plan in *Hastert* bear a useful resemblance to the legislative failure that initiated the present litigation but also the rationale of the three-judge panel there appears sound. Tellingly, the joint proponents neither distinguish *Hastert* nor criticize it. At its core, *Hastert* adapted constitutional precedent for the evaluation of legislatively enacted congressional plans under Art. I, § 2 to a court's evaluation of plans presented in litigation by the parties. The *Hastert* approach has the strength of being firmly

rooted in established constitutional precedent, while intelligently adapting the precedent to the real job of choosing among plans proposed by litigants in the absence of legislative action.

First, before a court chooses to adopt a proposed congressional redistricting plan, litigants must meet a threshold burden showing a good faith effort to achieve precise mathematical equality in the proposed plan at issue. *Hastert*, 777 F. Supp. at 644 (citing *Karcher* at 730). Second, if a plan fails to meet the threshold test, then litigants must justify each deviation as "**necessary to achieve some legitimate goal."** *Id*. (emphasis supplied) (same citation of *Karcher*). Because any proposal ultimately adopted becomes the court's plan, if it contains deviations, the justifications showing why the deviation was necessary normally become an important part of a court's findings and conclusions. *See, e.g., Abrams*, 521 U.S. at 99 (approving deviations in a court-drawn plan in part because the "District Court recited in detail those state policies and conditions which support the plan's slight deviations.") Because the Maestas Plaintiffs achieved absolute equality, which is to say a zero deviation plan, they are the only litigants to meet the threshold burden and thus obviate the task of justifying deviation. As the court in *Hastert* reasoned, "the availability of an alternative plan with a smaller total deviation effectively invalidates a good faith effort argument." *Hastert* at 644.

Due to advances in technology, justifying deviations as necessary has become increasingly difficult for litigants and courts alike. From the time the United States Supreme Court first used the word in *Wesberry* in 1964, what counts as a "practicable" lowering of deviation has moved to zero because of developments in mapping software over the intervening decades. "Practicable" means "capable of being put into practice or of being done or accomplished: feasible." *Merriam-Webster's Dictionary (Online).* Naturally, what is feasible in 2011 differs from that which was feasible in the 1960s, hence the overarching trend in

Congressional redistricting toward zero population deviation. *See Hastert* at 643 ("The use of increasingly sophisticated computers in the congressional map drawing process has reduced population deviations to nearly infinitesimal proportions. . . ."). *Hastert* was in 1991, and technology has progressed since. There's simply no cognizable excuse anymore for a litigant's not having a zero deviation plan. This fact of technological progress is widely, perhaps uniformly, recognized. In this very case, the expert who drew the Executive Defendants' Congressional plan (largely identical to the Joint Plan) testified in deposition as follows:

> Q. [I]s it fair to say that it's a certain trend in reapportionments that congressional maps should be zeroed out?
>
> A. Well, yes, definitely. In most states, that is the situation.

(Dep. of Clark Hamilton Bensen, 11/23/2011, 17:25-18:5)

Dr. Bensen's opinion is well supported. According to an analysis of the round of redistricting after the 2000 census conducted by the National Conference of State Legislatures (NCSL), Arizona adopted a congressional redistricting plan with a deviation of zero persons; Oklahoma, zero persons; Texas, one person; and Colorado, two persons. NCSL, "Redistricting 2000 Population Deviation Table", *available at* http://www.ncsl.org/default.aspx?tabid=16636 (accessed 12/8/2011). California achieved a deviation of one person; New York, one person; and Florida, zero persons. *Id.* As described previously, the Illinois plan was the one the three-judge panel adopted in *Hastert*, achieving zero deviation in 18 of 20 congressional districts. Overall in the last round of redistricting, of the 43 states with more than a single at-large congressional district, 19 ended with congressional plans having a deviation of either zero or one, and 10 more had plans with an overall range of two to ten persons. *Id.* As a result of this trend toward zero, issues related to absolute population equality under Art. I, § 2 have begun to disappear entirely from the landscape of American jurisprudence. Technology has eliminated the need for

deviation, and those deviations that exist are well supported in the legislative or the trial record. Both legislatures and courts alike see too much risk in leaving an open constitutional issue about "absolute population equality" in the congressional reapportionment plans they adopt.

II. THE JOINT PROPONENTS ARGUE THE WRONG STANDARD.

The joint proponents attempt to defend the deviation in the Joint Plan using two approaches. First, they review some constitutional precedent and then claim that 54 persons must be too small to matter. To avoid calling this argument what it really is—an invocation of the *de minimis* standard for congressional redistricting that *Karcher* explicitly rejected—the joint proponents rely heavily on *Chapman v. Meier*, 420 U.S. 1 (1975) for the proposition that this Court may accept a congressional plan that achieves only "**approximate** population equality." (Joint Proponents [Egolf] Cong. Pretrial Brief 9 [emphasis in original].) This is the wrong standard for congressional reapportionment, however. *Chapman* dealt with a court-ordered reapportionment of the North Dakota Assembly, that state's legislature. *Id.* at 3. In establishing the deviation standard for court-ordered reapportionment of a state legislature, the *Chapman* court took pains to distinguish the "**mathematical preciseness required for congressional redistricting.**" *Id.* at 27 n. 19 (emphasis supplied) (citations omitted). The distinction between the standard applicable to congressional redistricting and to the redistricting of legislative seats derives, of course, from Art. I, §2 itself, which governs congressional reapportionment but has no application to the redistricting of state and local bodies.

Also in their attempt to resuscitate the *de minimis* standard for congressional redistricting, the joint proponents rely upon *Abrams.* Although the Supreme Court in *Abrams* did indeed approve higher than usual deviations in a court-drawn congressional plan, it did so because "equitable considerations disfavor[ed] requiring yet another reapportionment to correct the

deviation." *Abrams*, 521 U.S. at 101. The equitable considerations included the fact that six years had elapsed since the last census and that the appellants' lower deviation plans were themselves "constitutionally infirm" because they were attempts at racial gerrymander. *Id.* at 100. In any event, correcting the deviations further was becoming "increasingly futile." *Id.* These unusual equitable considerations do not apply to the Joint Plan, nor to the typical case for that matter. As a result, the existence of *Abrams*, a 1997 opinion, did nothing to arrest the trend toward zero deviation that occurred in the 2000s.

III. THE MAESTAS PLAN SHOULD BE ADOPTED, NOT REJECTED, BECAUSE IT SPLITS A FEW PRECINCTS TO ACHIEVE A ZERO DEVIATION.

After trying to defend the deviation in the Joint Plan with an incorrect assertion of the *de minimis* standard, as their next strategy, the joint proponents launch a wholesale assault on the Maestas congressional plan for splitting 4 out of over 1,400 New Mexico precincts to achieve zero population deviation. Attacking another party's proposal in litigation is an inherently feeble way to meet the burden to establish the constitutionality of one's own proposal, of course. The joint proponents never reference facts in the record showing that the deviation in the Joint Plan of 54 persons had anything to do with trying to avoid precinct splitting or, for that matter, any of the other cognizable "conditions" that the federal district court, for example, "detailed" in its findings affirmed in *Abrams*. *See* 521 U.S. at 99. But for the sake of argument, assume that facts exist in the record showing that the deviation in the Joint Plan arose from the belief that the policy of New Mexico prohibits precinct splitting. Before examining just how incorrect the belief in this prohibition is legally, it should be noted factually that the James plaintiffs' congressional plan, filed with the Court on November 9, 2011, achieved a total cumulative deviation of four persons without splitting precincts. (Maestas Mot. for Partial Summ. J., Undisputed Fact No. 16(d).) From the factual record in this case, in other words, any claim that

the Joint Plan's deviation arises from attempts to leave precincts intact appears dubious. Unquestionably, deviations in the single digits can be achieved without splitting precincts. And "the availability" of the James congressional plan further "invalidates a good faith effort argument" on behalf of the Joint Plan's deviation, even assuming precinct splits are prohibited. *Hastert* at 644.

But precinct splits are not prohibited. To the contrary, the Precinct Boundary Adjustment Act actually mandates that county commissions "shall by resolution . . . **divide any precincts as necessary to meet legal and constitutional requirements for redistricting."** NMSA 1978, § 1-3-2(A)(5) (1969, amended through 2011) (emphasis supplied) (also providing that the secretary of state must approve all precinct splits). Far from prohibition, the Legislature has expressly recognized a policy that splitting precincts may be necessary to meet constitutional norms in the process of redistricting. *See also* NMSA 1978, 1-3-2(E) (recognizing a similar policy when it provides that a local public body "shall not split a precinct into two or more districts for any elected office unless necessary to comply with federal law or to preserve communities of interest.") While it is true that the Legislature suspended the power of county commissions to split precincts solely by resolution under Section 1-3-2 from July 1, 2009, to January 31, 2012, the secretary of state may still authorize precinct splits at the present time. NMSA 1978, § 1-3-6.1 (2009). Logic dictates that, if the secretary of state has the power to split precincts to meet constitutionality, this Court has equal power under New Mexico law.

Even if precinct splits were prohibited under state law, however, this Court's power to split precincts remains plenary in congressional redistricting regardless, for three reasons. First, the necessity of splitting precincts in this case arises from compliance with the United States Constitution, which of course ranks as supreme to any state statute or policy. *See* U.S. Const.

art. I, § 2, cl. 3; *see also* U.S. Const. amend. XIV, § 2 (providing that congressional districts be apportioned among the states "according to their respective numbers, counting the whole number of persons . . . ."). Second, given the total failure of the legislative process in congressional redistricting in New Mexico, this Court exercises equal power for congressional redistricting to that delegated to the Legislature. *See* U.S. Const. art. I, § 4, cl. 1 (delegating power to state legislatures for congressional redistricting); *Growe v. Emison*, 507 U.S. 25, 34-5 (1993) (reasoning that state court is equivalent to state legislature in power over congressional reapportionment). Third, this Court has the same power over congressional redistricting as a federal court. *See Growe*, 507 U.S. at 32 (1993) (stating that both state and federal courts exercise concurrent jurisdiction over the subject matter of congressional redistricting).

If the joint proponents in fact chose to leave a deviation of 54 persons in the Joint Plan due to their beliefs about a supposed prohibition on precinct splitting by this Court in adopting a congressional redistricting plan, then they submitted the Joint Plan under a mistake of law. Surely, such a mistake cannot justify deviation under Art. I, § 2 and the Fourteenth Amendment.

IV. CONCLUSION.

At minimum, only adoption of the Maestas congressional plan would leave no open question regarding constitutionality under the standard of "absolute population equality" required by the equal-vote provisions of the United States Constitution. More than that, the absence of a cognizable justification for the Joint Plan's deviation in the record means that the Court should adjudge the Joint Plan unconstitutional. If this conclusion seems draconian, suffice it to say that reasonable minds disagree over how important absolute population equality in congressional redistricting should be. *Karcher v. Daggett*, 462 U.S. 725 (1983) was itself 5-4 opinion, with

Justice Brennan writing for the majority, Justice Stevens concurring and Justice White writing for the four dissenters.

In some ways, the debate in the United States Supreme Court reflects the debate over fair methods of congressional apportionment that raged between Thomas Jefferson and Alexander Hamilton after the first census in 1791 and among others in the early days of the Republic. *See, e.g.,* Book Note, *1984 Survey of Books Relating to the Law*, 82 Mich. L. Rev. 1028 (1984) (reviewing Michel L. Balinski & H. Peyton Young , *Fair Representation: Meeting the Ideal of One Man, One Vote* (1982) and summarizing the debates between Federalists and Anti-Federalists over methods of congressional apportionment in the early Republic). However worthy this long-lived debate is, settled law unequivocally favors Thomas Jefferson's and Justice Brennan's side of it. Therefore, the Maestas Plaintiffs respectfully request the Court adopt their congressional plan because it is the only one that meets the constitutional ideal of absolute population equality with a zero deviation and because it otherwise meets all other constitutional demands, as shown at trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2011, I filed the foregoing electronically through the First Judicial District E-filing System, which caused all parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing; all counsel of record were additionally served via email.

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