IN THE SUPREME COURT FOR THE STATE OF NEW MEXICO

TIMOTHY Z. JENNINGS, *et al.*,

Petitioners,

Sup. Ct. No. 33, 387
Ct. App. No. 31,854

v.

THE NEW MEXICO COURT OF APPEALS,

Respondent,

and,

DIANNA J. DURAN, *et al.*,

Real Parties in Interest.

JAMES PLAINTIFFS' OPENING BRIEF

On Appeal from the First Judicial District Court, Santa Fe County, New Mexico
The Honorable James Hall, No. 0101-CV-2011-02942, Consolidated

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Certificate of Compliance

The body of the attached brief exceeds the 35-page limit set forth in the Rule 12-213(F)(2) NMRA. As Required by Rule 12-213(G) NMRA we certify that this brief complies with Rule 12-213(F)(3) NMRA, in that the brief is proportionately spaced and the body of the brief contains 8818 words. This brief was prepared and the word count determined using Microsoft Word.

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For the reasons set forth herein, Conrad James, Devon Day, Marge Teague, Monica Youngblood, Judy McKinney and John Ryan, Plaintiffs in consolidated Cause No. D-202-CV-2011-09600 below ("the James Plaintiffs"), oppose and request this Court to deny the Petition for Writ of Superintending Control filed by the Speaker of the House Lujan and Senate President pro tem Jennings ("Legislative Defendants"), and affirm the District Court judgment from which they appeal.

The James Plaintiffs join in and incorporate herein the arguments set forth in the Governor's and Lieutenant Governor's Opening Brief regarding Legislative Defendants' Petition.[1] The Legislative Defendants' Petition should be denied and the District Court judgment should be affirmed for the following reasons as well:

I. INTRODUCTION

The 2010 census revealed substantial population imbalances among New Mexico House of Representative districts that rendered them unconstitutional. The New Mexico Legislature bore initial responsibility to pass a plan that the Governor would approve to reapportion those districts. The Legislature failed to meet that responsibility, and the task therefore fell to the courts.

[1] In lieu of filing a separate Opening Brief regarding the Maestas/Egolf Plaintiffs' companion petition, No. 33,386, the James Plaintiffs join in the Governor's and Lieutenant Governor's Opening Brief regarding that petition as well.

Following his appointment by this Court, and acting as a court of equity, Judge James Hall received extensive evidence and argument over the course of eight days concerning redistricting of the House. To further the paramount goal of developing the best redistricting plan for the people of this State, he gave all of the parties opportunity to modify their proposed plans to address concerns and criticisms raised during the course of the proceedings. At the close of proofs, no party sought leave to submit additional modifications to its own plan or introduce further evidence regarding the other parties' plans. Thereafter, in the exercise of his equitable discretion to provide a remedy for the current, indisputably unconstitutional House districts, Judge Hall adopted, subject to his own additional modifications, the third alternative plan submitted by the Governor and the other Executive Defendants.

Judge Hall's House redistricting plan is supported by substantial evidence. It complies with the constitutional and other law that governs redistricting of state legislative bodies. He properly exercised, and certainly did not abuse, his discretion. Judge Hall's decision should be affirmed and the pending petitions for writs of superintending control should be denied.

II. FACTUAL AND PROCEDURAL BACKGROUND

The 2010 Census. On September 6, 2011, after receiving data from the United States Census, the Governor issued a proclamation calling the Legislature

into special session to deal with, among other things, reapportionment of the New Mexico House of Representatives. Court's January 3, 2012 Findings of Fact and Conclusions of Law ("FOF or COL"), FOF 14. This reapportionment became necessary after census data revealed major population changes across the state over the last decade. FOF 13. As a result of population growth on Albuquerque's Westside and in Rio Rancho, districts representing those areas became drastically overpopulated. For example, one district on the Westside (District 29) became overpopulated by 100.9 percent, and other districts in that part of the metropolitan area (Districts 12, 13, 44 and 60) became overpopulated by 31.6, 79.3, 73.5 and 40.1 percent, respectively. Together, these districts have a total positive deviation of more than 300%. In other words, the excess population justifies three entirely new seats in this area. FOF 7.

While West Albuquerque and Rio Rancho saw much greater growth than the state-wide average, other parts of the state saw relative population loss because they did not keep pace with the average. There are three clearly identifiable groups of districts in the state in which the population decline or relatively slow growth was so significant that the area now has enough population to justify one fewer House district that it presently has: 1) North Central New Mexico; 2) the mid-heights area in Albuquerque; and 3) Southeastern New Mexico. North Central New Mexico has eleven adjacent districts that only have enough population to

justify ten districts (districts 40, 41, 42, 43, 45, 46, 47, 48, 50, 68, and 70 have a cumulative deviation of approximately negative 92%); ten of these eleven districts are held by Democrat incumbents. The mid-heights of Albuquerque has eleven adjacent districts that only have enough population to justify ten districts (districts 10, 11, 14, 18, 19, 21, 24, 25, 26, 28, and 30 have a cumulative deviation of approximately negative 104%). Southeastern New Mexico has twelve adjacent districts that only have enough population to justify eleven districts (districts 51, 54, 55, 56, 57, 58, 59, 61, 62, 63, 64, and 66 have a cumulative deviation of approximately negative 95%); eleven of these twelve districts are held by Republican incumbents. FOF 8-11.

The September 2011 Special Session. Such deviation patterns lend themselves to the logical -- indeed, obvious -- solution to the redistricting puzzle: one seat from each of the three under-populated areas should move to the overpopulated areas on Albuquerque's Westside and Rio Rancho, which collectively warrant three new districts. TR 12/15/11 at 164-168. However, after the special session began on September 6, 2011, it became readily apparent that the Legislature had no intention to consolidate the North Central districts in order to create an appropriate number of new seats on the Westside and Rio Rancho. Defendant Ben Lujan, Sr., Speaker of the New Mexico House of Representatives, had given the Legislature's demographer, Brian Sanderoff, specific instructions not

to consolidate any districts in the North Central region. TR 12/13/11 at 158; FOF 35. Convinced that, so long as they kept deviations at ± 5 percent, they could draw a House map for any reason, TR 12/13/11 at 138-41, the House Democrats passed a plan, HB 39, that did not consolidate a district in the North Central region and that, as a result, under-populated the Democrat-heavy North Central districts and over-populated districts in Albuquerque. Legis. Dfdts. Ex. 1. Although refusing to consolidate a seat in the North Central region, HB 39 consolidated seats in the two other areas with nearly identical negative deviations: the Republican area in the Southeast and the area in the mid-heights of Albuquerque where a Democratic incumbent had announced his intention to leave the Legislature to run for another public office. Sena Ex. 3.

HB 39 passed the New Mexico House by only two votes, over bipartisan opposition. HB 39 passed the Senate, but again with bipartisan opposition. HB 39 did not receive a single Republican vote in either chamber. FOF 25; TR 12/13/11 at 17. Because HB 39 failed to honor "one person, one vote principles[,]" and failed to apply neutral principles to address population shifts, the Governor exercised her authority under the New Mexico Constitution and vetoed the legislation on October 17, 2011. *See* Veto Msg. (Gov. Ex. 8).

The House Districting Trial. This litigation followed. Six plaintiff and intervenor groups -- denominated James, Sena, Egolf, Maestas, Multi-Tribal and

Navajo Nation -- challenged the constitutionality of the current House districts. In accordance with a scheduling order, prior to trial each group submitted proposed plans (i.e., districting maps) or partial plans for drawing new districts. The Legislative Defendants urged adoption of HB 39. The Executive Defendants -- the Governor, the Lieutenant Governor and the Secretary of State -- proposed their plan for House districts.

The trial began on December 12, 2011 and lasted for eight trial days. Each party called expert and other witnesses to testify in favor of that party's plans and criticize the other parties' plans. At the beginning and during the course of the trial the Egolf and Maestas Plaintiffs and the Executive Defendants submitted amended or modified plans. Some of these were submitted at the suggestion of the Court to address concerns that were raised about previously submitted plans. FOF 28.

III. GOVERNING LAW

A. Standard of Review

1. The deferential standards that ordinarily apply to appellate review of district court decisions govern this proceeding.

The Court's review of a district court decision by way of an extraordinary writ remains subject to the deferential standards of review that apply to ordinary appeals:

> Our Constitution gives us appellate jurisdiction, N.M. Const. art. 6, § 2, and also original jurisdiction and superintending control, N.M. Const. art. 6, § 3, but these powers do not include the power to review de novo the factual basis for the orders or judgments of district courts. The fact-finding process has always been left to the district courts. That is, factual issues are always determined either by the trial jury or the trial court sitting without a jury. The weight and credibility of the evidence and of witnesses are left for the trier of the facts and are not subjects of review by this court.

Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 313, 551 P.2d 1354, 1360 (1976). See generally State v. House, 1999-NMSC-014, ¶ 33, 127 N.M. 151, 978 P.2d 967 (articulating substantial evidence rule). Thus, to prevail in this proceedings the Petitioners in these proceedings must "show, with reference to the best evidence supporting the trial court's decision, why each finding was error and why any finding that was not error was insufficient to support the judgment." State ex rel. Martinez v. Lewis, 116 N.M. 194, 206, 861 P.2d 235, 247 (Ct. App. 1993). The petitioner or appellant does not carry its burden where it "has not shown by reference to the evidence in the light most favorable to the decision that there were insufficient findings supported by substantial evidence to support the judgment." Id. at 209, 861 P.2d at 250. The Petitioners have not met their obligation to identify all of the evidence that supports Judge Hall's decision and otherwise cannot meet this burden.

2. In adopting a redistricting plan for the House, Judge Hall acted in equity. Therefore, his decision may be reversed only upon a showing of abuse of discretion.

Prior to trial all of the parties stipulated that the existing plan for the House (as well as those for Congress, the Senate and the Public Regulation Commission) was unconstitutional, i.e., "liability" was established. The only issue before the Court was the appropriate remedy. In fashioning that remedy, Judge Hall was acting in equity. "[The parties having conceded that the existing apportionment was unconstitutional,] The issue for us is therefore remedy: not, Is some enacted plan unconstitutional? But, What plan shall we as a court of equity promulgate in order to rectify the admitted constitutional violation?" Prosser v. Election Bd., 793 F. Supp. 859, 865 (W.D. Wis. 1992). Accord, Central Del. Branch, NAACP v. City of Dover, 110 F.R.D. 239, 241 (D. Del. 1985) (courts engaged in redistricting "have the equitable power to formulate a constitutionally-based election plan and require that elections be conducted according to its own plan"); Assembly of the State of Cal. v. Deukmejian, 639 P.2d 939, 960 (Cal. 1982) (noting the "breadth of a court's equitable powers in reapportionment cases"). The court may either draw its own plan, see, e.g., Prosser, 793 F. Supp. at 865, or pick from among plans proposed by the parties, see, e.g., Alexander v. Taylor, 51 P.3d 1204, 1207 (Okla. 2002).

A court's grant or denial of equitable relief is reviewed for abuse of discretion. Wolf & Klar Cos. v. Garner, 101 N.M. 116, 118, 679 P.2d 258, 260 (1984). Abuse of discretion is difficult to establish. "A trial court abuses its discretion when its decision is contrary to logic and reason." Roselli v. Rio Communities Serv. Station, Inc., 109 N.M. 509, 512, 787 P.2d 428, 431 (1990). "We read 'contrary to logic' and 'contrary to reason' as synonymous--i.e., as synonymous with 'unreasonable.'" Segal v. Goodman, 115 N.M. 349, 357 n.6, 851 P.2d 471, 479 n.6 (1993). "The issue before us ... is whether the trial court ... [chose] a course of action that no reasonable person would select.... If the trial court did not act unreasonably ... then we should affirm, even if the court reached a decision that one or more of the members of this Court would not ourselves have reached." Id. at 356-57, 851 P.2d at 478-79 (citation omitted). "An abuse of discretion is a decision that is clearly untenable." State v. Gonzales, 105 N.M. 238, 241, 731 P.2d 381, 384 (Ct. App. 1986). "When there exist reasons both supporting and detracting from a trial court decision, there is no abuse of discretion." Talley v. Talley, 115 N.M. 89, 92, 847 P.2d 323, 326 (Ct. App. 1993). The Legislative Defendants have not shown that Judge Hall abused his discretion in adopting the Executive Alternative 3 plan for redistricting the House.

B. Substantive Law of Redistricting

1. A court constitutionally must minimize population deviations.

The equal protection clause mandates equalization of populations within electoral districts "as nearly as practicable" following the decennial census. There is no ± 5% or other absolute safe harbor for population deviation in connection with reapportionment:

> [T]he Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable.... So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature. But neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation.

Reynolds v. Sims, 377 U.S. 533, 577, 579-80 (1964). "In challenging the District Court's judgment, appellant invites us to weaken the one-person, one-vote standard by creating a safe harbor for population deviations of less than ten percent, with which districting decisions could be made for any reason whatsoever. The Court properly rejects that invitation." Cox v. Larios, 542 U.S. 947, 949 (2004) (Stevens, J., concurring).

While not a safe harbor, a deviation of no more than ± 5% is prima facie valid for a legislatively enacted re-districting (and conversely, any deviation

greater than that is prima facie invalid). Connor v. Finch, 431 U.S. 407, 418 (1977) (noting "the 'under-10%' deviations the Court has previously considered to be of prima facie constitutional validity" in context of legislatively enacted apportionments).

> We have recognized that some deviations from population equality may be necessary to permit the States to pursue other legitimate objectives such as maintaining the integrity of various political subdivisions and providing for compact districts of contiguous territory.... [M]inor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State. Our decisions have established as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations. A plan with larger disparities in population, however, creates a prima facie case of discrimination, and therefore must be justified by the State.

Brown v. Thomson, 462 U.S. 835, 842-43 (1983) (internal quotation marks and citations omitted).

However, the standard for constitutionally permissible deviations fundamentally differs in the context of redistricting plans drawn by courts after the legislature and executive have failed to enact a plan or such a plan is found to be unconstitutional. In Chapman v. Meier, 420 U.S. 1 (1975), the Court determined that:

> A court-ordered plan ... 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.... We hold today that,

> unless there are persuasive justifications, a court-ordered reapportionment plan of a state legislature ... must ordinarily achieve the goal of population equality with little more than de minimis variation.

Id. at 26-27. The Court further held that any departure from de minimis deviation must be supported by significant state policies: "Where important and significant state considerations rationally mandate departure from these standards, it is the reapportioning court's responsibility to articulate precisely why a plan ... with minimal population variance cannot be adopted." Id. at 27. "The burden is on the District Court to elucidate the reason necessitating any departure from the goal of population equality, and to articulate clearly the relationship between the variance and the state policy furthered." Id. at 24. The presence of other feasible and yet "less statistically offensive" plans indicates that the greater deviation is unnecessary and thus unacceptable. Id. at 26.[2] Judge Hall properly followed this mandate.

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[2] In Sanchez v. King, No. 82-0067, slip op. at 130-31, 131 n.3 (D.N.M. Aug. 8, 1984), the court explained that its creation of Native American majority districts for the New Mexico House of Representatives justified more than de minimis population deviations. The court nevertheless emphasized that while the deviation range was 7.37%, "most of the districts imposed by the court-ordered plan vary from the ideal significantly less than the three districts which represent the maximum variance. Of the 18 districts reconstituted by the Court, seven have less than a one percent variance from the ideal.... Another two districts deviate by less than 2 percent.... Another seven deviate from the ideal by less than three percent.... Only two districts in the court-ordered plan vary from the ideal by more than three percent...."). See Legis. Dfdts. Ex. 5.

In New Mexico's last reapportionment litigation, the district court in its findings and conclusions cited In re Apportionment of the State Legislature -- 1982, 321 N.W.2d 585 (Mich. 1982), for the proposition that this stricter deviation standard for court-drawn plans applied only to federal and not state courts. Jepsen v. Vigil-Giron, No. CV-2001-2177, slip op. at 12 (N.M. First Jud. Dist. filed Jan. 24, 2002). In the Michigan case, following an initial determination that a state legislative apportionment plan drawn by a commission violated the equal protection clause, that state's supreme court approved a plan drawn at the court's request by the Michigan Secretary of State that contained deviations of up to 16.4%. See In re Apportionment of State Legislature -- 1992, 486 N.W.2d 639, 643-44 (1992) (discussing 1982 case history). An appeal to the United States Supreme Court was dismissed for want of a substantial federal question. Kleiner v. Sanderson, 459 U.S. 900 (1982).

The Jepsen court erred. It does not follow from the dismissal of the appeal that the United States Supreme Court determined that the Chapman rule of minimal deviation is not applicable to state court-drawn redistricting plans. While a dismissal for want of substantial federal question is a disposition on the merits and has precedential effect, Hicks v. Miranda, 422 U.S. 332 (1975), overruled on other grounds by Mandel v. Bradley, 432 U.S. 173 (1977), there is no available record of the Court's grounds for the dismissal (or even the precise issue raised on

the appeal) and therefore it is impossible to ascertain any rule or proposition for which the case might stand. Further, the Court elsewhere has admonished parties that, "[T]he fact that a 10% or 15% variation from the norm is approved in one State has little bearing on the validity of a similar variation in another State. 'What is marginally permissible in one State may be unsatisfactory in another, depending upon the particular circumstances of the case.'" Swann v. Adams, 385 U.S. 440, 445 (1967) (quoting Reynolds v. Sims, 377 U.S. at 578). Thus, the United States Supreme Court just as if not more likely dismissed the appeal on the grounds of some unique circumstance of the Michigan case as opposed to the improbable adoption of a general principle that the Chapman rule does not apply to state court-drawn reapportionment plans.

In fact, Michigan has a longstanding, strict policy, embodied in its constitution and statutes, of not crossing county and municipal boundaries to the extent possible in drawing legislative district boundaries, and the 16.4% deviation was justified on this basis:

> [W]e see in the constitutional history of this state dominant commitments to contiguous, single-member districts drawn along the boundary lines of local units of government which, within those limitations, are as compact as feasible. We accordingly direct that election districts shall be drawn in accordance with the following criteria: ... Senate and House election district lines shall preserve county lines with the least cost to the federal principle of equality of population between election districts consistent with the maximum preservation of county lines and without exceeding the range of allowable divergence under the federal constitution which, until the

United States Supreme Court declares otherwise, shall be deemed to be 16.4% (91.8-108.2%).

In re Apportionment of State Legislature -- 1982, 321 N.W.2d at 583.[3] Therefore, if anything, it is probable that the United States Supreme Court dismissed the appeal of the 1982 Michigan redistricting case on the grounds of this special consideration rather than the fact that a state versus a federal court drew the plan. Cf. Voinovich v. Quilter, 507 U.S. 146, 161-62 (1993) (policy embodied in Ohio constitution favoring preservation of county boundaries could justify deviations exceeding 10% in reapportioned state legislative districts). New Mexico, of course, has no similar constitutional or even statutory policy in favor of not splitting county or municipal boundaries in legislative redistricting.

Other, compelling reasons compel the conclusion that, absent "historically significant state policy of unique features," a court-drawn redistricting plan constitutionally must contain no more than minimal deviation from the population norm for districts. First, Chapman and Connor do not distinguish between federal and state court-drawn plans. Chapman repeatedly refers generally to the limited permissible deviation in a "court-ordered plan," not a "federal court-ordered plan." 420 U.S. at 24, 26. Similarly, Connor provides that, "[T]he latitude in court-

[3] As Judge Hall noted in his Conclusion 26, the Michigan court acknowledged that only the degree of deviation essential to achieve these state constitutional mandates was permissible: "An apportioning authority is justified in adopting only the degree of divergence from population equality essential to achieve the state goals." 321 N.W.2d at 576.

ordered plans for departure from the Reynolds standards in order to maintain county lines is considerably narrower than that accorded apportionments devised by state legislatures, and the burden of articulating special reasons for following such a policy in the face of substantial population inequalities is correspondingly higher." 431 U.S. at 419-20. [4]

Second, there is no principled basis for adopting different standards for federal and state courts. The fundamental question -- enforcing the equal protection clause's guarantee of one man, one vote parity -- is the same whether the dispute is resolved in federal or state court. And the differing standard has its genesis in the institutional differences between legislatures and courts. State legislatures bear primary responsibility for reapportionment. Reynolds, 377 U.S. at 586. This is because redistricting is "an inherently political task," Johnson v. Miller, 922 F. Supp. 1556, 1559 (S.D. Ga. 1995) (citing Upham v. Seamon, 456 U.S. 37, 41-42 (1982)), aff'd sub nom., Abrams v. Johnson, 521 U.S. 74 (1991), and "a state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality," Connor, 431 U.S. at 414-15.

[4] Granted, in discussing the minimum deviation requirement for court-drawn plans, the Connor opinion elsewhere refers at times -- but not uniformly -- to "federal courts." See, e.g., 431 U.S. at 415. But this properly is understood only to reflect the jurisdictional context of that case. At no point in the opinion does the Supreme Court state or even suggest the view that the rule is applicable only to federal courts, as opposed to courts generally.

Courts, on the other hand, are "ill-suited," Johnson v. Miller, 922 F. Supp. at 1559, to carry out this balancing of competing policy considerations. "[A]s a court, we possess no distinctive mandate to compromise sometimes conflicting state apportionment policies in the people's name." Below v. Gardner, 963 A.2d 785, 788-89 (N.H. 2002). Because courts lack competence to balance the competing policy and political considerations that underlies the prima facie ±5% standard, where the legislature fails to meet its responsibility and the task falls to the court, there is no continuing justification for granting either a state or a federal court leeway to deviate substantially from population equality.

Third, when confronted with this precise question, other state courts have concluded that Chapman's strict deviation standard for court-drawn reapportionment plans applies equally to state courts:

> The degree to which a state legislative district plan may vary from absolute population equality depends, in part, upon whether it is implemented by the legislature or by a court. State legislatures have more leeway than courts to devise redistricting plans that vary from absolute population equality. With respect to "a court plan," any deviation from approximate population equality must be supported by enunciation of historically significant state policy or unique features. Absent persuasive justifications, a court-ordered redistricting plan of a state legislature must ordinarily achieve the goal of population equality with little more than de minimis variation. The latitude in court-ordered plans to depart from population equality thus is considerably narrower than that accorded apportionments devised by state legislatures.... The senate and senate president argue that because we are a state court, we should use the standard applied to state legislatures rather than the standard applied to federal district courts. We disagree.

Below v. Gardner, 963 A.2d 785, 791 (N.H. 2002) (internal quotation marks and citations (to Chapman and Connor) omitted). Accord, Burling v. Chandler, 804 A.2d 471, 478 (N.H. 2002).[5]

[5] In Below and Burling, the New Hampshire Supreme Court reapportioned that state's Senate and House of Representatives districts, respectively, following the New Hampshire Legislature's failure to do so after the 2000 census. Unique circumstances -- the extremely small size and large number of New Hampshire's House of Representatives districts -- constituted a "special reason" that justified not meeting Chapman's "de minimis deviation mandate that otherwise would apply, and instead accepting an approximately 9% deviation range:

> Given the small population of this State, the unusually large size of its house of representatives, and our State Constitution and traditional redistricting policies, we hold that a deviation range of approximately 9% achieves substantial equality.
>
> New Hampshire has the largest state house of representatives in the country. New Hampshire also has one of the smallest state populations in the country.... Because New Hampshire has such a large house of representatives (400 members) and such a small population (1,235,786), it takes very few people to affect deviation substantially. For instance, a 10% deviation represents only 309 people, and a 1% deviation represents a mere 31 people.

804 A.2d at 484 (internal quotation marks and citations omitted). In addition, the New Hampshire constitution generally prohibits splitting towns and counties into two or more districts. Id. at 476-78, 484-85. The practical impossibility under these circumstances of achieving a lower deviation compelled the court to accept a deviation range of 9.26%. Id. at 484. In contrast, the same court's senate redistricting plan limited the total deviation range to 4.96%, i.e., around ± 2.5%. Below, 963 A.2d at 795. None of these structural challenges are present here in New Mexico.

2. A court drawing a redistricting plan must comply with the Voting Rights Act.

In addition to the Constitution's one person one vote mandate, a court-drawn redistricting plan must comply with the federal Voting Rights Act. See Upham v. Seamon, 456 U.S. 37, 39 (1982) ("the special standards of population equality and racial fairness" override other considerations in court-order plans); In re Legislative Districting of the State, 805 A.2d 292, 298 (Md. 2002) (identifying only federal constitutional requirements, the Voting Rights Act, and Maryland state constitutional provisions as the "strict legal requirements" that governed court's drafting of plan). Section 2 provides:

> (a) No voting qualification or prerequisite to voting or standard, practice or procedure shall be imposed or applied ... in a manner which results in a denial or abridgment of the right of any citizen ... to vote on account of race or color....
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

42 U.S.C. §1973.

Three "'necessary preconditions'" must be established before it can be said that Section 2 requires the drawing of a majority-minority district because failure to do so will dilute the minority group members' votes: "(1) The minority group

must be 'sufficiently large and geographically compact to constitute a majority in a single-member district,' (2) the minority group must be 'politically cohesive,' and (3) the majority must vote 'sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate.'" Bartlett v. Strickland, 556 U.S. 1, 129 S. Ct. 1231, 1241 (2009) (quoting Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986)). Accord, Growe v. Emison, 507 U.S. 25, 40-41 (1993).

Section 2 liability cannot be premised on the failure to establish minority "influence districts," because that does 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. This Court has held that § 2 does not require the creation of influence districts." Bartlett, 129 S. Ct. at 1242 (citing LULAC v. Perry, 548 U.S. 399, 445 (2006)). Rather, to establish the first Gingles prong it must be shown that the minority group is sufficiently large to constitute a numerical majority.

For the same reason -- it does not satisfy the first Gingles prong -- Section 2 liability cannot be premised on the failure to establish a "crossover district." A crossover district is one in which the minority population, at least potentially, is large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate. Id.

> Petitioners argue that although crossover districts do not include a numerical majority of minority voters, they still satisfy the first Gingles requirement because they are "effective minority districts." ... We reject that claim.... [A] party asserting § 2 liability must show by a preponderance of the evidence that the minority population in the potential election district is greater than 50 percent.

Bartlett, 129 S. Ct. at 1243, 1246.[6] More generally, the Supreme Court has rejected the proposition that the prohibition against minority group voting strength cannot be equated with an affirmative mandate to maximize that strength. Bartlett, 129 S. Ct. at 1244 (citing Johnson v. De Grandy, 512 U.S. 997, 1016-17 (1994)).

To satisfy the first Gingles requirement of a sufficient number of minority group members to constitute a majority in single member districts, the majority population must be based on numbers of citizens who may vote. In LULAC the Supreme Court concluded that in reconstituting a majority-minority congressional district the Texas Legislature violated Section 2, because the redrawn district did not contain enough Hispanic citizens to constitute a majority of the voters:

> The first Gingles factor requires that a group be sufficiently large and geographically compact to constitute a majority in a single-

[6] It is important to understand the significance of cross-over or coalition voting to the third as well as the first Gingles prong. As stated above, to satisfy the third prong it must be shown that the majority votes "sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate." If a sufficient number of majority, i.e., white, voters crossover and vote for the minority's preferred candidate such that in coalition with the minority group that candidate is usually elected, the third prong is not present. Thornburg v. Gingles, 478 U.S. at 56 ("[I]in general, [only] a white bloc vote that normally will defeat the combined strength of minority support plus white "crossover" votes rises to the level of legally significant white bloc voting.").

> member district. Latinos in [old Texas Congressional] District 23 could have constituted a majority of the citizen voting-age population in the district.... Latinos, to be sure, are a bare majority of the voting-age population in new District 23, but only in the hollow sense, for the parties agree that the relevant numbers must include citizenship. This approach fits the language of § 2 because only eligible voters affect a group's opportunity to elect candidates. In sum, appellants have established that Latinos could have had an opportunity district in District 23 had its lines not been altered and that they do not have one now.

LULAC, 548 U.S. at 427-29 (internal quotation marks and citation omitted).

"[O]nly when a party has established the Gingles requirements does a court proceed to analyze whether a violation has occurred [or will occur in the absence of a drawn minority-majority district] based on the totality of the circumstances." Bartlett, 129 S. Ct. at 1241. In assessing the totality of the circumstances court are guided by ten factors described in the Voting Rights Act's legislative history, see Gingles, 478 U.S. at 36-37, including the extent to which members of the minority group bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process.

3. A court drawing a redistricting plan may consider traditional districting factors.

After ensuring population equality and protection of minority voting rights, courts drawing redistricting plans consider, to the extent feasible, traditional redistricting principles: compactness and contiguity, preservation of counties and

other political subdivisions, preservation of communities of interest, preservation of cores of prior districts, and protection of incumbents. See, e.g., Arizonans for Fair Representation v. Symington, 828 F. Supp. 684, 688 (D. Ariz. 1992), aff'd sub nom., Hispanic Chamber of Commerce v. Arizonans for Fair Representation, 507 U.S. 981 (1993). Although these principles are not constitutionally required, they ensure that districts are drawn to be fair both to elected representatives and, most importantly, to their constituents. See Shaw v. Reno, 509 U.S. 630, 647 (1993); Arizonans for Fair Representation, 828 F. Supp. at 688.

Compactness and contiguity. These factors generally are evaluated together. "Compactness" historically relates to the minimum distance between all parts of the constituency. Contiguity requires that all parts of a district be connected at some point with the rest of the district. However, there are no hard and fast rules as to when a district is compact. The Supreme Court uses an "eyeball approach" to evaluate compactness. Bush v. Vera, 517 U.S. 952, 960 (1996). These are the only two criteria that are embodied in New Mexico law. See NMSA 1978 §§ 2-7C-3 (1991), 2-8D-2 (2002) (members of state Senate and House of Representatives shall be "elected from districts that are contiguous and that are as compact as is practical.")[7]

[7] The Legislative Council's "Guidelines," Legis. Dfdts. Ex. 3, were never enacted into law.

Preservation of political subdivisions. Another traditional redistricting consideration is minimizing to the extent feasible the number of counties and political subdivisions split between districts. See, e.g., Rodriguez v. Pataki, No. 02 Civ. 618, 2002 U.S. Dist. LEXIS 9272 (S.D.N.Y. May 23, 2002) (affirming plan that respected pre-existing political subdivisions). Preserving political boundaries must, of course, give way to concerns over population deviations between districts. See Karcher v. Daggett, 462 U.S. 725, 734 n.5 (1983) (noting that preservation of political subdivisions is permissible as a "secondary goal" but is not normally a "sufficient excuse for failing to achieve population equality.").

Communities of interest. Maintaining communities of interest is another "legitimate and traditional goal" in redistricting. See Bush, 517 U.S. at 977. Courts interpret "communities of interest" to include not only political, racial, ethnic, cultural, language and religious interests, but also communities organized around income levels, educational backgrounds, housing patterns, living conditions, and employment and economic patterns, as well as "shared broadcast and print media, public transport infrastructure, and institutions such as schools and churches[.]" See e.g. Carstens v. Lamm, 543 F. Supp. 68, 94-97 (D. Colo. 1982). However, such considerations are subordinate to protection of every citizen's equal right to vote. See Reynolds, 377 U.S. at 577 ("The fact that an individual lives here or there is not a legitimate reason for overweighting or

diluting the efficacy of his vote.").

Preserving District Cores. Core retention essentially measures the extent to which current districts are disrupted by a proposed new map; i.e., how much a particular district stays the same from one redistricting cycle to the next. See Larios v. Cox, 300 F.Supp.2d 1320, 1333-34 (N.D. Ga.), aff'd, 542 U.S. 947 (2004). Core retention attempts to preserve continuity of representation such that constituents have some assurance that their current senator, representative or commission member will remain part of their district when a new map is adopted. See, e.g., White v. Weiser, 412 U.S. 783, 791 (1973) (noting interest in preserving "constituency-representative relations."), Larios, 300 F. Supp. 2d at 1333-34.

Protection of Incumbents. The final traditional consideration attempts to minimize the pairing of incumbents such that elected officials are not forced, by the redrawing of districts, to run against each other. See Bush, 517 U.S. at 964 ("we have recognized incumbency protection, at least in the limited form of 'avoiding contests between incumbent[s],' as a legitimate state goal"). Further, where incumbents must be paired, courts must ensure that such pairings are politically fair and non-discriminatory such that they do not advantage one political party over another. See Larios, 300 F. Supp. 2d at 1333-34. Thus, redistricting plans can protect incumbents, but must do so "in a consistent and neutral way" that avoids pitting one party's incumbents against each other while shielding the other

party's incumbents from pairings. See id. at 1339, 1347 (citing Brown v. Thomson, 462 U.S. 835, 845-46). Moreover, incumbency protection must give way to the higher priorities recognized by the law such as minimization of population deviations. See, e.g., Bush, 517 U.S. at 967-70.

IV. ARGUMENT

A. In Exercising His Equitable Discretion, Judge Hall Properly Solicited Modifications to Proposed Plans.

The House redistricting trial was not a mere legal contest between two private litigants in which one party would win and the other lose. Judge Hall had a higher duty than just to even-handedly apply the rules of procedure and evidence. Rather, his job was to craft -- on an expedited basis -- a map for the House districts that would best serve the people of New Mexico by meeting the twin requirements of population equality and racial fairness and also accommodating to the extent possible secondary traditional districting considerations. In his role as a court of equity he had discretion to draw his own map following the close of evidence, without affording the parties further opportunity to comment on it. A fortiori, in this context Judge Hall acted appropriately in granting all of the parties leave to modify their plans to meet concerns that had been raised during trial,

notwithstanding the fact that doing so might create challenges for any party who wished to submit supplemental evidence regarding another party's modification.[8]

B. Judge Hall Properly Declined to Adopt the Legislative Defendants' Plan.

The trial transcript as well as Judge Hall's findings and conclusions reflect that he gave thoughtful consideration to HB 39. However, the point is moot. Once the forum moved from the Legislature to the court, as a practical matter the plan was dead on arrival. The great majority of HB 39's districts deviated significantly from the ideal district population, Gov. Ex. 12, and with the exception of the Native American districts none of them could be justified by "historically significant state policy or unique features." Chapman, 420 U.S. at 26. COL 27. Further, the Executive Defendants', among others', plans, which drew districts

[8] The James Plaintiffs submit that both of the Legislative Defendants could have submitted alternative plans that addressed the population deviation and other deficiencies in HB 39 that were identified during the trial, just as the other legislators who are parties herein (e.g., Egolf and Maestas) could and did do. However, even assuming, as the Legislative Defendants assert, that they lacked authority to submit proposed alternate plans to the District Court, then under that same logic, they lacked the authority to bring the current writ action. The New Mexico Constitution prohibits an individual member of the Legislature from acting on behalf of the body without the express approval of that body, which in turn requires a proper vote while the Legislature is in session. See N.M. Const., Art. IV, §§ 15, 17 (legislature acts through legislation that must be passed by majority of members present in each chamber). The Legislative Defendants have failed to establish that they obtained legislative approval prior to filing their Petition. This is grounds for dismissal of the writ, and Legislative Defendants should not be permitted to take further action unless and until they can establish that they have received the express approval of the entire Legislature through a proper vote.

with only de minimis deviations, demonstrated the feasibility of "less statistically offensive" plans that confirmed HB 39's constitutional infirmity. Egolf Ex. 24.

HB 39's irrational and discriminatory under-population of the state's North Central region and overpopulation of the Albuquerque metropolitan area, Gov. Exs. 16, 17, coupled with its glaring failure to pair any Democrat incumbents in the North Central consistent with the pairing of Republican incumbents in the Southeast, Sena Ex. 3, independently rendered the plan unconstitutional:

> [W]here population deviations are not supported by such legitimate interests [as compactness and contiguity] but, rather, are tainted by arbitrariness or discrimination, they cannot withstand constitutional scrutiny. The population deviations in the Georgia House and Senate Plans are not the result of an effort to further any legitimate, consistently applied state policy. Rather, we have found that the deviations were systematically and intentionally created ... to protect Democratic incumbents. Neither of these explanations withstands Equal Protection scrutiny.

Larios, 300 F. Supp. 2d at 1338. Moverover, even assuming for the sake of argument that this discrimatory underpopulating of the North Central districts and overpopulating of Albuquerque districts was not unconstitutional, the plan's unquestionable irrationality (what is the sense of overpopulating precisely those districts on Albuquerque's Westside that will grown the fastest over the next decade and underpopulating districts that are relatively stagnant?) certainly justified rejection in Judge Hall's exercise of equitable discretion. COL 27.

The Legislative Defendants rely on White v. Weiser, 412 U.S. 783 (1973), which suggests that federal courts should follow state reapportionment policies as expressed, among other things, "in the reapportionment plans proposed by the state legislature." 412 U.S. at 795-96. Weiser superficially appears to directly support Petitioners' position, but closer examination belies the point.

Weiser involved consideration of a congressional redistricting plan passed by the Texas state legislature. The plan was referred to as "Senate Bill One (S.B. 1)," but, unlike HB 39, was a "duly enacted statute." 412 U.S. at 795. It was "signed into law" by the Governor of Texas and subsequently challenged as unconstitutional under the population requirements of the United States Constitution. Id. at 784-86. The Supreme Court upheld the district court's decision that S.B. 1 was unconstitutional and turned to the issue of remedy, i.e., the selection of an alternative plan. Id. at 788, 793.

The parties before the district court had presented two alternative plans, one, known as "Plan B," that closely tracked S.B. 1, and one, known as "Plan C," that deviated substantially from S.B. 1. Id. at 786-89. The district court adopted Plan C. Id. at 789. The Supreme Court disagreed, holding that the district court should have honored "state [redistricting] goals, as embodied in S.B. 1, while eliminating impermissible deviations." Id. at 797. In other words, the Supreme Court found that the most recent *enacted* plan is the best evidence of the State of Texas'

redistricting goals and policies, while taking into account the fact that substantial population growth has resulted in population deviations. See id. The Supreme Court's passing reference in Weiser to reliance on proposed reapportionment legislation is dicta at best, and does not provide sufficient legal authority to support reliance on proposed, but *unenacted,* legislation.

The Legislative Defendants insistence on "thoughtful consideration" effectively amounts to a demand that Judge Hall simply defer to their wishes. Not only is this position contrary to the law, see Governor's and Lieutenant Governor's Opening Trial Brief, at 27-32, as a practical matter it also would encourage the Legislature to refuse to compromise with any Governor any time the Governor is a member of the political party that is in the minority in the Legislature. That is, the Legislature could pass a plan heavily gerrymandered in the majority party's favor, then nullify the Governor's inevitable veto -- notwithstanding the lack of an overdoing two-thirds majority -- by insisting that the court in the resulting litigation must adopt its plan. Our state Constitution clearly intends that through the veto power the Governor will have input in the writing of our laws. N.M. Const. art. IV, § 22. This fundamental precept can be honored in the context of redistricting litigation only if plans passed by the Legislature but vetoed by the Governor receive no more or less "consideration" than plans advocated by the Governor.

C. Judge Hall Properly Declined to Adopt the Egolf and Maestas Plans.

Instead of starting with the current House map, the Egolf and Maestas plans, including the last versions -- Egolf 4, Egolf Ex. 23, and Maestas Alternate, Maestas Ex. 31 -- and took their inspiration from HB 39, Legis. Dfdts. Ex. 1. TR 12/15/11 at 162. As a result, both the Egolf and the Maestas plans suffered from the same structural demographic flaw that infected HB 39: they initially failed to consolidate a North Central district. TR 12/15/11 at 164, TR 12/22/11 at 197-98. These parties thereafter unsuccessfully struggled to tweak deficient products into acceptability instead to starting from a clean slate. COL 29.

The Egolf and Maestas parties then both "remedied" the problem by discriminatorily eliminating the sole Republican district in the North Central region. That not only raised constitutional concerns, see supra at 25-26, but it was contrary to map drawers' best judgment. Professor Williams admitted that, while the decision to eliminate the Los Alamos district followed from discussions with Egolf counsel, if the goal was (as it should have been, see supra at 10-18) to equalize population he would not have chosen the Los Alamos district, because it is one of the least under-populated districts in the North Central region. TR 12/22/11 at 191, 196. Williams also admitted that, if he properly had used the current map and not HB 39 as his starting point, he would have eliminated a North Central district from the beginning. TR 12/15/11 at 226.

Apart from the discriminatory elimination of the Los Alamos district, the Maestas Alternative plan was not neutral in, and did not attempt to minimize, pairing of incumbents. While it eliminated the Maestas 2 plan's triple pairing of Republican incumbents in Chaves County, Sena Ex. 3, it continued to pair five incumbents: HD 25 and HD 26 (D-D), HD 38 and HD 39 (D-R), HD 43 (Los Alamos) and HD 50 (D-R), HD 57 and HD 66 (R-R), and HD 24 and HD 28 (R-R). The D-D pairing was in name only, because the incumbent in HD 26, Al Park, is not running for re-election. And the pairing of the two Albuquerque Northeast Heights Republicans in HD 24 and HD 28 was entirely gratuitous, because neither district was eliminated and moved to the Westside. TR 12/22/11 at 225-26. This unbalanced and in any event excessive pairing not only implicated the constitutional issues identified in Larios, 300 F. Supp. 2d at 1338, they conflicted with the traditional redistricting concern for minimizing incumbent pairing. COL 30.

The Egolf 4 plan, while less egregiously partisan than the Maestas Alternate, had one more incumbent pairing than Executive Alternate 3 had: HD 25 and HD 26 (also D-D in name only), HD 57 and HD 66 (R-R), HD 38 and HD 38 (D-R), and HD 43 (Los Alamos) and HD 50 (D-R). FOF 73, COL 29.[9]

[9] Judge Hall was even-handed in his consideration of incumbent pairings. One of the considerations that apparently led to his rejection of the plans submitted by the

Finally, the Executive Alternative 3's population deviations were less than those of any of the Egolf or Maestas maps. For all of these reasons, Judge Hall in exercising his equitable discretion properly rejected the Egolf and Maestas plans.

D. Judge Hall Properly Adopted Executive Alternative 3.

Executive Alternative 3 best met all of the legal requirements and secondary considerations that governed Judge Hall's task. COL 34. First and foremost, it minimized population deviations. "[In establishing a plan for new house districts], [w]e are primarily governed by the constitutional requirement of 'one person one vote.'" Burling v. Chandler, 804 A.2d 471, 474 (N.H. 2002). Executive Alternative 3 did a better job of minimizing population deviations while still addressing the other redistricting criteria than any of the other plans. FOF 70, COL 34.

Second, it met all Voting Rights Act requirements. Not only did it adopt the Native Americans' plan for creating six Native American majority districts in the Northwest quadrant of the state, which Judge Hall concluded was required by Section 2, FOF 68, 72, it also accommodated the Native American parties requests for maintaining communities of interest in other parts of the state, for example, the

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James and Sena (Republican) Plaintiffs was the fact that they paired more Democrats than Republicans. FOF 88, 96.

San Ildefonso and Tesuque Pueblos. [10] Similarly, it eliminated any possible Voting Rights Act concerns by maintaining a Hispanic majority district that encompass south Clovis. FOF 64-66. While none of the evidence presented by any of the parties established the three Gingles prerequisites for mandating a Hispanic majority district anywhere in the state, Executive Alternative 3 nonetheless created thirty nominally[11] Hispanic majority districts, more than any other plan proposed by the parties. FOF 71.

Third, to the extent feasible following satisfaction of the overriding requirements of population equality and racial fairness, Executive Alternative 3 reasonably accommodated the secondary traditional districting considerations. Its districts were compact and contiguous. FOF 30. While Judge Hall noted that all of

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[10] These considerations accounted for, but as a matter of law, also overrode the resulting slight increase in Republican performance in Executive Alternative 3. FOF 72, COL 34; TR 12/22/11 at 117-18; Gov. Ex. 30.

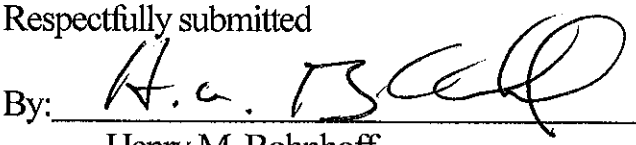
[11] The Parties compiled comparisons of the number of Hispanic majority voting age population ("VAP") district created by each of the plans. See, e.g., Gov. Ex. 31. However, under the Voting Rights Act, the necessity of establishing a minority majority district depends on the ability to form a majority of minority group members who can vote, i.e., who are citizens. See supra at 21-22. The census data available to the parties with which to ascertain Hispanic populations, however, does not distinguish between citizens and non-citizens. Thus, the witnesses uniformly acknowledged the inability to accurately determine how many districts in any of the proposed plans contained a majority of Hispanic citizens. James Ex. 9; TR 12/13/11 at 56-65; TR 12/15/11 at 215-26. This infirmity, coupled with the absence of evidence that Hispanics need majorities to have electoral success in New Mexico, supported Judge Hall's Conclusion of Law 26 that, "the Court finds no persuasive evidence that Sec. 2 of the Voting Rights Act requires any particular House majority district be drawn." See also FOF 36.

the plans necessarily split towns, counties and other communities of interest, Executive Alternative 3 properly attempted to minimize such splits as well as the cores of existing districts. FOF 29, 74. Finally, the plan minimized the pairing of incumbents, and did so in a politically neutral and consistent manner. FOF 73

This Court can note that Judge Hall did not accept Executive Alternative 3 carte blanche. Instead, he determined that one Bernalillo County precinct should be moved into a new district to better respect county lines, Finding 74, and he stated his willingness to eliminate the splitting of the Pueblo of Ohkay Owingeh, Conclusion 33 n.2 (this step was accomplished in the final plan that was described in the January 17, 2012 Judgment).

Judge Hall's findings that underlie his decision are supported by substantial evidence. Indeed, none of the petitioners/appellants even attempt to mount a substantial evidence challenge. Based on those findings, Judge Hall properly exercised, and did not abuse, his discretion in reaching the equitable decision that, on balance, of all the plans presented Executive Alternative 3 best complied with the governing legal standards. That exercise should not be disturbed on appeal.

Respectfully submitted

By: 

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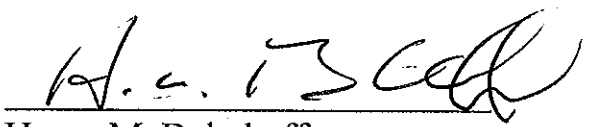

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