IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CLAUDETTE CHAVEZ-HANKINS,
PAUL PACHECO, and MIGUEL VEGA,

Plaintiffs,

-vs- NO. 1:12-cv-00140

DIANNA J. DURAN, in her official capacity
As new Mexico Secretary of State and
SUSANA MARTINEZ, in her official
Capacity as Governor of New Mexico,

Defendants.

GOVERNOR MARTINEZ AND SECRETARY OF STATE DURAN'S OPENING BRIEF REGARDING THE CONSTITUTIONALITY OF THE REMAND INSTRUCTIONS FROM THE NEW MEXICO SUPREME COURT

Defendants Susana Martinez, in her official capacity as Governor of New Mexico (hereinafter referred to as "Governor"), by and through counsel of record, Paul J. Kennedy and Jessica M. Hernandez; and Dianna J. Duran, in her official capacity as New Mexico Secretary of State (hereinafter referred to as "Secretary of State"), by and through counsel of record, Doughty & West, P.A. (Robert M. Doughty, III), hereby submit this Opening Brief Regarding the Constitutionality of the Remand Instructions from the New Mexico Supreme Court. As stated below, the Governor and Secretary of State believe that the remand instructions unconstitutionally subvert the equal protection clause by requiring the State District Court to advance certain secondary redistricting policies, over the "one person, one vote" principle. In addition and as discussed below, the Governor and Secretary of State believe that the remand instructions order the State District Court to draw a certain district based solely on the criteria of race, absent justification under the Voting Rights Act.

THE NEW MEXICO SUPREME COURT'S REMAND INSTRUCTIONS

In its Order, dated February 10, 2012, the New Mexico Supreme Court remanded this matter back to the State District Court with instructions to make several changes to the redistricting map that the State District Court adopted in its January 17, 2012 Judgment and Final Order for the New Mexico House of Representatives. The remand instructions are as follows:

> Remand Instruction 1: "On remand, the district court should consider whether additional cities, such as Deming, Silver City, and Las Vegas, can be maintained whole through creating a plan with greater than one-percent deviations."
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> Remand Instruction 2: "On remand, the goal of any plan should be to devise a plan that is partisan-neutral and fair to both sides. If the district court chooses to begin with the plan it adopted previously, it should address the partisan performance changes and bias noted in this order, and if the bias can be corrected or ameliorated with enunciated non-discriminatory application of historical, legitimate, and rational state policies, including through the use of higher population deviations, then the district court should do so."
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> Remand Instruction 3: "Any district that results from a Democratic-Republican consolidation, if that is what the court elects to do, should result in a district that provides an equal opportunity to either party. In the alternative, some other compensatory action may be taken to mitigate any severe unjustified partisan performance swing. The performance of created districts as well as those left behind should be justified."
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> Remand Instruction 4: "It does not appear that the district court considered Hispanic citizen voting age populations in reaching its decision, and it should do so on remand. Whatever its eventual form, the relevant Clovis community must be represented by an effective, citizen, majority-minority district as that term is commonly understood in the Voting Rights Act litigation, and as it has been represented, at least in effect, for the past three decades."

Remand Ord. at 19-21.

Within the past few days, the New Mexico Supreme Court has issued its written opinion clarifying and expanding on these remand instructions. *See Maestas, et al. v. Hall*, Consolidated Nos. 33,386 and 33,387 (Feb. 21, 2012). As to the issue of population deviations addressed in the remand instructions, the Court stated that "we interpret the district court to have concluded

that it was bound to a plus-or-minus one-percent population deviation with the sole exception of addressing the requirements of the Voting Rights Act." *Id.* at ¶ 39. That conclusion "does not conform to our view of the proper legal standard to be applied in redistricting cases[.]" *Id.* Thus, the Court "remanded this matter to the district court to draw its own redistricting map to avoid, to the extent possible, partisan bias, and determine whether it could implement legitimate state policies by employing a more flexible approach to ideal population equality without departing from constitutional considerations." *Id.*

ARGUMENTS AND AUTHORITIES

I. THE REMAND INSTRUCTIONS DIRECT THE STATE DISTRICT COURT TO SUBVERT THE EQUAL PROTECTION CLAUSE IN FAVOR OF CERTAIN SECONDARY REDISTRICTING POLICIES.

After full briefing from the parties to the underlying suit, the State District Court properly concluded as a matter of law that "[a]lthough a court-ordered plan need not have exactly zero population, 'any deviation from approximately population equality must be supported by enunciation of historically significant state policy or unique features.'" FOF/COL at COL ¶ 17 (citing *Chapman v. Meier*, 420 U.S. 1, 26-27 (1975)). Using these standards, the District Court developed its redistricting plan utilizing the following legal standard:

> Under the law, population equality and compliance with the Voting Rights Act are given the highest priority in redistricting, followed by the traditional redistricting principles of contiguity, compactness, respect for political boundaries, maintenance of communities of interest and the protection of incumbents.

FOF/COL at COL ¶ 35. The District Court further held that it was "obligated to follow the legal priorities and not allow partisan considerations to control the outcome." *Id.*

To the contrary, the New Mexico Supreme Court, citing a case predating *Chapman*, found that "[s]tate legislative districts require only 'substantial' population equality." Remand Ord. at 6 (citing *Gaffney v. Cummings*, 412 U.S. 735, 748 (1973)). Further, the Court ordered that "[w]hen other policies, such as avoiding bifurcation of municipalities and other recognized communities of interest, can be obtained with population deviations within the more flexible deviations applied historically, it is the duty of the court to accommodate those legitimate state interests, where feasible, or explain why it could not do so." Remand Ord. at 13. Remand Instructions 1 and 2 both explicitly urge that the State District Court accommodate specified policies by "creating a plan with greater than one-percent deviations" or "through the use of higher population deviations." *Id.* at 19-20. In its Order, the New Mexico Supreme Court elected to endorse a "safe harbor" deviation range of plus or minus five percent. *Id.* at 7. Later, in its written opinion regarding the remand, the Court endorsed a state policy that prohibited districts with population deviations greater than plus or minus five percent and stated that that standard "should be considered by a state court when called upon to draw a redistricting map." *Maestas, et al. v. Hall*, Consolidated Nos. 33,386 and 33,387 (Feb. 21, 2012), at ¶ 34.[1]

By instructing the State District Court to create a plan that places secondary redistricting policies above equal population, or run the risk of having to "explain why it could not do so," the

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[1] The redistricting policies endorsed by the New Mexico Supreme Court were taken from the New Mexico Legislative Council "Guidelines for the Development of State and Congressional Redistricting Plans." *See Maestas, et al. v. Hall*, Consolidated Nos. 33,386 and 33,387 (Feb. 21, 2012) at ¶¶ 6, 34. The "Guidelines for the Development of State and Congressional Redistricting Plans" state in relevant part as follows: "State districts shall be substantially equal in population; no plan for state office will be considered that include any district with a total population that deviates more than plus or minus five percent from the ideal." By endorsing the Guidelines, the New Mexico Supreme Court has elevated the Guidelines beyond expressing policies that govern the legislatively-enacted redistricting plans, to pronouncements carrying the force of law that governs court-ordered redistricting plans.

New Mexico Supreme Court turned the Equal Protection Clause on its head. The explicit instructions from the Court purport to require the State District Court to justify, in every instance, why it elected to adhere strictly to the Equal Protection Clause, as required by federal law, and not adopt a plan based on policies advocated by the parties. As explained below, the New Mexico Supreme Court misapplied the law in Remand Instructions 1 and 2, by directing the State District Court to accommodate certain policies advocated by the Supreme Court or, if it chose not to accommodate the policies advocated by the Court, explain why it decided to strictly apply the Equal Protection Clause's "one person, one vote" principle. Moreover, Remand Instructions 1 and 2 fail to acknowledge that the State District Court heard arguments from all parties advocating for various, secondary interests and policies, and drew its map in consideration of the policies that were demonstrated at trial as legitimate state reapportionment policies.

Significantly, at the core of its remand instructions, the New Mexico Supreme Court erroneously concluded that the State District Court applied low population deviation "at the expense of other traditional state redistricting policies[.]" Remand Ord. at 19. The State District Court, however, made it clear that the plan it adopted complied with the legal standards for redistricting, including other traditional state redistricting policies, such as: (1) maintaining tribal communities of interest; (2) drawing districts to be contiguous and compact; (3) preserving political and geographic boundaries; (4) preserving the core of previous districts; (5) minimizing incumbent pairings; and (6) maintaining communities of interest to a reasonable degree. FOF/COL at COL ¶ 34. Thus, the New Mexico Supreme Court relied on an inaccurate criticism of the State District Court plan to develop its remand instructions.

A. The State District Court Properly Held That Its Plan Was Required to Meet Stringent *De Minimis* Population Requirements.

The Supreme Court in *Reynolds v. Sims*, 377 U.S. 533 (1964), held that equal protection principles "require 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**." *Id.* at 577 (emphasis added). To achieve this goal, the Supreme Court has required that court-ordered redistricting plans "must ordinarily achieve the goal of population equality with little more than *de minimis* variation." *Chapman v. Meier*, 420 U.S. 1, 26-27 (1975); *see Connor v. Finch*, 431 U.S. 407, 414-17 (1977). The United States Supreme Court, in *Chapman*, makes it clear that:

> A court-ordered plan, however, must be held to higher standards than a State [Legislatures]'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. . . . **[U]nless 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.**

Chapman, 420 U.S. at 26-27 (emphasis added); *see also Sanchez v. King*, Civil No. 82-0067-M (D.N.M., filed Aug. 8, 1984) (Findings of Fact and Conclusions of Law at 130-31) ("The Court is mindful that not even a variance of 5.95 percent [less than ± 3%] is necessarily acceptable in a court-ordered plan."). As another state court further explains:

> 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 omitted) (emphasis in original); *accord Burling v. Chandler*, 804 A.2d 471, 478 (N.H. 2002).

The higher standard applied to court-ordered redistricting plans arises from the Supreme Court's recognition that "reapportionment is primarily the duty and responsibility of the State through its legislature or other body," rather than through a court. *Chapman*, 420 U.S. at 27; *see Reynolds*, 377 U.S. at 586; *Connor*, 431 U.S. at 415 (describing the task of judicial redistricting as an "unwelcome obligation of performing in the legislature's stead"). The distinction between the different standards that apply to legislatively-enacted and court-adopted redistricting plans arises not from federalism concerns, but from institutional differences between courts and legislatures. *See Connor*, 431 U.S. at 415 ("the court's task is inevitably an exposed and sensitive one that must be accomplished circumspectly"); *Abrams v. Johnson*, 521 U.S. 74, 101 (1997) ("The task of redistricting is best left to state legislatures, elected by the people and as capable as the courts, if not more so, in balancing the myriad factors and traditions in legitimate districting policies."). This distinction arises from "the give-and-take of the legislative process, involving as it does representatives elected by the people to make precisely these sorts of political and policy decisions[.]" *Below*, 963 A.2d at 791. In recognition of the differences between the legislative and judicial processes in redistricting, "the [Supreme] Court has tolerated somewhat greater flexibility in the fashioning of legislative remedies for violation of the one-person, one-vote rule than when a . . . court prepares its own remedial decree." *McDaniel v. Sanchez*, 452 U.S. 130, 138-39 (1981).

The separation of powers doctrine provides similar support for the application of the strict standard of *Chapman*. *See*, *e.g.*, *King v. State Bd. of Elections*, 979 F. Supp. 582, 603 (N.D. Ill. 1996), *vacated*, 519 U.S. 978 ("If a lesser standard is applied to court-ordered redistricting plans under these circumstances, the checks and balances inherent in our constitutional framework will be gravely injured in this discrete area."); *Bd. of Educ. v. Harrell*, 118 N.M. 470, 484 (1994) (discussing generally the separation of powers principles of the New Mexico Constitution). Specifically, the New Mexico Constitution leaves to the Legislature, and the Governor through her veto power, subjective policy decisions regarding redistricting decisions, such as the protection of certain communities of interest over others. In this state, "[c]ourts are not designed to perform the task of reapportionment and judicial relief becomes appropriate only when a State Legislature fails to reapportion according to federal constitutional standards, after having had an adequate opportunity to do so." *See Sanchez v. King*, 550 F. Supp. 13, 15 (D.N.M. 1982) (citing *Reynolds*, 377 U.S. at 586). Because the Constitution limits a court's role to construing the law, the State District Court properly applied neutral and objective criteria, and construed those criteria strictly so that the its role in redrawing New Mexico's political maps was limited. *See*, *e.g.*, *Balderas v. Texas*, Civil Action No. 6:01 CV 1581 (E.D. Texas Nov. 14, 2001) (holding that court's role in redistricting is limited to curing statutory or constitutional defects in a state reapportionment plan).

Thus, the District Court properly concluded that "population equality and compliance with the Voting Rights Act are given the highest priority in redistricting, followed by traditional redistricting principles" and not the other way around. The New Mexico Supreme Court, therefore, improperly instructed the District Court to subordinate the population equality required

by the Equal Protection Clause in favor of certain state policies advocated in the Remand Order. To do so, the New Mexico Supreme Court eradicated the distinction between legislatively-enacted and court-ordered redistricting plans and the discrete legal requirements that have been developed in light of that distinction.

B. The State District Court Properly Rejected the Ten Percent Deviation Range as a "Safe Harbor."

The New Mexico Supreme Court's remand instructions advocate for the use of so-called "safe harbor" deviation ranges, in which a redistricting plan utilizes a range of plus or minus five percent deviations and deviations within that range need not be justified by a legitimate state purpose. Remand Ord. at 7-8. As properly held by the State District Court, such "safe harbor" deviations ranges dilute the "one person, one vote" standard by providing a party license to freely utilize otherwise prohibited redistricting criteria in developing legislative redistricting plans. *See* FOF/COL at COL ¶ 13. While a certain amount of deviation is sometimes acceptable in a legislatively drawn plan, *see Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964); *Reynolds*, 377 U.S. at 577, courts should consider a deviation to be "tainted by arbitrariness or discrimination" if it is not supported by a legitimate interest. *Larios v. Cox*, 300 F. Supp. 2d 1320, 1338 (N.D. Ga. 2004), *aff'd*, *Cox v. Larios*, 542 U.S. 947. As discussed below, the "safe harbor" population deviation advocated by the New Mexico Supreme Court cannot survive constitutional scrutiny.

In *Larios v. Cox*, 300 F. Supp. 2d at 1326, the Georgia legislature created redistricting plans with the specific goal of maintaining a total population deviation of less than 10 percent, or a range of +4.99 percent to -4.99 percent, in the House of Representatives and Senate. The district court found that "[i]n an unambiguous attempt to hold onto as much of that political power as they could, and aided by what they perceived to be a 10% safe harbor, the plans'

drafters intentionally drew the state legislative plans in such a way as to minimize the loss of districts in the southern part of the state." *Id.* at 1328. The court found it "clear that rather than using the reapportionment process to equalize districts throughout the state, legislators and plan drafters sought to shift only as much population to the state's underpopulated districts as they thought necessary to stay within a total population deviation of 10%." *Id.* at 1329. Applying this 10 percent deviation metric "was an intentional effort to allow incumbent Democrats to maintain or increase their delegation, primarily by systematically underpopulating the districts held by incumbent Democrats, by overpopulating those of Republicans, and by deliberately pairing numerous Republican incumbents against each other." *Id.* Thus, the Georgia district court concluded that "[s]uch use of a 10% population window as a safe harbor may well violate the fundamental one person, one vote command of *Reynolds*, requiring that states 'make an honest and good faith effort to construct districts . . . as nearly of equal population as practicable' and deviate from this principle only where 'divergences . . . are based on legitimate considerations incident to the effectuation of a rational state policy.'" *Id.* at 1341 (citations omitted; omissions and ellipses in original). Ultimately, the district court found that the Georgia plans violated the Equal Protection Clause. *Id.* at 1338.

In its summary affirmance of the district court's decision, the United States Supreme Court discussed the appellant's invitation "to weaken the one-person, one-vote standard by creating a safe harbor for population deviations of less than 10 percent, within which districting decisions could be made for any reason whatsoever." *Cox v. Larios*, 542 U.S. at 949. In rejecting that invitation, the Court held that "the equal-population principle remains the only clear limitation on improper districting practices, and we must be careful not to dilute its

strength." *Id.* at 949-50 (citing *Vieth v. Jubelirer*, 541 U.S. 267 (2004)). Thus, the "safe harbor" population deviation range that is promoted by the New Mexico Supreme Court's remand instructions is no longer a valid principle to apply where the task of redistricting is performed by a court. By endorsing such a "safe harbor," the New Mexico Supreme Court has again violated the long-established distinction between the constitutional standards that govern legislatively-enacted and court-ordered redistricting plans.

C. The State District Court Properly Required Parties to Articulate Precisely Why Certain Policies Supported Deviation from Population Equality.

Important to the State District Court's legal analysis, deviations from strict population equality require a precise articulation of why those deviations must be employed. This decision by the district court is consistent with established federal law. The United States Supreme Court has made it clear that "[w]here important and significant state considerations rationally mandate departure from [population equality] standards, it is the reapportioning court's responsibility to articulate precisely why a plan . . . with minimal population variance cannot be adopted." *Chapman*, 420 U.S. at 26. It has never been a requirement that the reapportioning court explain why it could not adopt a plan with greater than minimal population variance. Despite this federal law, the New Mexico Supreme Court purported to require the State District Court to articulate precisely why higher or more "flexible" population deviations could not have been employed to accommodate certain policies.

The "articulate precisely" requirement recognizes that most proffered policies make insufficient excuses for failing to achieve population equality. *See, e.g.*, *Reynolds*, 377 U.S. at 567 ("The fact that an individual lives here or there is not a legitimate reason for overweighting

or diluting the efficacy of his vote"); *Karcher v. Daggett*, 462 U.S. 725, 734, n.5 (1983) (stating that preserving political subdivisions, "while perfectly permissible as a secondary goal, is not a sufficient excuse for failing to achieve population equality without [a] specific showing"); *Bush v. Vera*, 517 U.S. 952, 967-70 (1996) (stating that incumbency protection must give way to the higher priority of minimizing population deviations and protecting minority rights). The "articulate precisely" requirement also reflects the Supreme Court's admonition that when equal population "is submerged as the controlling consideration in the apportionment of seats in the particular legislative body, then the right of all of the State's citizens to cast an effective and adequately weighted vote would be unconstitutionally impaired." *Reynolds*, 377 U.S. at 581.

Accordingly, the District Court properly required a precise articulation justifying departure from strict population equality and accepted or rejected plans based on these criterion. *See, e.g.*, FOF/COL at COL ¶¶ 23 ("The Multi-Tribal/Navajo Nation Plan presents the best remedy under the Voting Rights Act); 24 ("Population deviations inherent in the Multi-Tribal/Navajo Plan are justified by . . . 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."); 26 ("the court finds no persuasive evidence that Sec. 2 of the Voting Rights Act requires any particular Hispanic majority district be drawn."); 27 ("after giving the Legislative Plan thoughtful consideration, the Court concludes that the Plan fails to satisfy the requirements necessary for a

court-ordered plan [and] are not justified by any significant state policy or unique features.").[2] The New Mexico Supreme Court, contrary to law and logic, would require the District Court on remand to reverse the burden of proof required by the Equal Protection Clause and articulate precisely why it could not adopt a plan with a higher population deviation. In other words, the State District Court would be required, in each instance, to defend the "one person, one vote" mandate of the Equal Protection Clause.

II. THE REMAND INSTRUCTIONS REQUIRE THE STATE DISTRICT COURT TO ENGAGE IN RACIAL GERRYMANDERING.

While the State District Court was required to ensure compliance with the Voting Rights Act, it was under a similar requirement to avoid subordinating traditional, race-neutral redistricting principles to racial considerations. *See Shaw v. Hunt*, 517 U.S. 899, 907-08 (1996) ("Racial classifications are antithetical to the Fourteenth Amendment, whose central purpose was to eliminate racial discrimination emanating from official sources in the States.") (internal quotation marks and citations omitted). Yet, the New Mexico Supreme Court's Remand Instruction 4 – titled "Hispanic 'Majority' District in House District 67" – states that "[w]hatever its eventual form, the relevant Clovis community must be represented by an effective, citizen, majority-minority district as that term is commonly understood in Voting Rights Act litigation, and as it has been represented, at least in effect, for the past three decades." Remand Ord. at 20-21. In its opinion, the New Mexico Supreme Court clarified Remand Instruction 4, stating

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[2] The remand instructions fail to acknowledge that the State District Court considered eight days of testimony regarding the different policies advocated by the parties and that the adopted map was the product of that process. In essence, the remand order requires the State District Court judge to "rethink the evidence and change his mind so as to provide for an even further deviation notwithstanding his view that proof requiring any such deviation was lacking." *See Maestas, et al. v. Hall*, Consolidated Nos. 33,386 and 33,387 (Feb. 21, 2012) at ¶ 56 (Sutin, J. dissenting).

"[a]ny redistricting plan ultimately adopted by the district court should maintain an effective majority-minority district in and around the Clovis area unless specific findings are made based on the record before the district court that Section 2 Voting Rights Act considerations are no longer warranted." *Maestas, et al. v. Hall*, Consolidated Nos. 33,386 and 33,387 (Feb. 21, 2012) at ¶ 20.

Notably, the State District Court specifically concluded after eight days of trial that "the Court finds no persuasive evidence that Sec. 2 of the Voting Rights Act requires any particular Hispanic majority district be drawn." FOF/COL at COL ¶ 26. The New Mexico Supreme Court has not reversed the State District Court on this point. Nevertheless, in light of the District Court's finding that there were no Voting Rights Act issues that required the intentional creation of a majority-minority district, the New Mexico Supreme Court has specifically instructed the State District Court to create such a district in Clovis. By doing so, the Supreme Court has ordered the State District Court to go beyond being simply aware of racial considerations, and instead, create a district based entirely on racial grounds. *See Miller v. Johnson*, 515 U.S. 900, 916 (1995). The adherence to this instruction by the State District Court would constitute racial gerrymandering in violation of the United States Constitution.

A. Based on the Totality of Circumstances, the Voting Rights Act Does Not Require a Hispanic-Majority District in Clovis.

Section 2(a) of the Voting Rights Act "prohibits the imposition of any electoral practice or procedure that 'results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color." *Bush v. Vera*, 517 U.S. 952, 976 (1996) (quoting 42 U.S.C. § 1973(a)) (omission and ellipsis in original). To establish a Section 2 violation, a party must establish three threshold conditions: (1) that the minority group "is sufficiently large and geographically

compact to constitute a majority in a single-member district"; (2) that the minority group is "politically cohesive"; and (3) "that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Growe v. Emison*, 507 U.S. 25, 40 (1993) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986)) (these are the "*Gingles* factors") ; *Sanchez v. Colorado*, 97 F.3d 1303, 1310-13 (10th Cir. 1996) (discussing the three *Gingles* factors). These are "necessary preconditions" that a plaintiff must establish. "Only when a party has established the *Gingles* requirements does a court proceed to analyze whether a violation has occurred based on the totality of the circumstances." *Bartlett v. Strickland*, 556 U.S. 1, 21-22 (2009) (citations omitted); *accord Growe*, 507 U.S. at 40-41.

As part of the totality of circumstances analysis, the court may consider numerous factors described in the Senate Report accompanying the 1982 amendments to the Voting Rights Act, including:

> the history of voting-related discrimination in the state . . .; the extent to which voting in the elections of the state . . . is racially polarized; the extent to which the State . . . has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting; the exclusion of members of the minority group from candidate slating processes; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction.

Id. at 45. The State District Court, therefore, was required to determine at trial whether, on the totality of the circumstances, a minority group has been denied an equal opportunity to participate in the political process and elect representatives of their choice. 42 U.S.C. § 1973(b).

After eight days of trial, the State District Court here found that: "[a]ll of the plans before the Court contain a significant number of Hispanic majority districts; however, the Court finds no persuasive evidence that Sec. 2 of the Voting Rights Act requires any particular Hispanic majority district be drawn." FOF/COL at COL ¶ 26. Because the Supreme Court failed to make any particular finding or otherwise reverse the State District Court as to this Conclusion of Law, there remains no Voting Rights Act issue that requires the creation of a Hispanic-Majority district in Clovis. Further, as clarified in the Court's subsequent opinion, the State District Court has been instructed to make a specific finding that Voting Rights Act considerations "are no longer warranted." *Maestas, et al. v. Hall*, Consolidated Nos. 33,386 and 33,387 (Feb. 21, 2012) at ¶ 20. Since the State District Court has already made such a finding, Remand Instruction 4 is unnecessary.

As with the other remand instructions, Remand Instruction 4 similarly reverses the burdens of proof required by law. Specifically, the New Mexico Supreme Court has directed the State District Court and, in effect, the parties, to prove that there is no Section 2 violation and no need for a remedy. Because the language of the Voting Rights Act and pronouncements of law regarding Section 2 of the Voting Rights Act place the burden of proof on the party seeking to remedy a Section 2 violation, Remand Instruction 4 is improper.

B. No Compelling Interest Exists to Create a Hispanic-Majority District in Clovis.

The Voting Rights Act grants courts the authority to "uncover official efforts to abridge minorities' right to vote," and that purpose "is neither assured nor well served . . . by carving electorates into racial blocs." *Miller v. Johnson*, 515 U.S. 900, 927 (1995). In the absence of a finding that the totality of the circumstances demonstrate that a Voting Rights Act requires the

creation of a particular majority-minority district, the creation of such a district constitutes racial gerrymandering and, like all other laws that classify citizens on the basis of race, is constitutionally suspect. *Id.* at 927-28 ("It takes a shortsighted and unauthorized view of the Voting Rights Act to invoke that statute, which has played a decisive role in redressing some of our worst forms of discrimination, to demand the very racial stereotyping the Fourteenth Amendment forbids.").

The Supreme Court has defined racial gerrymandering as the "deliberate and arbitrary distortion of district boundaries . . . for [racial] purposes." *Shaw v. Reno* ("*Shaw I*"), 509 U.S. 630, 640 (1993) (internal quotation marks omitted). Racial gerrymandering occurs when race becomes the dominant and controlling rationale for where district lines are drawn and other redistricting principles are subordinated. *Shaw v. Hunt* ("*Shaw II*"), 517 U.S. 899, 905 (1996). While parties proposing redistricting plans will "almost always be aware of racial demographics; . . . it does not follow that race predominates in the redistricting process." *Miller*, 515 U.S. at 916. Where a party can show that the challenged redistricting plan subordinated traditional, race-neutral redistricting principles to racial considerations, the plan constitutes an impermissible racial gerrymander. *Id.*

Initially, the party alleging a racial gerrymander "bears the burden of proving the race-based motive and may do so either through 'circumstantial evidence of a district's shape and demographics' or through 'more direct evidence going to legislative purpose.'" *Shaw II*, 517 U.S. at 905 (citations omitted); *see also Bush v. Vera*, 517 U.S. 952, 962 (1996). A party need not always demonstrate that a district is so bizarrely shaped as to be unexplainable on other grounds, *Miller*, 515 U.S. at 913, but appearances can certainly matter in racial gerrymandering

and often "[a] map portrays the districts' deviance far better than words[.]" *Shaw II*, 517 U.S. at 902. Relevant to the New Mexico Supreme Court's Remand Instruction 4, however, racial gerrymandering can also be established upon the admission by the proponent of the plan that creating majority-minority districts was the "principal reason" for certain district lines. *Shaw II*, 517 U.S. at 906. Without question, the New Mexico Supreme Court has directed the State District Court to draw a specific district so that it constitutes a Hispanic-Majority district, and the racial motive is clear.

Once this burden is met and a court finds that traditional redistricting criteria were subordinated to race, strict scrutiny applies to determine whether the proponents of the plan have a compelling interest in creating a majority-minority district using race as a predominant factor and whether the plan is narrowly tailored to achieve that compelling interest. *Id.* at 908. Compelling interests may include a redistricting plan's attempt to remedy past discrimination or ensuring compliance with Section 2 of the Voting Rights Act. *Id.* at 909, 911-12 (assuming *arguendo* that compliance with Section 2 could be a compelling interest).

Where the proffered compelling interest is to remedy past discrimination, a party must demonstrate that the discrimination is identified "with some specificity." *Id.* at 909. "A generalized assertion of past discrimination in a particular industry or region is not adequate because it provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy." *Id.* (internal quotation marks and citation omitted). As a result, alleviating the effects of societal discrimination is not a compelling interest. *Id.* After having identified the discrimination with specificity, the party must then present a "strong basis in evidence to conclude that remedial action was necessary." *Id.*

Similarly, where the proffered compelling interest is compliance with Section 2 of the Voting Rights Act, the Supreme Court has held that the party proponent must first meet the preconditions stated in *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986), and *Growe v. Emison*, 507 U.S. 25 (1993). *See Shaw II*, 517 U.S. at 914-17. The party must then demonstrate that, under the totality of the circumstances, members of the proffered protected class have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. *Id.* at 914. Having accomplished this, the party must then demonstrate that the proposed district is narrowly tailored to remedy the alleged Section 2 violation. *Id.* at 917.

Here, the New Mexico Supreme Court made no specific finding or conclusion that a compelling interest justified the creation of a Hispanic-Majority district as ordered by Remand Instruction 4. Instead and as clarified in the Court's subsequent opinion, the State District Court has been instructed to make a specific finding that Voting Rights Act considerations "are no longer warranted." *See Maestas, et al. v. Hall*, Consolidated Nos. 33,386 and 33,387 (Feb. 21, 2012) at ¶ 20. Since the State District Court has already made such a finding, Remand Instruction 4 is unnecessary and strict compliance with the instruction would require the State District Court to subordinate traditional redistricting criteria to racial considerations, in violation of the Voting Rights Act and the Fourteenth Amendment of the United States Constitution.

III. THE REMAND INSTRUCTIONS REQUIRE THE STATE DISTRICT COURT TO ENGAGE IN PARTISAN GERRYMANDERING TO INCREASE DEMOCRATIC PERFORMANCE IN SWING DISTRICTS.

The New Mexico Supreme Court's Remand Instructions 2 and 3 direct the State District Court to "devise a plan that is partisan-neutral and fair to both sides" and that "mitigate[s] any

severe and unjustified partisan performance swing." *See* Remand Ord. at 20. The Order also counsel that a court "should not select a plan that seeks partisan advantage" and should avoid a plan "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." *Id.* at 11. In the same order, the New Mexico Supreme Court specifically found that the State District Court's adopted plan increased Republican performance in swing districts and increased the number of districts with a higher than 50% Republican performance, referring to it as "partisan bias". *See id.* at 14-15. The Supreme Court then went on in Remand Instruction 2 to instruct this Court to "address the partisan performance changes and bias noted" in the remand order. *See id.* at 20. While the Supreme Court's specific remand instructions are not unconstitutional on their face, when reconciled with the instructions to "address the partisan performance changes and bias noted" in the remand order, it is clear that the New Mexico Supreme Court's remand instructions require the State District Court to draw a plan with the specific partisan goal to decrease Republican performance in swing districts and, correspondingly, increase Democratic performance in those districts.

Notably, this remand instruction – to artificially reduce the number of Republican performing districts in the State District Court's adopted plan despite clear relative population loss in Democratic areas and explosive growth in Republican areas as demonstrated in trial – would be the kind of unfair partisan consideration the New Mexico Supreme Court itself prohibited when it instructed the State District Court that a proposed plan should not "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." *See* Remand Ord. at 11. While the Supreme Court's recent opinion

states that "[t]he accusation that we ordered the district court to reduce Republican seats in the House originates in the imagination of the accuser", *Maestas, et al. v. Hall*, Consolidated Nos. 33,386 and 33,387 (Feb. 21, 2012) at ¶ 43, it certainly hasn't "shown how a new plan addressing a purported Republican swing-seat advantage will not result in an attackable maintenance of some Democratic advantage", at ¶ 58 (Sutin, J. dissenting).[3] Furthermore, Remand Instructions 2 and 3 would require the State District Court to either ignore or disagree with its findings and conclusions regarding the partisan effects of the plans presented to it at trial. *See* FOF/COL at COL ¶¶ 29 (regarding the partisan geographic bias of the Legislative and Egolf Plans), 30 (regarding the partisan incumbent pairings of the Maestas Plan), 34 (regarding the politically neutral incumbent pairings of the Executive Plan), 35 (stating that the Executive Plan has "some limited impact on partisan performance measures", that "[a]ll plans submitted to the Court have some partisan impact" and that "[t]he Court is obligated to follow the legal priorities and not allow partisan considerations to control the outcome.").

The redistricting process, in particular a court-ordered redistricting lawsuit, should never promote partisan interests or be motivated by the intent to create tangible benefits for one party over another. *See Upham v. Seamon*, 456 U.S. 37, 41-42 (1982); *see also Peterson v. Borst*, 786 N.E.2d 668, 673 (Ind. 2003) (holding that if the legislative and executive "branches cannot reach a political resolution and the dispute spills over into an Indiana court, the resolution must be judicial, not political."); *Johnson v. Miller*, 922 F. Supp. 1556, 1559 (S.D. Ga. 1995) ("In

[3] Interestingly, the New Mexico Supreme Court claims to have "required the district court to reject all of the previously submitted plans because of the political advantage sought by the parties." *Maestas, et al. v. Hall*, Consolidated Nos. 33,386 and 33,387 (Feb. 21, 2012) at ¶ 43. Yet, at the same time, the remand instructions specifically instruct that "[w]hether or not to use any of the maps that were introduced into evidence as a starting point, . . . is within the discretion of the district court." Remand Ord. at 19.

fashioning a remedy in redistricting cases, courts are generally limited to correcting only those unconstitutional aspects of a state's plan."). After all, "[r]edistricting is the most nakedly partisan activity in American politics[,]" and courts should strive to keep politics out of a court-drawn plan as much as is possible. *See* Keith Gaddie & Charles S. Bullock III, From Ashcroft to Larios: Recent Redistricting Lessons from Georgia, 34 Fordham L.J. 997, 997 (2007). Thus:

> When re-drawing electoral maps, courts take partisan fairness into consideration. When forced to correct defective maps, courts have taken pains to avoid advantaging one political party, lest the court be guilty of gerrymandering.

Gaddie & Bullock, *supra* at 1004, citing *Abrams v. Johnson*, 521 U.S. 74 (1997), *Upham v. Seamon*, 456 U.S. at 41-42.

Accordingly, the New Mexico Supreme Court's Remand Instruction 4 unconstitutionally injects a partisan purpose into the redistricting process and encouraged the State District Court to accomplish that purpose at the expense of population equality. The State District Court, pursuant to this instruction, would be required to artificially reduce the number of Republican performing districts in the State District Court's adopted plan, despite clear relative population loss in Democratic areas and explosive growth in Republican areas as demonstrated in trial. Remand Instruction 4, therefore, constitutes an order to commit partisan gerrymandering.

CONCLUSION

For the foregoing reasons, the Governor and Secretary of State believe that the New Mexico Supreme Court's remand instructions were unconstitutional and have the effect of ordering the State District Court to adopt an unlawful redistricting plan for the State House of Representatives.

Respectfully submitted,

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I HEREBY CERTIFY that on February 23, 2012, I filed and served a true and correct copy of the foregoing on all counsel of record via filing with the CM/ECF filing system.

_____
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