STATE OF NEW MEXICO

COUNTY OF SANTA FE

FIRST JUDICIAL DISTRICT COURT

No. D-101-CV-2011-02942

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

Plaintiffs,

vs.

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

Defendants.

- Consolidated with -

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

THE EXECUTIVE DEFENDANTS' PRE-TRIAL BRIEF REGARDING THE CONGRESSIONAL REDISTRICTING PLAN

The Governor and the Lieutenant Governor (collectively the "Executive Defendants") join in the trial memorandum contemporaneously submitted by the *Egolf* Plaintiffs. They also

submit this trial memorandum addressing additional issues that they believe the Court must consider in the congressional redistricting trial.

Even though redistricting is in court and no longer being resolved by the political process, the *Maestas* Plaintiffs -- one of whom is a Democrat New Mexico state legislator -- ask this Court to adopt a congressional plan that is radically different from what New Mexico currently has or ever has had. Indeed, the *Maestas* plan is so radical that the *Egolf* Plaintiffs -- one of whom is also a Democratic legislator -- oppose that plan and have instead joined with the Executive Defendants, the *James* Plaintiffs, and the *Sena* Plaintiffs to submit a consensus plan that makes only minimal changes to the existing Congressional district boundaries. Undoubtedly, the *Maestas* Plaintiffs are attempting to gain through the Court a Congressional plan that they could not obtain through the political process, and there is no sound basis for this Court to adopt such a plan. The nakedly partisan advantages the *Maestas* Plaintiffs seek are so severe that even other, Democratic-oriented parties to this case object to the adoption of the *Maestas* plan.

The *Maestas* Plaintiffs are not the only party seeking to gerrymander the existing Congressional districts for an improper purpose. The LULAC Intervenors have also come forward with a plan that is nothing less than an impermissible racial gerrymander that seeks to address a Voting Rights Act problem that does not exist in this state. As with the *Maestas* Plan, the LULAC Intervenors ask this Court to adopt a plan that they could not obtain through the legislative process.

The parties' joint brief explains why the Joint Plan should be adopted, and why the *Maestas* Plan should be rejected. As that brief explains, the Joint Plan achieves a zero percent

population[1] amongst its proposed districts, while at the same time doing as little violence as is possible to the current Congressional district boundaries. There are, however, additional reasons to reject both the *Maestas* Plan and the LULAC Plan. First, there is no basis to create minority-majority Congressional districts in New Mexico, and even if there were, the *Maestas* Plan fails to accomplish this task. Second, the *Maestas* Plan constitutes an impermissible partisan gerrymander. As for the LULAC Plan, it is both unnecessary under the Voting Rights Act, and is an inappropriate racial gerrymander. For these additional reasons, the Court should decline the *Maestas* Plaintiffs and LULAC Intervenors' invitations to adopt their respective plans, and should instead select the Joint Plan as the best Congressional map for our state.

I. NEITHER THE *MAESTAS* NOR THE LULAC PLANS ADDRESS ANY VOTING RIGHTS ACT VIOLATION, NOR DO THEY NEED TO.

It is unclear to what extent the *Maestas* Plaintiffs, or any other parties to the Congressional trial, will argue that either the *Maestas* Plan or the LULAC Plan is necessary to rectify a violation of the federal Voting Rights Act. To the extent such argument is made at trial, the Executive Defendants will show that it is improper because there is no Voting Rights Act issue that this Court need rectify through the adoption of any particular Congressional map. Further, the Joint Plan is as good as, ***if not better than***, the *Maestas* Plan for minority voting interests because it creates districts with higher concentrations of Hispanics and Native Americans.[2]

[1] Although the Joint Plan does not have an absolute zero percent deviation requirement, it is difficult to see how its deviation percentages -- 0.0003% in the First, 0.004% in the Second, and 0.004% in the Third -- are statistically significant.

[2] Even though the LULAC Plan arguably contains even better numbers for Hispanics than the Joint Plan, it goes too far because, as explained below, the LULAC Plan is the product of racial gerrymandering.

A. There is No Voting Rights Act Violation in New Mexico.

With regard to the Congressional districts, no one has come forward with sufficient evidence establishing that any of the Congressional redistricting plans is necessary to rectify problems under the federal Voting Rights Act. Section 2(a) of the Voting Rights Act "prohibits the imposition of any electoral practice or procedure that 'results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color." *Bush*, 517 U.S. at 976. To establish a Section 2 violation, a plaintiff must establish three threshold conditions: (1) that the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) that it is "politically cohesive"; and (3) "that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Growe v. Emison*, 507 U.S. 25, 39 n.4, 40 (1993) (quoting *Thornburgh v. Gingles*, 478 U.S. 30, 50-51 (1986)) (these are the "*Gingles* factors"); *Sanchez v. Colorado*, 97 F.3d 1303 (10th Cir. 1996) (discussing the three *Gingles* factors). These are "necessary preconditions" that a plaintiff must establish; "[o]nly when a party has established the *Gingles* requirements does a court proceed to analyze whether a violation has occurred based on the totality of the circumstances." *Bartlett v. Strickland*, ___ U.S. ___, ___, 129 S. Ct. 1231, 1241 (2009). *Accord*, *Growe*, 507 U.S. 25, 40-41.

There does not exist a sufficient Native American population to constitute a majority in any of New Mexico's three Congressional districts. Thus, as to Congressional districts, there can be no Section 2 Voting Rights Act issue with regard to Native Americans.[3] A violation of Section 2 cannot be established by the mere fact that Native American populations might be large enough to establish a so-called minority "influence" district. An "influence" district does

[3] Regardless, the Joint Plan preserves Native American voting strength by creating a 16.1 percent voting age population district in Congressional district 3, and otherwise protects Native American communities of interest. *See* Egolf Ex. 8.

not satisfy the first prong of the *Gingles* test. In "influence districts, ... a minority group can influence the outcome of an election even it its preferred candidate cannot be elected," but Section 2 requires that members of a minority group be able, not just to influence, but "to *elect* representatives of their choice." *Bartlett*, 129 S. Ct. at 1242 (*citing LULAC v. Perry*, 548 U.S. 399, 445 (2006)) (emphasis added); 42 U.S.C. § 1973. Accordingly, the Supreme " Court has held that § 2 does not require the creation of influence districts." *Id.*

Hispanics, on the other hand, conceivably are large, compact, and cohesive enough to satisfy the first two factors with regard to the Congressional districts. To date, however, neither the *Maestas* Plaintiffs, the LULAC Intervenors, nor any other party have provided data sufficient to determine whether the Hispanic populations in New Mexico's Congressional districts satisfies the first *Gingles* precondition. A minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50; *Growe*, 507 U.S. at 40. The Supreme Court has established that such a district is one in which "a minority group composes a numerical, working majority of the voting-age population." *Strickland*, 129 S. Ct. at 1242. In making this calculation, the measure of majority population must be based on numbers of *citizens* who may vote -- in other words, on the citizen voting-age population ("CVAP") in the relevant geographic area. *LULAC*, 548 U.S. at 427-29. Moreover, "[o]nly when a geographically compact group of minority voters could form a majority in a single-member district has the first *Gingles* requirement been met." *Strickland*, 129 S. Ct. at 1249; *see also Abrams v. Johnson*, 521 U.S. 74, 91-92 (1997) (no Section 2 right to a district that is not reasonably compact).

To the extent that the *Maestas* Plaintiffs, the LULAC Intervenors or other party claims that Section 2 requires the creation of majority-minority Congressional districts, such parties

would bear the burden of proving that all of the *Gingles* criteria are met, including the majority-minority requirement. *See Voinovich v. Quilter*, 507 U.S. 146, 155-56 (1993). The parties with this burden must provide citizenship data and establish there exists a sufficient number of geographically compact voting-age Hispanic citizens. No one has done so, and the Executive Defendants anticipate that no one will.

Any party claiming a Section 2 violation also must establish that Hispanic candidates are consistently defeated by Anglo bloc voting. The question "is not whether white residents tend to vote as a bloc, but whether such bloc voting is 'legally significant.'" *LULAC v. Clements*, 999 F.2d 831, 850 (5th Cir. 1993) (*citing Gingles*, 478 U.S. 30, 55). To be legally sufficient for the purposes of this precondition, white bloc voting must be shown to enable the white majority to defeat minority-preferred candidates most of the time, thus impairing the minority's ability to elect candidates of its choice. *Gingles,* 478 U.S. 30, 55-58. To this end plaintiff must show that the lack of electoral success of a minority group is due to racially significant bloc voting, and not merely voting by partisan affiliation. *LULAC*, 999 F.2d 831, 853. Thus, the mere "'lack of success at the polls' is not sufficient to trigger judicial intervention. *Id.* Courts must undertake the additional inquiry into the reasons for, or causes of, these electoral losses in order to determine whether they were the product of 'partisan politics' or 'racial vote dilution', 'political defeat', or 'built-in bias.'" *Id.* at 853-54.

Fortunately for New Mexico's Hispanic population, Hispanics from both parties have a long history of electoral success, including in the Congress. The Congressman who currently resides in District 3, Ben Ray Lujan, Jr., is Hispanic. And during the 1980s, two of three congressmen from New Mexico were of Hispanic origin (Bill Richardson and Manuel Lujan, Jr.). In its history, New Mexico has elected eight persons of Hispanic origin to Congress: B.C.

Hernandez, Nestor Montoya, Dennis Chavez, Joseph Montoya, Antonio Fernandez, Manuel Lujan, Bill Richardson, and Ben Lujan, Jr.

Hispanic electoral success does not end with the Congress. Hispanics have won, and continue to win, state legislative races. Lujan Jr.'s father, Ben Lujan, Sr., is Hispanic, and is the Speaker of the New Mexico House of Representatives. The Speaker for the prior 16 years was Raymond Sanchez, who is also Hispanic. The last two Senate presidents pro tempore, Senators Richard Romero and Manny Aragon, also are Hispanic.

Hispanics also consistently prevail in statewide races. The current Governor, Secretary of State, and State Auditor are all Hispanic. The previous Governor, Bill Richardson, is Hispanic. The previous Secretary of State, Rebecca Vigil-Giron, is Hispanic. The previous attorney general, Patricia Madrid, is Hispanic. The previous state Treasurer and state Auditor are Hispanic. Three out of the five current Supreme Court justices are Hispanic. Rather than suggesting that Hispanic candidates are defeated by Anglo bloc voting, New Mexico's political history demonstrates that electoral success in New Mexico is far more dependent upon personal characteristics of the candidate and "partisan political" factors rather than race.[4]

In addition, there is a distinct lack of evidence of racially polarized voting in New Mexico.[5] The evidence in this case will show that in New Mexico's political races, voting is not racially polarized. Instead, Hispanic voters are more likely to vote for the Democratic candidate, regardless of the race of the candidates running for election. *See, e.g.,* Ecological Inference

[4] Indeed, even if the *Gingles* racial bloc voting precondition is somehow met, the Court must consider the "totality of the circumstances" to determine whether Section 2 has been violated. *See* discussion *supra.* Amongst the factors a court should consider when examining these circumstances is "the extent to which members of the minority group have been elected to public office in the jurisdiction." *See Gingles*, 478 U.S. at 36-37; *LULAC v. Clements*, 999 F.2d 831, 849 n.22 (5th Cir. 1993). Given the number of Hispanics who have been elected to office in our state's history, this factor clearly weighs in favor of finding that there is no Section 2 violation in New Mexico.

[5] In addition to being part of the Gingles three-factor precondition test, "[t]he extent to which voting in the elections of the state or political subdivision is racially polarized" is part of a Court's examination of the totality of the circumstances to determine whether a Section 2 violation is present regardless of whether the *Gingles* factors are met. *See Gingles*, 478 U.S. at 36-37; *LULAC*, 999 F.2d 831, 849 n.22.

Analysis (Egolf Ex. 17) (demonstrating that in the 2010 Heinrich-Barela race, Hispanics voted for Democratic candidate even though Republican candidate was Hispanic). Given the long history of Hispanic candidates winning New Mexico's political races, combined with the lack of racially polarized voting in those contests, there is insufficient evidence of racial bloc voting in New Mexico to trigger Section 2 of the Voting Rights Act.

B. The *Maestas* Plan Is Less Favorable to Hispanics than the Joint Plan.

Given the lack of evidence of a Section 2 violation in New Mexico, there is no need to draw a Hispanic majority district. Regardless, the *Maestas* Plan actually treats Hispanics ***worse*** than the Joint Plan. The *Maestas* Plan creates a second Congressional district with 45 percent Hispanic voting age population, while the Joint Plan draws this district so that it contains 46.9 percent Hispanic voting age population and 51.8% total Hispanic population. *See* Maestas Ex. 1; Egolf Ex. 8. In other words, the Joint Plan creates a stronger Hispanic district, while the *Maestas* Plan disperses more Hispanics across three districts at the expense of creating a district where Hispanics are closer to a majority.

II. THE *LULAC* PLAN IS A RACIAL GERRYMANDER.

Given the lack of evidence of Section 2 problems in New Mexico, there is certainly no basis to accept the LULAC Intervenors' version of a Congressional map. More importantly, however, this Court should steer clear of the LULAC Plan because it constitutes racial gerrymandering.

The Supreme Court of the United States has defined racial gerrymandering as "the deliberate and arbitrary distortion of district boundaries . . . for [racial] purposes." *Shaw v. Reno*, ("*Shaw I*"), 509 U.S. 630, 640 (1993) (internal questions marks omitted). Racial gerrymandering exists where race for its own sake and not other redistricting principles is the legislature's

dominant and controlling rationale in drawing its district lines, and where the legislature subordinates traditional race-neutral districting principles to racial considerations. Under these standards, the LULAC Plan constitutes impermissible racial gerrymandering.

The Supreme Court has held several redistricting plans unconstitutional because of racial gerrymandering. The Court has stated:

> The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations.

Miller v. Johnson, 515 U.S. 900, 915-16 (1995) (internal quotation marks, footnotes and citation omitted). In *Bush v. Vera*, 517 U.S. 952 (1996), the Supreme Court stated that, "[f]or strict scrutiny to apply, the plaintiffs must prove that other, legitimate districting principles were 'subordinated' to race." *Id.* at 959 (citations omitted). "[R]ace must be 'the predominant factor' motivating" the proposed redistricting plan. *Id.* (citations omitted).

Three principal categories of evidence are used to determine whether legitimate districting principles were subordinated to race: (i) district slope and demographics; (ii) testimony and correspondence directly stating the motives for drawing the plan; and (iii) the nature of the redistricting data used by the plan's architects. As explained below, all of these categories weigh in favor of rejecting the LULAC Plan as a racial gerrymander.

A. The LULAC Districts Are Unusually Shaped.

The shapes of the minority districts have played an important role in the Supreme Court's decisions. "[Re]apportionment is one area in which appearances do matter." *Shaw I*, 509 U.S. at 648. A significant part of the evidence the Court relied on in finding racial gerrymandering in

Miller, 515 U.S. 900, *Bush*, 517 U.S. 952, and *Shaw v. Hunt* ("*Shaw II*"), 517 U.S. 899 (1996), was the irregular shape of the constructed districts, along with demographic data. The Supreme Court held that "redistricting legislation that is so bizarre on its face that it is 'unexplainable on grounds other than race,' . . . demands the same close scrutinizing that we give other state laws that classify citizens by race." *Miller*, 515 U.S. at 905 (quoting *Shaw I,* 509 U.S. at 644). "The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters with or without a particular district." *Id.* at 916.

The LULAC Plan contains a significantly contorted first Congressional district, as well as a radical change to both districts two and three for the sole purpose of capturing non-compact Hispanic poplulations. *See* LULAC map (Egolf Ex. 18). Clearly, these are the type of "bizarre" districts demonstrating racial gerrymandering.

B. The Executive Defendants Believe the Testimony Will Show that the Primary Motive for the LULAC Plan Was Race.

The second category of evidence the courts consider is direct evidence of the legislature's motive. Testimony of persons involved in the drafting process played a significant role in the court's findings in *Shaw II, Bush,* and *Miller*. *See Shaw II*, 517 U.S. 899, 096 (discussing evidence of plan's race-based objectives); *Bush*, 517 U.S. 952, 960 (same); *Miller*, 515 U.S. 900, 918 (same). The Executive Defendants believe that the trial evidence will demonstrate that LULAC's primary motive for its Congressional Plan was to create majority Hispanic districts.

C. **The Racial Data for the *LULAC* Plan Demonstrates it is a Racial Gerrymander**.

The third category of evidence considered by the court is the type and detail of data used by the state. The Supreme Court has recognized the power map drawers have "to manipulate

district lines on computer maps, on which racial and other socioeconomic data were superimposed." *Bush*, 514 U.S. at 961. "When racial data is available at the most detailed block level, and other data such as party registration, past voting statistics, and other socioeconomic data is only available at the much higher precinct ("Voting Tally District") or tract level, a red flag is raised." *Id.* "[T]he direct evidence of racial considerations, coupled with the fact that the computer program used was significantly more sophisticated with respect to race than with respect to other demographic data, provides substantial evidence that it was race that led to the neglect of traditional districting criteria . . . ." *Id.* at 963.

The racial data for the LULAC Plan demonstrates that its primary consideration was race without regard to traditional districting principles. As the maps and the data charts for that plan demonstrate, Districts 2 and 3 were contorted to split the Albuquerque community of interest in order to create a Congressional district with 52 percent Hispanic voting age population. *See* HB 46 (LULAC) Congressional Map and Data Charts.

In sum, race cannot be the primary consideration in forming districts "without regard for traditional districting principles." *Shaw I*, 509 U.S. at 642. "[R]ace for its own sake and not other districting principles [cannot be] the legislature's dominant and controlling rationale in drawing its district lines." *Miller*, 515 U.S. at 913. In turn, this Court cannot rely on race "in substantial disregard of customary and traditional districting practices. Those practices provide a crucial frame of reference and therefore constitute a significant governing principle in cases of this kind." *Id.* at 928. (O'Connor, J. concurring).

When one looks at traditional redistricting principles, it becomes clear that the LULAC Intervenors did not observe them when they prepared their plan. Indeed, the dominant and

controlling rationale in drawing the district lines in their plan was and is race. The Court should decline to adopt the LULAC Plan for this reason.

III. THE *MAESTAS* PLAN IS AN IMPERMISSIBLE POLITICAL GERRYMANDER.

Although redistricting at the legislative level is a political exercise[6], any plan which constitutes political gerrymandering is inappropriate for consideration by the Court in drawing a Congressional districting map. *See Hunt v. Cromartie*, 526 U.S. 541, 551 (1999); *see also Wyche v. Madison Parish Police Jury*, 769 F.2d 265, 268 (5th Cir. 1985) ("Many factors, such as the protection of incumbents, that are appropriate in the legislative development of an apportionment plan have no place in a plan formulated by the courts.").

For this reason, this Court can, and should, reject the *Maestas* Plan. Unlike the Joint Plan, the *Maestas* Plan radically departs from existing Congressional boundaries to pack Republicans into District 2, thereby weakening Republican performance in the remaining districts. *See* Egolf Ex. 9; Maestas Ex. 1. As explained in the Joint pre-trial brief submitted by the *Egolf* Plaintiffs, the *Maestas* Plan seeks this political advantage by disregarding, if not outright violating, traditional redistricting criteria such as preservation of political subdivisions and preservation of communities of interest.

To avoid inappropriate political gerrymandering, this Court should use as a starting point "the last legal map for the jurisdiction." *See Johnson v. Miller*, 922 F. Supp. 1556, 1559 (S.D. Ga. 1995) ("In fashioning a remedy in redistricting cases, courts are generally limited to correcting only those unconstitutional aspects of a state's plan . . . . The rationale for such a 'minimum change' remedy is the recognition that redistricting is an inherently political task" for

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[6] While a legislature may take politics into account, it cannot do so in derogation of other redistricting criteria, especially the one-person-one-vote population deviation requirement. *Larios v. Cox*, 300 F. Supp. 2d 1320, 1337 (N.D. Ga. 2003), *aff'd, Cox v. Larios*, 542 U.S. 947 (2004).

which courts are "ill suited.") (*citing Upham v. Seamon*, 456 U.S. 37, 41-42 (1982)). Unlike the *Maestas* Plan or the *LULAC* Plan, the Joint Plan makes the least amount of changes to existing districts, thus preserving, to the extent possible, the political *status quo* in this state. The Joint Plan is the Congressional map that this Court should adopt.

CONCLUSION

The Executive Defendants join with the *Egolf*, *James* and *Sena* Plaintiffs to respectfully request that this Court adopt the Joint Plan submitted by these parties.

Respectfully submitted,

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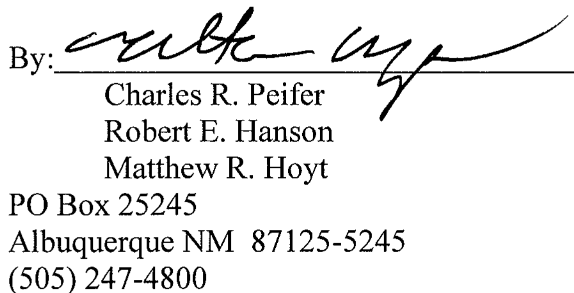
By: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of December 2011, I served via electronic mail and filed the foregoing pleading electronically, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

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