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

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

Plaintiffs,

vs. **Case 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.

BRIEF REGARDING THE CONSTITUTIONALITY OF THE NEW MEXICO SUPREME COURT'S INSTRUCTIONS TO THE DISTRICT COURT BY THE LESISLATIVE INTERVENORS

COME NOW Intervenors, the Speaker of the New Mexico House of Representatives, Ben Lujan, Sr., in his official capacity, and President Pro Tempore of the New Mexico Senate, Timothy Z. Jennings, in his official capacity ("Legislative Intervenors"), by and through their counsel of record, and hereby submit their *Brief Regarding the Constitutionality of the New Mexico Supreme Court's Instructions to the District Court*:

I. SUMMARY OF PROCEEDINGS

A. Nature of the Case

This case involves the redistricting of the New Mexico State House of Representatives after the 2010 decennial census. After the census results were finalized, Governor Susana Martinez called the New Mexico Legislature ("Legislature") into special session in order to redistrict the State House, among other offices. The Legislature passed a plan (House Bill 39) for the State House. The Governor vetoed the Legislature's plan, and various lawsuits were filed

in state court. Those lawsuits were consolidated by the New Mexico Supreme Court in the First Judicial District, and assigned to the Honorable James A. Hall, District Judge Pro Tempore.

After a trial on the matter, the district court rejected the Legislature's plan and those submitted by others and adopted one of the many alternative plans submitted by the Governor at trial, called Executive Alternative Plan 3.[1] The Legislative Intervenors and other parties appealed the district court's decision. After the New Mexico Supreme Court issued a Writ of Superintending Control and heard oral arguments from the parties, the Court filed its Order reversing the district court's judgment and remanding the case to the district court with instructions. Plaintiffs in the present case,[2] who are potential candidates in 2012 for various districts in the State House, request among other relief that this Court declare that the New Mexico Supreme Court's Order, and any plan adopted in accordance with such Order, violates the constitutional requirements for redistricting of state legislative bodies by a court. [Doc. 1, pp. 21].

Pursuant to the Court's request, this brief sets forth the reasons why the New Mexico Supreme Court's instructions to the district court with respect to the redistricting of the State House are constitutional.

B. Factual and Procedural Background

At the evidentiary hearing on the State House of Representatives, the district court was presented with six initial state-wide redistricting plans. In addition, partial House plans for the Northwest region of the state were submitted by the Navajo Nation Intervenors and the Multi-Tribal Plaintiffs.

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[1] The Legislative Defendants objected to the multiple and continued amendments by the Executive of the plans on separation of powers and other grounds.

[2] Counsel for these Plaintiffs represented similar interests in the State Court action.

As the trial progressed, and patent defects in the Executive Plan and in the plans of some Plaintiff groups were exposed, those parties submitted modified plans—often at the behest of the district court—five by the Egolf Plaintiffs, one by the Maestas Plaintiffs and three by the Executive Defendants. The Legislative Intervenors, in their official capacities as leaders of the respective houses of the Legislature, could present and defend only the plan which was passed by both houses. That bill, enrolled and engrossed as HB 39 and vetoed by the Governor did, however, include the partial plan of the Multi-Tribal Plaintiffs, and was in full compliance with applicable law.

The plan ultimately adopted by the district court, Executive Alternative Plan 3, was the fourth map proposed by the Executive Defendants at trial and was presented to the district court on the last day of testimony. Brian Sanderoff, an expert demographer who had assisted legislators from all parties in preparation of redistricting maps and was the Legislative Defendants' expert witness during trial, testified that this Plan had significant partisan performance changes that were not necessary when redrawing the map. His testimony was not rebutted.

Although Executive Alternative Plan 3 corrected some of the defects in earlier iterations of the Executive Defendants' plan, it contained significant partisan bias in connection with Republican leaning districts, failed to deal appropriately with House District 63, a Federal Court drawn district in Eastern New Mexico, and represented a dramatic departure from historical state redistricting policy and those policies embodied in current districts and in two other respects: The manner in which a republican and a democratic district in Northeast Albuquerque were consolidated leaving a strong republican district on the Westside instead of a competitive district, and the consolidation of two democratic districts in north central New Mexico which resulted in

the creation of a solid republican district on Albuquerque's Westside injected a partisan bias to the plan.

Judge Hall issued his Findings of Fact and Conclusions of Law, *see Complaint for Declaratory and Injunctive Relief and for Appointment of a Three Judge Panel* ("Complaint"), Exhibit 2. On the same day the judgment was entered, the Legislative Intervenors filed and docketed an appeal in the New Mexico Court of Appeals and also filed a Petition for Writ of Superintending Control asking the New Mexico Supreme Court to exercise its plenary power to review the district court's judgment. The Legislative Intervenor's immediate appeal was necessary due to the significant questions of law under the constitution of the United States and the constitution and law of New Mexico and the time-sensitive nature of this matter in light of the upcoming election cycle.

The New Mexico Supreme Court ("NM Supreme Court") granted the Petition, stayed the district court judgment pending further order of the NM Supreme Court, set an expedited briefing and argument schedule, and issued the Writ directing the Court of Appeals to certify the case to the NM Supreme Court. The Court of Appeals issued its Order formally certifying the case to the NM Supreme Court on January 20, 2012.

The NM Supreme Court heard oral arguments on February 7, 2012, and issued an Order on February 10, 2012. *See Complaint*, Exhibit 1 (hereinafter referred to as "Remand Order"). The Court reversed the district court's judgment and final order regarding the creation of districts for the New Mexico House of Representatives and remanded the case to the district court with the following instructions:

1. To consider population deviations of greater than one-percent if justified by the non-discriminatory application of historical, legitimate and rational state policies and traditional redistricting principles. *Remand Order*, 19:9-18.

2. To address partisan performance changes and bias set forth in the Order and correct or ameliorate with enunciated non-discriminatory application of historical, legitimate, and rational state policies. *Id.* at 20:1-7.

3. To consider the partisan effects of any consolidations as part of the review of partisan performance changes. *Id.* at 20:8-14.

4. To consider Hispanic citizen voting age populations when the trial court is reaching its decision regarding House District 67 to ensure the "relevant Clovis community is represented by an effective, citizen, majority-minority district as the 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 20:15-18, 21:1-2.

Since the Order was entered, the NM Supreme Court has issued its written opinion, *Maestas v. Hon. James A. Hall*, 2012-NMCA-___, ___ P.3d ___, Nos. 33,386, 33,387 (February 21, 2012). Shortly before this Brief was filed on February 27, 2012, Judge Hall issued his Decision on Remand adopting his Final District Court Plan in accordance with the NM Supreme Court's instructions, which is attached hereto as Exhibit "A".[3] Although there was no final plan, and thus no final order and judgment in state court when Plaintiffs in this case filed their *Complaint*, Plaintiffs continue to ask this Court to redraw the current State House districts and set aside Judge Hall's plan. Specifically, Plaintiffs question the constitutionality of the NM Supreme Court's instructions to the district court.

II. INTRODUCTION

The Legislative Intervenors would submit that what has occurred in the State Supreme Court proceedings is fully compliant with federal law and, in fact, highlight the reason why federal courts should be circumspect in assuming jurisdiction over proceedings of this nature. The need for such circumspection is particularly indicated in this case as a result of the following:

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[3] On February 22, 2012, the NM Supreme Court issued a Supplemental Scheduling Order setting an expedited review process if any party seeks to appeal Judge Hall's Final District Court Plan.

1. The efforts of the New Mexico Supreme Court in fact were appropriately undertaken to give meaningful guidance and set appropriate standards for state courts in New Mexico to follow in reviewing and adopting redistricting plans. As this Court is aware, this is the second redistricting cycle in which New Mexico state courts have had to involve themselves in the redistricting of various bodies, as a result of the failure of the political process.[4] Other states where state courts have had to engage themselves in the redistricting plans have had prudential standards outlined by their state appellate courts. *See e.g., In re Apportionment of State Legislature*, 231 N.W. 2d 585 (Mich. 1982); *Below v. Gardner*, 963 A.2d 785 (N.H. 2002); *Burling v. Chandler*, 804 A.2d 471 (N.H. 2002). One would hope that the standards set forth by the New Mexico Supreme Court, wholly appropriate under federal law, will help lessen the need for litigation in the future, especially as they highlight those sorts of policy considerations that can be considered in connection with deviations from the average. *See Reynolds v. Sims*, 377 U.S. 533 (1963).

2. There is absolutely no need for this Court to involve itself to assure expeditious resolution. In fact, the record reflects a supreme court and a state district court being focused on getting these issues resolved in a manner that will allow the primary elections to proceed. *See e.g.,* Order on Writ of Superintending Control dated October 12, 2011, attached as Exhibit "B" (initial assignment to Hall); Order of District Judge Pro Tem, James Hall setting trial and pretrial deadlines, Exhibit "C"; Order of New Mexico Supreme Court on Petition for Writ of Superintending Control setting expedited briefing and oral argument schedule (Exhibit "D"); Order of the New Mexico Supreme Court sending matter back to state district court for further

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[4] In the redistricting after the 2000 census cycle, there were a number of redistricting proceedings filed that had to be consolidated and were tried in front of Judge Frank Allen. *See Jepsen, et al. v. Vigil-Giron, et al.*, D-101-CV-2001-02177 (NM D.Ct. January 24, 2002).

proceedings; *see* Exhibit 1 to *Complaint* filed by Plaintiffs; and Supplemental Scheduling Order issued by the New Mexico Supreme Court setting expedited further review of process (Exhibit "E").

This effort to resolve this matter and bring it to a close within the time frame necessary to allow the electoral process to go forward highlights why this Court should apply the doctrine of *Growe v. Emison* and consider the Rooker/Feldman Doctrine and/or preclusion doctrines in order to prevent unwarranted federal court intervention in the state electoral process. The process should be allowed to proceed in the expeditious manner in which it is now proceeding.

3. Plaintiffs appear to want to have their cake served up in multiple ways. On the one hand, they ask this Court to proceed in the face of the principles of *Growe v. Emison,* 507 U.S. 25 (1993), the potential application of the Rooker/Feldman Doctrine, and the potential application of issue preclusion. Then they ask this Court to proceed to have, in essence, a *de novo* proceeding on the merits, totally negating and neglecting the proceeding that has already occurred on the merits in state district court. The appropriate process for plaintiffs[5] is for their similarly situated colleagues to pursue their appellate remedies and perhaps seek leave to file an amicus brief in these proceedings. *See* Rule 12-215 NMRA 2012.

III. SUMMARY OF ARGUMENT

The NM Supreme Court properly reversed the district court's final order and judgment, and remanded the case back to the district court with instructions within constitutional parameters. In its Order and Opinion, the NM Supreme Court set out prudential guidelines for New Mexico district courts with respect to redistricting, pursuant to the exercise of its

[5] As the Court knows, Plaintiffs' counsel has been extensively involved in the state district court proceedings. The issues raised here and in the state district court proceedings are remarkably similar. The issues plaintiffs raised will presumably get resolved through appropriate appellate procedures with a record review available from the state district court proceedings.

superintending authority. First, and as a procedural issue, the NM Supreme Court's action of placing this case on an expedited docket was appropriate given the time-sensitive nature of this matter in light of the upcoming election and the Court's inherent power to control its cases. Second, the NM Supreme Court correctly found that the district court was not bound to a plus-or minus 1% deviation absent Voting Rights Act infractions. Third, the NM Supreme Court properly found that the "district court plan was not indifferent to partisan considerations" and instructed the district court to take into account partisan change and bias, including when addressing consolidations. Finally, it was appropriate for the NM Supreme Court to instruct the district court to consider the dilution of voting strength of Hispanic citizen voting-age populations in reaching its decision on House District 67 (currently House District 63).

IV. ARGUMENT

A. The NM Supreme Court acted within its authority and power to control the appeal when placing the Legislative Defendants' and other parties' appeals on an expedited briefing schedule, especially considering the upcoming election.

In their *Complaint* and *Plaintiffs' Opening Brief Regarding the Unconstitutionality of the New Mexico Supreme Court's Remand Instructions to Judge Hall* ("Plaintiffs' Brief Re Constitutionality"), Plaintiffs attack the NM Supreme Court's expedited briefing schedule as "extremely and unusually rapid given the complexity of the subject matter and the amount of information which had been adduced during the eight day trial." [Doc. 1, ¶ 43; Doc. 43, p. 3]. However, the NM Supreme Court acted within its authority and discretion when placing the appeal of the district court's order and judgment on an expedited briefing schedule, especially in light of the fast-approaching election cycle. First, the New Mexico Rules of Appellate Procedure expressly authorize an appellate court to modify the time that briefs are filed. *See* Rule 12-213(H) NMRA ("*Unless otherwise ordered by the appellate court* or as these rules prescribe,

Rule 12-210 NMRA governs the time and order of filing briefs") (emphasis added). Second, the Court exercised its power of superintending control, which is invoked "where it is deemed to be in the public interest to settle the question involved at the earliest moment." *State ex rel. Schwartz v. Kennedy*, 120 N.M. 619, 624, 904 P.2d 1044 (1995). Third, a court in New Mexico generally controls the movement of cases on its docket. *See Belser v. O'Cleireachain*, 2005-NMCA-073, ¶ 3, 137 N.M. 623, 624, 114 P.3d 303, 304 (providing "[u]nless otherwise indicated in the Rules of Civil Procedure, the court, not the parties, controls the movement of cases on its docket within its discretion.").

In the present case, any such argument or suggestion that the Court's actions of imposing an expedited briefing schedule ignores the fact that ***all*** the redistricting litigation was expedited in light of the upcoming election. For example, Judge Hall was appointed Judge Pro Tempore to preside over the state litigation on October 12, 2011 and the trial on the State House began on December 12, 2011, after extensive discovery was conducted by all parties. As Plaintiffs recognize, important deadlines are approaching for the upcoming election, with the primary election scheduled for early June. [Doc. 1, ¶ 64]. The Court acted appropriately in imposing an expedited briefing schedule. *See* Rule 12-213(H) NMRA.

B. The NM Supreme Court's instructions to the district court to consider deviations greater than plus/minus 1% if justified by the non-discriminatory application of historical, legitimate and rational state policies and traditional redistricting principles are constitutional.

Based on applicable federal and state law, the NM Supreme Court correctly concluded that "[p]ursuit of precise population equivalence [i.e., the district court's strict adherence to a plus/minus 1% deviation] at the cost of other, legitimate state redistricting policies, such as those adopted by the bi-partisan Legislative Council [*see* footnote 1, *supra*], is inconsistent with existing legal principles and with the established precedent and custom of this State." *Remand*

Order, pp. 13; *see also Hall*, 2012-NMSC-___, ¶ 39 ("A court is not required to rigidly adhere to maximum population equality as long as the court can enunciate the state policy on which it relies in deviating from the ideal population").

The Equal Protection Clause of the United States Constitution "guarantees the opportunity for equal participation by all voters in the election of state legislators", commonly referred to as the "one person, one vote" doctrine. *Reynolds v. Sims*, 377 U.S. 533, 566 (1963). The Equal Protection Clause requires "substantial equality of population among the various districts" and that deviations be "based on legitimate considerations incident to the effectuation of a rational state policy...." *Id.* at 579. Overall deviations of less than ten percent are minor deviations which are presumptively constitutional and do not by themselves require a state to provide justification for the deviations. *Brown v. Thomson,* 462 U.S. 835, 842 (1983) (quoting *Gaffney v. Cummings*, 412 U.S. 735, 745(1973)) (recognizing "that some deviations from population equality may be necessary to permit the States to pursue other legitimate objectives such as '[maintaining] the integrity of various political subdivisions' and '[providing] for compact districts of contiguous territory'") (internal citations omitted); *see also Voinovich v. Quilter*, 507 U.S. 146, 160-162 (1993). As the NM Supreme Court stated, "courts [must] consider 'the policies and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitution.'" *Hall*, 2012-NMSC-___, ¶ 21 and *Remand Order*, pp. 6-7 (*quoting White v. Weiser*, 412 U.S. 783, 795 (1973)).

Contrary to Plaintiffs' claims, [Doc 1, ¶ 45; Doc. 43, pp. 14-18] and the Governor's and Secretary of State's claims in the *Opening Brief Regarding the Constitutionality of the Remand*

Instructions From the New Mexico Supreme Court ("Governor's Brief re Constitutionality") [Doc. 44, pp. 3-5], the NM Supreme Court's Remand Order and Opinion do not require the state district court to violate one-person, one-vote principles. Instead, the NM Supreme Court directed the district court to seek to accommodate legitimate state interests such as keeping municipalities and recognized communities of interest intact within a more flexible range of deviations than the extremely narrow range that the district court originally employed. *Hall*, 2012-NMSC-___, ¶ 45; *Remand Order* at pp. 13, 18-19. Furthermore, relying on New Mexico precedent regarding redistricting, the NM Supreme Court found "[w]hen other policies, such as avoiding bifurcation of municipalities and other recognized communities of interest [and partisan bias], 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 Order*, pp. 13 (*citing Jepsen v. Vigil-Giron*, No. D-0101-CV-2001-02177 (NM D. Ct. January 24, 2002) (Findings of Fact and Conclusions of Law Concerning State House of Representatives Redistricting in 2002) (per Allen, J.). The law is clear that in the context of state legislative redistricting, states are permitted to use population deviations to pursue legitimate objectives, such as maintaining the integrity of various subdivisions, and that deviations used within an overall range of ten percent are presumptively constitutional. *Brown*, 462 U.S. at 842-43.

Plaintiffs and the Governor claim that courts are bound by a more stringent standard than that announced in *Brown*. See [Doc. 43, pp. 14-18; Doc. 44, pp. 6-11]. However, cases which announce a more stringent standard have done so for *federal* courts so as to ensure that federal courts do not unnecessarily impinge upon state policymaking. *See In Re Apportionment of State Legislature,* 321 N.W. 2d 585 (Mich. 1982) (Levin and Fitzgerald, J.J. concurring), *appeal*

dismissed for want of a substantial federal question sub. nom. Kleiner v. Sanderson, 459 U.S. 900 (1982); *Chapman v. Meier*, 420 U.S. 1 (1975); *Connor v. Finch*, 431 U.S. 407 (1977). As explained by justices in *In Re Apportionment of State Legislature*:

> When a federal court apportions a state legislature, there is a risk that legitimate state policies will be ignored or misunderstood. To limit encroachment by the federal judicial on state sovereignty, the United State Supreme Court limited the discretion of the federal courts by requiring greater population equality in federal court-ordered plans. *This concern is not present where the court ordering the plan is not a federal court but a state court which has declared and acts to enforce state policy.*

Id. at 593 (emphasis added). In *Chapman*, a case relied on by Judge Hall, the United States Supreme Court never cited the Fourteenth Amendment as a basis for a stricter deviation standard for court-ordered plans, but rather derived the rule from principles of federalism. In doing so, *Chapman* expressly distinguished between plans ordered by federal courts and plans "formulated by state legislatures *or other state bodies*," 420 U.S. at 26 (emphasis added), and stressed that "reapportionment is primarily the duty and responsibility of the State through its legislature *or other body*, rather than of a *federal court*." *Id.* at 27 (emphases added). The Court echoed this principle in *Connor*, making clear that *Chapman*'s stricter population equality standards "reflect the unusual position of *federal courts* as draftsmen of reapportionment plans." 431 U.S. at 414 (emphasis added). These principles led Judge Allen in the *Jepsen* redistricting litigation in 2002 to rule that the New Mexico District Court was "constrained only by the 10% population deviation standard . . . ." *Jepsen v. Vigil-Giron,* Case No. D-0101-CV-2001-02177 (NM D. Ct. January 24, 2002) (Findings of Fact and Conclusions of Law Concerning State House of Representatives Redistricting, Conclusion No. 8) (per Allen, J.).

The United States Supreme Court recently indicated that rigorous *de minimis* deviation standards have no place in judicially adopted districting plans when they override legislative policy decisions that do not violate federal law. *See Perry v. Perez,* 565 U.S. ____, 132 S.Ct.

934 (2012) and *Tennant v. Jefferson County Comm'n,* No. 11A674, (U.S. Sup. Ct. Order List, January 20, 2012) *Staying Judgment in Jefferson County Comm'n v. Tennant,* 2012 WL 10500, ___ F.Supp. 2d ____ (S.D. W.Va. January 3, 2012). These two most recent actions by the U.S. Supreme Court make clear, if it was not so before, that there is nothing sacrosanct in minimal deviations. There is no reason why State Court's cannot use deviations within the +/- 5% range to deal with legitimate policy issues.

Like the United States Supreme Court in *Perry*, the NM Supreme Court correctly found that the district court was not compelled to apply narrow, *de minimis* deviations of the type imposed on federal courts in drafting or adopting a state legislative redistricting plan. *See Hall*, 2012-NMSC-___, ¶ 39. This finding recognizes the importance of the needed flexibility contained in the *Reynolds*' "substantial equality" standard that allows the legislature to balance the traditional state districting principles—embodied in the guidelines adopted by the bi-partisan New Mexico Legislative Council. *See, e.g., Reynolds*, 377 U.S. at 579; *Brown*, 462 U.S. at 842. This determination is constitutional and consistent with the district court's instruction to "consider historically significant state policies . . . through the use, where justified, of greater population deviations as set forth in the Legislative Council guidelines." *Hall*, 2012-NMSC-___, ¶ 45, *Remand Order*, pp. 18[6]. Just as the New Hampshire Supreme Court in the cases the Governor has cited of *Below v. Gardner*, 963 A.2d 785, 791, 794-95 (N.H. 2002) and *Burling v. Chandler*, 804 A.2d 471, 478, 484-85 (N.H. 2002), found deviation from strict adherence to the de minimus deviations justified based on unique state interests, it was appropriate for the NM

[6] Plaintiffs argue that the NM Supreme Court's more specific instruction to "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", *Hall*, 2012-NMSC-__, ¶ 45, *Remand Order*, pp. 19, is vague and does not set forth a reason for singling out certain municipalities. [Doc. 1, ¶ 46]. However, it is clear from the NM Supreme Court's use of the words "such as" that the named municipalities are just some examples for the trial court to focus on when applying the more broad instruction quoted above.

Supreme Court to determine that New Mexico's unique state interests, as embodied in redistricting criteria and policy going back many decennials justifies working within +/- 5%.

C. The NM Supreme Court correctly and constitutionally instructed the district court to review partisan performance changes and bias, including the partisan effects of any consolidations.

Contrary to Plaintiffs' assertions that the NM Supreme Court improperly directed the district court "that partisan performance changes be used as a basis for population inequality" [Doc. 1, ¶ 51], the NM Supreme Court acted well within the state and federal constitutions when directing the district court to simply address the partisan performance changes and bias noted in the Opinion with respect to Executive Alternative Plan 3. When tasked with the duty of drawing a redistricting map, Courts should review plans submitted to it with neutrality and not adopt a plan that seeks a partisan advantage. *See Prosser v. Elections Bd.*, 793 F. Supp. 859, 867 (W.D. Wis. 1992) (stating that when courts are "comparing submitted plans with a view to picking the one (or devising [their] own)", courts should do so with judicial neutrality and "[j]udges should not select a plan that seeks partisan advantage—that seeks to change the ground rules so that one party can do better than it would do under a plan drawn up by persons having no political agenda—even if they would not be entitled to invalidate an enacted plan that did so."). For example, in *Prosser*, the court drew its own redistricting plan for the Wisconsin legislature that incorporated the best features of two other plans submitted to the court. *Id.* at 865. In making its determination, the court analyzed and rejected other submitted plans for partisan bias. *Id.* The court even concluded by stating that "the court plan . . . creates the least perturbation in the political balance of the state" and that the court's comparisons of other plans "suggest the court plan is the least partisan." *Id.* at 871. Therefore, in order to maintain neutrality, courts must review plans submitted to them for potential bias and reject those plans that evidence partisan

bias and upset the political balance. *Id.; see also*, *Wilson v. Eu*, 823 P.2d 545, 576-77 (analyzing and then rejecting plans submitted to the court by the parties because of calculated political consequences); *Baumgart v. Wendelberger*, 01-C-0121, 2002 WL 34127471 (E.D. Wis. May 30, 2002) amended, 01-C-0121, 2002 WL 34127473 (E.D. Wis. July 11, 2002) (listing "avoiding the creation of partisan advantage" as one of the "traditional" redistricting criteria accepted by federal courts and analyzing various submitted plans for partisan bias).

The NM Supreme Court instructed the district court that in drawing a plan that would avoid partisan bias, it should consider traditional redistricting principles and criteria adopted by the bi-partisan Legislative Council, namely compactness, contiguity, preservation of geographical and political boundaries, preservation of communities of interest, and avoiding the pairing of incumbents. *Hall*, 2012-NMSC-___, ¶¶ 34-39. Importantly, the NM Supreme Court found that the district court did not scrutinize Executive Alternative Plan 3 for partisan bias in the manner it had other plans presented. *Id.* at ¶ 40. Indeed, given the litigation tactics of the Executive, which were objected to by the Legislative Defendants, he could not do so. Executive Alternative Plan 3 was introduced on the last day of trial, after the experts who scrutinized previous plans were not available to testify. *Id.* The only expert that provided testimony on the Executive Alternative Plan 3 was Brian Sanderoff, and he testified as to significant partisan performance changes as compared with previously introduced Executive plans. *Id.* The district court found Executive Alternative Plan 3 increased Republican swing seats from five to eight over prior Executive plans. *Id.* This significant increase in partisan bias according to Mr. Sanderoff's undisputed testimony was unnecessary and was not a necessary consequence of other changes to the map.

In addition, the NM Supreme Court's instruction regarding partisan bias was proper because the district court's adoption of Executive Alternative Plan 3 violates "least change" principles as it represents a significant partisan shift from current districts and from the balance of power in the Legislature historically. *See Hall*, 2012-NMSC-___, ¶ 31 (stating "maintaining the political ratios as close to the status quo as is practicable, accounting for any changes in statewide trends, will honor the neutrality required in such a politically-charged case."); *see also Jepsen*, D-0101-CV-2001-02177 (NM D.Ct. January 24, 2002) (applying least change principles to avoid making political decisions more properly made by the political branches). Executive Alternative Plan 3 increases Republican performing districts and Republican performance in key "swing" districts so that it creates the highest number of Republican seats in the House since 1967, when the House went to 70 districts. For example, Executive Alternative Plan 3 created a pairing in central Albuquerque between Representative Park (Democrat) and Representative Hall (Republican), which consolidated these two districts, moved them to the west side of the River and resulted in a strongly partisan district favoring Republicans. The consolidation of the north central districts, both democratic, results in the new seat emerging on the Westside as a Republican district. Both of these actions result in a partisan bias. Judge Allen's decision in *Jepsen* should be considered the last statement of New Mexico districting policy prior to the instant effort and his sound analysis regarding "least change" principles was not adhered to in analysis of partisan bias.

Thus, contrary to Plaintiffs' claims, the NM Supreme Court Remand Order and Opinion do not "mandate" a decrease or reduction in Republican districts. [Doc.1, ¶¶ 41, 52]. Rather, the NM Supreme Court's instruction to the district court is to actually scrutinize Executive Alternative Plan 3 or any further plan for partisan bias. This is hardly unconstitutional, as the

instruction is imposed to ensure the district court complies with law and that any plan that emerges remains politically neutral.

D. The NM Supreme Court's instruction to the district court to consider Hispanic citizen voting-age populations in reaching its decision on House District 67 and 63 is proper and constitutional.

With respect to House District 67 (in Executive Alternative Plan 3) and House District 63 (as it stands currently), the NM Supreme Court properly instructed the district court to "determine whether the relevant population is an effective Hispanic citizen voting-age population" and stated that "[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." *Hall*, 2012-NMSC-___, ¶ 20.

The federal Voting Rights Act protects against the dilution of voting strength on the basis of race or color. *See League of United Latin American Citizens (LULAC) v. Perry,* 548 U.S. 399, 424-29 (2006). Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, prohibits any State or political subdivision from imposing an electoral practice "which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a). This Section is violated if, "based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of [protected] citizens . . . 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). In order to demonstrate a violation of Section 2 of the Voting Rights Act, three preconditions must be met. *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). These require a showing that: (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 usually to defeat the minority's preferred candidate. *Id.* If all three *Gingles* factors are established, courts must then consider the "totality of circumstances" to determine whether minorities have less opportunity than other members of the electorate to elect their candidate of choice. *LULAC*, 548 U.S. at 425.

The factors courts consider in assessing the "totality of circumstances" for purposes of a Section 2 claim are those set forth in the Senate Report on the 1982 amendments to the VRA, and include the following:

a. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

b. the extent to which voting in the elections of the state or political subdivision is racially polarized;

c. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

d. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

e. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

f. whether political campaigns have been characterized by overt or subtle racial appeals;

g. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Gingles, 478 U.S. at 36-37 (1986) (internal quotation marks omitted). Another relevant consideration is "whether the number of districts in which the minority group forms an effective majority is roughly proportional to its share of the population in the relevant area." *LULAC*, 548 U.S. at 426.

Given federal law, the NM Supreme Court's instruction is constitutional considering that the uncontroverted evidence at trial demonstrated that the Executive Alternative 3 Plan violates Section 2 of the Voting Rights Act by dismantling House District 63 in Clovis—a district originally created by a three-judge federal court in 1982 to remedy Voting Rights Act concerns. *See Sanchez v. King*, 550 F. Supp. 13 (D.N.M. 1982). Since its creation, HD 63 has consistently elected Hispanic candidates to the State House of Representatives. As the NM Supreme Court recognized, House District 63 "remains an effective majority-minority district" and no evidence was presented at trial to establish the relevant population materially changed, *Hall*, 2012-NMSC-___, ¶ 20, contrary to Plaintiffs' unsupported assertions. [Doc. 1, ¶¶ 57-58, 63].

The district court found that the three preconditions for a violation of Section 2 of the Voting Rights Act set forth in *Gingles*, 478 U.S. at 50-51, were satisfied with regard to the Hispanic community of Clovis. *See Complaint*, Ex. 2, Findings 64, 65. In addition, the Legislative Defendants presented undisputed evidence demonstrating that the "totality of circumstances" required a finding of a Section 2 violation in that area.

The expert for the Egolf Plaintiffs, Dr. James Williams, testified that the Executive Defendants' plan, even as amended by them during trial, failed to create an effective Hispanic majority district in the Clovis area. The Executive Plan adopted by the district court dismantled the highly successful strong majority Hispanic House District 63 in Clovis and hence runs afoul of Section 2 of the VRA.

The NM Supreme Court's instructions to Judge Hall are not only consistent with Section 2 of the VRA, but plainly do not invite or require racial gerrymandering. Therefore, Plaintiffs' claims of racial gerrymandering must fail. [Doc. 1, ¶¶ 62-63]. The act of drawing districts based predominantly on race, also known as racial gerrymandering, is subject to strict scrutiny. *Shaw v. Reno*, 509 U.S 630, 643 (1993). Race-conscious redistricting decisions are not always unconstitutional, and strict scrutiny will only apply where race is "the predominant factor motivating the [map-drawer's] decision" and where other legitimate districting principles have been "subordinated to race." *Bush*, 517 U.S. at 993.

Contrary to Plaintiffs' and the Governor's allegations, the New Mexico Supreme Court did not instruct the district court to subordinate race-neutral districting principles to racial considerations in drawing its new map. Instead, the Supreme Court directed the district court to avoid diluting the voting strength of Hispanic residents in and near Clovis, New Mexico. *Hall*, 2012-NMSC-___, ¶¶ 20, 45; *Remand Order* at p. 20-21. There is no evidence that this aim cannot be accomplished through the drawing of a district which otherwise comports with traditional redistricting principles, and in fact, at trial the Legislative Defendants and other parties proposed a district which increased Hispanic voting strength in the relevant area, which preserved the core of existing districts in the area, contained contiguous precincts and which was reasonably compact.[7]

[7] Even where race is shown to be the predominant factor in drawing districts, the plan is permissible if it is narrowly tailored to achieve a compelling government interest, such as compliance with the Voting Rights Act. *See Bush*, 517 U.S at 976-77. While the district court stated that the Voting Rights Act did not require the drawing of any particular majority Hispanic district, the New Mexico Supreme Court's Order is most fairly read to hold that the trial court erred in reaching this conclusion.

Therefore, the NM Supreme Court's instruction to consider Hispanic citizen voting-age populations in reaching its decision in drawing a district in the Clovis area is constitutional and intended to avoid violations of Section 2 of the Voting Rights Act.

V. **CONCLUSION**

For the foregoing reasons, the New Mexico Supreme Court's instructions to the district court are constitutional.

Respectfully submitted,

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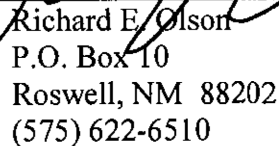

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CERTIFICATE OF SERVICE

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

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