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.

MAESTAS PETITIONERS' OPENING BRIEF

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I. INTRODUCTION AND SUMMARY OF PROCEEDINGS

The Maestas Petitioners, who are Plaintiffs in the consolidated cases for reapportionment of the New Mexico House of Representatives, respectfully submit this Opening Brief pursuant to this Court's briefing schedule. On January 3, 2012, the District Court entered its findings of fact and conclusions of law, announcing the decision to adopt the Executive Alternative 3 plan with minor modification for reapportionment of the state house. [Maestas Pet. Ex. 1, FOF and COL] On January 17, the District Court entered Judgment adopting Executive Alternative 3 with minor modification. Also on January 17, the Maestas Petitioners initiated proceedings in this Court with filing of their Verified Petition for Superintending Control. Believing the choice of plans to be in error, the Maestas Petitioners seek writ reversing the District Court's choice of Executive Alternative 3 and directing the District Court to pick from among other acceptable plans presented at trial.

"The perfect is the enemy of the good," or so says the maxim attributed to Voltaire, which helps explain how a well-intentioned District Court was led into error with the adoption of Governor Martinez's Executive Alternative 3 plan. In its quest to make an unblemished choice, the District Court allowed litigants much freedom to revise their proposals and to patch up flaws, even in the final days and hours of trial. By the end, eight sets of parties arrayed more than a dozen complete redistricting plans for state house before the District Court. [FOF 26 & 28]

Apparently, Governor Martinez and the other Executive Defendants could not resist the temptation to mischief in the freedom afforded them. Though they began the trial with plans showing partisan fairness, which is to say a level playing field between Republicans and Democrats, they introduced Executive Alternative 3 on the last day of trial, and this plan manipulates the lines of the seventy house districts in order to create an unconstitutional, partisan gerrymander.

As stated more fully in the Petition and now in this Brief, the District Court reversibly erred in its choice of Executive Alternative 3 for two constitutional reasons: First, because the Executive Defendants introduced their Alternative 3 on the last day of trial—failing even to have a witness testify on its behalf—the District Court's adoption of Executive Alternative 3 effectively deprived the Petitioners of their rights to procedural and substantive due process. Second, Executive Alternative 3 contains a statistically significant pro-Republican bias, rendering it constitutionally and legally ineligible for court adoption. [Maestas Pet. Ex. 4, Katz Aff. ¶ 28 & Katz Aff. Ex. C]

If this Court reverses the District Court's choice of Executive Alternative 3, then fashioning an appropriate remedy is not a trivial exercise, given the exigencies of upcoming election deadlines. While these exigencies are undoubtedly real, they do not justify permitting the unconstitutional Executive Alternative 3 to govern elections for the next decade, as the Secretary of State's motion to lift stay would

seem to suggest. The Maestas Petitioners will respond separately to the motion to lift stay, but for purposes of this Brief, they have tried to give significant thought to the appropriate remedy.

Because the error here would normally be corrected through a post-trial motion, it is best to think of any remedy from this Court as achieving the same objectives. In turn, the task that the District Court faced in choosing from among so many proposals was first a process of elimination. Certain plans cannot be chosen because they contain one or more fatal flaws. For example, one reason the District Court gave for rejecting the James Plan was that it "contains significant partisan bias," based on Dr. Katz's trial testimony. [FOF 87] To facilitate this Court's understanding of the appropriate process of elimination, the Maestas Petitioners have constructed a "Table of Fatal Flaws," incorporated into argument here as Attachment 1, showing each plan litigated at trial with entries corresponding to "fatal flaws." These entries are cited mainly to the District Court's findings but also to the trial record, when necessary. As described below, proposals are highlighted in green, for those containing no fatal flaws, and red, for those that contain one or more fatal flaws. A couple of plans are highlighted in yellow, indicating they only partially comply with the interests of the Navajo Nation but do not contain any fatal flaws.

Picking a replacement from among acceptable plans then becomes a straightforward exercise for the District Court, if this Court reverses the original choice of Executive Alternative 3 as requested. Because the merits appeal has now also been certified to this Court, the Maestas Petitioners argue in this Brief that the District Court erred in a handful of findings related to the two Maestas plans litigated at trial, lest the points be waived. The Maestas Petitioners believe that their Alternative 2 came in a close second place in the District Court's findings, primarily because of its very low mean deviation from the ideal of 1.1%. [FOF 108] Clearly, deviation was a major legal focus of the District Court's ruling, and Maestas Alternative 2 would be a suitable replacement for Executive Alternative 3, requiring the least modification to the District Court's findings.

II. GROUNDS FOR THE WRIT AND ARGUMENT

A. Due Process Limits Required the Court to Disallow the Executives Late Filings and Apply the Scrupulously Fair Standard In the Litigation of Those Plans.

The Scheduling Order required that the parties submit plans originally on November 9, kicking off an expedited discovery process presumably intended to allow parties to screen out legal infirmities, such as Voting Rights Act violations or blatant partisan bias. [Maestas Pet. Ex. 3, Scheduling Order] Following the District Court's structure, the Maestas Plaintiffs amended their original plan once before trial, in order to fully accommodate Native American interests, and they

presented their Maestas Alternative 2 with a witness to testify on its behalf and face cross-examination during trial. By contrast, over the objections of many litigants, the Executive Defendants offered multiple plans on rolling basis, which supposedly corrected many infirmities discovered through the adversarial process.

The constant amendment to the plans put a strain on all parties; litigants worked day and night to at least minimally analyze every new plan that was presented. This was until the final days of trial, when the time constraints of the trial would not permit proper examination of the executive's new plans. Submitted under the guise of fixing their erstwhile refusal to accommodate the interests of the Navajo Nation and Multi-Tribal Plaintiffs, Executive Alternative 3, disclosed to the parties the day before the trial ended and introduced into evidence on the last day, was actually a Trojan horse. In submitting a last-minute plan, which no party had an opportunity to properly evaluate or litigate, the Executive Defendants snuck in a partisan biased plan. What must not be overlooked is that the Executive Defendants improperly postured themselves as partisan litigators looking for partisan advantage by gaming the rush of redistricting. Instead, they should have comported themselves to the higher standard of State actors, whose job it was to bring out all the facts for debate and scrutiny.

1. Adoption of Executive Alternative 3 Deprives the Maestas Petitioners of their Rights to Procedural Due Process.

Claims of violation of due process of law are reviewed by this Court *de novo*. *State ex rel. CYFD v. Mafin M.,* 2003-NMSC-015, ¶ 17, 133 N.M. 827, 70 P.3d 1266 ("[t]he question of whether an individual was afforded due process is a question of law that we review de novo"). The United States Supreme Court has recognized that a Petitioner's right to a fair an open reapportionment process is a fundamental interest protected by the United States Constitution, stating:

> The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.

Reynolds v. Sims, 377 U.S. 533, 555, 84 S.Ct. 1362, 1378 (1964).

The question of whether Petitioner Maestas is entitled to specific due process in the District Court's deliberation of the Executive 3 map has not been addressed directly by New Mexico Courts. However, this Court has imposed a strict burden on the State when it places a burden on a citizen's fundamental right, such as in its decisions governing termination of parental rights. These cases should guide the court in the case at bar and compel scrupulous fairness to this reapportionment proceeding.

In its decision in *State v. Mafin M.,* this Court reaffirmed that termination of

parental rights proceedings must be conducted with "scrupulous fairness" to the parent because termination proceedings place in jeopardy the fundamental right to raise one's children. 2003-NMSC-015, ¶ 17. (*quoting State ex rel. Children, Youth & Families Dept. v. Lorena R.*, 1999-NMCA-035, ¶ 19, 126 N.M. 670, 974 P.2d 164.) Similarly, the Executive Defendants' coordinated effort to force a partisan plan on the District Court without proper factual foundation or justification must be closely scrutinized and conducted with scrupulous fairness.

The fundamental requirement of procedural due process is notice and "the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge,* 424 U.S. 319, 333, 96 S. Ct. 893 (1976) (internal quotation omitted) In the litigation context, this means "the opportunity to present evidence and to examine and cross-examine witnesses." *TW Telecom, LLC v. New Mexico Pub. Regulation Comm'n*, 2011-NMSC-029, ¶ 20, 150 N.M. 12, 256 P.3d 24 (vacating administrative order because "the parties were denied the opportunity to substantively address the impact" of it). The Executive Defendants had no witness available to testify on behalf of Executive Alternatives 2 and 3, when they were introduced into evidence on December 22, 2011. [Tr. 12/22/2011, 227:10-23 (Paul Kennedy colloquy with District Court)] Therefore, like the parties in *TW Telecom*, the parties in the consolidated redistricting litigation were denied "the opportunity to address the impact" of Executive Alternative 3. The District Court's adoption of

a plan in support of which no witness testified or faced cross-examination constitutes reversible error. Likewise, the inability to present Dr. Katz's analysis of partisan bias during trial compounds the error and led to the District Court's adoption of a plan containing significant partisan bias.

Additionally, the Executive Defendants' tactics deprived the parties of sufficient notice regarding the true impact of Executive Alternative 3. Notice is essential to due process because without adequate notice, a citizen litigant is unable to prepare and present a defense in a redistricting case. Denial of notice, standing alone, plainly increases the risk of an erroneous decision beyond what is permissible in a proceeding where the State seeks to define the electoral boundaries for ten years.

2. Adoption of Executive Alternative 3 Deprives the Maestas Petitioners of their Rights to Substantive Due Process.

The cases recognize a substantive component of the Due Process Clause that protects individual liberty against abusive government action, "regardless of the fairness of the procedures used to implement them." *Daniels v. Williams,* 474 U.S. 327, 331, 106 S. Ct. 662, 88 L.Ed.2d 662 (1986). However, the United States Supreme Court "has always been reluctant to expand the concept of substantive due process because guideposts for responsible decision-making in this unchartered area are scarce and open-ended." *Collins v. City of Harker Heights,*

503 U.S. 115, 125, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992). The due process clause "is not a guarantee against incorrect or ill-advised [government] decisions." *Bishop v. Wood,* 426 U.S. 341, 350, 96 S. Ct. 2074, 48 L. Ed. 2d 684 (1976).

A substantive due process claim based on allegedly abusive conduct by government officials therefore ordinarily requires evidence of conduct that "can properly be characterized as arbitrary, or conscience-shocking, in a constitutional sense." *Collins,* 503 U.S. at 128, 112 S. Ct. 1061; *see also Rosa R. v. Connelly,* 889 F.2d 435, 439 (2d Cir.1989) (requiring evidence that official action was "arbitrary or irrational or motivated by bad faith"), *cert. denied,* 496 U.S. 941, 110 S. Ct. 3225, 110 L. Ed. 2d 671 (1990). *Baines v. Masiello*, 288 F. Supp. 2d 376, 388 (W.D.N.Y., 2003). The Executive Defendants behavior fits this exacting standard. It is clear that the Executive Defendants intended to disclose their maps slowly in order to deprive other litigants and the District Court sufficient time to fully analyze. This gamesmanship on the part of Governor Martinez and the other Executive Defendants shocks the conscience.

B. The District Court Reversibly Erred by Adopting Executive Alternative 3 Because It Contains Significant Partisan Bias.

The uninvited labor of reapportioning the New Mexico House of Representatives falls to the judiciary because the political branches of government—the legislative and executive—failed to reach a compromise. As happened after the 2000 census, a Republican governor and a Democratic

legislature could not find the way, and the courts must now do reapportionment. In the absence of political compromise, the customary role of the judiciary as neutral arbiter becomes all the more vital, because reapportionment lays down the playing field of representative democracy. Therefore, it was reversible error for the District Court, however accidentally, to take sides in the political fight by adoption of a partisan biased plan. As Judge Posner writing on behalf of a three-judge panel reasoned, court adopted plans should be free from partisan bias:

> We are comparing submitted plans with a view to picking the one (or devising our own) most consistent with judicial neutrality. 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—even if they would not be entitled to invalidate an enacted plan that did so.

Prosser v. Wisconsin Elections Bd., 793 F. Supp. 859, 867 (W.D. Wis. 1992) (Posner, Cir. J., sitting by designation) (drawing its own reapportionment plan after Republican governor vetoed plan passed by a Democratically controlled legislature).

In fairness, the District Court did take sides by accident, having been led to adopt Executive Alternative 3 by an eleventh-hour maneuver by the Executive Defendants, who introduced the plan into evidence on December 22, 2011, the last day of trial. No witness testified in support Executive Alternative 3, and the Executive Defendants' tactics left no time for Dr. Jonathan Katz to analyze the plan for partisan bias. Once analyzed for purposes of the Maestas Petitioners' writ proceeding in this Court, however, Executive Alternative 3 joined the James and

Sena Plans in showing a statistically significant pro-Republican bias, [Maestas Pet. Ex. 4, Katz Aff. ¶ 28 & Katz Aff. Ex. C], providing reason to reverse the District Court and remedy the situation with a fair and constitutional plan.

1. The Executive Defendants' Gamesmanship Went So Far as to Mislead the District Court Regarding the Significant Partisan Bias Contained in Executive Alternative 3.

Giving more detail as to how the error occurred, in written closing argument, the Executive Defendants misled the District Court with regard to partisan bias, using Dr. Katz's testimony at trial to cast their alternative maps in the positive glow of their original effort:

> [T]he Executive Plan is also fair from a partisan bias perspective. [TR 12/20 at 46:3-11 (Dr. J. Katz testimony)]. This means that it treats Republican and Democratic districts equally in terms of translating votes into actual seats. The other political fairness considerations also show that the Executive plans are the most politically neutral.

[Executive Defendants' Closing Brief filed 12/28/2011 at 40]

While Dr. Katz did in fact determine the original Executive Plan to be partisan fair, the statement that all the Executive plans are "the most politically neutral" is false, especially with regard to Executive Alternative 3.

That the Executive Defendants wanted to sneak through a biased plan is all the more troubling because they operated under the same tacit assumption all the parties and the District Court did: that partisan fairness is a threshold issue for court adopted plans, a filter through which a proposal must pass before it merits

further consideration. For example, one reason the District Court gave for rejecting the James Plan was that it "contains significant partisan bias," based on Dr. Katz's trial testimony. [FOF 87] Ultimately, the District Court found that the original partisan-fair Executive Plan possessed other fatal flaws: it failed to comply with the preferences of the Multi-Tribal Plaintiffs and the Navajo Nation and probably violated the Voting Rights Act in the Clovis area by splitting the minority population there. [FOF 63-65] Yet, when given the opportunity to revise their plans to correct these defects, the Executive Defendants did not stop at correcting the split in Clovis, did not stop at conforming their maps to the interests of Native Americans and their sovereign tribal governments, but used the District Court's open attitude toward late revision further still, to press a partisan advantage.

The story is familiar from the Petition but bears retelling. At trial, the District Court qualified Dr. Katz as an expert witness in the quantitative analysis of partisan bias in proposed redistricting plans, but the Executive Defendants did not make Executive Alternative 3 available until December 21, after Dr. Katz had testified on December 20. [Katz Aff. ¶¶ 2-13] The Executive Defendants did not introduce Executive Alternative 3 into evidence until December 22, the last day of trial, thus shielding it generally from scrutiny and particularly from the peer-reviewed partisan bias analysis Dr. Katz provided at trial.

Dr. Katz is Chair of the Division of the Humanities and Social Sciences at the California Institute of Technology (Caltech), the functional equivalent of a deanship at other universities. [Katz Aff. ¶ 2] Among his many eminent qualifications, he is an elected Fellow of the American Academy of Arts and Sciences. [Katz Aff. ¶ 2; Maestas Trial Ex. 11 (*curriculum vitae*)] As a testifying and consulting expert, Dr. Katz works for both Republicans and Democrats, and he worked in New Mexico for a Republican group of litigants in the last round of redistricting ten years ago, the *Jepsen* case. [Katz Aff. ¶ 3] For purposes of the Maestas writ proceeding, Dr. Katz updated his opinions to include an analysis of Executive Alternative 3. [Katz Aff. ¶¶ 13-28 & Katz Aff. Ex. C]

2. Executive Alternative 3 Contains Significant Partisan Bias under the Partisan Symmetry Standard

To sum up his updated opinion, the James, Sena and Executive Alternative 3 plans all show a statistically significant pro-Republican bias, while the other proposals that Dr. Katz analyzed exhibit partisan fairness. [Katz Aff. ¶ 28] The partisan fair plans include the original two that the Executive Defendants proposed. [Katz Aff. ¶ 28] Apropos here, the Executive Defendants' own expert political scientist, Dr. Keith Gaddie, credited the methodology that Dr. Katz used as a "very sophisticated" one designed "to estimate fairness or bias in legislative districting." [Tr. 12/14/2011, 286:14-22] Dr. Gaddie went on to admit that the methodology was "the most sophisticated mechanism we have" to measure how a proposed

redistricting plan can result "in changes in partisan control of the Legislature." [Tr. 12/14/2011, 287:4-23] Furthermore, Justices Stevens and Breyer have explicitly endorsed the partisan symmetry methodology used by Dr. Katz as "widely accepted by scholars as providing a measure of partisan fairness in electoral systems." *See LULAC v. Perry*, 548 U.S. 399, 466, 126 S. Ct 2594 (2006) (Stevens & Breyer, JJ., concurring in part and dissenting in part). Dr. Gaddie actually offered an expert opinion in *LULAC v. Perry* using the partisan symmetry methodology, and Justices Stevens and Breyer favorably cite Dr. Gaddie's work by name. 548 U.S. at 464-65.

The Executive Defendants had no witness available to testify on behalf of Executive Alternative 3 when it was presented on December 22. [Tr. 12/22/2011, 227:10-23 (Paul Kennedy colloquy with Judge Hall)] But the person who drew it, John A. Morgan, had testified the week before regarding the executive's first proposals. In his testimony, Mr. Morgan admitted several facts showing the appearance of a "political agenda" on his part, the very thing the *Prosser* court warned against. Mr. Morgan described his business as "Republican consulting and strategy." [Tr. 12/14/2011, 178:24-25 & 179:1] He had a contract with the Republican Party of New Mexico to draw reapportionment plans for Republican legislators during the Special Session of the Legislature in September 2011, which ended only weeks before trial began. [Tr. 12/14/2011, 179:2-5] Naturally, he met

with many Republican legislators during the session, including those from the Roswell area, whose districts faced pressure from relative population decline in Chavez County. [Tr. 12/14/2011, 174:1-20] In preparation for his work in this case, Mr. Morgan participated on a conference call with Jay McCleskey, Governor Martinez's chief political strategist. [Tr. 12/14/2011, 180:8-20]

Although the District Court did not have access to the Katz analysis for Executive Alternative 3, it did take some notice of the partisan implications of the plan, finding it increased the number of majority-Republican districts from 31 in the executive's original proposal to 34 and also increased the number of so-called swing seats from five to eight. [FOF 72] The District Court made a serious factual mistake, however, in trying to justify this, stating incorrectly that the partisan shift was "a result of the inclusion of the Multi-Tribal/Navajo Nation Plan." [FOF 72] The record lacks any support for the notion that the partisan shift in Executive Alternative 3 was the result of deference to Native American interests, and throughout the litigation, the various Maestas and Egolf plans conformed with the Multi-Tribal/Navajo Nation Plan without triggering a partisan shift, as the findings and record confirm. This last statement merits emphasis: the fact that the Maestas and Egolf Plaintiffs presented several plans that conformed completely with Native American interests negates the District Court's hypothesis that the Executive Defendant's accommodation to the Multi-Tribal Plaintiffs and Navajo Nation

somehow necessitated a pro-Republican shift. That part of Finding of Fact No. 72 entirely lacks support in the record; it is simply not true.

3. The District Court Erred Reversibly by Selecting a Plan that Seeks and Achieves Partisan Advantage.

Thus, as a factual matter, the District Court unquestionably wound up adopting a partisan biased plan, drawn by a self-described Republican strategist who never faced cross-examination regarding its design. The facts alone militate in favor of reversal with regard to the adoption of Executive Alternative 3. Once again, as the executive's expert political scientist, Dr. Gaddie, admitted, a biased plan can result "in changes in partisan control of the Legislature." [Tr. 12/14/2011, 287:4-23] The stakes are large, therefore, but the legal rule needed to resolve the problem is narrow and simple. The Maestas Petitioners respectfully request this Court hold that, when facing the task of adopting a reapportionment plan after the legislative and executive branches have failed to enact one into statute, a district court cannot adopt any plan exhibiting significant partisan bias. Partisan fairness, in other words, should be a threshold question.

The District Court itself seems to have applied this rule in substance, when rejecting the James Plan because it "contains significant partisan bias," based on Dr. Katz's trial testimony, [FOF 87], and the District Court treated the James plan correctly. To remain "consistent with judicial neutrality," as the *Prosser* court reasoned, a court tasked with reapportionment "should not select a plan that seeks

partisan advantage." 793 F. Supp. at 859; *see also, e.g., Peterson v. Borst*, 786 N.E. 2d 668, 673 (Ind. 2003) ("A court called upon to draw a map on a clean slate should do so with both the appearance and fact of scrupulous neutrality."). Although the District Court cited *Peterson v. Borst*, it oddly interpreted the opinion to stand for the notion that a court tasked with adopting a reapportionment plan must be blind to the partisan consequences of its actions. [COL 35]

But this "hear no evil, see no evil" interpretation turns judicial neutrality upside down. Logic dictates that only by restricting a court's choice to those plans free from partisan bias can neutrality be achieved in fact. *Peterson* itself dealt with a slightly different issue, the "appearance" of partisanship on the part of the judiciary, where an Indiana trial court adopted a city council redistricting plan *en banc* with the judges splitting their votes along party lines. 786 N.E. 2d at 673-74. The Indiana Supreme Court did not doubt the judges' good faith but determined that the party line vote among the judges looked so bad as to warrant reversal. *Id.* No one in the case, however, is charging the District Court itself with the appearance of partisanship, though it fell into adopting a plan designed by a Republican strategist. Rather, it is the established fact that Executive Alternative 3 seeks and achieves unfair partisan advantage that warrants reversal. Although the appearance of partisanship on the part of the courts in *Peterson* was bad, the fact of partisan bias, which could lead to a change in control of the Legislature, must be

considered worse. It unfairly burdens the rights of the citizenry, not merely the reputation of the judiciary.

4. To Allow Executive Alternative 3 to Govern Elections for the Next Ten Years Would Violate Both the United States and New Mexico Constitutions.

Actually, to allow Executive Alternative 3 to govern the 2012 elections and beyond would violate both the United States and New Mexico Constitutions. First, the Bill of Rights of the New Mexico Constitution provides that "[a]ll elections shall be free and open." N.M. Const. art. II, § 8. Four states have such a "free and open" election clause in their constitutions, and thirteen other states have a similar "free and equal" clause in theirs. *See Gunaji v. Macias*, 2001-NMSC-028, ¶¶ 27-8, 130 N.M. 734, 31 P.3d 1008 (analogizing New Mexico's "free and open" clause to Kentucky's "free and equal" clause). Elections for the state house will not be free, open or equal if held under a biased redistricting plan, which by definition unfairly favors one political party over another. Second, holding elections under a biased plan burdens associational rights under the First Amendment. *See LULAC v. Perry*, 548 U.S. at 462 (Stevens & Breyer, JJ., concurring in part and dissenting in part) (stating, in reference to claims of partisan gerrymander, "the freedom of political belief and association guaranteed by the First Amendment prevents the State, absent a compelling interest, from 'penalizing citizens because of their participation in the electoral process, . . . their association with a political party, or

their expression of political views'") (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 314, 124 S. Ct. 1769 (2004) (Kennedy, J., concurring in judgment))

Finally with regard to constitutional implications of partisan bias, leaving Executive Alternative 3 in place would violate the separation of powers, allowing Governor Martinez to achieve through the judiciary a political prize she could never have obtained through the legislative process. Constitutionally, redistricting is first and foremost a legislative task. N.M. Const. art. IV, § 3 (providing that, after each census, "the legislature may by statute reapportion its membership"). Although Governor Martinez has the right to veto, the veto is a negative power, which does not permit the Governor to, in effect, create a reapportionment statute by way of the judiciary. *See State ex rel. Sego v. Kirkpatrick*, 86 N.M. 359, 365, 524 P.2d 975, 981 (1974) (holding that the power of veto is the power to "disapprove" and not "the power to create or enact new legislation"). If this limit on the power of veto is to mean anything in the context of reapportionment, then the judiciary must hew to a strict standard of neutrality, effectively establishing partisan fairness as a threshold question each plan must pass before it merits further consideration.

In establishing this rule for court adopted plans, this Court need not, and should not, reach the different but related question of whether significant partisan bias—partisan gerrymander—constitutes an actionable defect in a reapportionment

plan enacted into statute, which is to say passed by the legislature and signed by the governor. Due to the deference usually afforded enacted reapportionment plans, the contour of challenges based on partisan gerrymander as against plans enacted into law has been a source of active debate in the federal courts since *Davis v. Bandemer*, 478 U.S. 109, 106 S. Ct. 2797 (1986), where the United States Supreme Court held that an equal protection challenge to a political gerrymander in an enacted plan presents a justiciable case. Moving to the present, *LULAC v. Perry*, where a plurality held that plaintiffs had not established a claim of partisan gerrymander against a mid-decade Congressional reapportionment plan enacted by the Texas Legislature and signed by Governor Perry, is the latest round in that debate. 548 U.S. at 409 (plurality opinion) (affirming district court's rejection of partisan gerrymandering claims against the enacted mid-decade plan).

Although this Court need not and should not address partisan gerrymander in the context of plans enacted into law, the opinion authored by Justice Stevens and joined by Justice Breyer in *LULAC v. Perry* nevertheless contains reasoning helpful to deciding the present case. As cited previously, Justices Stevens and Breyer essentially endorse the partisan symmetry methodology, used by Dr. Katz, as a judicially manageable standard for determining actionable partisan bias in constitutional challenges to enacted plans. *See LULAC v. Perry*, 548 at 466 (Stevens & Breyer, JJ., concurring in part and dissenting in part) (calling the

partisan symmetry "undoubtedly a reliable standard for measuring a burden on a the complainants' representational rights") (citations and internal quotation marks omitted); *see also* Bernard Grofman & Gary King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering after LULAC v. Perry*, 6 Election L.J. 2 (pointing out that a majority of justices appear now to have endorsed the view that partisan symmetry can be used as part of broader test in resolving partisan gerrymandering claims challenging enacted plans on equal protection grounds). As a side note, Dr. Katz joined the authors of this latter article in filing an *amicus* brief in *LULAC v. Perry*; the brief is discussed in the article.

In conclusion, with regard to partisan bias, as a general principle, a court tasked with reapportionment after failure of the legislative process "should not select a plan that seeks partisan advantage." *Prosser*, 793 F. Supp. at 859. From a factual standpoint, there can be no doubt that Executive Alternative 3 seeks and achieves unfair partisan advantage. The Executive Defendants themselves relied upon Dr. Katz's opinion as to partisan fairness, when they thought it served their purposes. The District Court relied upon Dr. Katz in rejecting the James Plan because it "contains significant partisan bias." [FOF 87] Dr. Gaddie, an expert for the executive, not only endorses and uses partisan symmetry analysis himself but also admitted that change in control of the Legislature is at stake. In turn, Justices

Stevens and Breyer view partisan symmetry as "undoubtedly a reliable standard for measuring a burden . . . on representational rights." *See LULAC v. Perry*, 548 at 466 (Stevens & Breyer, JJ., concurring in part and dissenting in part)

One cannot help but feel sympathy with how the District Court was led into error by gamesmanship, but, in the end, Mr. Morgan's gerrymander cannot be allowed to decide the fate of the New Mexico House of Representatives for the next ten years. Democracy demands a level playing field.

III. PROPOSED REMEDY

If this Court reverses the District Court's adoption of Executive Alternative 3 as requested, this Court should grant relief in one of the following ways: 1) order redistricting of the New Mexico House of Representatives in accordance with the Maestas Alternative Plan; or 2) remand to the District Court to choose among the acceptable plans presented during the trial, as indicated in Attachment 1. As described briefly in the Introduction and Summary of Proceedings, the Maestas Petitioners have constructed a "Table of Fatal Flaws," which is Attachment 1. Acceptable plans are those highlighted in green or yellow on the Table. Primarily the District Court's finding and, to a much lesser extent, other parts of the trial record established six reasons to rule out a particular plan, which the Maestas Petitioners describe as "fatal flaws." Those reasons are discussed below and outlined in the horizontal axis on the Table. The vertical axis

on the Table lists each plan presented at trial and delineates compliance with the six dispositive criteria. The colors, red, green and yellow correspond to non-compliance, full-compliance and partial compliance, respectively.

A. If this Court Directs Adoption a Particular Plan Other Than Executive Alternative 3, The Maestas Alternative Plan Provides the Best Remedy Because It Requires the Least Modification to the District Court's Ruling.

The Maestas Plaintiffs respectfully request that this Court order the adoption of the Maestas Alternative Plan. The Maestas Alternative Plan is the superior plan among the six left standing because it contains the lowest deviations, well within the required *de minimis* standard articulated in *Chapman v. Meier*, 420 U.S. 1, 26 (1975). Given the exigencies of upcoming election deadlines, it is well within this Court's power and prerogative to prescribe relief that orders the District Court to adopt an acceptable plan. For the reasons articulated below, the Maestas Alternative Plan is the proper plan to be adopted by this Court, if it so chooses.

The Court would find that the Maestas Alternative Plan best complies with legal standards for court-ordered redistricting. The Maestas Alternative Plan properly places the highest priority on population equality, compliance with the Voting Rights Act as required by law and respects principles of Native American self-determination with complete adoption of the Native American partial plans and compliance with the expressed wishes of northern pueblos. The Maestas Plan also maintains a majority-Hispanic district in Clovis and preserves the core

protected population there. The Maestas Alternative Plan was fully litigated and examined, and all parties had the opportunity to cross-examine the Maestas Plaintiffs' witness, Representative Antonio "Moe" Maestas. These were the dispositive issues during litigation and should have been the dispositive criteria on which the District Court chose a plan. And, like the Maestas Alternative Plan, five other plans presented at trial meet the same criteria. A review of deviations in those plans, however, make the Maestas Plan far superior. The Maestas Alternative Plan contains a mean or average deviation of 1.1%, resulting in the lowest deviation of all the suitable substitutes for Executive Alternative 3. [FOF 108]

B. If this Court Chooses Not To Order Adoption of a Particular Plan, It Should Direct the District Court to Choose from Among Acceptable Plans Shown on the Table.

The Court recognized the correct application of law in a court-ordered reapportionment plan is *Chapman v. Meier*, 420 U.S. 1 (1975). [COL 6 and 17] The controlling precedent is articulated by Chapman as: "A court-ordered plan...must be held to higher standard 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 feature." Chapman at 26-27. [COL 6] The Court is required to articulate these significant state policies or unique features as findings because of the burden to "elucidate the reasons

necessitating any departure from approximate population equality and articulate clearly the relationship between the variance the state policy furthered." *Chapman* at 24.

Thus, the Maestas Plaintiffs, in recognizing the District Court's articulation of significant state policy propose a remedy that does the least amount of violence to the Court's findings of fact. The Court clearly articulates the following significant state policies in Finding of Fact No. 60:

- "[c]ompliance with the Voting Rights Act Section 2,
- respect for self-determination,
- preservation of tribal communities of interest,
- maintaining tribal communities whole within a district, and
- the need to remedy the historic and continuing dilution of Native American voting rights..." (*formatting added*)

The Maestas Plaintiffs' Attachment 1 outlines each plan's compliance with the District Court's findings of significant state policy, as well as compliance with well-established principles of law at issue in this writ (due process and partisan fairness). The exhibit delineates "fatal flaws," which this Court can use to limit the District Court's consideration of acceptable plans on remand. The dispositive criteria are discussed in sections below.

1. Complies with Navajo and Multitribal Preferences.

The first two dispositive criteria are conformance to the partial plans presented by the Navajo and Multi-Tribal Plaintiffs. In its findings and conclusions, the District Court clearly found that respect for Native American self-determination is a significant New Mexico policy. The District Court also found that that Section 2 of the Voting Rights Act applied to the Native American communities of New Mexico based on the *Gingles* preconditions and totality of circumstances test. [FOF 49 through 53 and COL 21 and 22] The Navajo Interveners and the Multi-tribal Plaintiffs submitted partial plans before trial began, which concerned Districts 1, 2, 3, 4, 5, 6, 9, 65, 69. Although the deviations were significant (but within a +/-5% range), the District Court found that the deviations 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. [COL 24] By the lights of the District Court's ruling, any reapportionment plan not inconsistent with either partial plans proffered by the Native American should be eliminated from

consideration on remand. This approach is also consistent with the District Court's findings on specific plans. [FOF 63, 67, 69, 82, 83 and 94]

The Maestas Plaintiffs were the only party to comply with both of these partial plans before trial began through the Maestas 2 Plan. During litigation, other parties submitted maps matching the districts proffered by the Native American Plaintiffs. For example, the Maestas Alternative Plan complies with the interests of both Native American litigants. The Egolf Plaintiffs submitted five additional plans during trial, all of which comply with the interests of both Native American litigants. The Executive Defendants submitted three additional plans during trial, only one of which complied with the interests of both Native American litigants, Executive Alternative 3. While Executive Alternative 2 adopted the Navajo proposed Northwest quadrant, the plan failed to satisfy the Multi-Tribal proposal despite an incorrect finding to the contrary. [FOF 68].

2. Complies with Northern Pueblos.

Compliance with the expressed desires of the tribes participating in trial also would be required under the District Court's findings and evidence presented. The District Court found that splitting certain tribal communities of interest was unacceptable for a reapportionment plan. [FOF 69 and n. 2]. The evidence further supports this. During the trial, a number of Governors or representatives from the northern pueblos testified to tribal preferences when redistricting. These

preferences are manifestations of self-determination, which facilitate political participation for the tribes. Many of the northern pueblo tribes—on the record—have expressed clear interest in staying wholly within a single district and remaining with the representation they currently have because of the time it takes to build relationships, educate legislators on issues specific to tribes, and the like. [Tr. 12/19/2011, 89:12-20 (Alivin Warren)] Governor Lovato of Ohkay Owingeh defined not only the tribal community of interest, but requested it be kept in House District 40. [Tr. 12/20/2011, 227:18-21; 229:21-25 (Gov. Lovato)] Further, the Governor expressed tribal opposition of a pairing between Rep. Salazar and Rep. Rodella or Rep. Salazar and Rep. Garcia because the population represented in the instance of would likely result in the unseating of Rep. Salazar. [Tr. 12/20/2011, 227:18 to 229:4 (Gov. Lovato)]

Alvin Warren, former Governor of Santa Clara testified that it was the preference of the whole tribe to stay in House District 41. [Tr. 12/19/2011, 87:6-18; 90:7-15 (Alivin Warren)] Alvin Warren also expressed Santa Clara's opposition to a pairing of Rep. Rodella (House District 41). [Tr. 12/19/2011, 93:1-22 (Alvin Warren)] Vice President Dorame, former Governor of Tesuque and current government affairs liaison, testified that the Tesuque pueblo desired to remain in House District 46 and to not have pueblo boundaries split between districts. [Tr. 12/19/2011, 118:12 to 120:10 (Vice President Dorame) The purpose

of these cites is to demonstrate that evidence was presented on the preferences of the northern pueblos and compliance is necessary in light of the findings and articulated significant state policy. The District Court found that "[t]ribal communities are in the best position to determine what is best for their own communities." [FOF 48] Based on the District Court's findings, therefore, lack of conformance to the stated preferences of tribes should disqualify a plan from consideration on remand.

3. Complies with VRA in Clovis District 63.

The Court found that splitting the minority community in Clovis disqualified the original Executive Plan. [FOF 63-65]

4. Significant Partisan Bias.

A major justification for reversal of the District Court's choice of Executive Alternative 3, significant partisan bias disqualifies a plan. *Supra* II(B).

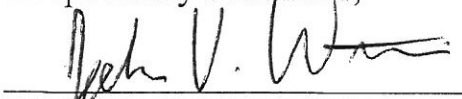
5. Procedural and Substantive Due Process.

A major justification for reversal of the District Court's choice of Executive Alternative 3, violation of procedural and substantive due process not only disqualifies Executive Alternative 3 but also Alternative 2, as they were both presented on the last day of trial without a supporting witness. *Supra* II(A).

IV. CONCLUSION

The Executive Defendants led the District Court into error with gamesmanship, but the District Court erred reversibly in its choice of Executive Alternative 3 nonetheless. First, because the Executive Defendants introduced their Alternative 3 on the last day of trial—failing even to have a witness testify on its behalf—the District Court's adoption of Executive Alternative 3 effectively deprived the Petitioners of their rights to procedural and substantive due process. Second, Executive Alternative 3 contains a statistically significant pro-Republican bias, rendering it constitutionally and legally ineligible for court adoption. The Maestas Petitioners respectfully request the reversal of the District Court's adoption of Executive Alternative 3 and either (1) direct adoption of Maestas Alternative 2, as the plan that does the least violence to the District Court's ruling, or (2) direct the District choose from among the various acceptable plans shown in Attachment 1.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 27, 2012, I caused a true and correct copy of the Maestas Plaintiffs' Opening Brief to be served by e-mail to all parties and counsel of record in the consolidated redistricting cases pending in the First Judicial District Court and to the Respondent, the Hon. James A. Hall, District Judge *Pro Tempore* of the First Judicial District Court, at the following addresses:

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Table of Fatal Flaws

	Complies w/ Navajo Inter.	Complies w/ Multi-Tribal Inter.	Complies w/ North. Pueblos	Complies w/ VRA in Clovis	Partisan Biased	Due Process Supp. Witness
H. Plans Filed Pre-Trial[1]						
(a) Leglislative Plan (HB 39)	Partial[2]	Yes	Yes	Yes		Yes
(b) The Executive Plan	No[3]	No[3]	No[3]	No[4]		Yes
(c) The James Plan	No[5]	No[5]	Unk.	No[6]	Biased[7]	Yes
(d) The Sena Plan	No[8]	No[8]	Unk.	Yes	Biased[9]	Yes
(e) The Egolf Plan	Partial[2]	Yes	Yes	Yes		Yes
(f) The Maestas 2 Plan	Yes	Yes	Yes	Yes		Yes
H. Plans Filed During Trial[1]						
(g) Executive Alt 1	No[10]	No[10,11]	No[10]	Partial		Yes
(h) Executive Alt 2	Yes	No[11]	No[12]	Partial		No[13]
(i) Executive Alt 3	Yes	Yes	Partial[12]	Partial	Biased[14]	No[13]
(j) Egolf 2	Yes	Yes	Yes	Yes		Yes
(k) Egolf Alt 1	Yes	Yes	Yes	Yes		Yes
(l) Egolf Alt 2	Yes	Yes	Yes	Yes		Yes
(m) Egolf Alt 3 (Withdrawn)	N/A	N/A	N/A	N/A		N/A
(n) Egolf Alt 4	Yes	Yes	Yes	Yes		Yes
(o) Maestas Alternative	Yes	Yes	Yes	Yes		Yes

NB: Plans shown in Red are ruled out from Court consideration due the presence of one or more fatal flaws. Plans shown in Green have no fatal flaws. The Legislative Plan (HB 39) and the Egolf Plan also have no fatal flaws but do not fully comply with interests of the Navajo Nation. Therefore, they appear in Yellow.

ATTACHMENT 1

Table of Fatal Flaws--Source Notes

1 The District Court listed all complete house plans presented at trial. [FOF 26 & 28]

2 The original Legislative Plan failed to comply fully with Navajo Nation interests. [Navajo Interv. Closing Brief at 9-10, with transcript cites] Likewise, the original Egolf Plan was based on the Legislature's. [FOF 97]

3 The District Court found the original Executive Plan failed to comply with Navajo Nation and Multi-Tribal interests and unnecessarily split San Ildefonso Pueblo. [FOF 63]

4 The District Court found that the original Executive Plan split the Hispanic community in Clovis, thus triggering vote dilution of a politically-cohesive minority. [FOF 64 & 65]

5 The James Plan failed to comply with Navajo Nation and Multi-Tribal interests. [FOF 82]

6 The James Plan split the Hispanic community in Clovis, triggering vote dilution of a politically-cohesive minority. [Map Packet, James Trial Ex. 1]

7 The District Court found that the James Plan "contains significant partisan bias," based on Dr. Jonathan Katz's partisan bias opinion. [FOF 87; Maestas Trial Ex. 12; Pet. Ex. 4, Katz Aff. ¶ 28 & Katz Aff. Ex. C]

8 The Sena Plan failed to comply with Navajo Nation and Multi-Tribal interests. [FOF 94]

9 The Sena Plan exhibits a statistically significant pro-Republican bias. [Maestas Trial Ex. 12; Maestas Pet. Ex. 4, Katz Aff. ¶ 28 & Katz Aff. Ex. C]

10 The District Court found that the Executive Alternative 1 failed to comply with Navajo Nation and Multi-Tribal interests and split Native American communities of interest. [FOF 67]

11 The Multi-Tribal Plaintiffs showed Executive Alternative 1 and Alternative 2 violated the Voting Rights Act by infringing tribal sovereignty and splitting communities. [Multi-Tribal Closing Brief at 5, with transcript cites]

12 Executive Alternatives 2 and 3 split the San Ildefonso and Tesuque Pueblos. [Map Packets, Executive Trial Ex. 32 & 33]

13 The Executive Defendants offered no witness to support Alternatives 2 and 3, thus depriving the Parties the right to cross-examine and other due process rights. [Tr. 12/22/2011, 227:10-23 (Paul Kennedy colloquy with Judge Hall)]

14 Executive Alternative 3 exhibits a statistically significant pro-Republican bias. [Katz Aff. ¶ 28 & Katz Aff. Ex. C]