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

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

Plaintiffs,

vs. No. 1:12-cv-00140

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

Defendants.

INTERVENOR STATE OF NEW MEXICO EX REL GARY KING'S
RESPONSE REGARDING THE CONSTITUTIONALITY OF THE NEW
MEXICO SUPREME COURT'S REMAND TO STATE DISTRICT COURT

Intervenor State of New Mexico ex rel. Gary King, by and through counsel of record, hereby submits this Response Brief regarding the constitutionality of the remand order issued by the New Mexico Supreme Court. Contrary to the misplaced assertions of Plaintiffs and Defendants Governor Martinez and Secretary of State Duran, the New Mexico Supreme Court's Remand Order is well within the confines of the United States Constitution.

ARGUMENT

I. The New Mexico Supreme Court Decision Effectuates Legitimate State Interests Within Constitutional Limitations.

Contrary to the allegations of Plaintiffs and the Governor, the New Mexico Supreme Court's decision does not "submerge" of "subvert" the "one person, one vote" doctrine grounded in the Constitution's due process clause and announced in *Reynolds v. Sims*, 377 U.S. 533 (1964). Instead, the Supreme Court's decision merely recognizes that some flexibility from absolute population equality is allowed to accommodate certain legitimate state interests in redistricting.

A. The New Mexico Supreme Court's Order to Utilize More Flexible Population Deviations is Supported by Significant and Legitimate State Interests.

In its February 21, 2012 Order (hereinafter, "Remand Order"), the New Mexico Supreme Court directed the State District Court to draw a new map taking communities of interest and the elimination of partisan bias into consideration. Remand Order at 33-34. In doing so, the Court was cognizant of the need to articulate reasons for minor deviations from ideal population equality (Remand Order at 17-8) and fully set forth significant, legitimate policies supporting its remand to the lower court. In this regard, the New Mexico Supreme Court wisely referred to guidelines adopted by the bipartisan New Mexico Legislative Council Service, noting that said guidelines are similar to policies that have been

recognized as legitimate by the courts. Remand Order at 23-4. As recognized by the New Mexico Supreme Court, other courts have looked to state policies when drawing districts and the practice has been approved by the U.S. Supreme Court. *See* Remand Order at 23; *White v. Weiser*, 412 U.S. 783, 795-96 (1973); *Abrams v. Johnson*, 521 U.S. 74, 79 (1997); *Upham v. Seamon*, 456 U.S. 37, 40-41 (1982) (*per curiam*).

One policy set forth by the guidelines is "[t]o the extent feasible, districts shall be drawn in an attempt to preserve communities of interest and shall take into consideration political and geographic boundaries." Remand Order at 25. The failure of the lower court's plan to keep certain communities of interest was the reason the New Mexico Supreme Court instructed the State District Court to explore if such interests could be preserved with population deviations greater that 1% in a new plan. Remand Order at 33-34 (remand instruction 1). Preserving communities of interest has long been recognized as a legitimate state reason to deviate from population neutrality, *Reynolds,* 377 U.S. at 578. Remand Instruction 1 is therefore constitutionally valid.

The New Mexico Supreme Court also fully explained the reasons for Remand Instructions 2 and 3 in which it instructed the State District Court to seek partisan neutrality within the confines of constitutional limitations. While the Plaintiffs' brief implies that partisan neutrality should not be a consideration in

court-drawn districts, the New Mexico Supreme Court set forth a significant and legitimate basis for such a consideration:

> Because the redistricting process is embroiled in partisan politics, when called upon to draw a redistricting map, a court must 'do so with both the appearance and fact of scrupulous neutrality.' *Peterson*, 786 N.E.2d [668] at 673 [(Ind.2003)]. To avoid the appearance of partisan politics, a judge should not select a plan that seeks partisan advantage. Thus, a proposed plan that seeks to change the ground rules so that one party can do better than it would under a plan drawn up by someone without a political agenda is unacceptable for a court-drawn plan.

Remand Order at 19 (citation omitted).

The New Mexico Supreme Court's Order continues by stating that the "principle of judicial independence and neutrality" means that a court should not adopt one political party's idea of how districts should be drawn. Remand Order at 20. The Order then quotes the following from the U.S. Supreme Court's decision in *Gaffney*:

> It may be suggested that those who redistrict and reapportion should work with census, not political, data and achieve population equality without regard for political impact. But this politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results.

412 U.S. at 753. Remand Order at 20.

The New Mexico Supreme Court thusly articulated a strong and legitimate basis for instructing the lower court to attempt to eliminate partisan bias with the use of higher population deviations if necessary. The Court further noted that the

lower court had, in fact, examined evidence on the partisan bias of other plans that had been put before it but that it failed to do so for the plan it had approved ("Executive Alternative Plan 3"). Remand Order at 20, 28. Further supporting the position that elimination of partisan bias is a legitimate interest is the fact that the U.S. Supreme Court has indicated that partisan gerrymandering may be challenged under the Constitution. *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 413-14 (2006); *Vieth v. Jubelirer*, 541 U.S. 267, 306-317 (2004) (Kennedy, J., concurring in judgment); *Davis v. Bandemer*, 478 U.S. 109 (1986). The remand instructions on partisan bias are therefore valid. Remand Order at 34 (Instructions 2 & 3).

B. Minor Population Deviations to Accommodate Legitimate State Interest are Constitutionally Permissible.

In analyzing the extent of population deviations allowed by the New Mexico Supreme Court's Order, it is important for this Court to apply the appropriate constitutional standards. As a starting point, the case at hand deals with districts of the state legislature, not federal congressional districts. While this point may seem obvious, the Plaintiffs' and Governor's briefs frequently conflate the standards that apply to state legislative plans and congressional districts when the two standards are actually quite different. Federal congressional redistricting is reviewed under the Apportionment Clause, U.S. Const. art. I, §2 while challenges to state

legislative redistricting are brought under the Equal Protection Clause, U.S. Const. amend XIV, §1. As correctly recognized by the New Mexico Supreme Court's Order, "While the United States Supreme Court has held that population equality is the paramount objective of apportionment for congressional districts, *Karcher v. Dagge*t, 462 U.S. 725, 732-33 (1983), state legislative district plans require only 'substantial' population equality, *see Gaffney v. Cummings*, 412 U.S. 735, 748 (1973)."[1] Remand Order at 9. *Gaffney* recognized legitimate state objectives beyond absolute population equality and further held:

> [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.

412 U.S. at 749.

The Plaintiffs and the Governor, in addition to attempting to hold the New Mexico Supreme Court to a standard that does not apply, assert that the New Mexico Supreme Court did not abide by the U.S. Supreme Court's directives for court-drawn districts in *Chapman v. Meier*, 420 U.S. 1 (1975). However, it is clear that the New Mexico Supreme Court was well aware of the teachings of *Chapman* and applied them. Thus, the Court's Order states,

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[1] The Governor's brief, at page 4, seems to insinuate that *Gaffney* was somehow overruled by *Chapman v. Meier*, 420 U.S. 1 (1975). However, *Gaffney* is still good law and, in fact, was relied on in *Brown v. Thomson*, 462 U.S. 835 (1983), a case that post dates *Chapman*.

> In contrast to legislatively-drawn plans, court-drawn plans are held to a higher standard, and 'must ordinarily achieve the goal of population equality with little more than de minimus variation.' *Chapman v. Meier*, 420 U.S. 1, 27 (1975). The United States Supreme Court has not defined what constitutes de minimus variations for a court-drawn plan.

Remand Order at 17.[2]

The New Mexico Supreme Court then correctly notes that court-drawn districts have sometimes deviated from 5 to 10% including the following cases: *Burlington v. Chandler*, 804 A.2d 471 (N.H. 2002) (*per curiam*) (9.26% deviation); *Below v. Gardner*, 963 A.2d 785 (N.H. 2002) (4.96 deviation); *Chapman v. Meier*, 407 F.Supp. 649 (D.N.D 1975), *on remand from* 420 U.S. 1 (1975) (6.6% deviation).

Importantly, the Plaintiffs and the Governor do not show—or even assert—that the New Mexico Supreme Court's instructions will necessarily result in more than de minimus deviation in district populations. And indeed, the population deviation of the final map adopted by Judge Hall's on February 27, 2012 has a population deviation well in line with other court-drawn districts, including those cited above. By the Plaintiffs own account, the increase in average population deviation between the plan first approved by the State District Court and the Final Plan adopted after the New Mexico Supreme Court's remand is a scant *one tenth of one*

[2] In a footnote to *Chapman* the U.S. Supreme court did sate, "This is not to say, however, that court-ordered reapportionment of a state legislature must attain the mathematical preciseness required for congressional redistricting…." *Id.* at 27, footnote 19 (citations omitted).

percent—0.1 percent—and the total deviation increase is a mere 1%. (Pl.'s Br. Doc. 43, p. 17). With such a miniscule increase in deviation, it certainly cannot be the case that the new plan, after remand, is unconstitutional while the first plan was not. Further, it must be noted that Judge Hall, in his decision on remand, explains that he actually used precisely the same standard announced by the New Mexico Supreme Court's Order in developing his first plan—the plan that Plaintiffs and the Governor claim is constitutional. Judge Hall's Decision on Remand at 5-6, footnote 6. It therefore is quite ironic that Plaintiffs and the Governor have argued that the New Mexico Supreme Court's instructions are unconstitutional when it turns out that Judge Hall actually applied the very same standard in adopting the plan they contend is constitutional.

The population deviations of the redistricting plans resulting from New Mexico Supreme Court's remand instructions are well within constitutionally permissible boundaries and the deviations are fully supported by legitimate state interests. The inescapable conclusion is that the New Mexico Supreme Court's remand instructions are constitutional.

II. The New Mexico Supreme Court's Instruction to Follow the U.S. District Court's Order to Draw a Majority-Minority District in Clovis is Proper.

The Plaintiffs and the Governor also take issue with the New Mexico Supreme Court's instruction to enable minority voting rights by drawing a majority-minority district in Clovis (District 63). A considerable amount of space in both the Plaintiffs' and the Governor's brief is spent discussing the standards for establishing a violation of Section 2 of the Voting Rights Act and arguing the standards have not been shown in this case. The Plaintiffs and the Governor arguments on this issue ignore one important fact that is vital to the New Mexico Supreme Court's Order—a Section 2 violation *was* found to exist in Clovis by the U.S. District Court for the District of New Mexico in *Sanchez v. King*, No. 82-0067-M (D.N.M 1984). Because of the history of racial and ethnic discrimination affecting the minority population, the three-judge panel redrew the boundaries to create a majority-minority district. Remand Order at 13-14. The question at hand, therefore, is not whether there is a Section 2 violation in the first instance but, rather, whether the majority-minority district ordered by this U.S District Court should continue.

The New Mexico Supreme Court found that

> "there was no evidence to establish that the relevant population had materially changed so as to no longer require an effective majority-minority district….Any 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."

Remand Order at 14.

The Plaintiffs and the Governor argue that this finding is improper because there has not been a finding of a Section 2 violation in the redistricting case at hand. This raises the question, who has the burden of proof? Under the New Mexico Supreme Court's view, a majority-minority district ordered by a court to remedy proven discrimination continues in existence until a party specifically demonstrates that it is no longer needed. Under the view advocated by the Plaintiffs and the Governor, a court-ordered majority-minority district goes away at redistricting unless a Section 2 violation is proven all over again.

The undersigned has been unable to find any authority that directly addresses this precise issue. However, the law and jurisprudence developed under Section 5 of the Voting Rights Act is analogous and provides a useful guidepost to address this question.

Unlike Section 2, which applies to all jurisdictions, Section 5 only applies to certain areas that were found by Congress to have the most serious voting rights problems. *Northwest Austin Municipal Utility v. Holder*, 557 U.S. 193 (2009). In this regard, when a court finds a violation under Section 2, of the Voting Rights Act because of pervasive and historical discrimination—as occurred for the Clovis district in *Sanchez v. King*—that district, we submit, is similar and analogous to a district that is "covered by" Section 5 of the Act.

"Section 5 requires covered jurisdictions to obtain what has come to be known as 'preclearance' from the District Court for the District of Columbia or the DOJ before 'enact[ing] or seek[ing] to administer' any alteration of their practices or procedures affecting voting." *Riley v. Kennedy*, 553 U.S. 406, 412 (2008) (alterations in original) (quoting 42 U.S.C. § 1973c(a)). “This process…requires the covered jurisdiction to demonstrate that its proposed change ‘neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color.’” *Perry v. Perez*, ___U.S.___,___, 132 S. Ct. 934, 939-40 (2012) (per curiam) (quoting 42 U.S.C. § 1973c(a)). "An election practice has the 'effect' of 'denying or abridging the right to vote' if it 'lead[s] to a retrogression in the position of racial [or language] minorities with respect to their effective exercise of the electoral franchise.'" *Riley*, 553 U.S. at 412. (alterations in original) (quoting *Beer v. United States*, 425 U.S. 130, 141, 96 S. Ct. 1357, 47 L. Ed. 2d 629 (1976)). This is what has become to be known as the non-retrogression principle. *Beer* at 141. Section 5 is applicable when a state or political subdivision adopts a legislative reapportionment plan. *Allen* v. *State Board of Elections,* 393 U.S. 544; *Georgia* v. *United States,* 411 U.S. 526.

Thus, under Section 5 jurisprudence, a majority-minority district in a covered area stays in effect and cannot be changed until there is a showing that the change will not harm the voting power of the group the majority-minority district

was intended to protect. In other words, the burden of proof is on the entity seeking to change or eliminate a majority-minority district. In the Section 5 context, a minority-majority district does not simply “go away” because of redistricting after a new census. The change must be explained and justified.

Given that a district covered by Section 5 is analogous to a district found to be in violation of Section 2 because of historical discrimination, the same burden of proof allocation should apply to the case at hand. That is, the New Mexico State Supreme Court has allocated the burden correctly by requiring a showing that the majority-minority district in Clovis is no longer needed. For this reason, the Court should find Remand Instruction 4 valid.

CONCLUSION

Because the New Mexico Supreme Court’s Order states legitimate state reasons for minor deviations from absolute equality in district population and because the Order correctly allocates the burden of proof with regard to the elimination of a court-ordered majority-minority district, this Court, if it reaches these issues at all, should find that the Remand Order of the New Mexico Supreme Court is constitutional.

Respectfully submitted,

GARY K. KING
Attorney General

By */s/ Mark Reynolds*________

SCOTT FUQUA
sfuqua@nmag.gov

MARK REYNOLDS
mreynolds@nmag.gov

Assistant Attorneys General
P. O. Drawer 1508
Santa Fe, NM 87504-1508
Phone: 505-827-7416

I hereby certify that a copy of the foregoing was electronically served to counsel of record through the CM/ECF system on this 27th day of February, 2012.

By */s/ Mark Reynolds*