

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

CAUSE NO. D-101-CV-2011-02942

BRAIN 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 NOS.: D-101-CV-2011-02944; D-101-CV-2011-03016;
D-101-CV-2011-03099; D-101-CV-2011-03107; D-101-CV-2011-02945; D-506-CV-2011-00913;
D-202-CV-2011-09600**

**JAMES PLAINTIFFS' COMMENTS REGARDING
THE COURT'S PROPOSED ALTERNATIVE REMAND MAPS**

In accordance with the Court's February 13, 2012 Order Establishing Deadlines,
Plaintiffs Conrad James, Devon Day, Marge Teague, Monica Youngblood, Judy McKinney and
John Ryan ("the James Plaintiffs") submit the following comments regarding the two alternative
preliminary remand maps filed by the Court on February 20, 2012.¹

A. Definition of "Political Neutrality"

The alternative maps' projected political party performance, as measured by the Research
& Polling, Inc. formula, is 38 Democrat majority districts, 31 Republican majority districts, and

¹ The James Plaintiffs submit these comments without prejudice to their position that the New Mexico Supreme Court's February 20, 2012 Remand Order directs this Court to act in a manner that violates the United States Constitution. That position is not addressed therein.

one 50-50 district. The James Plaintiffs assume from this that the Court decided to define “political neutrality,” which the New Mexico Supreme Court directed the Court to attempt to achieve, as maintaining the existing party performance that results from the malapportioned redistricting map that has been in place since 2002. The James Plaintiffs object to this definition.

The existing map was never drawn to be politically neutral. Rather, it was a product of efforts by the New Mexico Legislature in 2001, which Governor Johnson vetoed, to favor Democrats. See infra at 6 n.2. Using that map as the standard for drawing a new map for use in the future at worst simply perpetuates the partisan goals of a Democrat-controlled Legislature ten years ago, and at best perpetuates political conditions that no longer exist. A map drawn in 2001 should be not adopted as the standard for drawing a politically neutral map in 2012.

A politically neutral map should reflect the existing political landscape. If, as the New Mexico Supreme Court has now demanded, this Court is to draw a map to accomplish political goals, the Court should use as the definition of political neutrality either the existing composition of the House of Representatives or the current statewide voting pattern, both of which of course are 37-33.

If maintenance of the existing plan’s party performance, i.e., perpetuation of whatever bias or gerrymandering is embodied in it, is established as the definition of political neutrality, there will be perverse consequences. In future redistricting cycles, if (as has been the case in the past two redistricting cycles), party control of the Legislature and the Executive is split, then the party that is favored by the existing plan’s performance will have every incentive to refuse to compromise and instead force the issue again into the courts, because that party can rely on the courts to draw a plan that simply maintains the partisan status quo under the guise of “political neutrality.” The Court’s apparent definition of political neutrality therefore will encourage the

political branches of government to abdicate their constitutional responsibility to re-draw district boundaries. Further, New Mexico will face the prospect that the political performance of a House districting map adopted in 2002 will drive the performance of future maps drawn by courts multiple decades into the future.

In its February 21, 2012 Opinion, at 30, the New Mexico Supreme Court acknowledged the inevitable partisan consequences of the demographic changes over the past decade that necessitated the movement of three House districts to Albuquerque's westside: "The result was a partisan swing of two strong seats in favor of one party. The three new [westside] seats, two Republican and one Democrat, correctly reflected the political affiliation of the population in the overpopulated areas on the West side of Albuquerque and in Rio Rancho, a result we do not question." Quite simply, if the Court's map is to be politically neutral, this reality requires that its party performance should shift from a 38-32 to a 37-33 Democrat-Republican split.

The Court should revise its map to achieve a 37-33 Democrat-Republican performance split. The James Plaintiffs believe that this can be accomplished relatively easily by shifting a minimal number of precincts in House Districts 28 and either 32 or 49.

B. Incumbent Pairing -- District 28

The map adopted by the Court on January 3, 2012 ("Modified Executive Alternative 3" or "MEA3") did not pair Plaintiff Conrad James, the incumbent in HD 28, and none of the parties advocated this change in their February 15, 2012 submissions. Nevertheless, both of the alternative preliminary plans radically change the precinct composition of HD 28 in order to pair Representative James with retiring Representative Al Park. The James Plaintiffs respectfully object to this aspect of the Court's preliminary plans as both unnecessary and improper.

As re-drawn by the Court and its Rule 706 expert, HD 28 is highly non-compact. It is long and narrow, with two fingers each stretching several miles to the east and west obviously for the sole purpose of joining James and Park in the same district. The Polsby-Popper and Reock scores for new HD 28 likely are extremely small. This new district does not comply with the direction in the Legislative Council Guidelines and NMSA 1978, § 2-7C-3 (1991), that districts should be “as compact as is practical and possible.” New HD 28 also splits near northeast heights neighborhoods in and around the Fairgrounds, combining portions instead with neighborhoods as far away as Tramway and Montgomery.

The presumed rationale for a non-compact district is to “balance” party performance because, as re-drawn, HD 28 “pairs” incumbents. But the pairing is a fiction, because Representative Park, of course, is not running for re-election. Consequently, as re-drawn HD 28 simply neutralizes Republican strength in the Albuquerque northeast heights to offset the fact that Park’s old district, HD 26, has been moved to Albuquerque’s westside and now performs as a Republican district. This amounts to a gerrymander to avoid the consequences of simple demographics, which the New Mexico Supreme Court determined should not be done. See February 10, 2012 Remand Order at 15.

In its February 10, 2012 Remand Order the New Mexico Supreme Court instructed that “[a]ny district that results from a Democrat-Republican consolidation, if that is what the district court elects to do, should result in a district that provides an equal opportunity to either party.” Id. at 20. Representative James’ HD 28 does not “result” from the consolidation, or “jumping,” of HD 26 to Albuquerque’s westside, any more than any of the other northeast heights districts to which old HD 26’s precincts were shifted can be said to “result” from the consolidation. If the

Court determines that it should equalize the party performance of HD 28 because it contains precincts that used to be in HD 26, then it should do the same for all such districts.

The fundamental flaw with any effort to equalize performance in any of the Albuquerque northeast heights districts that remain after jumping HD 26 to the westside is that it incorrectly conflates the results of consolidation with the results of pairing incumbents. As Representative Park's retirement demonstrates, a consolidation does not necessarily result in a true incumbent pairing, and incumbent pairings of course can occur without a consolidation. The partisan consequences of consolidation and movement of districts is simply a function of demographics: a predominantly Democrat district in central Albuquerque is eliminated and a predominantly Republican district is created in northwest Albuquerque. But that does not result in a true incumbent pairing at all unless the incumbent in the eliminated district wishes to run for re-election, and in any event can result in a Democrat-Republican pairing only if the map drawer chooses to do so. Further, the consolidation of HD 26 does not necessitate a shift in party performance in the districts that remain in Albuquerque's eastside. Under MEA3, for example, the eastside districts that previously were Democrat-performing remained Democrat, and the Republican-performing districts remained Republican. (Specifically, the performance of Representative Jimmie Hall's HD 28 did not shift under MEA3, as the New Mexico Supreme Court mistakenly assumed. Remand Order at 16.) The question should be, given that Representative Park is not running for re-election, is any adjustment in the performance of Albuquerque eastside districts necessary in order to not prejudice any of the incumbents who are running for re-election? The answer is no. The precincts in Representative Park's old HD 26 can be allocated in a manner that has neutral political consequences for the remaining districts,

i.e., their party performance can be maintained. That is in fact what the Court accomplished in its original plan.

That is also what the Court can -- and the James Plaintiff urge should -- do by “pairing” (again, only nominally), Representatives Park and Picraux by placing the precinct in which Park lives in HD 25. This will maintain HDs 26 and 28 as Republican districts and HD 25 as a Democrat district. The result will be true neutrality in the performance of House districts in Albuquerque’s eastside, and the addition of one Republican district on the westside that simply acknowledges the reality of the partisan consequences that have resulted from the demographic changes over the past decade. Remand Order at 15; see also February 21, 2012 Opinion at 30 (“The result was a partisan swing of two strong seats in favor of one party. The three new [westside] seats, two Republican and one Democrat, correctly reflected the political affiliation of the population in the overpopulated areas on the West side of Albuquerque and in Rio Rancho, a result we do not question.”).

C. Incumbent Pairing -- North Central New Mexico

The New Mexico Supreme Court upheld the Court’s original decision to consolidate a district in North Central New Mexico, “jump” District 68 to Rio Rancho, and pair Representatives Salazar and Garcia. At the invitation of the Democrat Maestas Plaintiffs, the Court now has proposed, as an alternative, to “jump” District 46, currently held by Speaker Lujan, and nominally pair Salazar with Lujan. The James Plaintiffs respectfully object to this alternative.

The announced retirement of Speaker Lujan is new evidence, consideration of which is contrary to the New Mexico Supreme Court’s Remand Order at 18. It is not appropriate to draw

a plan on this basis, which the parties were not able to take into account when they presented their plans to the Court at trial.²

More fundamentally, a false pairing of Representative Salazar and Speaker Lujan is unfair, because it skews the incumbent pairings embodied in the Court's plan unfairly against Republicans. Under the Court's Alternative 2, there is only one true incumbent pairing -- Republican Representatives Kintigh and Wooley in Roswell. No Democrat is paired with another Democrat who wishes to run for re-election. The pairings of Representatives Salazar and Park are fictions. That is not politically neutral.

D. Conclusion

The Court should adopt a map that has a 37-33 Democrat-Republican performance, which simply would recognize the political consequences of the shift of three House districts to the westside of metropolitan Albuquerque mandated by the demographic changes in New Mexico over the past decade. The Court should not draw HD 26 to "pair" Representatives Park and James, and instead should allocate the precincts in Park's old district in a manner that maintains the party performance of districts on the eastside of Albuquerque. The Court should consolidate a district in North Central New Mexico in the same manner it did in MEA3.

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

By: /s/ Henry M. Bohnhoff
Henry M. Bohnhoff
P.O. Box 1888
Albuquerque, NM 87103
Phone: (505) 765-5900
hbohnhoff@rodey.com

² If Court were to consider new evidence at this juncture, the James Plaintiffs also would seek to introduce evidence from the Jepsen case that the map adopted by Judge Allen increased by three the number of Democratic-performing districts, as compared to the performance of the districting map that had been in effect in the 1990's.

SAUCEDO CHAVEZ, PC

Christopher T. Saucedo
Iris L. Marshall
100 Gold Ave. SW, Suite 206
Albuquerque, NM 87102
Phone: (505) 275-3200
csaucedo@saucedochavez.com
imarshall@saucedochavez.com

DAVID A. GARCIA LLC

David A. Garcia
1905 Wyoming Blvd. NE
Albuquerque, NM 87112
Phone: (505) 275-3200
david@theblf.com

*Attorneys for Plaintiffs James, Day, Teague,
Youngblood, Mckinney and Ryan*

CERTIFICATE OF SERVICE:

WE HEREBY CERTIFY that on the 23rd day of February, 2012, we filed the foregoing electronically, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing and we e-mailed a true and correct copy of the foregoing pleading on this 23rd day of February, 2012 to the following:

James Hall
James A. Hall LLC
505 Don Gaspar Ave
Santa Fe, NM 87505-4463
(505) 988-9988
jhall@jhall-law.com

Robert M. Doughty, III
Judd C. West
Doughty & West, P.A.
20 First Plaza NW, Suite 412
Albuquerque, NM 87102
(505) 242-7070
rob@doughtywest.com
judd@doughtywest.com

Attorney for Defendants Dianna J Duran, in her official capacity as New Mexico Secretary of State

Paul J. Kennedy
201 12th Street NW
Albuquerque NM 87102-1815
(505) 842-0653
pkennedy@kennedyhan.com

Jessica Hernandez
Matthew J. Stackpole
Office of the Governor
490 Old Santa Fe Trail #400
Santa Fe, NM 87401-2704
(505) 476-2200
jessica.hernandez@state.nm.us
matthew.stackpole@state.nm.us

Attorneys for Defendant Susana Martinez, in her official capacity as New Mexico Governor

Charles R. Peifer
Robert E. Hanson
Matthew R. Hoyt
Peifer, Hanson & Mullins, P.A.
Post Office Box 25245
Albuquerque, New Mexico 87125-5245
(505) 247-4800
cpeifer@peiferlaw.com
rhanson@peiferlaw.com
mhoyt@peiferlaw.com

Attorneys for John A. Sanchez, in his official capacity as New Mexico Lieutenant Governor and presiding officer of the New Mexico Senate

Ray M. Vargas, II
David P. Garcia
Erin B. O'Connell
Garcia & Vargas, LLC
303 Paseo del Peralta
Santa Fe, NM 87501
(505) 982-1873
ray@garcia-vargas.com
david@garcia-vargas.com
erin@garcia-vargas.com

Joseph Goldberg
John W. Boyd
David H. Urias
Sara K. Berger Freedman
Boyd Hollander
Goldberg & Ives
20 First Plaza Ctr. NW. #700
Albuquerque, NM 87102
(505) 842-9960
jg@fbdlaw.com
jwb@fbdlaw.com
dhu@fbdlaw.com
skb@fbdlaw.com

Attorneys for Plaintiffs in Egolf v. Duran, D-101-CV-2011-02942; Holguin v. Duran, D-101-CV-2011-0944; and Castro v. Duran, D-101-CV-2011-02945

Patrick J. Rogers
Modrall, Sperling, Roehl, Harris & Sisk P A
P.O. Box 2168
Albuquerque, NM 87103
(505) 848-1849
pjr@modrall.com

Attorneys for Plaintiffs in Sena v. Duran, D-506-CV-2011-00913

Casey Douma
Attorney at Law
PO Box 812
Laguna NM 87026-0812
(505) 552-5776
cdouma@lagunatribe.org

Teresa Leger
Nordhaus Law Firm LLP
1239 Paseo de Peralta
Santa Fe NM 87501-2758
(505) 982-3622
tleger@nordhauslaw.com

Cynthia Kiersnowski
Nordhaus Law Firm LLP
1239 Paseo de Peralta
Santa Fe NM 87501-2758
(505) 982-3622
ckiersnowski@nordhauslaw.com

Attorneys for Plaintiffs in Pueblo of Laguna, Pueblo of Acoma, Jicarilla Apache Nation, Pueblo of Zuni, Richard Luarkie, Harry A. Antonio, Jr., David F. Garcia, Levi Pesata and Leon Reval v. Duran, D-101-CV-2011-03016

David K. Thomson
Thomason Law Firm
303 Paseo de Peralta
Santa Fe NM 87501-1860
(505) 982-1873
david@thomsonlawfirm.net
Attorney for Plaintiffs in Maestas v. Duran, D-101-CV-2011-03099 and Maestas v. Duran, D-101-CV-2011-03107

Stephen G. Durkovich
Law Office of Stephen Durkovich
534 Old Santa Fe Trail
Santa Fe, NM 87505-0372
(505) 986-1800
romero@durkovich.com

John V. Wertheim
Jones, Snead, Wertheim & Wentworth, P.A.
PO Box 2228
Santa Fe, NM 87505-2228
(505) 982-0011
johnv@thejonesfirm.com
Attorneys for Plaintiffs in Maestas v. Duran, D-101-CV-2011-03107

Luis G. Stelzner
Sara N. Sanchez
Stelzner, Winter, Warburton, Flores, Sanchez & Dawes, P.A.
PO Box 528
Albuquerque NM 87103
(505) 988-7770
lgs@stelznerlaw.com
ssanchez@stelznerlaw.com

Richard E. Olson
Jennifer M. Heim
Hinkle, Hensley, Shanor & Martin, PLP
PO Box 10
Roswell NM 88202-0010
(575) 622-6510
rolson@hinklelawfirm.com
jheim@hinklelawfirm.com
Attorneys for Defendants Timothy J. 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

Patricia G Williams
Jenny J. Dumas
Wiggins, Williams & Wiggins, APC
P.O. Box 1308
Albuquerque, New Mexico 87103-16308
(505) 764-8400
pwilliams@wwwlaw.us
jdumas@wwwlaw.us

Dana L. Bobroff, Deputy Attorney General
Navajo Nation Department of Justice
P.O. Box 2010
Window Rock, Arizona 86515
(928) 871-6345/6205
Attorneys for Navajo Interveners
dbobroff@nm DOJ.org

Paul M. Kienzle III
Duncan Scott
Paul W. Spear
P.O. Box 587
Albuquerque, New Mexico 87103-0587
505-246-8600
Attorneys for Plaintiffs Jonathan Sena, Don Bratton, Carroll Leavell, and Gay Kernan
Paul@kienzlelaw.com
spear@kienzlelaw.com
duncan@dscottlaw.com

/s/ Henry M. Bohnhoff
Henry M. Bohnhoff