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

CLAUDETTE CHAVEZ-HANKINS,
PAUL PACHECO and MIGUEL VEGA,

Plaintiffs,

vs. No. 12-CV-140 HH-BB-WJ

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,

and

BRIAN EGOLF, MAURILIO CASTRO, MEL HOLGUIN, HAKIM BELLAMY AND ROXANE SPRUCE BLY,

Intervenors.

EGOLF INTERVENORS' RESPONSE TO EXECUTIVE DEFENDANTS' AND PLAINTIFFS' OPENING BRIEFS REGARDING THE CONSTITUTIONALITY OF THE NEW MEXICO SUPREME COURT'S REMAND INSTRUCTIONS

I. INTRODUCTION.

It is plain as day. The Executive Defendants and the Plaintiffs in this federal litigation (hereinafter, "Plaintiffs/Execs"), who represent Republican Party interests, are bent on protecting a state court judge's initial House redistricting plan that the New Mexico Supreme Court properly rejected. Their motivation is also plain. As the New Mexico Supreme Court found, the House plan that Judge Hall adopted because it had the lowest population deviation is also significantly biased in favor of Republicans. The plaintiffs and Executive defendants can hardly be faulted for taking every measure - including opening another front in federal court - to protect their state court coup, which the Executive accomplished by first selling Judge Hall on the idea that near-

zero population deviations were mandatory and must trump all other redistricting criteria and then, at the last minute, submitting a lowest-deviation plan with the lowest deviations that also heavily favored the Republican Party. No party disputes that the plan originally adopted by Judge Hall, in order to maintain near-zero population deviations, split communities and communities of interest (including racial and ethnic minority communities) and sundered an effective Hispanic majority district that a previous three-judge federal panel had created to remedy the effects of past discrimination. It should not have surprised the Plaintiffs/Execs, nor should it surprise this Court that the New Mexico Supreme Court rejected the plan and asked the district court to create a new redistricting plan that was politically neutral, restored the historic effective Hispanic majority district in Clovis and further addressed split communities and communities of interest, even if it meant greater than near-zero population deviations, so long as they were within plus or minus five percent.

In reversing the district court, the New Mexico Supreme Court provided the following instructions to the district court on remand: 1) Keep communities and communities of interest together if possible; 2) Do not split communities and communities of interest simply to keep population deviations near zero. Instead, work within the permissible range of plus or minus five percent, which the New Mexico legislature has unanimously endorsed and which the United States Supreme Court has explicitly and repeatedly held to be not only permissible, but important to assure that communities and communities of interest *can* be kept together; 3) maintain, rather than break up, a previously effective minority voting district that was created by a three-judge court to remedy the effects of past discrimination, and 4) eliminate partisan bias.

The suggestion that these unremarkable remand instructions will necessarily create an unconstitutional plan is a fantasy. Yet Plaintiffs/Execs, in their enthusiasm for the biased plan

that the state district court initially adopted, now propose to this Court that these remand instructions are unconstitutional and that this Court should intervene to protect the biased redistricting plan that Plaintiffs/Execs sold to the state district court.[1] The New Mexico Supreme Court's instructions to Judge Hall, however, fully comport with United States Supreme Court decisional law and New Mexico's own, neutral redistricting principles, which a bipartisan panel of the New Mexico legislature unanimously adopted.

In short, the plaintiffs and Executive defendants have manufactured a constitutional controversy where none exists and, in doing so, seek to enlist the federal court to interfere in state redistricting, which the Supreme Court has held is peculiarly the province of the state courts, not the federal courts.

II. ARGUMENT

A. The Standard of Review Applied by the New Mexico Supreme Court to the State District Court Decision Raises No Federal Question.

Plaintiffs begin their brief by complaining that the New Mexico Supreme Court performed a *de novo* review of the district court's redistricting plan and re-weighed the evidence. Pl. Br., p. 3. This complaint has no place in federal court. The New Mexico Supreme Court, consistent with both state and federal law, reviewed *de novo* the question of whether the district court had applied the correct legal standard. N.M.S.Ct. Op. of Feb. 21, 2012, p. 9, citing *Strausberg v. Laurel Healthcare Providers, LLC.*, 2012 NMCA-006, Para. 6, ____N.M. ____, ____P.3d ____.

But even if the New Mexico court's standard of review were different than federal

[1] The presence or absence of any legitimate constitutional issue should only be addressed if this Court is satisfied that the Plaintiffs have standing to bring their claim and that their claim presents a ripe controversy. *See* Egolf Intervenors' Brief in Support of Motion to Dismiss or Defer, filed on February 22, 2012.

courts' standard of review in similar circumstances, it would not form a basis for review by a federal court. *See, e.g., Swapshire v. Baer*, 865 F.2d 948, 950 (8th Cir.1989) (disagreeing that "because the state court's standard of review of administrative action is limited under Missouri law, the state court's judgment is not entitled to preclusive effect" and finding instead that "[t]here is no requirement that judicial review must proceed de novo in order for the state-court judgment to be entitled to preclusive effect in federal court under § 1738 [providing for full faith and credit]").

B. The Plaintiffs/Execs's View of Permissible Population Deviations in Court Plans for State Legislatures is Not Supported by any Supreme Court or Lower Court Decision, Nor Did the New Mexico Supreme Court, in its Remand Instructions, Violate any Holding of the United States Supreme Court.

Both the Executives and the Plaintiffs argue that the New Mexico Supreme Court erred in redirecting the district court's redistricting efforts from *lowest deviations at any cost* to *lowest deviations consistent with accepted redistricting criteria, so long as the deviations are less than plus or minus 5%.* The New Mexico Supreme Court was correct, under controlling United States Supreme Court decisions and neutral, New Mexico redistricting standards, to require the district court to revisit its House redistricting plan to restore divided communities and communities of interest (including ethnic communities of interest) and to make the plan politically neutral.

To support the district court's decision to split communities and communities of interest in favor of near-zero population deviations, the Plaintiffs/Execs take some general language from U.S. Supreme Court and lower court decisions regarding the need for low population deviations and attempt to convert those observations into an inflexible rule that would effectively *require* that considerations of partisan bias and the unity of communities and communities of interest be subordinated to strict population equality among districts. *See* Pl. Brf., pp. 15-17

(arguing at p. 17, for example, that "[i]t is unconstitutional to subordinate population equality and one-person, one-vote" to "partisan neutrality" because partisan neutrality is "new," and neither "historic" nor "significant.").

For their part, the Executive Defendants point out, correctly, that the Supreme Court, in *Chapman v. Meier,* 420 U.S. 1, 26-27 (1975), and the New Hampshire Supreme Court, in *Below v. Gardner,* 963 A.2d 785, 791 (N.H. 2002) (quoting *Chapman*) both held that court redistricting plans are held to "higher standards" of population equality than legislatively-adopted plans and, "unless there are persuasive justifications, a court-ordered reapportionment plan of a state legislature ...must ordinarily achieve the goal of population equality with little more than *de minimis* variation." Exec. Br., p. 6.

The Executive Defendants then argue that Judge Hall correctly concluded that "population equality and compliance with the Voting Rights Act are given the highest priority in redistricting, followed by traditional redistricting principles." Exec. Br., p. 8.

Next, the Executive Defendants state what all parties and the New Mexico Supreme Court have conceded: that the "plus or minus 5% deviation" is not a "safe harbor" for courts engaged in redistricting. Exec. Br., p. 9. The Executive Defendants, without a basis for their assertion, claim that the New Mexico Supreme Court treated it as a safe harbor. Exec. Br., p. 11.

Finally, the Executive Defendants argue that any court mandated deviation from strict population equality among districts must be based on clearly-articulated state redistricting policies and that the New Mexico Supreme Court somehow got it backwards, by requiring that adherence to zero population deviations be justified. Exec. Br., p. 11-13.

None of the Plaintiffs' and Executive Defendants' arguments has a basis in law, fact, or in the New Mexico Supreme Court's opinion.

1. Plaintiffs and the Executive Defendants fail to address the controlling legal principles that the United States Supreme Court has laid down regarding population deviations.

The arguments in the Plaintiffs/Exec briefs can be merged and summarized as follows: The state district court adopted a plan that correctly subordinated all neutral redistricting criteria, with the exception of complying with the Voting Rights Act, including the maintenance of communities and communities of interest and avoidance of political bias, in favor of strict population equality among districts. The New Mexico Supreme Court improperly reversed the district court and incorrectly adopted plus or minus five percent population deviations as the outer limit for court redistricting and improperly required the district court to redraw its plan in such a way that communities of interest and communities could be kept together where possible and to adopt a plan that did not have significant political bias. Stated differently, the Plaintiffs/Execs argue that all neutral redistricting criteria must take a back seat to strict population equality and that if the near-zero-deviation plan that the district court adopted also happened to have a heavy political bias in favor of the Republican Party, it's just tough luck for the people of New Mexico.

This is not the law, as we show below.

a. **The difference between Congressional redistricting and state legislative redistricting.**

The United States Supreme Court requires that *Congressional* redistricting be precise and that any deviation from strict population equality be justified by a legitimate state interest. *Kirkpatrick v. Preisler,* 394 U.S. 526, 531 (1969) (In Congressional redistricting, a state "must justify each variance [from population equality], no matter how small"). Courts have interpreted the Supreme Court's rule regarding Congressional redistricting to be stringent. *See, e.g., See*

Hastert v. State Bd. of Elections, 777 F.Supp. 634 (N.D.Ill.1991).

In contrast, the requirement of strict population equality and the need to justify the slightest deviation from strict equality is inapplicable to state legislative redistricting, which is not subject "to the same strict standards applicable to reapportionment of congressional seats." *White v. Regester,* 412 U.S. 755, 763 (1973). Rather, states must adopt redistricting plans that are "as nearly of equal population as is practicable." *Reynolds v. Simms,* 377 U.S. 533, 577 (1964). Thus all that is required with respect to state and local redistricting efforts is that the resulting plan produces " 'substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State.' " *Gaffney v. Cummings,* 412 U.S. 735, 744 (1973) (quoting *Reynolds*, 377 U.S. at 579).

b. Application of the population deviation standards in state legislative redistricting.

The United States Supreme Court has refined the foregoing generalities by holding that a non-Congressional redistricting plan with less than a ten percent total deviation simply does not raise equal protection concerns. *See Gaffney,* 412 U.S. at 740-41 (holding that simply because an alternative plan had a lower deviation was no constitutional basis to require that it be accepted in preference to an existing plan with a higher deviation that cut fewer town lines, where both plans' total deviations were under ten percent).

In *Brown v. Thompson,* 462 U.S. 835, 842-3 (1983), the Court explained how it would apply its "10%" threshold:

> Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations. A plan with larger disparities in population, however, creates a *prima facie* case of discrmination and therefor must be justified by the State. *See Swann v. Adams,* 385 U.S. 440, 444 (1967) ("*De minimis* deviations are unavoidable, but variations of 30% among senate districts and 40% among house districts can hardly

> be deemed *de minimis* and none of our cases suggests that differences of this magnitude will be accepted without a satisfactory explanation grounded on acceptable state policy.

Id. (Emphasis in original.)

In *Gaffney,* the Supreme Court had characterized a 7% maximum population deviation in a Connecticut legislative redistricting plan as "insignificant:"

> [Substantial population equality among legislative districts] is a vital and worthy goal, but surely its attainment does not in any commonsense way depend upon eliminating the insignificant population variations involved in this case. Fair and effective representation may be destroyed by gross population variations among districts, but it is apparent that such representation does not depend solely on mathematical equality among district populations. There are other relevant factors to be taken into account and other important interests that States may legitimately be mindful of. See Mahan v. Howell, supra; Abate v. Mundt, 403 U.S. 182, 91 S.Ct. 1904, 29 L.Ed.2d 399 (1971) [allowing 11% deviation to preserve town-based representation]; Dusch v. Davis, 387 U.S. 112, 87 S.Ct. 1554, 18 L.Ed.2d 656 (1967) [allowing significant deviations to preserve borough-based representation, where no invidious political discrimination shown]; Sailors v. Board of Education, 387 U.S. 105, 87 S.Ct. 1549, 18 L.Ed.2d 650 (1967) [finding that school board consisting of representatives of boards of local districts was not subject to equal protection requirements]; Burns v. Richardson, supra [reapportionment plans for state offices need not be based on census population figures that include aliens, transcients, etc.]. *An unrealistic overemphasis on raw population figures, a mere nose count in the districts, may submerge these other considerations and itself furnish a ready tool for ignoring factors that in day-to-day operation are important to an acceptable representation and apportionment arrangement.*

Gaffney, 412 U.S. at 748-749 (1973) (emphasis added). The "ultimate inquiry" is whether the state's plan "'may reasonably be said to advance [a] rational state policy and, if so, 'whether the population disparities among the districts that have resulted from the pursuit of this plan exceed constitutional limits." *Brown,* 462 U.S. at 843.

To be sure, the Supreme Court has not made its "10%" rule a safe harbor as such. Rather, as the quote from *Brown,* above, suggests, deviations in excess of 10% are *prima facie* violative of equal protection but may be explained and justified, while deviations of less than 10% are

"minor" but subject to attack if the deviations are invidiously discriminatory. *See, e.g., Larios v. Cox,* 300 F.Supp.2d 1320, 1341 (2004), *sum. aff.,* 542 U.S. 947 (holding legislative plan unconstitutional even though deviations less than 10% where deviations used to create political bias and geographical discrimination).

Applying the foregoing principles, the United States Supreme Court has indicated that, in addressing redistricting plans adopted by state legislatures, as great as a 16.4% total deviation can be acceptable if the deviation is reasonably justified. *Mahan v. Howell,* 410 U.S. 315, 324-5 (1973). By the same token, the Court agreed with the lower court in *Larios* that a plan with less than 10% deviations was nevertheless unconstitutional where Democrats who controlled the legislature adopted a plan that was grossly biased against Republicans by favoring particular geographic areas.

c. Population deviations in court-adopted legislative redistricting.

With respect to court-ordered plans, the Supreme Court, in *Chapman v. Meier,* 420 U.S. 1, 26 (1975), held that federal court-ordered redistricting plans that deviate from *"approximate population equality* must be supported by enunciation of historically significant state policy or unique features." *Id.* (emphasis added). In *Chapman,* the Court chastised the three-judge district court for failing to explain why it had adopted a plan with a population deviation that was significantly above 10% when another plan, with a population deviation of 5.95% was available to the lower court. The Supreme Court commented that it did not necessarily endorse a 5.95% deviation in a court plan, one way or the other. *See id.* Nevertheless, the *Chapman* court made clear that it was not suggesting that court-ordered state legislative redistricting was subject to the strict population equality required of Congressional redistricting. *See id.* at 27 ("This is not to say, however, that court-ordered reapportionment of a state legislature must attain the

mathematical preciseness required for congressional redistricting").

What may be drawn from *Chapman* and the foregoing Supreme Court decisions is that, where a federal court engages in state legislative redistricting, it must achieve "approximate" population equality (or stated differently, "*de minimis*" deviations) and that if it does deviate from approximate equality, it must articulate why a plan "with minimal population variance cannot be adopted." *Id.* at 26-27. But court ordered plans, contrary to the Plaintiffs/Execs view, and contrary to Judge Hall's view, need not attain "mathematical preciseness." *Id.*

As to what factors courts have held may justify a deviation from approximate population equality in state redistricting, one federal district court reviewed the Supreme Court's decisions and summarized them as follows:

> Historically, federal courts have accepted some deviation from perfect population equality to comply with "traditional" redistricting criteria. These criteria include retaining previous occupants in new legislative districts, known as "core retention," see Karcher [v. Daggett], 462 U.S. 725, 740 (1983) [Congressional redistricting]; avoiding split municipalities, see id.; drawing districts that are as contiguous and compact as possible, see id.; respecting the requirements of the Voting Rights Act, 42 U.S.C. § 1973; maintaining traditional communities of interest, see AFL–CIO, 543 F.Supp. at 636; and avoiding the creation of partisan advantage, see Prosser, 793 F.Supp. at 867 (noting that "[j]udges should not select a plan that seeks partisan advantage") [and] [a]voiding unnecessary pairing of incumbents, a criterion discussed by the Supreme Court in Karcher, 462 U.S. at 740...

Baumgart v. Wendelberger, 2002 WL 34127471, 3 (E.D.Wis.) (E.D.Wis.,2002). As the New Mexico Supreme Court noted on page 17 of its February 21, 2012 opinion, "[d]eviations in court-drawn maps have varied with some in the range of five to ten percent;" *see also Burling v. Chandler,* 804A.2d 471 (N.H. 2002) (per curiam)(court drawn map with 9.26 percent deviations in House plan); *Below v. Gardner,* 963 A.2d 785 (N.H. 2002) (court-drawn map with 4.96 percent deviations in Senate plan).

The foregoing principles relating to court-drawn maps have been somewhat modified, in

ways as yet unclear, by the Supreme Court's opinion in *Growe v. Emison,* 507 U.S. 25 (1993), in which it has intimated that state *court* redistricting plans are themselves entitled to deference from federal courts in somewhat the same fashion that legislatively-adopted plans are. The Supreme Court has suggested, in *Growe,* that state courts may have a freer hand in drafting legislative redistricting plans than do federal courts. *See id.* at 34.

For purposes of this proceeding, however, *Growe* does not alter the foregoing analysis, although *Growe's* central holding that federal courts stay out of state courts' timely effort to redistrict remains of importance in this proceeding. What *is* important is that, before *Growe,* the Supreme Court has repeatedly recognized that courts may deviate from approximate population equality in order to accomodate traditional redistricting criteria or to accommodate peculiarities of a state's redistricting history and geography. Most important in this context is that the Supreme Court has never hinted, much less held, that state courts (or federal courts, for that matter) are forbidden to take into account traditional redistricting principles that require minor population deviations, which the Supreme Court has defined as plus or minus 5%. *Brown, supra,* 462 U.S. 842–843 (implementation of a redistricting plan for state legislative districts with population deviations over 10% creates a prima facie case of discrimination under the Equal Protection Clause, thus shifting the burden to the State to defend the plan).

Nor has the Supreme Court ever suggested that a state's supreme court is forbidden to instruct its lower courts on what neutral redistricting principles its lower courts should apply in arriving at a plan. Indeed, the suggestion by the Plaintiffs/Execs that this Court should second-guess the New Mexico Supreme Court in this regard is at war with *Growe's* teaching that "principles of federalism and comity dictate" deferring to state courts in the context of redistricting "when the federal action raises difficult questions of state law bearing on important

matters of state policy". *Growe v. Emison*, 507 U.S. 25, 32 (1993).

Growe, however, speaks directly to the Plaintiffs/Execs effort to enlist this federal Court to review and second-guess the New Mexico Supreme Court's decision to allow minor population deviations where neceeary to create a redistricting plan that avoids partisan bias, maintains communities and communities of interest intact and protects a minority district created to remedy past discrimination:

> In the reapportionment context, the Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative *or judicial branch*, has begun to address that highly political task itself.... [T]he Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts. *See* U.S. Const., Art. I, § 2. 'We say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature *or other body*, rather than of a federal court.' Chapman v. Meier, 420 U.S. 1, 27, 95 S.Ct. 751, 42 L.Ed.2d 766 (1975).

Growe, 507 U.S. at 34 (emphasis added). The lessons of *Growe,* for purposes of this proceeding, therefore, are two-fold. First, the New Mexico State Courts, while undoubtedly lacking the political latitude of the state's legislature (vis the New Mexico Supreme Court's requirement that any court plan avoid political bias), are nevertheless part of the state's political redistricting process and the federal court is not. Second, *Growe* teaches that the proper sequence of events is that federal courts leave state courts alone to arrive at a redistricting plan and that a state court plan, once adopted, be accorded full faith and credit by federal courts. *See id.* at 36. If the plan so adopted is subject to challenge under the Fourteenth Amendment (or the Voting Rights Act), then a federal court may intervene, but only then.[2]

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[2] "The state court's plan became the law of Minnesota. At the very least, the elementary principles of federalism and comity embodied in the full faith and credit statute, 28 U.S.C. § 1738, obligated the federal court to give that judgment legal effect, rather than treating it as simply one of several competing legislative redistricting proposals available for the District Court's choosing. In other words, after January 30 the federal court was empowered to entertain the Emison plaintiffs' claims

Reading *Growe* together with other controlling Supreme Court precedent, state courts are fully empowered, as part of the state redistricting process, to recognize the "other relevant factors to be taken into account and other important interests that States may legitimately be mindful of" and that may necessitate minor population deviations, *Gaffney,* 412 U.S. 735, 748-749 (1973), which the Supreme Court has repeatedly recognized as plus or minus 5%. *Gaffney*, supra, 412 U.S. at 741 (state legislative deviations of less than a total of 10% do not raise federal equal protection concerns).

C. The Plaintiffs' and Executives' Quibbles with the State Supreme Court's Instructions are Without any Basis.

1. The Executive Defendants' argument that the New Mexico Supreme Court treated "plus or minus 5%" as a "safe harbor."

The Executive Defendants devote an entire point of argument to their claim that the New Mexico Supreme Court "endors[ed] a safe harbor" of plus or minus 5% population deviation in its instructions to the district court. Exec. Br., pp. 9-11. The Executive Defendants are incorrect. At pages 15-17 of the New Mexico Supreme Court's opinion, the Court explicitly states that the 10% deviation is not a safe harbor and while deviations over 10% are *prima facie* unconstitutional, deviations under 10% are subject to challenge but are *prima facie* constitutional. There is no basis for the Executive Defendants attempt to sell this Court on the idea that the New Mexico Supreme Court ignored the law.

2. The Executive Defendants' argument that the New Mexico Supreme Court refused to adopt a de minimis population requirement.

The Executive Defendants devote another section of their brief to persuade this Court that

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relating to legislative redistricting only to the extent those claims challenged the state court's ***plan***."*Growe,* 507 U.S. at 35-36 (emphasis added).

the New Mexico Supreme Court somehow rejected the state district court's holding that "stringent *de minimis* population requirements" applied. Exec. Br., pp. 6-9. The Executive Defendants, once more, are creating an argument out of whole cloth. The New Mexico Supreme Court's complaint with the state district court was that Judge Hall sacrificed accepted and traditional redistricting criteria (keeping communities of interest and communities together, avoiding partisan bias, etc.) in favor of keeping population deviations near zero, which is not required. As the authorities cited above establish, it is those very traditional neutral criteria that the United States Supreme Court has held are sufficient to justify deviation from "de minimis" population deviations. Furthermore, a fair reading of the Supreme Court's decisions is that plus or minus 5% *is de minimis.*

The Executive Defendants descend, at this portion of their brief, into a discussion of the separation of powers doctrine and why the New Mexico Supreme Court must abandon common sense in redistricting and hew, instead, to "*de minimis*" population deviations at the expense, for example, of keeping a New Mexico town like Deming or Silver City from being split down the middle. Br., p. 8. As the authorities cited above establish, there is no Supreme Court decision that requires this.

D. The Argument That the New Mexico Supreme Court Has Ordered Race-Based Redistricting is Based on a Mischaracterization of the Court's Order and Opinion and a Fundamental Misunderstanding of the Law Regarding Redistricting.

Plaintiffs and Executive Defendants would have this Court ignore the fact that Plaintiffs have suffered no actual injury and that the "unconstitutional" redistricting plan they anticipate is nothing more than a product of unfounded conjecture. These aligned parties try to hurdle this jurisdictional obstacle by claiming that the Court must nevertheless act immediately because the

New Mexico Supreme Court has "ordered" impermissible racial gerrymandering for the area in and around Clovis, New Mexico. As shown below, Plaintiffs and Executive Defendants not only mischaracterize the Supreme Court's Order, they rely on a skewed reading of the law regarding redistricting to try to transform a vote-dilution issue into one involving race-based redistricting. Based upon a fair reading of the Supreme Court's order and opinion, and the well-established law demonstrating that the original plan adopted by the state district court would have resulted in a violation of the Voting Rights Act, this Court should reject the arguments made by Plaintiffs and Executive Defendants.

1. The Supreme Court of New Mexico correctly directed the state district court to avoid impermissible minority vote dilution in the remedial district created by the Sanchez v. King three-judge court.

The Supreme Court of New Mexico did not order the district court to engage in race-based redistricting. Nowhere in the Court's Order is there such an instruction, either explicit or implicit. Instead, the Court rightfully expressed concern that impermissible minority vote dilution existed in the plan that had been adopted by the district court. The Supreme Court took note of the substantial evidence presented during the 7-day hearing before the district court that demonstrated that all of the preconditions for finding a violation of Section 2 of the Voting Rights Act existed in Clovis, New Mexico, with respect to the Hispanic community in that area. Far from ordering that Section 2 be violated, the New Mexico Supreme Court directed that such a violation be avoided, given the overwhelming (and entirely unrebutted) evidence produced during the hearing demonstrating that the voting strength of the Hispanic community in Clovis could not be diluted without running afoul of the Voting Rights Act.

a. Section 2 of the Voting Rights Act

A redistricting plan violates Section 2 of the Voting Rights Act if:

> [B]ased on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of [a racial group] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

42 U.S.C. § 1973(b). The Supreme Court has identified three threshold conditions for establishing a Section 2 violation, known as the *Gingles* requirements. *See Johnson v. De Grandy*, 512 U.S. 997, 1006-1007 (1994). First, the racial group at issue must be "sufficiently large and geographically compact to constitute a majority in a single-member district;" second, the racial group must be shown to be "politically cohesive;" and finally, there must be some evidence that the majority "vot[es] sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Id.*; *see also Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). If all three *Gingles* requirements are met, the text of Section 2 directs the court to consider the "totality of the circumstances" to determine whether members of a racial group have less opportunity than do other members of the electorate. *De Grandy*, 512 U.S. at 1011-1012; *Abrams v. Johnson*, 521 U.S. 74, 91 (1997). The totality of the circumstances consideration involves consideration of certain factors referred to in the Senate Report on the 1982 amendments to the Voting Rights Act, including:

> [T]he history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group . . .; 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. The [Senate] Report notes also that evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group and that the policy underlying the State's or the political subdivision's use of the contested practice or structure is tenuous may have

probative value.

Gingles, 478 U.S. at 44-45 (citing S.Rep. No. 97-417 (1982), U.S. Code Cong. & Admin. News 1982, pp. 177, 206).

b. LULAC v. Perry and Minority Vote Dilution Under Section 2.

In *LULAC v. Perry*, 548 U.S. 399 (2006), the Supreme Court explained how a redistricting plan could result in impermissible minority vote dilution. *LULAC* is relevant here because the plan struck down in that case bears a striking resemblance to the plan proposed by the Executive Defendants and originally adopted by the state district court here. . In *LULAC*, minority voters brought suit challenging a redistricting plan that they claimed diluted their voting strength in a congressional district that covered parts of South and West Texas. The district, Congressional District 23 ("CD 23"), was split under the challenged plan such that Hispanics in Webb County and the city of Laredo resided in a district where the total Hispanic voting age population was just over 50% and the Hispanic *citizen* voting age population was only 46%. *See id.* at 424. Before the enactment of the challenged plan, the same Hispanic community resided in the previous configuration of CD 23 and had enjoyed a majority *citizen* voting age population of 57.5%. *See id.* at 423. The plaintiffs alleged that the manner in which the plan split the Hispanic community ensured that they no longer lived in an effective Hispanic opportunity district, and that the challenged plan thus violated Section 2 and the Fourteenth Amendment to the United States Constitution. The three-judge federal district court, however, declined to find a Section 2 violation in the redrawing of CD 23, finding that the State's actions were taken primarily for political (incumbency protection), not racial reasons and that the loss of Hispanic population in CD 23 was remedied by the State's creation of a new Hispanic majority district in another part of the State. *See id.* at 440, 441.

The Supreme Court addressed the plaintiff minority groups' contention that Hispanic voting power was impermissibly diluted by the reconfiguration of CD 23 which dropped the Hispanic citizen voting age population in that district to under 50%. To determine whether the change in CD 23 violated Section 2, the Supreme Court first analyzed whether the Gingles factors were met and found sufficient evidence in the record that the three threshold factors were met in CD 23 in that there was cohesion among Hispanics in that district, that bloc voting existed in the Anglo population in that district (racially polarized voting), and that the Hispanics constituted a sufficiently large and geographically compact group. *See id.* at 427. The Court then turned to analyze the totality of the circumstances factors relevant to a Section 2 inquiry and found that Texas had a long, well-documented history of discrimination against Hispanics in the voting process and that there existed a "political, social, and economic legacy of past discrimination" for Hispanics in Texas. *Id.* at 439-40. Ultimately, the Court held that its analysis of these factors confirmed a violation of Section 2 of the Voting Rights Act. *See id.* at 427-442.

The Court held that the just over 50% total Hispanic voting age population in CD 23 was not enough to constitute or guarantee an effective Hispanic opportunity district, where the district had been steadily becoming an effective district before its dismantling by the Legislature such that the Hispanic citizen voting age population dropped to 46%. *See id.* at 427-429. The Court rejected the contention that *citizen* voting age population should be ignored and the district was effective because it consisted of a Hispanic total voting age population of just over 50%. As explained by the Court, "Latinos, to be sure, are a bare majority of the voting-age population in new District 23, but only in a hollow sense, for the parties agree that the relevant numbers must include citizenship." *Id.* at 429. The Court thus reversed the three-judge panel's determination and directed that new districts in south and west Texas be redrawn to remedy the Section 2

violation in CD 23. *See id.* at 442.

c. The redistricting plan originally adopted by the state district court, similar to the plan struck down in *LULAC*, would have constituted impermissible minority vote dilution.

In this case, the treatment of the Hispanic community in Clovis in the plan originally adopted by the state district court closely mirrors the treatment of the Hispanic community in CD 23 in *LULAC*. For many years, Clovis Hispanics have resided in an effective Hispanic majority district. By 2011, Hispanics constituted 54.6% of the total voting age population in House District 63 and approximately 50.1% of the *citizen* voting age population in that district.[3] The plan originally adopted by the state district court, however, extrapolated the Hispanic community in the heart of Clovis from House District 63, where it has been for three decades and would have relocated that community to House District 67, which stretched to the east of Clovis to the Texas state line.[4] Similar to the Hispanics in CD 23 in *LULAC*, the cohesive Hispanic community in Clovis would have been moved from a district in which they previously constituted a majority of the citizen voting age population (approximately 50.1%) into a district in which they would constitute less than a majority of the citizen voting age population (approximately 46%).[5] The fact that in the new House District 67 that same Hispanic community would have constituted 50.9% of the total voting age population did nothing to remedy the dilution of its voting strength, just as such a bare majority of total voting age population did nothing to remedy the vote dilution in *LULAC*, because the relevant inquiry must include consideration of the citizen voting age

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[3] *See* Legis. Def. Ex. 8 (District Profile for House Dist. 63); James Ex. 9 (showing citizen voting age population by county compared to voting age population).

[4] *See* Gov. Ex. 33 ("Executive Alternative Plan 3") (District Profile for House Dist. 67).

[5] *See id.*

population. *See id.* at 429.

There can be little dispute that House District 63, as it has stood since shortly after it was created by the three-judge panel in *Sanchez v. King*, No. 82-0067-M (D.N.M. 1984), has been an effective Hispanic opportunity district, as the unrebutted evidence at the hearing on house redistricting demonstrated.[6] Since that time, in elections for the New Mexico House of Representatives, the Hispanic community has been able to elect their candidate of choice in 12 out of the 14 races conducted in that district.[7] It is also certain that the *Gingles* requirements for establishing a Section 2 violation all exist in Curry County, including the city of Clovis. With regard to the first *Gingles* factor, as shown at the hearing before the state district court, the Hispanic population at issue is sufficiently large and geographically compact to constitute a majority in a single-member district.[8] As to the second and third *Gingles* factors, the evidence at trial demonstrated that the Hispanic community in Clovis is politically cohesive and that Anglo bloc voting continues to exist in the area. As shown by compelling exhibits introduced at trial, including scatter charts and variant regression analysis of both endogenous and exogenous election results in House District 63, Hispanics have historically voted together in that district for their preferred candidate of choice and Anglos in the district have historically voted as a bloc against Hispanic candidates.[9]

With regard to the "totality of the circumstances," the state district court heard evidence from a Curry County Commissioner and 75 year resident of Clovis regarding the continued

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[6] *See* 12/12/11 Hearing Testimony at 237 (Sanderoff).

[7] *See* Leg. Def. Ex. 18(h); 12/12/11 Hearing Testimony at 252 (Sanderoff).

[8] *See* 12/12/11 Hearing Testimony at 241 (Sanderoff).

[9] *See* Leg. Def. Exes. 19, 22.

existence of many of the same factors indicating bias towards Hispanics that the Sanchez court had heard thirty years ago.[10] The Commissioner testified that disparities in education, income, and housing still exist between Hispanics and Anglos in Clovis and Curry County, and that there continued to be discrimination in the political process in that area.[11] In addition to the Commissioner's testimony, which was not disputed, the district court admitted evidence from the U.S. Census Bureau American Community Survey for 2008 which demonstrated that Hispanics in Curry County continue to fare much worse than Anglos in income and educational attainment. All of this, coupled with the evidence of a long history of discrimination against Hispanics in Curry County as found by the court in *Sanchez*, provide ample support for the proposition that all of the requirements for finding a violation of Section 2 in the plan originally adopted by the state district court existed.

Given the undisputed evidence at the hearing, the New Mexico Supreme Court was correct in concluding that the original plan adopted by the state district court raised serious Section 2 concerns in that it diluted the voting strength of the Hispanic community in Clovis. The Supreme Court pointed out that the district court itself had found that "[the] Hispanic community in and around Clovis is sufficiently large and geographically compact to constitute a majority in a single-member district," that the community "is politically cohesive," and that "Anglos in the area vote sufficiently as a bloc to enable them to usually defeat the minority's preferred candidate." NMSC Order of February 10, 2012, at 16. The state Supreme Court also took note that the house district in that area was a remedial district, having been drawn by the

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[10] *See* TR 12/13/11, at 219-95 (Robert Sandoval).

[11] *See id.* at 222-234.

federal three-judge panel in *Sanchez v. King*, No. 82-0067-M (D.N.M. 1984), to address historical racial and ethnic discrimination in that same population and to make the district an effective majority-minority district. *See id.* at 16-17. The Court recognized that the district had been redrawn in shape over the years since it was drawn by the federal court, but that it had always remained an effective majority-minority district since that time and "[i]n the present trial, there was no evidence to establish that the district had materially changes so as to no longer require an effective majority-minority district." *Id.* at 17. With that evidence in the record, the state Supreme Court was rightfully concerned that, under the redistricting plan initially adopted by the district court, the reduction in the voting strength of the Hispanic community in house district 63 from a majority citizen Hispanic citizen voting age population to a minority Hispanic citizen voting age population, violated Section 2 of the Voting Rights Act. The state Supreme Court thus correctly determined that, in order to avoid impermissible minority vote dilution of the kind precluded by the Supreme Court in *LULAC*, "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." *Id.* at 20-21.

The Supreme Court's Order did not direct that the state district court engage in racial gerrymandering. Instead, the Supreme Court correctly directed the state district court to avoid the vote dilution of an existing Hispanic majority-minority district.

2. Shaw v. Reno does not apply here because this case does not involve the creation of a majority-minority district where it otherwise would not exist, but instead involves the avoidance of the dismantling of an existing and effective majority minority district of the type addressed in LULAC.

The Plaintiffs and Executive Defendants erroneously argue that avoiding minority vote dilution in the Clovis would constitute unlawful racial gerrymandering. For this argument, Plaintiffs and Executive Defendants cite to *Shaw v. Reno*, 509 U.S. 630 (1993), although they do not explain how the holding of that case is implicated here. *Shaw* and its progeny, in fact, have no application here because the state courts are not attempting to create a new majority-minority district where it previously did not exist and where the Voting Rights Act does not justify the creation of such a new district. As explained below, *Shaw* and its progeny involved drawing new districts, not the dilution of existing effective majority-minority districts as is the case here.

In *Shaw*, the Supreme Court addressed the 1990 reapportionment of the Congressional districts in North Carolina. To comply with Section 5 of the Voting Rights Act, North Carolina submitted to the United States Attorney General a reapportionment plan with one majority-black district. The Attorney General's office objected to the plan on the ground that it believed a second majority-black district could have been created to give effect to minority voting strength in the State's south-central to southeastern region. The State obliged and submitted a revised reapportionment plan that contained a second majority-black district in the north-central region of the State. The State Legislature succeeding in making this "new" district a majority-black district, but only by drawing it along a narrow, 160 mile-long strip no wider than the I-85 corridor. The stated purpose behind the manner in which the boundaries of the new district were drawn was to "gobble[] in enough enclaves of black neighborhoods" to constitute a new

majority-black district. *Id.* at 635-36.

The question before the Supreme Court in *Shaw* was thus whether, by drawing a new majority-black district (which was not compact, contiguous or respected political subdivisions) where it otherwise did not exist and was not justified by the Voting Rights Act, plaintiffs in that case had presented a cause of action under the Fourteenth Amendment. The Supreme Court concluded that plaintiffs could challenge the reapportionment under the Equal Protection Clause where it was alleged that the drawing of the new district could not be understood as anything other than an effort to separate voters into different districts on the basis of race and that separations lacks sufficient justification. *See id.* at 649.

In the state court proceeding at issue here, *Shaw* is not applicable because neither the state legislature nor the state courts attempted to create a new majority-minority district where it otherwise did not exist. Instead, what the concern of the New Mexico Supreme Court is that the dismantling of House District 63 will constitute impermissible vote dilution in an existing, effective Hispanic majority district of the type condemned by the Supreme Court in *LULAC*. To say that the Supreme Court's direction to avoid a *LULAC*-type violation of Section 2 of the Voting Rights Act amounts to racial gerrymandering is the product of a fundamental misunderstanding of redistricting jurisprudence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 27th, 2012, I caused the foregoing to be filed electronically through the CM/ECF system, which caused the parties or counsel to be served by electronic means as more fully reflected on the Notice of Electronic Filing.

/s/ Joseph Goldberg
Joseph Goldberg