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' TRIAL BRIEF FOR THE HOUSE REDISTRICTING PLAN

Plaintiffs Conrad James, Devon Day, Marge Teague, Monica Youngblood, Judy McKinney and John Ryan ("the James Plaintiffs") submit for following trial brief in connection with the trial currently scheduled to begin on December 12, 2011 for the purpose of reapportioning the seventy districts of the New Mexico House of Representatives.

A. Permissible Population Deviation

The Court faces a threshold legal question that governs the permissible scope of the redistricting plans -- whether proposed by the parties or fashioned by the Court -- that the Court might consider: to what extent and under what circumstances may the Court adopt a plan that departs from the principle of absolute population equality embodied in the Fourteenth Amendment?

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

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

Reynolds v. Sims, 377 U.S. 533, 577, 579-80 (1964). "In challenging the District Court's judgment, appellant invites us to weaken the one-person, one-vote standard by creating a safe harbor for population deviations of less than 10 percent, with which districting decision could be made for any reason whatsoever. The Court properly rejects that invitation." Cox v. Larios, 542 U.S. 947, 949 (2004).

While not a safe harbor, a deviation of no more than ± 5% is prima facie valid for a legislatively enacted re-districting (and conversely, any deviation greater than that is prima facie invalid). Connor v. Finch, 431 U.S. 407, 418 (1977) (noting "the 'under-10%' deviations the Court has previously considered to be of prima facie constitutional validity" in context of legislatively enacted apportionments; citing Gaffney v. Cummings, 412 U.S. 735 (1973) (upholding 7.83% maximum deviation from norm); White v. Regester, 412 U.S. 755 (1973) (same - 9.9%).[1]

[1] In the two cited cases, the Court noted that, while the deviation range approached ± 5%, the average or mean deviations were low. In Gaffney, the mean deviations for the state house and senate plans in question were 1.9% and 0.45%, respectively, 412 U.S. at 750, and in White, the mean deviation for the house plan was 1.8%, 412 U.S. at 764.

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

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

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

> A court-ordered plan ... must be held to higher standards than a State's own plan. With a court plan, any deviation from approximate population equality must be supported by enunciation of historically significant state policy or unique features.... We hold today that, unless there are persuasive justifications, a court-ordered reapportionment plan of a state legislature ... must ordinarily achieve the goal of population equality with little more than de minimis variation.

Id. at 26-27.[2] The Court further held that any departure from de minimis deviation must be supported by significant state policies: "Where important and significant state considerations rationally mandate departure from these standards, it is the reapportioning court's responsibility to articulate precisely why a plan ... with minimal population variance cannot be adopted." Id. at 27. "The burden is on the District Court to elucidate the reason necessitating any departure from

[2] In a footnote to this statement, however, the Court cautioned that, "This is not to say, however, that court-ordered reapportionment must attain the mathematical preciseness required for congressional redistricting...." 420 U.S. at 27 n.19. Courts have construed Chapman's holding to require deviation ranges of less than 2%, Wisconsin State AFL-CIO v. Elections Bd., 543 F. Supp. 630, 634 (E.D. Wis. 1982), and "closer to Wesberry than Brown" Burton v. Sheheen, 793 F. Supp. 1329, 1345 (D.S.C. 1992), i.e., no more than 5%.

the goal of population equality, and to articulate clearly the relationship between the variance and the state policy furthered." Id. at 24 (emphasis added). The presence of other feasible and yet "less statistically offensive" plans indicates that the greater deviation is unnecessary and thus unacceptable. Id. at 26.

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

The James Plaintiffs respectfully submit that the Jepsen court erred. It does not follow from the dismissal of the appeal that the United States Supreme Court determined that the Chapman rule of minimal deviation is not applicable to state court-drawn redistricting plans. While a dismissal for want of substantial federal question is a disposition on the merits and has precedential effect, Hicks v. Miranda, 422 U.S. 332 (1975), there is no record of the Court's grounds for the dismissal (or even the precise issue raised on the appeal) and therefore it is impossible to ascertain any rule or proposition for which the case might stand. Further, the Court has admonished parties that, "[T]he fact that a 10% or 15% variation from the norm is approved

in one State has little bearing on the validity of a similar variation in another State. 'What is marginally permissible in one State may be unsatisfactory in another, depending upon the particular circumstances of the case.'" Swann v. Adams, 385 U.S. 440, 445 (1967) (quoting Reynolds v. Sims, 377 U.S. at 578). Thus, the United States Supreme Court just as if not more likely dismissed the appeal on the grounds of some unique circumstance of the Michigan case as opposed to the improbable adoption of a general principle that the Chapman rule does not apply to state court-drawn reapportionment plans.

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

> [W]e see in the constitutional history of this state dominant commitments to contiguous, single-member districts drawn along the boundary lines of local units of government which, within those limitations, are as compact as feasible. We accordingly direct that election districts shall be drawn in accordance with the following criteria: ... Senate and House election district lines shall preserve county lines with the least cost to the federal principle of equality of population between election districts consistent with the maximum preservation of county lines and without exceeding the range of allowable divergence under the federal constitution which, until the United States Supreme Court declares otherwise, shall be deemed to be 16.4% (91.8-108.2%).

In re Apportionment of State Legislature -- 1982, 321 N.W.2d at 583.[3] Therefore, if anything, it is probable that the United States Supreme Court dismissed the appeal of the 1982 Michigan redistricting case on the grounds of this special consideration rather than the fact that a state versus a federal court drew the plan. Cf. Voinovich v. Quilter, 507 U.S. 146, 161-62 (1993) (policy embodied in Ohio constitution favoring preservation of county boundaries could justify deviations exceeding 10% in reapportioned state legislative districts). New Mexico, of course,

[3] See also In re Apportionment of State Legislature -- 1992, 486 N.W.2d at 732-33 ("For well over a century, Michigan law has recognized that effective representative government is strongly enhanced by apportioning the state in manner that honors jurisdictional lines"; the 1982 deviation was justified on this ground).

has no similar constitutional or even statutory policy in favor of preserving county or municipal boundaries.

There are additional, compelling reasons why this Court should decline to follow the decision of the district court in New Mexico's redistricting litigation ten years ago and instead conclude that a court-drawn redistricting plan must contain no more than minimal deviation from the population norm for districts. First, Chapman and Connor do not distinguish between federal and state court-drawn plans. Chapman repeatedly refers generally to the limited permissible deviation in a "court-ordered plan," not a "federal court-ordered plan." 420 U.S. at 24, 26. Similarly, Connor provides that, "[T]he latitude in court-ordered plans for departure from the Reynolds standards in order to maintain county lines is considerably narrower than that accorded apportionments devised by state legislatures, and the burden of articulating special reasons for following such a policy in the face of substantial population inequalities is correspondingly higher." 431 U.S. at 419-20.

Second, there is no principled basis for adopting different standards. State legislatures bear primary responsibility for reapportionment. Reynolds, 377 U.S. at 586. This is because redistricting is "an inherently political task," Johnson v. Miller, 922 F. Supp. 1556, 1559 (S.D. Ga. 1995) (quoting Upham v. Seamon, 456 U.S. 37, 41-42 (1982)), and "a state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality." Connor, 431 U.S. at 414-15. In contrast, courts are "ill-suited," Johnson v. Miller, 922 F. Supp. at 1559, to carry out this balancing of competing policy considerations. "Many factors, such as the protection of incumbents, that are appropriate in the legislative development of an apportionment plan have no place in a plan formulated by the courts." Wyche v. Madison Parish Police Jury,

769 F.2d 265, 268 (5th Cir. 1985). But when the legislature fails to meet its responsibility, there is no reason to give a state court any more leeway than that which is afforded a federal court. The fundamental question -- enforcing the equal protection clause's guarantee of one man, one vote parity -- is the same whether the dispute is resolved in federal or state court

Third, in any event there also is no reason to construe New Mexico's constitution's equal protection clause any different from the federal provision. A state court should enforce the state constitutional guarantee of every man's and woman's right to have his or her vote counted the same as the next person's vote with the same vigor that the federal courts enforce the federal right.

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

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

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

B. Section 2 of the Voting Rights Act

It also is important for the Court to understand the basic parameters of Section 2[4] of the Voting Rights Act, 42 U.S.C. § 1973, i.e., what it requires and – equally important – does not require in the context of redistricting. Section 2 provides:

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

Three "'necessary preconditions'" must be established before it can be said that Section 2 requires the drawing of a majority-minority district because failure to do so will dilute the minority group members' votes: "(1) The minority group must be 'sufficiently large and geographically compact to constitute a majority in a single-member district,' (2) the minority group must be 'politically cohesive,' and (3) the majority must vote 'sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate.'" Bartlett v. Strickland, ___ U.S. ___, 129 S. Ct. 1231, 1241 (2009) (quoting Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986)). Accord, Growe v. Emison, 507 U.S. 25, 40-41 (1993). "[O]nly when a party has established the Gingles requirements does a court proceed to analyze whether a violation has

[4] "Retrogression," a term the Court may hear during the course of the trial, applies to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973, which applies to states that are subject to preclearance by the United States Department of Justice of any change in voting qualifications, prerequisites, standards, practices or procedures. New Mexico is not subject to Section 5. Retrogression means "a decrease ... in the absolute number of representatives which a minority group has a fair chance to elect," Ketchum v. Byrne, 740 F.2d 1398, 1402 n.2 (7th Cir. 1984), and is measured by comparing minority voting strength under the new plan with minority voting strength under the immediately preceding plan. Id. at 1417.

occurred [or will occur in the absence of a minority-majority district] based on the totality of the circumstances." Bartlett, 129 S. Ct. at 1241.

Section 2 liability requires proof of both an inability by the minority group members to elect representatives of their choice and less opportunity than other members of the electorate to participate in the political process:

> As the statute [§ 2] is written, ... the inability to elect representatives of their choice is not sufficient to establish a violation unless, under the totality of the circumstances, it can also be said that the members of the protected class have less opportunity to participate in the political process.... [A]ll such claims must allege an abridgment of the opportunity to participate in the political process *and* to elect representatives of one's choice.

Chisom v. Roemer, 501 U.S. 380, 397-98 (1991) (citations omitted) (footnotes omitted).

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

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

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

Bartlett, 129 S. Ct. at 1243, 1246.[5] Similarly, "coalition districts," in which two or more minority groups can band together to elect a candidate of their combined choice, also have been rejected as a premise to Section 2 liability. Nixon v. Kent County, 76 F.3d 1381, 1393 (6th Cir. 1996) ("The language of the Voting Rights Act does not support a conclusion that coalition suits are part of Congress' remedial purpose and, as previously discussed, there are compelling reasons to believe that they are not.") (cited in Bartlett, 129 S. Ct. at 1242). More generally, the Supreme Court has rejected the proposition that the prohibition against minority group voting strength cannot be equated with an affirmative mandate to maximize that strength. Bartlett, 129 S. Ct. at 1244 (citing Johnson v. De Grandy, 512 U.S. 997, 1016-17 (1994)).

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

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

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

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

Prior New Mexico court decisions applying Section 2 are instructive. In Sanchez v. King, in addressing a minority group's need to have an "effective" majority that can elect a candidate of its choice, the court concluded that: "[A] minority population needs 65 percent of the population of a district in order to have a meaningful opportunity to elect a candidate of their choice. In view of the extreme depression of Indian voter participation, the percentage may in fact be higher for Indians in northwest New Mexico." Slip op. at 61 n.1. A decade ago, in adopting a "least-change" Congressional districting plan, the court in Jepsen v. Sanchez found that, "The white majority does not vote sufficiently as a block [in New Mexico] to enable it to usually defeat the minority preferred candidate." Slip op. at 3 (filed Jan. 2, 2002).

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CERTIFICATE OF SERVICE:

WE HEREBY CERTIFY that on the 9th day of December, 2011, 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 9th day of December, 2011 to the following:

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