IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

HON. ANTONIO MAESTAS and HON. BRIAN EGOLF, members of the New Mexico House of Representatives, and JUNE LORENZO, ALVIN WARREN, ELOISE GIFT and HENRY OCHOA,

Plaintiffs-Petitioners,

vs. No. 33,386

HON. JAMES A. HALL, District Judge *Pro Tempore* of the First Judicial District Court,

Respondent,

vs.

HON. SUSANA MARTINEZ, in her capacity as Governor of New Mexico, et al.,

Real Parties in Interest.

APPELLEES, NAVAJO INTERVENORS' RESPONSE BRIEF

ORAL ARGUMENT WAS REQUESTED
AND IS SCHEDULED FOR
FEBRUARY 7, 2012

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STATEMENT OF COMPLIANCE

Pursuant to the requirements of Rules of Appellate Procedure 12-305 and 12-213 (F)(3), the Appellees, Navajo Intervenors' Response Brief, has been prepared using Times New Roman, 14-point font, and exclusive of caption, signature block, and Certificate of Service, contains 1,795 words, as determined by the word count program of the word processing system used, WordPerfect version X5.

INTRODUCTION

Pursuant to New Mexico Rules of Appellate Procedure 12-201(C) and 12-213(B), the Navajo Nation, a federally recognized Indian tribe, Lorenzo Bates, Duane H. Yazzie, Rodger Martinez, Kimmeth Yazzie, and Angela Barney Nez (collectively "Navajo Intervenors") hereby submit this Response Brief supporting the trial court's decision on Native American issues in the New Mexico State House of Representatives redistricting trial.

ARGUMENT

In their Opening Brief, the Navajo Intervenors, like the Multi-Tribal Plaintiffs, argued: (1) the evidence presented below overwhelmingly supported the district court's conclusion that the Navajo Intervenors and Multi-Tribal Plaintiffs had successfully established the elements of a Section 2 Voting Rights Act claim, pursuant to 42 U.S.C. § 1973; (2) the district court did not abuse its discretion in concluding that the plan submitted by those parties (the "Navajo/Multi-Tribal Plan") was the best remedy for addressing the established Voting Rights Act violations; and (3) this Court should ensure that any redistricting plan that is finally adopted, like the plan adopted below, incorporates, without alteration, the Navajo/Multi-Tribal Plan for redistricting the northwest quadrant of the state. The Navajo Intervenors have

taken no position, either in the trial court or in this Court regarding the manner in which districts outside of the northwest quadrant should be drawn.

As explained in more detail herein, the Navajo Intervenors support any and all statewide redistricting plans that incorporate the Navajo/Multi-Tribal Plaintiffs' complete plan for the northwest quadrant and presented more than enough evidence to protect the district court's Voting Rights Act findings on appeal.

I. THE NAVAJO INTERVENORS, LIKE THE EXECUTIVE DEFENDANTS AND JAMES AND SENA PLAINTIFFS, SUPPORT ADOPTION OF THE PLAN SELECTED BY THE DISTRICT COURT.

The Executive Defendants, along with the James Plaintiffs and Sena Plaintiffs have asked this Court to allow the district court's decision to stand, either by declining to hear the matter, or affirming the decision below. Opening Br. Of Real Parties in Interest Governor Susana Martinez and Lieutenant Governor John A. Sanchez Regarding Legislative Defendant's Petition (filed in No. 33, 387) at 5 (asking court to dismiss the writ or affirm the lower court decision); Opening Brief of Real Parties in Interest Governor Susana Martinez and Lieutenant Governor John A. Sanchez Regarding Maestas Plaintiffs' and Brian Egolf's Petition (filed in Sup. Ct. No. 33, 386) at 3-4 (asking court to deny request for remand and quash the writ) (joined by James Plaintiffs and Sena Plaintiffs); Sena and Legislative Plaintiffs' Opening Brief (filed in No. 33,387) at 1 (writ should be denied and district court

judgment affirmed); James Plaintiffs' Opening Brief (filed in 33,387) at 1 (court should deny writ petition and affirm lower court judgment).

The district court's decision respects and incorporates, without alteration, the Navajo/Multi-Tribal Plaintiffs' plan. For this reason, the Navajo Intervenors support affirmance of the district court's decision.

II. THE NAVAJO INTERVENORS SUPPORT ADOPTION OF THE MAESTAS PLAINTIFFS' ALTERNATE PLAN AND OTHER PLANS THAT INCORPORATE THE NAVAJO/MULTI-TRIBAL PLAN.

The Maestas Plaintiffs have asked this Court to reverse the district court's selection of Executive Alternative 3, Maestas Petitioners' Opening Brief (filed in No. 33, 386) at 1, and either select Maestas Alternative 2 or remand for selection among a handful of other plans, Id. at 22. Maestas Alternative 2 fully incorporates the Navajo/Multi-Tribal Plaintiffs' partial redistricting plan. For this reason, the Navajo Intervenors support selection of Maestas Alternative 2 in the event that the lower court decision is not permitted to stand.

The Maestas Plaintiffs also argue that any plan which does not honor the expressed preferences of the Navajo/Multi-Tribal Plan should be eliminated from consideration. Id. at 26.27. The Navajo Intervenors agree with and support that argument. On remand, the Navajo Intervenors will support any plan which incorporates, without alteration, the Navajo/Multi-Tribal Plaintiffs' partial

redistricting plan, or any plan, such as the Legislative Defendants' Original Plan or the Egolf Plaintiffs' Original Plan which is amended to incorporate the Navajo/Multi-Tribal Plaintiffs' partial redistricting plan fo the northwest quadrant.

III. THE NAVAJO INTERVENORS SUPPORT ADOPTION OF THE EGOLF PLAINTIFFS' ALTERNATE PLANS.

The Egolf Plaintiffs request the Court find that the trial court's plan constitutes an improper balance of traditional redistricting principles and an abuse of discretion. Egolf Plaintiffs' Brief in Support of Reversing District Court's Redistricting Plan for the New Mexico House of Representatives (filed in 33,386 and 33,387) at 1-2. The Egolf Plaintiffs request that this Court direct the trial court to adopt either Egolf Plan 2 or Egolf Plan 5. Id. at 2. Both Egolf 2 and Egolf 5 incorporate the Navajo/Multi-Tribal Plan without alteration. For this reason, the Navajo Intervenors support selection of either Egolf 2 or Egolf 5 in the event that the lower court decision is not permitted to stand.

IV. THE NAVAJO INTERVENORS SUPPORT ADOPTION OF THE LEGISLATIVE DEFENDANTS PLAN SO LONG AS THAT PLAN IS MODIFIED TO INCLUDE THE NAVAJO/MULTI-TRIBAL PLAN FOR THE NORTHWEST QUADRANT.

As set forth in the Navajo Intervenors' Opening Brief, the district court appropriately found that the Navajo Intervenors had established the elements of a Section 2 Voting Rights Act claim and that the best remedy for addressing that claim

and for respecting relevant communities of interest and tribal self determination was the partial redistricting plan submitted by the Navajo/Multi-Tribal Plan.

The redistricting plan ultimately adopted by the legislature, while informed by tribal input and desires, was the product of compromise and negotiations. Transcript of New Mexico House of Representatives Hearing ("Trans."), December 13, 2011, Cross Examination of Brian Sanderoff, p. 110, line 7 to p. 111, line 18; Trans., December 20, 2011, Direct Testimony of Leonard Gorman, p. 145, line 11 to p. 158, line 23; Trans., December 21, 2011, Cross Examination of Kenny Martinez, p. 258, line 4 to p. 262, line 3.

As a result of such compromises, the final plan did not fully reflect the Navajo Nation's interests and desires. Id.

After the legislature's plan was vetoed, the Navajo Nation no longer had to concern itself with pandering to the requirements of individual legislators and focused solely on remedying the Voting Rights Act violations by raising and balancing the Native American voting age population among the minority majority Native American districts in northwest New Mexico. Trans., December 20, 2011, Direct Testimony of Leonard Gorman, p. 145, line 11 to p. 158, line 23.

With only one exception, each witness who testified to the subject agreed that tribes themselves were in the best position to determine how to remedy the Voting

Rights Act violations that were proven in trial, and that the Navajo/Multi-Tribal Plan should be incorporated into any statewide plan ultimately adopted by the Court. Compare Trans., December 14, 2011, Cross Examination of James Williams, p. 151, line 11 to p. 152, line 16; Trans., December 14, 2011, Cross Examination of Theodore Arrington, p. 257, line 7 to p. 258, line 6; Trans., December 13, 2011, Cross Examination of Brian Sanderoff, p. 111, line 19 to p. 112, line 16; Trans., December 20, 2011, Direct Examination of Leonard Gorman, p. 152, line 10 to p. 157, line 6, p. 189, line 15 to p. 190, line 17 with Trans., Dec. 21, 2011, Testimony of Rod Adair, p. 7, line 17 to p. 146, line 14.

The Court agreed with this conclusion, expressly finding that "Tribal communities are in the best position to determine what is best for their own communities," and that "The Multi-Tribal/Navajo Nation Plan presents the best remedy under the Voting Rights Act." Egolf v. Duran, No. D-101-CV-2011-02942, Findings of Fact and Conclusions of Law (Jan. 2, 2012), Finding of Fact ¶48, Conclusion of Law ¶ 23.

The Legislative Defendants do not oppose this conclusion and have specifically stated that:

> Petitioners do not contest the district court's finding of a Voting Rights Act violation in the current Native American districts, nor its imposition

> of a remedy in the form of full adoption of the Multi-Tribal Plan for House Districts 6, 65, and 69 and the Navajo Nation Plan for House Districts 1, 2, 3, 4, 5 and 9. Conclusion 21, 23.

Petitioners' Opening Brief (filed in No. 33,387) at p. 45. As the Legislative Defendants' own witness testified, the Navajo/Multi-Tribal Plan could easily be incorporated into the Legislative Defendants' plan without any significant ripple effect. Trans., December 22, 2011, Cross Examination of Brian Sanderoff, p. 99, lines 11-16.

With this correction (i.e. inclusion of the Navajo/Multi-Tribal Plaintiffs' Plan), the Navajo Intervenors' do not oppose adoption of the Legislative Defendants' Plan here. Without this correction, the Navajo Intervenors oppose that plan.

V. THE NAVAJO INTERVENORS OPPOSE ADOPTION OF THE SENA PLAN.

The Sena Plaintiffs, while advocating affirmance of the trial court's decision, also appear to suggest adoption of the Sena Plan:

> While the request to have this Court toss out the trial court's findings and consider adoption of the petitioners' map is entirely unwarranted, to the extent higher deviation maps are considered at any point, the Sena map is clearly superior to the Legislative Defendants' map.

Sena and Legislative Defendants' Opening Brief at 13-14.

The Sena map does not incorporate the Navajo/Multi-Tribal Plan for the northwest quadrant. For the same reasons as the Navajo Intervenors oppose the

Legislative Defendants' original map, the Navajo Intervenors also oppose the Sena Plaintiff's original map, unless and until it is modified to include the Navajo Intervenors/Multi-Tribal Plaintiffs' northwest quadrant.

VI. THE NAVAJO INTERVENORS AND MULTI-TRIBAL PLAINTIFFS PRESENTED OVERWHELMING EVIDENCE BELOW IN SUPPORT OF THEIR VOTING RIGHTS ACT CLAIMS.

The Sena Plaintiffs state, without any citation to the record or particular court findings that "the Gingles requirements were not met." Sena and Legislative Defendants' Opening Brief at 8. The Sena Plaintiffs do not state whether these comments are directed toward the Native American groups participating in the litigation or toward some other minority group. See id.

To the extent that this comment is directed toward Native American groups, is patently untrue. Both the Navajo Intervenors' Opening Brief and the Multi-Tribal Plaintiffs' Opening Brief, which are hereby incorporated herein, set forth the overwhelming evidence that was presented at trial in support of the Voting Rights Act Claims generally, and the Thornburg v. Gingles, 478 U.S. 30 (1986) requirements in particular. This evidence was more than sufficient to establish the claims at issue and to prevent reversal for lack of substantial evidence on appeal.

CONCLUSION

The Navajo Intervenors respectfully request that this Court either affirm the decision rendered below, adopt a statewide plan that incorporates the Navajo/Multi-Tribal Plan, or direct the trial court to adopt such a plan.

ORAL ARGUMENT HAS BEEN REQUESTED

Given the number of plans before the Court, the size of the record, and the detailed arguments to be presented with regard to each plan, counsel believes that this Court's determination would be materially assisted by oral argument. Oral argument has been scheduled for February 7, 2012.

Respectfully submitted,

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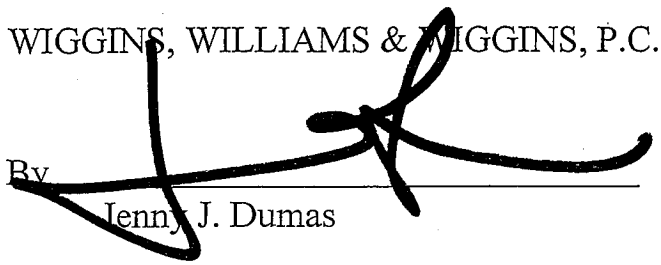
We hereby certify that a copy of the foregoing was electronically mailed and mailed to counsel of record and the Honorable James A. Hall on this 31st day of January, 2011.

WIGGINS, WILLIAMS & WIGGINS, P.C.



By _____
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