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

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

Plaintiffs,

v. 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.

PLAINTIFFS' OPENING BRIEF REGARDING THE UNCONSTITUTIONALITY OF THE NEW MEXICO SUPREME COURT'S REMAND INSTRUCTIONS TO JUDGE HALL

Plaintiffs Claudette Chavez-Hankins, Paul Pacheco, and Miguel Vega, by and through counsel of record, hereby submit this Opening Brief Regarding the Constitutionality of the New Mexico Supreme Court's Remand Instructions to Judge Hall pursuant to the instructions of the Three-Judge Panel at the February 17, 2012 Status Conference in the above-referenced matter.

I. Summary of Proceedings.

The New Mexico House of Representatives ("State House") has not yet been redistricted in connection with the 2010 census to conform to the one

person, one vote doctrine although it is not disputed that the current districts are unconstitutionally malapportioned. Despite a special session of the State Legislature convened for this purpose in September, 2011, no law has been enacted to accomplish redistricting. Litigation concerning this is pending in the state court system, but as described in detail below the state litigation is highly unlikely to produce a lawful, constitutional redistricting plan.

The initial redistricting litigation was filed in September, 2011. Various lawsuits were filed, which ultimately were consolidated by the New Mexico Supreme Court ("NMSC") in the New Mexico District Court in Santa Fe County. The NMSC *sua sponte* selected retired New Mexico District Court Judge James Hall to preside over all of the redistricting lawsuits.

Judge Hall held an eight day evidentiary bench trial in December, 2011 pertaining to reapportioning the State House. On January 3, 2012, Judge Hall entered Findings of Fact and Conclusions of Law in the State House case. In this decision, Judge Hall adopted a redistricting plan (the "Hall Original Map"). The Hall Original Map was constitutional, fully complied with federal and state law, and was the result of Judge Hall's careful weighing of the evidence and the law.

After Judge Hall entered his order adopting the Hall Original Map, the Speaker of the State House of Representatives and the President Pro-Tem of

the State Senate, both members of the Democratic Party and apparently upset over perceived minor partisan political features of the Hall Original Map, filed a request for an emergency writ with the NMSC. Another Democrat group also filed a writ petition.

The NMSC, after an extremely and unusually expedited emergency writ proceeding in which it reweighed evidence de novo and accepted additional evidence from one of the Democrat groups, on February 10, 2012 entered an Order (the "NMSC Order") reversing and remanding Judge Hall's decision pertaining to reapportioning the State House of Representatives.

As set forth below, the NMSC Order contained very detailed instructions (entered only after Judge Hall's decision had been made) for revising Judge Hall's State House redistricting plan, instructions that violate the United States Constitution. The NMSC Order also suggested that Judge Hall appoint Brian Sanderoff of Research and Polling, Inc., the Democratic legislator's expert witness at trial, as a Rule 706 expert to assist in redrawing a new redistricting map. On February 13, 2012, Judge Hall in fact did appoint Mr. Sanderoff as his Rule 706 expert.

On February 20, 2012, Judge Hall released two proposed alternative maps to the parties for comment ("Hall Map 2" and "Hall Map 3"). These maps were drawn pursuant to the NMSC's instructions. It is likely that Judge

Hall will select and enter one of these two alternatives as his final map. On February 21, 2012, the NMSC entered a formal opinion ("NMSC Opinion") in support of its February 10, 2012 NMSC Order. The NMSC Opinion, which was entered after Judge Hall released Hall Maps 2 and 3, reiterates the errors contained in the NMSC Order.

As shown below, the new maps drawn by Judge Hall following the unconstitutional instructions are, themselves, unconstitutional. The State of New Mexico has failed to adopt a lawful reapportionment plan for the State House. As more fully addressed in Plaintiffs' Memorandum Brief Regarding this Court's Authority to Address the Merits of the Plaintiffs Claims filed herein on February 22, 2012, this Court should immediately proceed with the merits of this case in order to prevent disruption of the 2012 primary election.

II. The NMSC Order and NMSC Opinion Mandate Race-Based Redistricting in Violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Despite the absence of any violation of the Voting Rights Act, 42 U.S.C. §1972 *et seq.*, the NMSC has expressly ordered that a certain district in the Clovis, New Mexico area be drawn based on racial criteria. This directive requires a map be drawn that will constitute an unconstitutional racial gerrymander. *See*, *Shaw v. Reno*, 509 U.S. 630 (1993).

The racial gerrymander ordered by the NMSC is neither required nor lawful under the Voting Rights Act. In order to find a violation of Section 2 the Voting Rights Act, a court must find that certain preconditions are met: (1) a particular racial group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the racial group is politically cohesive; and (3) the majority votes sufficiently as a bloc to enable it to usually defeat the minority's preferred candidate. *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). After the preconditions have been established, moreover, the court then must then carefully examine the "totality of the circumstances" to determine whether a violation has occurred. *See*, *Bartlett v. Strickland*, 556 U.S. 1, 7 (2009).

In his Findings of Fact and Conclusions of Law ("FFCL"), Judge Hall expressly held that a Voting Rights Act violation exists in New Mexico regarding Native Americans. FFCL, Conclusion of Law No. 22. Judge Hall also held that a plan for certain State House districts in Northwestern New Mexico that had been submitted by litigants representing Native American interests at trial "presents the best remedy under the Voting Rights Act". FFCL, Conclusion of Law No. 23. That plan was adopted into the Hal Original Map. Judge Hall made numerous and thorough other Findings and Conclusions in support of this holding, which demonstrated his informed

understanding of Voting Rights Act jurisprudence. *See, e.g.* Finding Nos. 49, 50, 51, 52, 53, 55, 56, 57 and 60, Conclusion Nos. 17, 18, 19, 20, 21, 22, 23, 24, 25, 32, 33, 34 and 35.

In particular, Judge Hall expressly found that with respect to Native Americans, the three *Gingles* preconditions existed. FFCL, Conclusion of Law No. 21. Then Judge Hall went on to carefully examine the "totality of the circumstances" in multiple Findings and concluded that a Voting Rights Act violation exists. FFCL, Conclusion of Law No. 22. Judge Hall then carefully reviewed the plans submitted by the various parties and entered numerous findings and conclusions analyzing those plans vis-à-vis Native Americans and the Voting Rights Act.

Regarding Hispanics in New Mexico, upon review of the evidence presented at trial Judge Hall found that the three *Gingles* preconditions existed in the Clovis area. FFCL, Findings Nos. 64 and 65. However, Judge Hall went on to examine the totality of the circumstances and concluded that: "All 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." Judge Hall in his decision, looking at the totality of the

circumstances, thus held that no voting rights violation exists as to Hispanics in New Mexico.

The NMSC, in the Order, after *de novo* review, noted Judge Hall's findings that the three *Gingles* preconditions existed in the Clovis area, and stated:

> Previously, a federal three-judge panel, having found a detailed history of racial and ethnic discrimination affecting that same population, redrew House District 63 to include compact and politically cohesive Clovis minorities and make the district a performing, effective majority-minority district, as that term is commonly understood in Voting Rights Act jurisprudence. Sanchez v. King, No. 82-0067-M (D.N.M. 1984). *Though redrawn in shape*, that district has remained an effective majority-minority district since that time, including the most recent court-ordered redistricting plan in the Jepsen case. In the present trial, there was no evidence to establish that the district had materially changed so as to no longer require an effective majority-minority district. Therefore, those same considerations that led to a redrawing of House District 63 continue to apply to that community, and must be reflected in any court-ordered plan.

Order at pp. 16-17 (emphasis added). The NMSC Order required Judge Hall to change his redistricting map as follows:

> 4. Hispanic "Majority" District in House District 67. 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 Voting Rights Act litigation, and as it has been represented, *at least in effect*, for the past three decades.

NMSC Order at p. 20-21 (emphasis added). The NMSC Order does not indicate in any way whatsoever that the NMSC examined the "totality of the circumstances" in its "de novo" review. The NMSC did not find that a Voting Rights Act violation exists. The NMSC did not make any other findings of fact overruling Judge Hall. The NMSC did, however, put the burden on Judge Hall of proving the 1984 district had "materially changed so as to no longer require an effective majority-minority district." NMSC Order at p. 17. *See* NMSC Opinion, at p. 39 (Justice Sutin's dissent). Nevertheless, not only did the NMSC expressly order race-based districting in the Clovis area, Judge Hall has now drawn and circulated maps in compliance with that order (Hall Maps 2 and 3).

At trial, pursuant to stipulation of the parties, certain demographic data compiled by Research and Polling, Inc., including some ethnic and racial data, was submitted in evidence along with every plan submitted. For each plan, this information was compiled for each proposed State House district. District 67 in the Hall Original Map is 56.0 percent Hispanic, and has a total minority population of 64.4 percent, looking at total population. Regarding voting age population, District 67 in the Hall Original Map has a 50.9 percent Hispanic voting age population and a minority voting age population of 59.3 percent. *See*, Exhibit 1, Research and Polling data.

However, as Justice Sutin notes in his dissent, testimony at trial by the Democratic legislators' expert witness, Brian Sanderoff, who is now the District Court's Rule 706 expert, established "that there is no data indicating the exact percentage of Hispanic citizen voting age population in the existing districts or in the districts contained in any of the plans." NMSC Opinion at p. 40.

Hall Maps 2 and 3 follow the NMSC's unlawful instructions vis-à-vis District 63, which is identical in both maps and is analogous to District 67 in the Hall Original Map. In both Hall Map 2 and Hall Map 3, District 63 has a total Hispanic population of 61.3 percent and a total minority population of 68.8 percent. District 63 also has a 57 percent Hispanic voting age population and a 64.5 percent minority voting age population in each map. Again, there is no data indicating Hispanic citizen voting age population, and no such data is necessary under the facts of this case. Exhibit 1.

Hall Maps 2 and 3 also subordinate the primary goal of one person, one vote to the NMSC's racial concerns. While the Clovis district in question in the Hall Original Map had a population deviation of only 0.2 percent, District 63 in Hall Maps 2 and 3 has a deviation of -1.4 percent.

State mandated racial classifications, of course, are subject to familiar Fourteenth Amendment jurisprudence. "All racial classifications, imposed

by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Adarand Constructors v. Pena*, 515 U.S. 200, 227 (1995).

The NMSC Order does not articulate, or even attempt to articulate, any compelling state interest for its directive that the Clovis area be districted by race. The only basis given at all is a reference to a redistricting decision pertaining to the 1980 census. *Sanchez v. King*, No. 82-0067-M (D.N.M. 1984). The NMSC simply channels the ghost of a long-departed legislative district drawn almost thirty years ago as justification for its decision. The NMSC even acknowledges the district has been redrawn and, in fact, that district has been redrawn twice to reflect the 1990 census and the 2000 census and will be redrawn yet again to reflect the 2010 census.[1] The NMSC does not set forth any compelling state interest permitting violation of the Equal Protection Clause of the Fourteenth Amendment in drawing this district and the trial court expressly found that no such justification exists.

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[1] Justice Sutin, in his dissent to the NMSC Opinion, points out that Judge Hall "was in no way required to continue in force the nearly twenty-eight-year-old, elephant truncated, unnaturally divided district created in *Sanchez*."

The February 21, 2011 NMSC Opinion at pp. 13-14 cites *Voinovich v. Quilter*, 507 U.S. 146, 156 (1993), apparently to support a proposition that race-based districting by a state is lawful even in the absence of a violation of the Voting Rights Act or other federal law. *Voinovich* does not support this contention and, in fact, the United States Supreme Court in *Voinovich* specifically limited its ruling as follows:

> Appellees' complaint does not allege that the State's conscious use of race in redistricting violates the Equal Protection Clause; the District Court below did not address the issue; and neither party raises it here. Accordingly, we express no view on how such a claim might be evaluated. We hold only that, under §2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973, plaintiffs can prevail on a dilution claim only if they show that, under the totality of the circumstances, the State's reapportionment scheme has the effect of diminishing or abridging the voting strength of the protected class.

In this case, the Plaintiffs' complaint expressly alleges that the NMSC's conscious use of race in redistricting violates the Equal Protection Clause. *See, e.g.*, Complaint at paragraphs 1, 2, 40, 56, 61, 62 and 63. Moreover, *Voinovich* predates significant United States Supreme Court decisions on this very issue, cases repeatedly cited in the record of this matter, which the NMSC ignores.

For example, *Voinovich* was decided only a few months before the seminal case of *Shaw v. Reno*, 509 U.S. 630 (1993), which involves unconstitutional racial gerrymandering of the kind present in the case at bar.

In *Shaw*, the United States Supreme Court held that a plaintiff states a claim under the Equal Protection Clause by alleging that a state redistricting plan, on its face, has no rational explanation save as an effort to separate voters on the basis of race.

Typically, as in *Shaw*, redistricting cases involving racial gerrymandering hinge on proving that intentional race-based districting occurred, and thus often discuss such matters as looking at whether districts are oddly shaped, or other indicia of race-based gerrymandering. In the case at bar, this sort of exercise is not necessary – the NMSC Order is explicitly and expressly motivated by racial considerations and is intended to separate voters on the basis of race. *See, e.g.* NMSC Order at p. 20: "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 Voting Rights Act litigation, and as it has been represented, at least in effect, for the past three decades."

As shown above, the District Court, on remand, redrew district boundary lines in obedience to this instruction, deliberately changing the racial composition of districts in the Clovis area. "Laws that explicitly

distinguish between individuals on racial grounds fall within the core of the [Equal Protection Clause's] prohibition." *Shaw* at 642.

The United States Supreme Court also stated in *Shaw*:

> Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin. Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters – a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire. It is for these reasons that race-based districting by our state legislatures demands close judicial scrutiny.

Shaw, 509 U.S. at 657. As mentioned, the *Adarand* case, among many others, stands for the proposition that racial classifications by *any* state actor, which would include a state court, must be analyzed under strict scrutiny.

The NMSC also suggests that *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006) somehow supports its conclusion that not only must race be considered in drawing districts in the Clovis area, but that citizen voting-age population must be considered as well. As Justice Sutin points out in his dissent, the *League* case sets forth no rule or principle governing the case at bar. *League* concerned a situation where a Voting Rights Act violation had been established, including the "totality of the

circumstances" analysis. *League*, 548 U.S. at 403. Judge Hall expressly found no such violation in New Mexico with respect to Hispanics.

As no compelling state interest has been shown, or even articulated, the NMSC Order and the resulting maps based on that Order (Hall Map 2 and Hall Map 3), are unconstitutional. The State of New Mexico, therefore, is on the brink of adopting an unconstitutional redistricting scheme and the intervention of this Court is necessary.

III. The NMSC Order Fails To Comply With The One Person, One Vote Requirement of the Equal Protection Clause.

The overriding purpose of reapportionment is the one person, one vote principle. *Reynolds v. Sims*, 377 U.S. 533 (1964)(The Fourteenth Amendment requires the doctrine of "one person, one vote" to apply to apportionment of state legislatures). The *Reynolds* Court stated:

> [C]areful judicial scrutiny must of course be given, in evaluating state apportionment schemes, to the character as well as the degree of deviations from a strict population basis. But if, even as a result of a clearly rational state policy of according some legislative representation to political subdivisions, population is submerged as the controlling consideration in the apportionment of seats in the particular legislative body, then the right of all the State's citizens to cast an effective and adequately weighted vote would be unconstitutionally impaired.

Reynolds, 377 U.S. at 581. The NMSC Order required that equalizing population between districts be submerged as the controlling consideration in

the apportionment of seats in the State House and the resulting higher-deviation maps are unconstitutional.

Reynolds also holds that "...the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable". *Reynolds*, 377 U.S. at 577. The NMSC's remand instructions expressly violate this ruling.

Chapman v. Meier, 420 U.S. 1 (1975) builds and elaborates on *Reynolds* regarding the rigid standards for population equality that must be met when a court draws a plan:

> ... unless there are persuasive justifications, a court-ordered reapportionment plan of a state legislature ... must ordinarily achieve the goal of population equality with little more than *de minimus* variation. Where important and significant state considerations rationally mandate departure from these standards, it is the reapportioning court's responsibility to articulate precisely why a plan ... with minimal population variance cannot be adopted.

Chapman, 420 U.S. at 27. *See, also*, *Cox v. Larios*, 542 U.S. 947 (2004)(ten percent deviations are not a "safe harbor"). In the case below, *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004), a three judge panel of the U.S. District Court for the Northern District of Georgia held that Georgia's state legislative reapportionment plans, which deviated from population equality

by a total of 9.98 percent, violated the one person, one vote principle mandated by the Constitution. This decision was summarily affirmed by the United States Supreme Court.

In the case at bar, the NMSC remanded to the district court with a number of instructions that involve use of higher deviations. Those instructions include 1) "correcting" the alleged partisan "bias" of the Hall Original Map using higher population deviations[2] and 2) maintaining certain municipalities "whole". NMSC Order at p. 19.

Regarding adjusting the alleged partisan bias, the NMSC did not articulate any important and significant state considerations that would support abandonment of the *de minimus* deviation standard. In fact, the NMSC ordered the District Court to go out and find "historical, legitimate, and rational state policies" to use in justifying both altering the partisan performance of the map and using higher deviations to do so. NMSC Order

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[2] *See*, NMSC Order at p. 31 (dissent notes that instruction "essentially requir[es] Judge Hall to reduce Republican Seats)." No baseline or standard for partisan "neutrality" is consistently articulated in the NMSC Order, although the current malapportioned map, drawn in 2001, is to be the basis for the District Court's determination of "neutrality." NMSC Order at p. 20, *see* Justice Sutin's dissent at p. 45 of the NMSC Opinion. Obviously, that map does not accurately reflect the contemporary political landscape, if just because of shifts and increases in population. Plaintiffs note that, contrary to the NMSC Order at p. 14, Mr. Sanderoff's testimony does not support the NMSC's contention that he testified as to the existence of "significant partisan performance changes." Trial Transcript, 12/22/11, pp. 55-66. *See, also*, Justice Sutin's dissent at pp. 42-43 of the NMSC Opinion.

at p. 20. This is not the "honest and good faith effort" to minimize population deviations required by *Reynolds v. Sims*, 377 U.S. at 577. No "historically significant state policy" of any kind is specifically identified. *Chapman*, 420 U.S. at 26.

Instead, the goal that the NMSC promotes is so-called "partisan neutrality" although it expressly directs the District Court to go out and find some other state policies to justify this. It is clear that New Mexico has never had any state policy, much less a historic, significant state policy, that redistricting should be "politically neutral," whatever the meaning of that term is. It is unconstitutional to subordinate population equality and one person, one vote to what is at best a brand new state policy that is neither historic nor, under the facts at bar, significant.

Despite this, the NMSC directed that Judge Hall subordinate population equality, and find any other available justifications, to achieve the goal of altering the partisan performance of the map. Judge Hall did this, the overall average deviation of Hall Map 2 and Hall Map 3 is 0.1 percent higher (representing some 2,059 people statewide). Not counting NW New Mexico, the total population deviation (i.e. the spread between the most underpopulated district and the most overpopulated district) increased by approximately one percent.

The remand instructions in the NMSC Order also required that the District Court consider whether certain additional municipalities "can be maintained whole through creating a plan *with greater than one-percent deviations*." NMSC Order at p. 19. (emphasis added). The NMSC ordered that, "[I]f 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." NMSC Order at p. 20. (emphasis added).

The NMSC's direction to "maintain whole" municipalities at the expense of population neutrality subordinates one person, one vote in favor of what is at best a weak state policy. There is no provision in New Mexico's Constitution or in its statutes that prohibits splitting of municipal boundaries. Although a set of guidelines circulated to legislators during the special session of the Legislature pertaining to redistricting, those guidelines only referred to not splitting municipalities as a "goal." Evidence at trial showed that numerous municipalities were split by the court adopted plan in 2002, as well as by all of the redistricting plans before Judge Hall. Hall

Maps 2 and 3, in fact, still split Silver City, a municipality singled out by the NMSC Order as one that should be maintained whole if possible.

We also note that Hall Map 2 and Hall Map 3 increased population deviation in the relevant Clovis district by approximately seven times (from 0.2 to -1.4) in implementing the racial gerrymander intended by the NMSC.

IV. Conclusion.

The NMSC Order has resulted in creation of unlawful redistricting plans that violate the principle of one man, one vote and constitute an unconstitutional racial gerrymander. The Plaintiffs respectfully request that this Court find that the NMSC's remand instructions, and the redistricting plans resulting from those instructions, are unconstitutional. Plaintiffs also respectfully request that this Court exercise jurisdiction and proceed to decide the merits of the claims presented in the Complaint.

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