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

Plaintiff-Petitioners,

v.

D101-CV-2011-02942
D101-CV-2011-02944
D101-CV-2011-02945
County of Santa Fe
First Judicial District Court
(CONSOLIDATED)

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, JR., in his official capacity as Speaker of the New Mexico House of Representatives,

Defendant-Respondents.

THE MAESTAS PLAINTIFFS' POST-TRIAL BRIEF FOR REDISTRICTING THE NEW MEXICO PUBLIC REGULATIONS COMMISSION

COMES NOW, the Maestas Plaintiffs by and through Counsel, and as directed by the Court, respectfully submit the post-trial brief for the redistricting of the New Mexico Public Regulations Commission. At trial, the Maestas Plaintiffs demonstrated why the Court should adopt the Maestas 2 Plan, which conforms to the Navajo Interveners' proposed District 4, contains low deviations, is modeled as a hybrid of the current map and the legislatively passed Senate Bill 24, maintains the majority Hispanic voting age population district in District 5, conforms to traditional redistricting principles and keeps communities of interest in tact, most notably the City of Las Cruces.

I. Introduction

Article. XI, § 1 of the New Mexico Constitution provides for a five district Public Regulations Commission. In redistricting those five districts, an apportionment plan must conform to the standards established by the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution*, U.S. Const. amend XIV* ("Equal Protection Clause"), the New Mexico Constitution and the Voting Rights Act of 1965, 42 U.S.C. §§1973-1973gg-10 ("Voting Rights Act"). The ideal Public Regulations Commission district based upon the 2010 census has a population of 411,836. As stipulated to by the parties to this litigation (Joint Stipulation December 4, 2011) the current plan is unconstitutional under the Fourteenth Amendment and the New Mexico Constitution Art. II, Section 18. Because of the suits filed, the current plan is enjoined from use in future elections.

During the 2012 Special Session called by the Governor, the Legislature passed Senate Bill 24 to provide for the redistricting of the Public Regulations Commission which was consequently vetoed by the Governor in Senate Executive Message No. 13. While redistricting is primarily a legislative duty, courts must intervene in the redistricting process when no redistricting law is enacted. *White v. Weiser*, 412 U.S. 783, 794-95 (1973). As established in *Growe v. Emison,* state courts – as opposed to federal courts - are particularly appropriate for this task. *Id.,* 507 U.S. 25 (1993). The law, however, as applied to plans drawn or adopted by state courts contain specific mandates more strict than the those of the Legislatively-drawn maps and less strict than those binding the federal courts (for reasons of more limited

jurisdiction). This court is now presented with the complex challenge of drawing or adopting a plan to redress the constitutional violation of malapportionment.

II. Argument

A. Plans

In the trial of the New Mexico Public Regulations Commission reapportionment, the court has four maps before it – Maestas 2 Plan, Senate Bill 24, the Navajo Plan and the James 3 Plan. Through litigation, it became clear that either the Maestas 2 Plan or the Navajo Plan are the only viable options for the court. Unless the court grants deference to Senate Bill 24, the Legislative Defendants likely have deviations too high for a court drawn map with no evidence presented of a significant state policy or unique features to justify those deviations. See *Chapman v. Meier*, 420 U.S. 1, 26 (1975). The James 3 Plan fails for the primary reason that it subverts traditional redistricting principles for the sole purpose of a partisan gerrymander. *See* Cross Examination of Sen. Rod Adair, Jan. 11, 2012. Exhibits and testimony presented demonstrate that the James 3 Plan splits the highest number of municipalities (*See* Governor's Ex. 28 and Legislative Defendants Ex. 13) and is the least compact map with a Polsby Popper score of .22 (*See* Governor's Ex. 28). These municipalities were unnecessarily divided and districts were oddly-shaped in order to achieve the stated goal of weakening Democratic performance. *See* Cross Examination of Sen. Rod Adair, Jan. 11, 2011. Not only does the James 3 Plan show these oddly-shaped districts, but the Maestas Plaintiffs put on evidence that certain party-performing precincts were "grabbed" by the James 3 plan at the expense of

compactness and keeping communities of interest together. Another fatal flaw in the James 3 Plan is that it rids the state of the only majority Hispanic voting age population (VAP) district creating potential retrogression issues under the Voting Rights Act. The current majority Hispanic VAP district is District 5. While James 3 Plan eliminates all majority Hispanic VAP districts, the Maestas 2 Plan, the Navajo Plan and Senate Bill 24 retain District 5 as a majority Hispanic VAP district.

Finally, what distinguishes the Maestas 2 Plan from the Navajo plan is that 1) the deviations are much lower in the Maestas 2 Plan and 2) Districts 1, 2, 3, and 5 were drawn in the Maestas 2 Plan with the intention of keeping communities of interests together and the Navajo Plan used the other districts as simple placeholders. For the higher deviations, the Navajo Interveners offered no evidence or support to justify deviations throughout the state other than Native American preference / self-determination in District 4. For instance, the Navajo Plan without explanation maintains a deviation of -1.0% and -0.6% in Districts 5 and 3, respectively. *See* Navajo Plan map packet. Alternatively, the Maestas 2 Plan adopts Navajo District 4 in full with deviations of 0.8% (justified by a significant state policy) then spreads the population difference equally across the other four districts with deviations of -0.2%, which demonstrates absolute commitment to one person one vote. For the lack of intention in the other four districts, the Navajo Interveners witness, Dr. Gorman, testified that the Navajo did not have any interest in districts other than District 4. *See* Direct Examination of Dr. Gorman, Jan. 11, 2012. From this information, the court can assume that the other four districts were not drawn with consideration for other traditional redistricting factors, such

as communities of interest. It is important to note that the Navajo Plan splits Las Cruces into two Public Regulations Commission district, despite the fact that Las Cruces shares common electric and utility infrastructure and is New Mexico's second largest city.

B. Legal Standard

While court-drawn or –adopted plans must conform to the same governing authorities as the legislature, legislatures are granted much more deference in deviations because of its well-established policy-making role. Courts, on the other hand, are bound to a stricter standard when left with the task of redistricting. *Connor v. Finch*, 431 U.S. 407 (1977). From review of these plans and the evidence presented, this court is asked to ferret out findings and make conclusions of law in order to choose the appropriate reapportionment for the state House. Certainly, the court plan will comply with one person, one vote *de minimis* requirement of the Equal Protection Clause[1] as well as § 2 of the Voting Rights Act[2]. However, consideration for state policy as expressed in statutory or constitutional provisions cannot be ignored even when a court is reluctantly involved in redistricting. In fact, a judicial reapportionment plan should reflect policy decisions made by the legislature even when the legislature has abdicated its responsibility to redistrict. *Abrams v. Johnson,* 521 U.S. 74, 79 (1997) ("When faced with the necessity of

[1] *Chapman v. Meier*, 420 U.S. 1, 27-27 (1975)(stating that a court-ordered plan should "ordinarily achieve the goal of population equality with little more than de minimis variation" and "must be held to higher standards than a State's own plan. With a court plan, any deviation from approximate population equality must be supported by enunciation of historically significant state policy or unique features.")
[2] While the court in Abrams v. Johnson, 521 U.S. 74 (1997) assumes a court should comply with § 2 of the Voting Rights Act, no court plan has ever been held to violate § 2.

drawing district lines by judicial order, a court, as a general rule, should be guided by the legislative policies underlying the existing plans, to the extent those policies do not lead to violations of the Constitution or the Voting Rights Act."). New Mexico state policy clearly expresses a respect for Native American sovereignty and self-determination, which in redistricting points to a deference for Native American preferences. Such state policy considerations also extend to Voting Rights Act consideration (in this case it is important to maintain the single Hispanic majority VAP district), traditional districting principles including compactness, contiguity, retaining the core of existing districts, avoiding contests between incumbents[3], and protecting communities of interest.

For the reapportionment of the Public Regulations Commission (like the state legislature), the Equal Protection Clause rather than Article I, Section 2 of the U.S. Constitution is the legal foundation for the one person one vote requirement. This is an important difference because in contrast to Congressional districting where precise population equality is the preeminent – if not the sole – concern, the court acknowledges "leeway in the equal-population requirement" for a legislative reapportionment plan. *Chapman v. Meier*, 420 U.S. 1, 23 (1975). To a different degree, that leeway is permissible in both legislatively-enacted maps and court-drawn maps. While a legislature may adopt a state House plan with deviations of up to ten percent (the controversial and unsettled "safe harbor" articulated in *White v. Regester*, 412 U.S. 755 (1973)) without violating the Equal Protection Clause, court-

[3] Colleton County Council v. McConnell, 201 F.Supp.2d 618, 647 (D.S.C. 2002) (finding incumbent protection to be a traditional state interest); Prosser v. Elections Bd., 793 F.Supp. 859, 871 (W.D. Wis. 1992) (discussing incumbent pairings as avoidance of "perturbation in the political balance of the state.")

drawn plans are held to a much higher standard. *Connor,* 431 U.S. 407. Unfortunately, there is no threshold deviation binding the courts with a defined standard. *Id.* The only clear direction for a court-drawn state legislative redistricting map is *approximate* population equality or *de minimis* deviation. *Id.* Constrained by this *de minimis* standard, courts seem to adopt or draw maps with average deviations below the +/-5% or total deviation of 10% that often guides Legislatures. If a plan tends towards the upward range of the +/- 5%, the plan may be considered beyond *de minimis* deviation or approximate population equality and a court may justify those deviations with an "enunciation of historically significant state policy or unique features." *Chapman*, 420 U.S. at 26.

For a court to diverge from *de minimis* deviation, a court must justify those deviations in its findings. The court has the burden to "elucidate the reasons necessitating any departure from approximate population equality and articulate clearly the relationship between the variance and the state policy furthered." *Id.* at 24. Because the state court is uniquely situated to understand the nuances of New Mexico and well-versed in the application New Mexico law, this court should be compelled to recognize Native American sovereignty and self-determination and avoiding Voting Rights Act liability as significant state policies in order to implement the proper redistricting solution for the Public Regulations Commission. The range of deviation in the Maestas Plans correspond to furthering significant state policies – tribal sovereignty and self-determination recognizing the special status of tribes and

avoiding § 2 liability of the Voting Rights Act because of the historical dilution of minority voting power.[4] *Chapman*, 420 U.S. at 24.

The judicial power created by U.S. Const. art. III is limited by the requirement "that judicial action must be governed by standard, by rule. *Vieth v. Juberlirer*, 541 U.S. 267, 278 (2004) (talking about political gerrymandering as grounds for challenging legislatively-passed maps.) This is the inherent difference, however, between laws promulgated by the legislature and laws pronounced by the courts. Laws passed by the legislature "can be inconsistent, illogical, and ad hoc." *Id.* In contrast, laws pronounced by the courts must be "principled, rational and based on reasoned distinctions." *Id.* It is with ease that this court should find that the legitimate and important state policy of self-determination may justify higher deviation districts provided that those deviations are proportional to furthering the state policy recognized.

C. Tribal Self-determination

New Mexico is uniquely situated in that it encompasses 19 pueblos and three reservations. The Maestas Plaintiffs assert that this is a unique feature of New Mexico sufficient to justify higher population deviations under *Chapman.* Native

[4] The Jepsen Court found that a population deviation as high as + 4.8% was acceptable in order to create a majority Native American seat "to remedy the dilution of Native American voting rights." *Jepsen*, Finding 35, at 7. If this deviation represented both the underrepresented and overrepresented extremes used to calculate overall deviation, the overall deviation would be 9. 6. The deviation was not subservient to neutral redistricting principles. The deviation was also justified by natural, political and traditional boundaries.

Americans in New Mexico constitute 10.7% of the overall population of the state. Both the state and the federal government recognize the special status of tribes as sovereign nations, often described as "domestic dependent nations." The federal government granted tribal sovereignty through treaties, Congress and the courts. There is a long line of cases precluding states from interfering with tribal nations' sovereignty. *Montana v. U.S.* , 452 U.S. 911(1981); *Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134 (1980); *U.S. v. Mazurie,* 419 U.S. 544 (1975). In 2009, the Legislature passed the New Mexico State-Tribal Collaboration Act, which codified state recognition of tribal self-determination. *NMSA 1978 §§ 11-18-1 to 15 (2009).* This is a clear expression of New Mexico state policy, which the court took judicial notice of during trial. Self-determination is a key aspect of Native American sovereignty and should be recognized particularly in regard to participation in the state political process.

As presented by the Navajo Interveners at trial, the tribal interest in creating an influence District in District 4 is two-fold. First, the District 4 Public Regulations Commission seat has historically provided a platform for Navajo politicians to run for office, succeed and run for higher office. *See* Direct Examination of D. Gorman, Jan. 11, 2012. Second, a strong influence Public Regulations Commission district is important because of the lack of infrastructure (regulated by the Public Regulations Commission) on tribal lands. *Id*. In light of federal and state policies recognizing the sovereignty and self-determination of Indian tribes, it should be a mandate of this court to recognize the tribes' exercise of self-determination in asserting preferences for redistricting as a significant state policy in New Mexico. This

significant state policy may justify greater than de *minimis* deviations tailored to advance that interest.

D. Voting Rights Act

First, the courts recognize a state interest in compliance with § 2 of the Voting Rights Act. *Bush v. Vera*, 517 U.S. 952, 990 (1996). Provided that these interests are not subordinate to traditional redistricting principles, race-based factors may be considered as long as they are narrowly tailored. *Shaw v. Reno*, 509 U.S. 630 (1993); *Bush,* 517 U.S. 952. The state – including this court - can and should make reasonable efforts to avoid § 2 liability. *Abrams,* 521 U.S. 90 at 90. ("We will assume courts should comply with [§ 2] when exercising their equitable powers to redistrict.") This compliance with § 2 mandates this court to maintain the one majority Hispanic District 5.

III. Conclusion

In light of the legal standards for the state court's exercise of jurisdiction over state legislative reapportionment as it pertains to the Public Regulations Commission, the evidence demonstrates that the Maestas 2 Plan is the best option for the court. The Maestas Plaintiffs assert that the facts presented into evidence lead the court to the adoption of the Maestas 2 plan because it is the only plan that conforms to the Navajo Interveners' proposed District 4 with lowest possible deviations, is modeled as a hybrid of the current map and the legislatively passed Senate Bill 24, maintains the Hispanic majority VAP district, conforms to traditional

redistricting principles and keeps communities of interest in tact. The Maestas Plaintiffs respectfully request that this Court adopt the Maestas 2 Plan, as submitted.

Respectfully submitted,

_____/s/_____

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Certificate of Service

I HEREBY CERTIFY that on this 17 day of January, 2012 the foregoing was served via email and filed by electronic means pursuant to the First Judicial Court E-filing system to counsels of record.

_____/s/_____
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