IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

HON. ANTONIO MAESTAS, *et al.*,

Plaintiffs-Petitioners,

vs. Sup. Ct. No. 33,386

HON. JAMES A. HALL,

Respondent,

and,

HON. SUSANA MARTINEZ, *et al.*,

Real Parties in Interest.

OPENING BRIEF OF REAL PARTIES IN INTEREST GOVERNOR SUSANA MARTINEZ AND LIEUTENANT GOVERNOR JOHN A. SANCHEZ REGARDING MAESTAS PLAINTIFFS' AND BRIAN EGOLF'S PETITION

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

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Pursuant to Rule 12-213(A), (F) & (G), Plaintiffs-Appellants state that the total word count contained in the body of the brief is 9,902 words, using Microsoft Office Word 2007.

1/27/12
Dated

Matthew R. Hoyt

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INTRODUCTION AND SUMMARY OF ARGUMENT

When this Court issued its original writ assigning this case to Judge James Hall, it set into motion a process by which the District Court handled the redistricting litigation that was no different from any other civil case: The District Court permitted discovery, accepted and weighed evidence, and conducted complete, open, and fair bench trials in which all parties were permitted to fully advocate for their various plans. Petitioners ask this Court to toss that entire process into the rubbish bin, start afresh pursuant to an extraordinary writ, have this Court consider newly presented evidence, and mandate a limitation on the evidence that the District Court can consider on remand. They argue that Judge Hall violated their due process rights by engaging in arbitrary decisionmaking, when he did not.

Petitioners Maestas/Egolf Plaintiffs[1] are a group of private litigants who were provided every opportunity to submit alternate redistricting plans after trial had started and to proffer evidence in support of or in opposition to the various plans, but nonetheless are dissatisfied with the process the District Court employed to reach its decisions on the House districts. However, after the District Court reached a decision to adopt a map other than the one proposed by the Maestas or

[1] Petitioner Brian Egolf is the only member of the original group of Egolf Plaintiffs who joined in the petition submitted by the Maestas Plaintiffs.

the Egolf Plaintiffs, these Petitioners failed to ask the District Court to reconsider its decision, reopen evidence, or stay its decision pending an appeal to the Court of Appeals or this Court. Nevertheless, these Petitioners complain, for the first time, that they were not afforded a full or fair opportunity to present evidence.

Not content to follow the rules of Civil or Appellate Procedure, or even the Constitutional limitations on extraordinary writ actions, Petitioners ask this Court to take the unprecedented step of wresting control of this case from the lower courts, considering new evidence revealed to the litigants for the first time, and remanding the case to the District Court with the instruction that it can select any state House district other than the modified version of Executive Alternate 3 that the District Court eventually adopted. While not as drastic as the relief requested by the Legislative Defendants in their contemporaneously filed Petition, these Petitioners, like the Legislative Defendants, have no legal basis for requesting that this Court overturn the District Court's state House decision.

The Maestas/Egolf Plaintiffs contend that the District Court violated their due process rights, even though the due process clause is not implicated here. Moreover, the Maestas/Egolf Plaintiffs' due process claims rest on the demonstrably false assertion that they were denied process: The District Court afforded the Maestas/Egolf Plaintiffs, and every other party to the case, ample opportunity to present evidence, object to evidence presented by other litigants,

and be heard at every stage of the process. Regardless, the Maestas/Egolf Plaintiffs waived their due process claims by failing to raise the issue with the District Court, or to otherwise preserve the court's supposed error below. Reviewed through a proper abuse-of-discretion standard, it is clear that Judge Hall did nothing arbitrary or erroneous by allowing the parties to submit alternate plans into evidence. And there is simply no merit to Petitioners' claim that the Executive Defendants, by seeking the introduction of an alternate plan, somehow infringed upon the Maestas/Egolf Plaintiffs substantive due process rights.

Not content to rest on their meritless constitutional claims, the Maestas/Egolf Plaintiffs claim that the District Court-adopted apportionment map for the state House is politically biased, and attach to their Petition a new affidavit from their trial expert, Jonathan Katz, that they contend supports their argument that the plan is politically unfair. It is inappropriate for Petitioners to invite this Court to second-guess Judge Hall and decide which of the many measures of political performance laid out in front of the District Court was the proper metric to evaluate partisan fairness. In any case, Petitioners' new evidence actually ***supports*** adoption of the map selected by the district court because Dr. Katz's analysis demonstrates that the prevailing plan is as politically "responsive[,]" or competitive as the other plans submitted below. And at least one measure of partisan neutrality – incumbent pairings – demonstrates without doubt that the

plans supported by the Maestas/Egolf Plaintiffs are not politically fair, as they claim. In sum, Petitioners have given no sound reason for this Court to disturb the decision below, and their request for relief should be denied and the writ quashed.

BACKGROUND

The Failed Legislative Effort to Redistrict.

Following receipt of the official 2010 census data from the United States Census Bureau, the Governor called the New Mexico Legislature into a special session, commencing on September 6, 2011. During the special session, the New Mexico Legislature passed, along partisan lines, House Voters and Elections Committee Substitute for House Bill 39 ("HB 39"), proposing a plan for redrawing New Mexico's state House districts.[2] [Findings of Fact and Conclusions of Law on the New Mexico House of Representatives Trial (January 3, 2012) (hereinafter "FOF/COL") (Ex. 1)[3] at FOF ¶¶ 14, 25; 12/15/11 TR at 93:17-24 (Ex. C)]. HB 39 passed along partisan lines.[4] [FOF/COL (Ex. 1)at FOF ¶ 25].

HB 39 did not survive the legislative process, however. On October 7, 2011, the Governor vetoed HB 39. [Gov. Ex. 8 (Ex. D)]. In the meantime, a number of

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[2] This map eventually became the Legislative Defendants' Plan in this litigation. [*See id.*; Legis. Ex. 1 (Ex. B)].

[3] Numerical citations to Appendix exhibits are to Petitioners' exhibits, and alphabetical citations are to the Parties in Interest's.

[4] HB 39 did not receive a single GOP vote and received bipartisan opposition. *See* www.nmlegis.gov/Sessions/11%20Special/bills/house/HB0039HVOTE.pdf

individual legislators and New Mexico residents filed a series of lawsuits against the Legislative Defendants and the Executive Defendants in district courts across the state. A group of these residents, the Egolf Plaintiffs, then filed a petition before this Court seeking a writ of superintending control, and on October 12, 2011, this Court granted the petition, consolidating all of the redistricting cases into the First Judicial District and designating James Hall as judge *pro tem* to preside over the consolidated cases [*See* Order, *Egolf v. Duran*, No. 33, 239 (October 12, 2011).]

The Redistricting Proceedings Before the District Court.

Judge Hall wasted no time setting the proceedings in motion. On October 17, 2011, Judge Hall held a scheduling conference with all parties present and, on October 19, 2011, entered a scheduling order setting pre-trial deadlines and set an evidentiary hearing for the redistricting of the State House of Representatives starting on December 12, 2011. [Sch. Ord. (10/19/11) (Ex. 3).] Separate trials on the other offices were set to commence December 5, 2011 (Congress), January 3, 2012 (State Senate) , and January 11, 2012 (Public Regulation Commission).[5]

[5] In the Congress trial, the Executive Defendants joined with the Egolf Plaintiffs to submit a joint consensus plan to the District Court. In the state Senate trial, the Executive Defendants joined with the Egolf Plaintiffs, the Maestas Plaintiffs, and the Native American parties to submit a consensus map. In the PRC trial, the Executive Defendants supported a plan submitted by the Navajo Intervenors.

Prior to trial, the District Court was presented with six complete and two partial plans concerning the State House of Representatives: a) The Legislative Defendants' Plan, House Bill 39; b) The Executive Defendants' Plan; c) The James Plaintiffs' Plan; d) The Sena Plaintiffs' Plan; e) The Egolf Plaintiffs' Plan; f) The Maestas Plaintiffs' Plan; g) The Navajo Nation Interevenors' Plan (partial); and h) The Multi-Tribal Plaintiffs' Plan (partial). [*See* FOF/COL (Ex. 1) at FOF ¶¶ 26, 27].

The Court began the Congress evidentiary hearing on December 5, 2011. [*See* Sch. Ord. (Ex. 3)]. At the close of those proceedings, the Court decided to re-open the evidence to permit the Egolf Plaintiffs and the Executive Defendants to submit an alternate Congressional plan. [*See* 12/12/11 TR at 69:9-80:16 (Ex. C)]. The Egolf Plaintiffs did not object to this decision. [*See id.*] The Maestas Plaintiffs did object, however, claiming that it violated their Due Process rights to re-open evidence in a redistricting case. [*See* Mot. to Close Evidence (filed 12/18/11) (Ex. A)]. The District Court denied this motion, re-opened the evidence, and allowed all parties, including the Maestas/Egolf Plaintiffs, to submit additional evidence in support of, or against, the plans presented to the court. [*See, e.g.,* Order (1/3/12) (Ex. E); 12/20/11 TR at 183:23-186:5; 12/22/11 TR at 100:14-104:14; 131:11-133:10, 134:21-137:13, 252:4-256:7 (Ex. C)].

Between December 12 and 22, 2011, the District Court held the evidentiary hearing on the House reapportionment. During trial, several parties amended or modified their original plans and submitted the amended or modified plans to the District Court. Specifically, the Egolf Plaintiffs submitted five alternative plans, the Maestas Plaintiffs submitted one alternative plan, and the Executive Defendants submitted three alternative plans. [*See* FOF/COL (Ex. 1) at FOF ¶ 28]. Some modified or amended plans were prepared and submitted at Judge Hall's suggestion to address particular issues raised by other parties during the course of the litigation. [*See* 12/14/11 TR at 299:12-301:10 (Ex. C)]. Judge Hall did not accept any maps that were an entirely new argument. [*See id.*]. No party objected to the District Court's instruction to consider presenting alternative plans, or the admission of alternates pursuant to that instruction. [*See id.*].[6]

At the conclusion of the fourth day of evidentiary hearing, Judge Hall encouraged the Executive Defendants to submit an alternate plan that either adopted the Multi-Tribal/Navajo Nation Plans or matched the boundaries of those plans. [*See* 12/15/11 TR at 284:8-23 (Ex. C)]. He also suggested that the Legislative Defendants, the Maestas Plaintiffs, or the Egolf Plaintiffs prepare a map that moved a district from north central New Mexico. [*See id.*]. No party

[6] For example, no party objected to the admission of Executive Alternate 1. [V12/13/11 TR at 299:5-301:2 (Ex. C.)].

objected to the court's request for alternative plans. [*See id.*]. The only complaint came from counsel for the Legislative Defendants, who stated that "we would love to provide you with an alternative map, but the Legislative Defendants are the only parties here who have a set plan which we can't change." [12/15/11 TR at 284:25-285:3 (Ex. C)].[7]

Meanwhile, on December 20, 2011, after many alternate plans had been submitted by the parties, the Maestas Plaintiffs called their only expert witness, Dr. Jonathan Katz, to testify about the partisan fairness of the plans submitted. Dr. Katz testified that he had analyzed all the plans thus far submitted, including the original Executive Plan and the first two alternatives to determine whether any of the plans demonstrated a partisan slant toward one political party or another. [*See* 12/20/11 TR at 17:10-20:22; 44:16-21 (Ex. C); Maestas Exs. 12, 13 (Ex. F)]. Dr. Katz analyzed the plans under two criteria – partisan bias and responsiveness. [*See id.*]. He explained that responsiveness measures the political competitiveness of a plan by determining whether a map responds to changes in the political winds such that a banner year for a major party (*e.g,* the 2008 Barack Obama election) would translate into additional state House seats for that party. [*See id.* at 27:15-33:14].

[7] The transcript misidentified counsel for the *Egolf* Plaintiffs as the speaker; in reality, the speaking attorney was Mr. Luis Stelzner, counsel for the Legislative Defendants.

Dr. Katz found all of the plans presented to the District Court, including the Executive plans, responsive. [*Id.* at 33:9-14; 45:14-46:7].

Pursuant to the invitation from the court, the Executive Defendants prepared "Executive Alternate Plan 2" and "Executive Alternate Plan 3", and submitted them into evidence on December 22, 2011. In addition, the Egolf Plaintiffs submitted two alternative maps, Egolf Plan 3 and Egolf Plan 4, as did the Maestas Plaintiffs, with their "Maestas Alternative Plan", in response to Judge Hall's instructions. [*See* 12/20/11 TR at 330:14-19; 12/22/11 TR at 6:22-7:8 (Ex. C)]. In fact, Egolf Plan 3 and Plan 4 were admitted into evidence subsequent to Executive Alternate Plans 2 and 3. [*See* 12/22/11 TR at 132:23-133:24 (Ex. C)].

On December 18, 2011, the Legislative Defendants filed a Motion to Strike seeking to strike all of the Executive Defendants' alternate plans. [*See* Mot. to Strike (12/18/11) (Ex. G)]. The Legislative Defendants' motion sought only to strike maps submitted by the Executive Defendants; it did not request that the District Court strike any of the alternative plans submitted by either the Egolf or Maestas Plaintiffs. [*See id.*]. After briefing and oral argument, the District Court denied the motion. [*See* Order (1/3/12) (Ex. H); 12/22/11 TR at 30:24-36:9 (Ex. C)].

Over the objections raised in this motion, on December 22, 2011 the District accepted into evidence the Executive Alternate Plan 2 and Alternate Plan 3. [*See*

12/22/11 TR at 30:24-36:12 (Ex. C)]. The District Court then heard testimony from the Legislative Defendants' expert, Brian Sanderoff, about Executive Alternate Plan 3. [*Id.* at 53:4-70:1; 114:12-120:5]. Notably, Mr. Sanderoff testified that the Executive Alternate Plan 3 increased Republican performance in certain districts, but that this effect was simply one method of handling the population shifts that were necessary to accommodate the Native American interests expressed by the Native American parties and the Court. [*See* 12/22/11 TR at 117:9-118:25]. Significantly, Mr. Sanderoff compared the increase in GOP performance in certain districts contained in Executive Alternate 3 to the original Executive Plan, not to the current districts. [*See id.* at 122:1-125:12]. When compared to the current districts, Alternate 3 actually reduced Republican performance in many of those districts. [*See id.*]. In any case, Mr. Sanderoff admitted that he could discern no partisan intent from this plan. [*See id.* at 119:1-2].

At the close of Mr. Sanderoff's testimony, Executive Defendants' counsel stated that they could make the Executive Defendants' map-drawing expert, John Morgan, available to testify by telephone about Executive Alternate 3 if requested. [*See id.* 227:10-23]. No party accepted this invitation, and the court did not indicate it was necessary for its own questioning. [*See id.*]. The District Court then asked the parties: "Is there any other evidence that I need to address in the

House trial?" [12/22/11 TR at 247:24-25]. No party requested presentation of any additional evidence, and Judge Hall closed the trial. [*See* id.]. Notably, at no point prior to filing the instant Petition did the Maestas/Egolf Plaintiffs notify the District Court or the parties of Dr. Katz's opinions regarding Executive Alternate 3, request that they be permitted to call Dr. Katz to the stand to give these additional opinions, or make him available for deposition or cross-examination regarding these additional opinions.

The parties submitted closing briefs and proposed findings of fact and conclusions of law. In their Closing Brief, the Executive Defendants advocated for their original Plan and their First Alternate Plan, and took no position regarding Executive Alternate Plan 2 and Alternate Plan 3. [*See* Closing Br. (filed December 28, 2011) (Ex. I) at 21, n.3.]

The Decision of the District Court.

On January 3, 2012, Judge Hall filed his Findings of Fact and Conclusions of Law on the New Mexico House of Representatives Trial. The District Court recognized that, due to population shifts, several districts in Rio Rancho and the Westside of Albuquerque were significantly overpopulated to the point that they justified new districts in that region, and a number of districts in the north central and southeastern parts of the state and in central Albuquerque were significantly

underpopulated to the point that they could not longer justify the current number of districts in those areas. [*See* FOF/COL (Ex. 1) at FOF ¶¶ 7-11].

The District Court also acknowledged that after trial had commenced some parties submitted amended or modified plans to the court, some of which "were submitted at the suggestion of the Court to address issues raised by parties to the litigation." [*Id.* at FOF ¶ 28]. The District Court, after acknowledging that "[n]o plan can perfectly address all traditional redistricting principles [or] achieve perfect population equality between the districts[,]" discussed each plan presented to the court. [*Id.* at FOF ¶ 29]. The court also found that all plans honored traditional secondary redistricting criteria on a close-to-equal basis. [*See id.* at FOF ¶¶ 29 & 30].

Noting that "[a]dopting or drawing a plan by a court is an equitable remedy[,]" [*Id.* at COL ¶ 4]. the District Court found that a "court-ordered reapportionment plan of a state legislature is held to a higher standard than a legislatively drawn map, because it must ordinarily achieve the goal of population equality with little more than *de minimis* variation." [*Id.* at COL ¶ 6 (internal quotation marks omitted)]. The District Court also concluded that "[b]ecause the Constitution limits this Court's role to construing the law, this Court must apply neutral, objective criteria, and, further, must construe those criteria strictly so that

the Court's role in redrawing New Mexico's political maps is limited." [*Id.* at COL ¶ 10.]

The District Court concluded that "[a]lthough the Legislative Plan is entitled to thoughtful consideration, it is not entitled to any particular deference in this case because it was not enacted into law." [*Id.* at COL ¶ 11 (citations omitted)]. Similarly, the court rejected the Legislative Defendants' argument that the court should not consider any plans submitted by the Executive Defendants because they failed to "meaningfully participate in the redistricting efforts during the special session and only presented specific plans during litigation[,]" because that argument was unsupported by any authority and because the court found it inappropriate to use the redistricting process to encourage future legislators and governors to perform their legal responsibilities. [*See id.* at COL ¶¶ 15-16].

With regard to the Legislative Plan, the District Court found that it contained a deviation range of 9.83 percent that was the result of an instruction by the House Speaker to avoid elimination of a district in the north central region of the state. [*See id.* at FOF ¶ 32]. The result was an underpopulation of districts in the north central and southeast sections of the state and an overpopulation of districts in central and west Albuquerque. [*See id.* at FOF ¶¶ 32-34, 39-40, COL ¶ 27]. The court therefore decided that the "systemic under population of [the legislative plan's] districts in north central and southeast New Mexico results in a significant

regional imbalance between districts." [*Id.* at FOF ¶ 41]. The imbalance, the court concluded, "is not justified by any consistently applied neutral state interest" and "would dilute the votes of the persons within [certain] districts." [*Id.* at FOF ¶¶ 40, 41]. The Court found that these same flaws pervaded the Egolf and Maestas plans, which were based on the legislative plan. [*See id.* at FOF ¶¶ 100, 103, COL ¶¶ 29, 30]. The District Court found it significant that the Egolf Plaintiffs' expert, James Williams, testified that, if he had not been instructed to employ the legislative plan as a starting point, he would have eliminated a seat in the underpopulated north central region. [*See id.* at FOF ¶ 98, COL ¶29; 12/15/11 TR at 226:7-15]. In addition, the Court found that later versions of the Egolf and Maestas plans were politically unfair because they paired the only Republican incumbent in north central New Mexico with a Democratic incumbent. [*See id.* at FOF ¶ 110, COL ¶¶ 29, 30]. Evidence from the Legislative Defendants demonstrated that there were eleven districts with Democratic incumbents that were collectively underpopulated by an entire district's worth of people and therefore could no longer justify the same number of district in that area of the state. [*See* Legis. Ex. 25 (Ex. M)].

With regard to the Executive Defendants' plans, the District Court noted that, while the original Executive Plan appropriately dealt with population shifts and contained no geographic bias, it did not conform to the preferences of the Multi-Tribal and Navajo Nation Plaintiffs. [*See id.* at FOF ¶ 63]. In addition, the

court noted that the original Executive Plan also split the Hispanic community in and around Clovis. [*See id.* at FOF ¶ 64]. Similarly, the court found that Executive Alternate Plan 1 did not fully conform to the preferences of the Multi-Tribal and Navajo Nation Plaintiffs with respect to districts in the northwest quadrant of the state and continued to split some Native American communities of interest. [*See id.* at FOF ¶ 67]. With regard to Executive Alternate Plan 2, the District Court found that it inserted the Multi-Tribal/Navajo Nation Plan and addressed concerns regarding districts in the southwest portion of the state. [*See id.* at FOF ¶ 68].

In selecting a plan, the District Court found a violation of the Voting Rights Act with regard to certain of New Mexico's Native American population in the Northwest corner of the state. [*See Id.* at COL ¶ 21]. It also found that by giving "thoughtful consideration" to the Legislative plan, the District Court's plan must honor state policy toward Native Americans. [*See id.* at COL ¶ 28]. Accordingly, the court concluded that in certain districts population deviations outside of the *de minimis* range were justified by: "1) the need to comply with the Voting Rights Act in creating a plan that does not dilute Native American voting strength; and 2) the furtherance of significant state policies, such as providing equal protection under the law to all citizens, New Mexico's historical policy of crafting legislative districts based on precincts, the geography of the state, maintaining multiple

reservation precincts within a district and respect for tribal self-determination." [*Id.* at COL ¶ 24].

The court found that Executive Alternate Plan 3 was a further revision to Executive Alternate Plan 2 that: a) maintained that plan's insertion of the Multi-Tribal/Navajo Nation Plan (and therefore dealt with the Native American Voting Rights Act and state policy issues), b) properly addressed concerns expressed by the Multi-Tribal Plaintiffs concerning splitting certain communities of interest including Tesuque and San Ildefonso; c) with the exception of Native American districts in the northwest quadrant, maintained deviations between -1.0 and +1.0 percent; d) contained districts that were contiguous, reasonably compact, and that political and geographic boundaries were preserved to a reasonable degree; e) retained the core of previous districts and maintained communities of interest to a reasonable degree; and f) paired incumbents only as necessary and in a manner that was politically neutral. [*See id.* at FOF ¶ 69, COL ¶ 34]. Nevertheless, the District Court decided that Executive Alternate Plan 3 could be improved by moving Bernalillo County precinct 567 from District 65 to District 31, and ultimately ordered this modification to the Plan. [8] [*See id.* at FOF ¶ 75]. The Court also decided that, if certain circumstances existed or the parties agreed, it would further

[8] Petitioners inaccurately claim that the District Court adopted Executive Alternative 3. [*See* Pet. at 3.] In reality, the District Court adopted a modified version of Executive Alterative 3. [*See* FOF/COL (Ex. 1) at FOF ¶ 75].

modify the plan to ensure that the bulk of the population of the Ohkay Owingeh Pueblo remained in a single district.[9] [*See id.* at COL ¶ 33, n.2].

The District Court recognized that "[i]ncorporating the Multi-Tribal/Navajo Nation Plan into the Executive Plan necessarily produced political performance consequences in other districts outside the northwest quadrant." [*Id.* at FOF ¶ 72]. Specifically, the number of districts with a Republican political performance measure over 50 percent increased.[10] [*Id.*]. The District Court was therefore "cognizant of the fact that incorporation of the Multi-Tribal/Navajo Nation Plan into the Executive Plan has some limited impact on the partisan performance measures of individual districts." [*Id.* at COL ¶ 35]. However, the court acknowledged that all plans submitted to the court "have some partisan effect" and the District Court "is obligated to follow the legal priorities and not allow partisan considerations to control the outcome." [*Id.* at COL ¶ 35 (citations omitted)].

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[9] The Judgment entered by the District Court incorporated this change without objection from any party. [*See* Jdgmt. (entered 1/17/12) (Ex. J)].

[10] As explained in detail below, the Legislative Defendants' expert firm, Research & Polling, Inc., provided political "performance" data for each proposed district appearing in the parties' maps. [*See* 12/12/11 TR at 120:7-11 (Ex. C)]. Research & Polling provides this data through an analysis of the votes for Democratic and Republican candidates in certain statewide elections that occurred in the last 10 years. [*See* 12/13/11 TR at 52:17-55:15 (Ex. C)].

On January 17, 2012, the District Court entered its judgment on the House districts. The following day, the Legislative Defendants and the Maestas/Egolf Plaintiffs filed petitions with this Court.

ARGUMENT

Petitioners are simply wrong to suggest that the District Court violated their Due Process rights, because the record below reveals that Petitioners were given every opportunity to propose, and address through witnesses and evidence, alternate plans invited by the Court.

As with the Legislative Defendants' petition, the Executive Defendants seek no relief from this Court. They only ask that the present writ be quashed, and to the extent necessary, the decision of the District Court affirmed. Petitioners' effort to override the decision of the District Court and impose their plan upon the State House districts is flawed for two reasons. First, and as explained in detail in the Executive Defendants' contemporaneously filed Opening Brief Regarding Legislative Defendants' Petition, Petitioners improperly seek, through the extraordinary vehicle of superintending control, to nullify the District Court's decision and re-litigate disputed issues of fact before this court. Second, the District Court did not violated Petitioners' Due Process rights, because a) the trial court's evidentiary rulings do not implicate the Due Process clause, and b) the record below reveals that Petitioners were given every opportunity to propose, and

address through witnesses and evidence, alternate plans invited by the Court. Regardless, the District Court did not abuse its discretion in admitting the Executive Alternate 3 plan into evidence.

I. PETITIONERS HAVE FAILED TO ESTABLISH A BASIS FOR THIS COURT TO EMPLOY ITS SUPERINTENDING CONTROL JURISDICTION.

In their Opening Brief Regarding the Legislative Defendants' Petition for Writ of Superintending Control, the Executive Defendants explain that the extraordinary relief requested by the Legislative Defendants – a writ ordering the District Court to accept and adopt the Legislative plan in contravention of the District Court's decision below – is neither a justified nor proper exercise of this Court's writ jurisdiction. The Maestas/Egolf Petitioners' requested relief, while less radical, is no less unwarranted. As explained in Executive Defendants' other Opening Brief, "the writ of supervisory control will issue only when a ruling, order, or decision of an inferior court, within its jurisdiction, (1) is erroneous; (2) is arbitrary or tyrannical; (3) does gross injustice to the petitioner; (4) may result in irreparable injury to the petitioner; (5) and there is no plain, speedy, and adequate remedy other than by issuance of the writ." *Albuquerque Gas & Elec. Co. v. Curtis*, 43 N.M. 234, 241, 89 P.2d 615, 619 (1939) (internal citation and quotation marks omitted); *see* Op. Br. (Legis.) at 8-9.

Like the Legislative Defendants, the Maestas/Egolf Petitioners have failed to establish that the District Court's decisions were arbitrary, tyrannical or so clearly erroneous that a superintending control writ wresting control of the District Court's evidentiary decisions is justified in this case. *See id.* at 9-13. Instead, because the challenge of the Maestas/Egolf Petitioners focuses on an evidentiary ruling – the District Court's refusal to exclude the Executive Alternate 3 Plan – the appropriate review by this Court is an appellate analysis under an abuse-of-discretion standard. *See* Op. Br. (Legis.) at 10-11.

Further, the Maestas/Egolf Plaintiffs, like the Legislative Defendants, have failed to establish irreparable injury or gross injustice of the kind warranting relief through this Court's extraordinary writ jurisdiction. *See* Op. Br. (Legis.) at 14-15. And the Maestas/Egolf Plaintiffs, again like the Legislative Defendants, have failed to avail themselves of the adequate legal remedy of an expedited appeal, for which this Court has historically refused to use its writ authority as a substitute. *See* Op. Br. (Legis.) at 16. For all of these reasons, the Executive Defendants/Respondents incorporate herein by reference their arguments in section I of their Opening Brief (Legislature), and for those reasons respectfully request this Court quash the present writ, or otherwise deny the relief sought by the Maestas/Egolf Plaintiffs.

II. THE DISTRICT COURT DID NOT OFFEND DUE PROCESS OR ABUSE ITS DISCRETION BY PERMITTING THE SUBMISSION OF ALTERNATE PLAN 3 BY THE EXECUTIVE DEFENDANTS.

The Maestas/Egolf Plaintiffs' main argument is that the District Court violated their Due Process rights by 1) admitting into evidence the Executive Alternate 3 map without requiring the Executive Defendants' map drawer, John Morgan to take the stand and be subject to cross examination; and by 2) not permitting the Maestas Plaintiffs to introduce additional testimony from their expert, Dr. Katz, regarding the political fairness of the Executive Alternate 3 Plan. [*See* Pet. at 7-15]. The action of the District Court with which the Maestas/Egolf Plaintiffs take issue is an evidentiary ruling properly reviewed for abuse of discretion. The District Court's ruling does not implicate due process concerns, and does not merit *de novo* review. Furthermore, the facts and evidence show that, regardless, there is no ground for reversing the District Court's decision.

A. The District Court's Evidentiary Rulings Do Not Implicate Due Process Concerns.

The Maestas/Egolf Plaintiffs assert that the Court's evidentiary decisions create a Due Process violation, therefore making the rulings subject to *de novo* review. [*See* Pet. at 7-15]. Petitioners fail to cite any authority for the idea that a court's evidentiary ruling in a redistricting case may rise to the level of an unconstitutional deprivation of due process. The case on which Petitioners rely to

support their contention, *State ex rel. CYFD v. Mafin M.*, 2003-NMSC-015, ¶¶ 1, 22, 133 N.M. 827, 70 P.3d 1266, is inapposite. That case dealt not with a trial court's evidentiary ruling but, in a custody proceeding, whether a lower court afforded a parent due process when it held a hearing concerning termination of parental rights in the parent's absence. Thus, and as explained in more detail below, Petitioners seek to apply the wrong standard to their claims.

1. A Trial Court's Evidentiary Decisions Do Not Create a Constitutional Question.

It is inaccurate to claim, as Petitioners do, that the trial court's evidentiary rulings somehow rise to the level of a Constitutional question before this Court. *See State v. Orfanakis*, 22 N.M. 107, 122, 159 P. 674, 687 (1916) (the admission of evidence does not normally constitute a deprivation of due process of law; "[t]he rule is well established that a state cannot be deemed guilty of a violation of its constitutional obligation . . . simply because one of its courts, while acting within its jurisdiction, has made an erroneous decision.") (internal citation omitted); *State v. Rosales*, 2004-NMSC-022, ¶ 7, 136 N.M. 25, 94 P.3d 768 (district court's evidentiary decision did not offend Due Process Clause because right to present evidence "has never been absolute or unlimited"); *Moongate Water Co. Inc. v. State*, 120 N.M. 399, 404, 902 P.2d 554, 559 (Ct. App. 1995) (where state official has allegedly violated state law, such violations ordinarily do not rise to the level

of a constitutional deprivation); *see also Crane v. Kentucky*, 476 U.S. 683, 689 (1986) (acknowledging the Court's "traditional reluctance to impose constitutional constraints on ordinary evidentiary rulings by state trial courts"); *Romano v. Gibson*, 239 F.3d 1156, 1166 (10th Cir. 2001) ("[S]tate evidentiary determinations ordinarily do not present federal constitutional issues."). Were the law otherwise, then ***every*** evidentiary ruling by a district court would implicate the Due Process clause, and elevate form over substance.

2. The Mathews Test is Not Applicable Here.

Petitioners invoke the balancing test for procedural due process claims articulated in *Mathews v. Eldridge*, 424 U.S. 319 (1976), as a basis for trumping the rules of evidence and procedure that the District Court applied during the trial in this case. [*See* Pet. at 11-12]. *Mathews* in not applicable here. "*Mathews* itself involved a due process challenge to the adequacy of administrative procedures established for the purpose of terminating Social Security disability benefits, and the *Mathews* balancing test was first conceived to address due process claims arising in the context of administrative law." *Medina v. California*, 505 U.S. 437, 444 (1992). But the United States Supreme Court has "never viewed *Mathews* as announcing an all-embracing test for deciding due process claims." *Dusenbery v. United States*, 534 U.S. 161, 168 (2002).

In the limited context of an administrative tribunal, "ordinarily one who has a protected property interest is entitled to some sort of hearing before the government acts to impair that interest, although the hearing need not necessarily provide all, or even most, of the protections afforded by a trial." *Camuglia v. City of Albuquerque*, 448 F.3d 1214, 1220 (10th Cir. 2006). There is simply no application of the *Mathews* analysis where, as here, Petitioners have already been afforded a full trial on the merits before a court. *See District Atty's Office for the Third Jud. Dist. v. Osborne*, 557 U.S. 52, __, 129 S. Ct. 2308, 2320 (2009) (noting difference when due process claim occurs post-trial).

Petitioners' due process claim rings hollow because they only raise that claim ***after*** they were provided with the due process protections afforded by a full trial on the merits in the District Court. Once a litigant has been afforded a full trial on the merits, the "State accordingly has more flexibility in deciding what procedures are needed" with respect to post-judgment relief, and the *Mathews* balancing test is replaced by a less demanding test for assessing what process is due. *Id.* This case does not, and cannot, implicate the *Mathews* analysis.

3. Petitioners Were Afforded Due Process.

There is nothing fundamentally inadequate about the procedures afforded to Petitioners either before, during, or after trial in this case. Due process is a "flexible" concept that only "calls for such procedural protections as the particular

situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *TW Telecom of New Mexico, L.L.C. v. New Mexico Pub. Reg. Comm'n*, 2011-NMSC-029, ¶ 17 ,___N.M. ___, 256 P.3d 24. The Maestas/Egolf Plaintiffs cannot dispute the fact that they were given the full opportunity to conduct discovery, to object to each version of the Executive Defendants' maps as they were offered, to present evidence in rebuttal, to argue the merits of their alternative maps before the District Court issued its ruling, and to appeal that ruling. The mere fact that Petitioners disagree with the District Court's ruling on a single piece of evidence admitted over an eight-day trial is miles away from establishing a due process claim in this case. The Maestas/Egolf Plaintiffs' due process claims lack any semblance of merit.

4. Any Proper Review Is Governed by an Abuse of Discretion Standard.

Given the dearth of factual or legal support for Petitioners' due process claim, their petition should be denied and the writ quashed. If this Court determines that it need address the District Court's decision to admit the Executive Alternate 3 map, it has made clear that such evidentiary rulings are reviewed pursuant to the Rules of Evidence, and under an abuse of discretion standard.[11] *See*

[11] Petitioners also appear to assert that the District Court should have applied Rule 1-015 NMRA "to allow a new claim to be introduced[.]" [*See* Pet. at 14]. However, Rule 1-015 deals with amendments to pleadings, not the introduction of

discussion *supra* at 20; *State v. Hughey,* 2007-NMSC-036, ¶ 9, 142 N.M. 83, 163 P.3d 470; *State v. Armendariz,* 2006-NMSC-036, ¶ 6, 140 N.M. 182, 141 P.3d 526. There is nothing in the record reflecting that the District Court denied any party notice and an opportunity to be heard regarding any issue in this redistricting litigation. It is inappropriate for Petitioners to assert, as they do, that the issues they raise implicate constitutional concerns.[12] To the extent this Court considers it appropriate to address Petitioners' evidentiary arguments, it should review the District Court's rulings under an abuse of discretion standard, not as a *de novo* constitutional question as requested by Petitioners.

B. Petitioners Have Waived Their Due Process Claims, or any Right to Judicial Review of the District Court's Evidentiary Rulings, by Failing To Raise the Issues with the Court Below.

Perhaps the more fundamental flaw in Petitioners' due process claim is the total absence in the record of ***any*** attempt by Petitioners to raise their evidentiary

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evidence. The issue before this Court is the admission of evidence, not the District Court's decision to allow, or deny, amendments to Petitioners' complaint below. Rule 1-015 simply has no application here.

[12] It is also questionable whether Petitioners have a fundamental right or vested property interest in a particular reapportionment map that was deprived by the Court's evidentiary ruling. The due process clause protects only against the deprivation or interference with fundamental rights or vested property interests. *See Pedrazza v. Sid Fleming Contractor, Inc.* 94 N.M. 59, 61, 607 P.2d 597, 599 (1980). Petitioners cite no authority for the proposition that, in redistricting litigation, a party has a fundamental right or a property interest in one state House map over another, such that a trial court's decision to accept a map into evidence somehow interferes with that right.

concerns with the District Court during the proceedings below. Nothing in the record indicates that Petitioners requested, and were denied, the opportunity to call the Executive Defendants' map expert, John Morgan, to the stand to cross examine him about Executive Alternate 3. Indeed, Executive Defendants' counsel raised the possibility of Mr. Morgan appearing telephonically (due to his involvement in redistricting litigation in New Jersey) for the parties and the District Court to question him about Alternate 3, but no party took up the invitation. [*See* 12/22/11 TR at 227:10-23 (Ex. C)]. Further, nothing in the record indicates that Petitioners requested, and were denied, the opportunity to reopen the evidence and call Dr. Katz back to the stand to testify regarding his opinions about Executive Alternate 3.[13]

Petitioners' failure to raise these issues with the Court below is fatal to their present claims for relief, on two grounds. First, it is well established that a party can waive its claim of a due process violation by failing to raise it in a timely or appropriate fashion. *See, e.g., State v. Urban*, 108 N.M. 744, 748, 779 P.2d 121, 125 (Ct. App. 1989) (noting that party "can waive even constitutionally protected rights by failure to timely assert them."). Second, it is equally well established that

[13] In light of Dr. Katz's opinion that Executive Alternate 3 is just as responsive, or politically competitive, as the other plans presented to the District Court, *see* discussion *infra* at 38, Petitioners likely did not make such a request because they recognize it would not persuade the Court to select a different plan.

this Court will not consider questions which have not been passed upon by the trial court. *See, e.g., State ex rel. State Hwy Comm'n v. Quesenberry*, 72 N.M. 291, 295, 383 P.2d 255, 258 (1963); *Cockrell v. Cockrell*, 117 N.M. 321, 323, 871 P.2d 977, 979 (1994) ("to preserve trial error for appeal it is necessary to call the error to the attention of the trial court"); *see also, e.g., Campos Enters., Inc. v. Edwin K. Williams & Co.,* 1998-NMCA-131, ¶ 12, 125 N.M. 691, 964 P.2d 855 (appellate court "reviews the case litigated below, not the case that is fleshed out for the first time on appeal.") (internal citations and quotation marks omitted). Clearly, Petitioners have waived, or alternatively failed to preserve, their due process and evidentiary claims by neglecting to make any attempt to raise these issues with the District Court. This is reason enough to deny the relief requested by the Maestas/Egolf Plaintiffs.

C. The District Court Did Not Abuse Its Discretion by Permitting the Introduction of Alternate Plan 3.

As Executive Defendants explain in their contemporaneously filed Opening Brief Regarding the Legislative Defendants' Petition, the District Court, acting as a court of equity, is vested with full discretion to admit into evidence alternate plans submitted by the parties. *See* Op. Br. (Legis.) at 41-42, *citing Alexander v. Taylor*, 51 P.3d 1204, 1207-08, 1213 (Okla. 2002); *League of United Latin Am. Citizens v. Perry*, 457 F. Supp. 2d 716, 718 (E.D. Tex. 2006); *Perrin v. Kitzhaber*, 83 P.3d

368, 370-71 (Or. App. 2004). The Maestas/Egolf Plaintiffs do not squarely accuse the District Court of abusing its discretion, perhaps because the record below would not support such an argument. The District Court was careful to allow all parties, including the Maestas/Egolf Plaintiffs, to submit alternate plans over the course of the trial. [*See, e.g.,* 12/22/11 TR at 133:20-25, 204:7-205:5 (Ex. C); Egolf Ex. 23 (Ex. K); Maestas Ex. 23 (Ex. F)]. Indeed, the Court allowed both the Maestas and Egolf Plaintiffs to submit alternate plans on the last day of trial after all of the parties had completed their case-in-chief. [*See id.*]. In light of the Court's liberal admission of alternate plans submitted by most parties, including Petitioners, and in light of Petitioners' failure to raise with the District Court their supposed need to put on additional evidence or cross examine witnesses to attack Executive Alternate 3, there is nothing in the record that even suggests, much less establishes, that Judge Hall abused his discretion by allowing the admission of the Executive Alternate 3 plan into evidence.

III. PETITIONERS' SUBSTANTIVE DUE PROCESS CLAIM AGAINST THE GOVERNOR IS WITHOUT MERIT.

Petitioners also contend that the Executive Defendants violated their substantive due process rights by engaging in a strategic move as to when they introduced their alternate maps into evidence. [*See* Pet. at 14-15]. There is simply no basis for recognizing a substantive due process claim in this situation. The

standard for showing that governmental conduct is so truly conscience-shocking as to violate the substantive component of the Due Process Clause "is met in only the most extreme circumstances, typically involving some violation of physical liberty or personal physical integrity." *Becker v. Kroll*, 494 F.3d 904, 923 (10th Cir. 2007); *accord City of Cuyahoga Falls v. Buckeye Comty. Hope Found.*, 538 U.S. 188, 198 (2003).

Petitioners allege nothing of the sort. Instead, their claim boils down to an allegation that the Executive Defendants sought the admission of documentary evidence on a particular trial day, which happens to be the same trial day when the Maestas/Egolf Plaintiffs also tendered similar such evidence. The Executive Defendants were merely acting like any litigant in a civil case; there is no evidence that they did so in "bad faith" or were "disingenuous." [*See* Pet. at 15.] Even if Petitioners' meritless allegations were taken as true, this is not the sort of state action egregious enough to implicate a party's substantive due process rights. In short, there is no basis for Petitioners' substantive due process claims.

IV. THE REAPPORTIONMENT PLAN ADOPTED BY THE COURT IS NOT IMPERMISSIBLY BIASED.

The Maestas/Egolf Plaintiffs next argue that a redistricting court cannot adopt a plan that contains any detectable partisan bias, as measured by their trial expert, and that the Executive Alternative 3 Plan the Court modified and adopted

as the District Court's plan is biased. [*See* Pet. at 17-21]. They are wrong on both counts.

A. The Court Was Correct To Analyze Political Effect but Properly Refrained from Selecting a Plan Based on Partisan Considerations.

Petitioners are correct that when selecting a plan, a court may, and should, take its political effect into account. [*See id.*]; *see also, e.g.,* Keith Gaddie & Charles S. Bullock III, *From Ashcroft to Larios: Recent Redistricting Lessons from Georgia*, 34 Fordham Urban L. J. 997, 997 (2007) (When re-drawing electoral maps, courts take partisan fairness into consideration.). However, courts are not prohibited from adopting a redistricting plan that has unintended political consequences. Indeed, as explained in detail below, any redistricting plan, including those submitted by Petitioners, necessarily will have some partisan effect. Rather, courts can, and should, avoid selecting a plan ***based*** on its partisan effect. *Peterson v. Borst*, 786 N.E.2d 668, 672-73 (Ind. 2003) ("Judges should not select a plan that seeks partisan advantage -- that seeks to change the ground rules so that one party can do better than it would do under a plan drawn up by persons having no political agenda[.]" (quoting *Prosser v. Elections Bd.*, 793 F. Supp. 859, 867 (W.D. Wis. 1992)); *In re Legislative Districting of the State*, 805 A.2d 292, 298 (Md. Ct. App. 2002) ("When the Court drafts the plan, it may not take into

account the same political considerations as the Governor and the Legislatur[e]. Judges are forbidden to be partisan politicians.").

This is not to say that courts should consciously ignore the partisan consequences of their redistricting plans. On the contrary, after adopting or drawing a plan on the basis of neutral districting principles, courts should check their plans to ensure that they do not stray far from the existing political landscape. In *Good v. Austin*, 800 F. Supp. 557 (E.D. Mich. 1992), groups of Democrats and Republicans brought suit after the Michigan legislature failed to reapportion that state's congressional districts. The three-judge panel ultimately rejected both sides' proposed redistricting plans as too partisan, *see id.* at 562, and with the assistance of its own expert drew a plan of its own design based on "nonpolitical criteria[.]" *id.* at 562, 563-66. However, the court recognized that:

> [A] districting map devised entirely according to nonpolitical criteria could inadvertently result in a plan that unfairly favored one political party over the other. We decided, therefore, to evaluate the probable political effects of the newly constructed districts by applying the tests for 'political fairness' proposed by the parties' experts who testified at the hearing.

Id. at 566. These historical voting analyses verified that the court's plan "is likely to result in a congressional delegation in 1992 that is roughly proportionate to the relative strength of the political parties in the State of Michigan[.]" *Id.*

Similarly, in *Balderas v. Texas*, No. 6:01CV158-TJW, 2001 U.S. Dist. Lexis 25-740 at *8 (E.D. Tex. Nov. 14, 2001), a three-judge panel drew new congressional districts for Texas following the 2000 census, again based on "neutral districting factors." After completing that task, however, the court conducted two "check[s] against the outcome of our neutral principles." *Id.* at *16. First, the court considered whether the plan was unfairly detrimental to members of the Texas congressional delegation who held either Democrat or Republican leadership positions. *See id.* at *17. Second, the court "checked our plan against the test of general partisan outcome, comparing the number of districts leaning in favor of each party based on prior election results against the percentage breakdown statewide of votes cast for each party in congressional races," and "found that the plan is likely to produce a congressional delegation roughly proportionate to the party voting breakdown across the state." *Id.* at *17-18.

In light of such authority, the District Court properly analyzed the political effect of the various plans, but recognized its limited, non-partisan role and refused to elevate this consideration above the Constitutional requirement of equal population, the statutory requirement of Voting Rights Act compliance, and secondary neutral redistricting principles. [*See* FOF/COL (Ex. 1) at COL ¶¶ 34-36]. This Court should decline Petitioners' request to disturb the District Court's rulings in this regard.

B. The District Court Was Correct To Find that All of the Considered Plans Contained Some Partisan Effect, and Some Had More than Others when It Came to Incumbent Pairings and Other Factors.

Judge Hall was presented with competing measures of the proposed plans' partisan bias or impact, which demonstrated that ***no*** plan submitted to or considered by the Court was perfectly politically neutral, especially when taking into account alternate measures of partisan fairness such as incumbent pairings. In light of such evidence, the District Court properly exercised his equitable discretion in evaluating the plans and his ultimate decision to modify Executive Alternative 3 and adopt it as the District Court's plan is supported by substantial evidence.

When analyzing partisan fairness, courts can and do take such things into account as how a district might perform politically in future elections, and whether its demographic makeup favors the election of one party's candidate over another. *See Good v. Austin*, 800 F. Supp. 557, 566-67 (E.D. & W.D. Mich. 1992) (recognizing that drawing a map using only "nonpolitical criteria could inadvertently result in a plan that unfairly favored one political party over the other," and evaluating the "political fairness" of the court's map); *Diaz v. Silver*, 978 F. Supp. 96, 102, 105-06 (E.D.N.Y. 1997) (referees appointed by a state court considered "political fairness," describing it as "drawing district lines 'so as not to disproportionately advantage or disadvantage one political party over another'");

Mellow v. Mitchell, 607 A.2d 204, 210 (Pa. 1992) (finding proposed congressional plan to be "a politically fair balance in the Pennsylvania delegation between Democrats and Republicans").

In addition, *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004), *aff'd mem.*, 542 U.S. 947 (2004), counsels that courts also must be sensitive to non-neutral pairing of incumbents. If a redistricting plan reflects the "blatantly partisan and discriminatory" protection of incumbents in one party and pairing of incumbents in the other, the plan's population deviations cannot be justified as promoting a legitimate state policy. *Id.* at 1338, 1347-49.

From the beginning of the case, the District Court was sensitive to such considerations. In accordance with the scheduling order, prior to trial each group submitted proposed plans (i.e., districting maps) or partial plans for drawing new districts. [*See* Sch. Ord. (10/19/11) (Ex. 3); FOF/COL (Ex. 1) at FOF ¶¶ 26, 27]. The Legislative Defendants – the Speaker of the House and the President *Pro Tem* of the Senate – urged adoption of HB 39. The Executive Defendants – the Governor, the Lieutenant Governor and the Secretary of State – proposed their own plan for House districts. Other parties advocated for their respective plans, or in the case of the Native American parties, partial plans. [*See id.*]. Over the eight-day bench trial, each party in turn called expert and other witnesses to testify in favor of that party's plans, including amended or modified plans, some of which

were submitted at the suggestion of the District Court to address concerns that were raised about previously submitted plans. [*See* 12/14/11 TR at 299:12-301:10; 12/15/11 TR at 284:8-23 (Ex. C); FOF/COL (Ex. 1) at FOF ¶ 28].

The parties' plans were formatted in standardized "map packets" prepared by Mr. Sanderoff's firm, Research & Polling, Inc. Part of the information provided in the map packets was political "performance" data for each proposed district. [*See* 12/12/11 TR at 120:7-11 (Ex. C)]. Research & Polling performs its analysis by summing the votes for Democratic and Republican candidates in a number of statewide elections over the past decade. [*See* 12/13/11 TR at 52:17-55:15 (Ex. C)]. The result – approximately 53 percent of the votes were for Democrats and 47 percent for Republicans – represents a rough estimate of long-term party performance. [*See id.* at 12:22-15:13]. Further, because the votes can be compiled and the Democrat/Republican ratio calculated on a precinct-by-precinct basis, party performance can be calculated for House districts that are created by combinations of precincts. [*See id.* at 53:9-14]. By tallying the estimated performance of all of the districts in any party's House plan, one can determine the plan's estimated overall partisan impact. [*See id.*]. Notably, this was the same analysis that members of the Legislature used during the 2001 Special Session to evaluate plans then under consideration. [*See id.* at 80:17-81:3].

The Research & Polling performance data revealed that all of the proposed districting plans suggested partisan outcomes that diverged from that which could be expected to result from the existing, unconstitutional plan. For example, whereas the existing plan projects a 38-32 split in the House between Democrats and Republicans, the Executive Alternative 3 plan, HB 39, the Egolf 4 plan and the Maestas 2 plans project 36-34, 40-30, 40-30 and 43-27 splits, respectively. [*See* Gov. Ex. 30 (Ex. D); Court Plan Packet (Ex. L)]. These figures reflect that only the existing plan and the Executive Alternative 3 plan are roughly proportionate to the ratio of voting performance over the past decade in New Mexico as calculated by Research & Polling, since 37/33 ≈ 53/47. These figures were discussed extensively during the trial, and the District Court was well aware of them: It noted that, compared to Executive Alternative 3, earlier versions of the Executive Defendants' plans had reduced Republican performance. [*See* FOF/COL (Ex. 1) at FOF ¶ 72]. Moreover, Petitioners' claims about supposed partisan bias in Alternate 3 forgets that when compared to current district, Alternate 3 actually ***reduced*** GOP performance. [*See* 12/22/11 TR at 122:1-125:12 (Ex. C)].

Professors Arrington and Katz, who testified on behalf of the Egolf and Maestas Plaintiff groups, respectively, presented analyses of the various plans' "responsiveness" and "partisan bias." [*See* 12/19/11 TR at 30:6-40:16, 12/20/11 TR at 27:9–44:9, 47:3-58:10, 59:3-68:15 (Ex. C); Egolf Ex. 8 (Ex. K); Maestas

Exs. 12, 13. (Ex. F)] Dr. Katz, in particular, acknowledged, in his testimony that all the plans are equally "responsive[.]" [*See* 12/20/12 TR at 66:12-25 (Ex. C)]. This conclusion is no different in Dr. Katz's newly submitted affidavit, in which he again finds that all of the plans are "responsive[,]" including the Court-adopted plan. [*See* Ex. 4 ¶ 25].

The Petitioners' experts highly elaborate partisan bias analyses were subject to question for other reasons as well. First, the District Court could note that the Legislature had opted for Research & Polling's alternative analysis. Second, Arrington and Katz could not agree among themselves over the extent of various plans' biases. [*See* Egolf Ex. 8 (Ex. K); Maestas Ex. 12 (Ex. F)]. Third, they premised their analyses by assuming that the electorate splits its votes evenly among Democrats and Republicans. [*See* 12/19/11 TR at 31:12 – 34:9; 12/20/11 TR at 36:19 – 38:5 (Ex. C)]. While this approach might be acceptable for academic purposes, its relevance to the real world of New Mexico politics, where the norm is a 53/47 Democratic/Republican performance ratio, is unclear. Third, the experts' conclusions were at odds with this basic New Mexico voting pattern. If a party's districting plan was unbiased – that is, seats won accurately reflect votes cast – it should project a Democrat-Republican split in the vicinity of 53 percent to 47 percent, that is, 37 Democrat seats and 33 Republican. [*See* 12/20/11 TR at 51:11-52:20 (Ex. C)]. But Professors Arrington and Katz nonetheless

insisted that the Egolf and Maestas plans' 41-29 and 43-27 splits were "unbiased." [*See* 12/20/11 TR at 53:1-54:13; 12/15/11 TR at 267:13-268:13 (Ex. C)].

In light of such testimony and facts, it was appropriate for the District Court to weigh the testimony of Professors Arrington and Katz against the Research & Polling performance numbers and to find those numbers more persuasive. "[I]t is the prerogative of the finder of fact to accept or reject expert testimony and to select which parts of the witness' testimony to believe or disbelieve." *Peters Corp. v. N.M. Banquest Investors Corp.*, 2008-NMSC-039, ¶ 49, 144 N.M. 434, 188 P.3d 1185. Thus, "[w]hen there exist reasons both supporting and detracting from a trial court decision, there is no abuse of discretion." *Alverson v. Harris*, 1997-NMCA-024, ¶ 25, 123 N.M. 153, 935 P.2d 1165; *see also Amkco, Ltd. v. Welborn*, 2001-NMSC-012, ¶ 8, 130 N.M. 155, 21 P.3d 24 ("We cannot say the trial court abused its discretion by its ruling unless we can characterize it as clearly untenable or not justified by reason."). Further, to the extent the record below creates any doubt, such doubt is weighed in favor of the District Court's decision. *See, e.g., State ex rel. Alfred v. Anderson*, 87 N.M. 106, 107, 529 P.2d 1227, 1228 (1974) ("Upon a doubtful or deficient record we indulge every presumption in support of the correctness and regularity of the decision of the trial court.") (citations omitted); *Crowe v. State*, 82 N.M. 296, 297, 480 P.2d 691, 692 (1971) (holding that "[o]n appeal the decision of the trial court will be presumed correct until the contrary is

clearly shown."); *Ellis v. Parmer*, 76 N.M. 626, 629, 417 P.2d 436, 438 (1966) ("On appeal all reasonable presumptions will be indulged to support the decision and judgment of the trial court and the proceedings in that court."); *Hort v. Gen. Elec. Co.*, 92 N.M. 359, 362, 588 P.2d 560, 563 (Ct. App. 1978) ("We have a well-established rule that upon a doubtful or deficient record, every presumption is indulged in favor of the correctness and regularity of the decision of the trial court, and we indulge such presumption in support of the order entered.").

The District Court also appropriately analyzed how the parties' plans paired incumbents, and discovered that in this category, the Petitioners' plans were ***not*** politically fair. All of the Executive Defendants' plans evenly paired two Democrats, two Republicans and one Democrat with one Republican.[14] [*See, e.g.*, Gov. Ex. 30 (Ex. D); FOF/COL (Ex. 1) at FOF ¶ 73, COL ¶ 34]. As the District Court found, the Maestas and Egolf Plaintiffs' plans were unacceptable mainly because they attempted to address the north central consolidation issue by consolidating the Los Alamos district held by the sole Republican incumbent in the eleven-district north central region, and splitting that district's Republican precincts among the surviving Democrat districts, eliminating the possibility that a Republican could be elected there in the future. [*See* 12/22/11 TR at 159:11-

[14] The Democrat/Republican pairing included Representative Al Park, who had announced his decision to retire from the Legislature. [*See* 12/13/11 TR at 37:11-15; 12/14/11 TR at 58:11-13 (Ex. C)].

161:13; 192:25-196:22, 206:9-209:2, 220:17-222:19 (Ex. C); FOF/COL (Ex. 1) at FOF ¶¶ 105, 111].

Thus, in accordance with *Larios v. Cox*, the District Court properly noted the partisan impact of the Egolf and Maestas pairings of incumbents. After deciding that the Executive Alternative 3 map was, on balance, the best plan to minimize population deviation, meet Native American voting right concerns, and also reasonably accommodate neutral districting principles, the District Court properly checked the plan's performance numbers and verified that they were roughly proportional to New Mexico's statewide voting numbers over the past decade. [*See* FOF/COL (Ex. 1) at COL ¶ 34]. What political impact it did find, the District Court determined that it was the result of a "ripple effect" caused by incorporation of the Democrat-heavy native American districts into the Executive Plan. [*See* FOF/COL (Ex. 1) at COL ¶ 35; 12/22/11 TR at 117:9-118:1 (Ex. C)]. There was no evidence of a partisan intent behind this "ripple effect[,]" however, and the Court, by remaining politically neutral, appropriately refused to overemphasize this issue. [*See* FOF/COL at COL ¶¶ 35-36; 12/22/11 TR at 119:1-2].

In sum, the District Court prudently exercised, and certainly did not abuse, its equitable discretion. The District Court was correct in deciding that among all the plans, Executive Alternative 3 results in "the least perturbation in the political

balance of the state." *Prosser v. Elections Bd.*, 793 F. Supp. at 871. Its decision should not be overruled by this Court.

CONCLUSION

For the reasons stated above, this Court should decline to employ its original jurisdiction to mandate that the lower courts be forbidden from considering Executive Alternate 3 as a potential redistricting plan for the state House, deny the requested relief sought by Petitioners, and affirm the ruling of the District Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We hereby certify that a copy of the foregoing OPENING BRIEF OF REAL PARTIES IN INTEREST GOVERNOR SUSANA MARTINEZ AND LIEUTENANT GOVERNOR JOHN A. SANCHEZ REGARDING MAESTAS PLAINTIFFS' AND BRIAN EGOLF'S PETITION was emailed to the following counsel of record this 27th day of January, 2012:

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