IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

TIMOTHY Z. JENNINGS, in his official capacity as President Pro-Tempore of the New Mexico Senate, and BEN LUJAN, SR. , in his official capacity as Speaker of the New Mexico House of Representatives,

Petitioners,

vs. No. 33,387

THE NEW MEXICO COURT OF APPEALS,

Respondent,

vs.

DIANNA J. DURAN, in her official capacity as New Mexico Secretary of State SUSANA MARTINEZ, in her official capacity as New Mexico Governor, and JOHN A. SANCHEZ in his official capacity as New Mexico Lieutenant Governor and presiding officer of the New Mexico Senate,

Real Parties in Interest.

APPELLEES, NAVAJO INTERVENORS' OPENING BRIEF

ORAL ARGUMENT WAS REQUESTED
AND IS SCHEDULED FOR
FEBRUARY 7, 2012

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INTRODUCTION

Pursuant to New Mexico Rule of Appellate Procedure 12-201(C), the Navajo Nation, a federally recognized Indian tribe, Lorenzo Bates, Duane H. Yazzie, Rodger Martinez, Kimmeth Yazzie, and Angela Barney Nez (collectively "Navajo Intervenors") hereby submit this Opening Brief supporting the trial court's decision on Native American issues in the New Mexico State House of Representatives redistricting trial.

SUMMARY OF PROCEEDINGS

Between December 12, 2011 and December 22, 2011, a trial was held in New Mexico's First Judicial District Court before the Honorable Judge Pro Tem James A. Hall to determine how the New Mexico State House of Representatives districts should be drawn to accommodate population growth and shifts over the last ten years. See generally, Transcript of New Mexico House of Representative Hearing, Egolf v. Duran, No. D-101-CV-2011-02942 (First Judicial District, N.M., Jan. 12-22, 2011) ("Trans.").

In that trial, the Navajo Intervenors, along with a group of Pueblos, the Jicarilla Apache Nation, and individual Indians (hereinafter the "Multi-Tribal Plaintiffs"), presented evidence that the then existing House districting plan diluted the voting strength of Native Americans and deprived Native Americans of equal access to New

Mexico's electoral process in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. Trans., Dec. 19, 2011 and Dec. 20, 2011. The trial court agreed. Egolf v. Duran, No. D-2020CV-2011-02942, Findings of Fact and Conclusions of Law (Jan. 2, 2012), Findings of Fact ¶¶42-60, Conclusions of Law ¶¶17-25.

As a proposed remedy for the Voting Rights Act violations, the Navajo Intervenors proposed a nine district partial redistricting plan ("Navajo Plan"), which incorporated the three districts proposed by the Multi-Tribal Plaintiffs. At the beginning of the litigation, both the Maestas Plaintiffs and the Egolf Plaintiffs incorporated the Navajo Plan into their own plans, without alteration. See generally, Maestas Plan 2 [Maestas Ex. 2], Egolf Plans 2-5 [Egolf Exs. 11, 22, 23, 26]. Later in the litigation, at the direction of the Court, the Executive Defendants also incorporated the Navajo Plan into two of their plans, Alternatives 2 and 3.[1]

The Navajo Intervenors and the Multi-Tribal Plaintiffs presented evidence that the Navajo Plan would best remedy the Voting Rights Act violations because it would

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[1] Originally, the Navajo Intervenors included Bernalillo County Precinct 567 in House District 65. The Navajo Intervenors did not ultimately advocate that Bernalillo County Precinct 567 be included in House District 65. The Navajo Intervenors' final proposed House district 65, therefore, is identical to that proposed by the Maestas Plaintiffs, the Egolf Plaintiffs, the Multi-Tribal Plaintiffs, and the Legislative Defendants. The Executive Defendants' Alternatives 2 and 3 include Bernalillo County Precinct 567 in House District 65, because the Executive Defendants relied on the Navajo Intervenors' original maps in drafting Alternatives 2 and 3.

increase Native American voting strength while at the same time respecting tribal self-determination and preserving Native American communities of interest. Trans., Dec. 19, 2011; Trans., Dec. 20, 2011. The Court agreed. Egolf v. Duran, No. D-101-CV-2011-02942, Findings of Fact and Conclusions of Law (Jan. 2, 2012), Findings of Fact ¶¶42-60, Conclusions of Law ¶¶17-25.

The trial court expressly found that the Native American population in northwest New Mexico is sufficiently numerous and geographically compact to constitute a majority in six districts, Finding ¶ 49, that voting in Native American districts is racially polarized, Finding ¶ 50, that non-Native voters vote as a bloc to defeat Native American candidates of choice, Finding ¶ 50, that Native Americans continue to suffer the effects of discrimination which hinder their ability to effectively participate in the political process, Finding ¶ 53, and that compliance with the Voting Rights Act Section 2, respect for self-determination, and preservation of tribal communities of interest justify the districts in the Navajo Plan, Finding ¶ 60.

The trial court concluded that the Navajo Intervenors and Multi-Tribal Plaintiffs met the threshold criteria for establishing a Voting Rights Act claim, Conclusion ¶ 21, that under the totality of the circumstances, Native Americans do not have the same electoral opportunities as other New Mexicans in violation of the Voting Rights Act, Conclusion ¶ 22, that the Navajo/Multi-Tribal Plan presents the

best remedy for addressing these violations, Conclusion ¶ 23, and that the population deviations in the districts in the Navajo/Multi-Tribal Plan are justified by, among other things, the need to address Voting Rights Act violations, and the policy of respecting tribal self-determination, Conclusion ¶ 24.

The trial court ultimately adopted Executive Defendants' Alternative 3, which incorporated, without alteration, the Navajo Plan.

ARGUMENT

The Navajo Intervenors are participating in this proceeding for the limited purpose of ensuring that any statewide redistricting plan adopted by this or any other court incorporates, without alteration, the Navajo Plan. See NMRA 12-201(C).

As explained in more detail below, there is substantial evidence to support the trial court's conclusion that Native Americans in northwest New Mexico have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice in violation of the Voting Rights Act , and the trial court did not abuse its discretion in concluding that the Navajo Plan would provide the best remedy for addressing these Voting Rights Act issues while at the same time respecting tribal self determination and communities of interest.

If this Court selects a statewide redistricting plan other than Executive Alternative 3, which was adopted by the trial court, or directs the trial court to adopt a different plan, the only plans that should be considered are those that either incorporate the Navajo Plan, or are altered to do so. Currently, Maestas 2 [Maestas Ex. 2], Egolf 2-5 [Egolf Exhibits 11, 22, 23, 26], and Executive Alternatives 2 and 3 incorporate the Navajo Plan. The Legislative Defendants' plan can easily be altered to do so. Trans., Dec. 22, 2011, Cross Examination of Brian Sanderoff by Patricia Williams, p. 99, lines 11-16. These plans, therefore, are the only plans that should be considered for adoption.

I. THE EVIDENCE OVERWHELMINGLY SUPPORTS THE DISTRICT COURT'S CONCLUSION THAT NATIVE AMERICANS HAVE LESS OPPORTUNITY THAN OTHER MEMBERS OF THE ELECTORATE TO PARTICIPATE IN THE POLITICAL PROCESS AND TO ELECT REPRESENTATIVES OF THEIR CHOICE.

Section 2 of the Voting Rights Act prohibits any state from imposing any voting qualification, standard, practice or procedure that results in the abridgement of any citizen's right to vote based on the voter's race, color or status as a member of a language minority group. Native Americans are a protected minority group within the meaning of the Voting Rights Act. Jepsen v. Vigil-Giron, No. D-0101-CV-2001-02177, Court's Findings of Fact and Conclusions of Law Concerning State House of Representatives Redistricting (N.M. First Judicial District Court, Jan. 24, 2002); 42

U.S.C. § 1973b(f)(2); 42 U.S.C. §1973aa-1a. A protected minority group establishes a Voting Rights Act violation when it demonstrates "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).

Thornburg v. Gingles, 478 U.S. 30 (1986), sets forth the contours of a Section 2 Voting Rights Act claim. Under Gingles, a protected minority must show that (1) it is sufficiently large, geographically compact and capable of electing a representative of choice in a hypothetical single member district, (2) it is politically cohesive; (3) non-minorities vote as a bloc such that they are usually able to defeat candidates of the minority group's choice; and (4) under the totality of the circumstances, the challenged voting procedure dilutes minority voting strength. Id. at 49-51. The trial court found that the Navajo Intervenors and Multi-Tribal Plaintiffs had satisfied each of these requirements. Egolf v. Duran, No. D-101-CV-2011-02942, Findings of Fact and Conclusions of Law (Jan. 2, 2012), Findings of Fact ¶¶42-60, Conclusions of Law ¶¶17-25.

As recognized in Gingles, the Voting Rights Act analysis is "fact-intensive." Id. at 46. The Gingles factors are clearly dependent on particularized facts such as the status and behavior of the communities at issue, and the specific elections in the relevant region. Because the Gingles analysis is factual, this Court may not overturn

the trial court's findings in this regard unless those findings are not supported by substantial evidence. Segal v. Goodman, 115 N.M. 349, 353, 851 P.2d 471, 475 (1993).

On substantial evidence review, this Court should "not reweigh the evidence nor substitute [its] judgment for that of the fact finder." Las Cruces Prof'l Fire Fighters v. City of Las Cruces, 1997-NMCA-044, ¶ 12, 123 N.M. 329, 940 P.2d 177. "[F]acts found by the trial court will not be disturbed by an appellate court if those factual findings are supported by substantial evidence." Segal, 115 N.M. at 353, 851 P.2d 471, 475 (1993). "Substantial evidence is such relevant evidence that a reasonable mind would find adequate to support a conclusion." Landavazo v. Sanchez, 111 N.M. 137, 138, 802 P.2d 1283 (1990); Ruiz v. Vigil-Jiron, 2008-NMSC-063, ¶ 13, 145 N.M. 280, 196 P.2d 1286.

As explained in more detail herein, the evidence overwhelmingly supports the trial court's conclusions with regard to Voting Rights Act claims made by the Navajo Intervenors and Multi-Tribal Plaintiffs, and the trail court's findings in that regard, therefore, must not be disturbed on appeal.

A. The Navajo Intervenors and Multi-Tribal Plaintiffs Presented Clear Evidence That There are Sufficient Numbers of Native Americans Living Within a Geographically Compact Area of Northwest New Mexico to Support Six Majority Native American Districts.

The Navajo Plan was offered in the proceedings below as Navajo Exhibit 3. The Navajo Plan, which incorporates the Multi-Tribal Plaintiffs' Plan, includes six Native American minority-majority districts—4, 5, 6, 9, 65, and 69—in a geographically compact area, the northwest quadrant of New Mexico. Nav. Ex. 3; Trans, Dec. 20, 2011, Testimony of Leonard Gorman, p. 213, line 6-214, line 1. As proposed by the Navajo Intervenors, each of these six Native American minority-majority districts have total adult Native American voting age population of 65.1% or more, Nav. Ex. 3, and the total Native American non-Hispanic voting age population in each of the Navajo Intervenors' proposed districts is 62.1% or higher. Id.

As the Navajo Plan demonstrates, there are indeed sufficient numbers of Native Americans living within the northwest quadrant of the State to create six majority-minority House districts from which Native Americans have the opportunity to elect a candidate of their choice. There was clear evidence presented below, therefore, to satisfy prong one of Gingles.

B. The Navajo Intervenors and Multi-Tribal Plaintiffs Presented Substantial Evidence that Native American Voters in Northwest New Mexico are Politically Cohesive, Voting in Northwest New Mexico is Racially Polarized, and Non-Natives Vote as a Bloc Against Native American Candidates of Choice.

At trial, the Navajo Intervenors and Multi-Tribal Plaintiffs presented evidence that analysis of voting patterns conducted by experts Dr. Richard Engstrom and Dr. Rodolpho Espino established that Native Americans in the northwest quadrant of New Mexico are politically cohesive because Native Americans tend to vote for the same candidates. Trans., Dec. 19, 2011, Direct Examination of Richard Engstrom, p. 196, lines 7-11, p. 201-02; Trans., Dec. 20, 2011 at Direct and Redirect Examinations of Rodolpho Espino, p. 125, lines 15-17; p. 125, line 25 to p. 126, line 10; p. 126, line 21 to p. 127, line 9. The evidence illustrates that using homogeneous precinct analyses, ecological regression analyses, and multinomial-dirichlet ecological inference analyses, Drs. Engstrom and Espino determined that voting in Native American majority-minority districts in New Mexico is racially polarized, and that in primary elections, non-Native voters vote as a bloc to defeat Native American candidates of choice more often than not. Trans., Dec. 19, 2011, Direct Examination of Richard Engstrom, p. 196, lines 7-11, p. 201-02; Trans., Dec. 20, 2011, at Direct and Redirect Examinations of Rodolpho Espino, p. 129, lines 5 to 130, line 10; p. 138

lines 10-15; p. 141 lines 13-18. No expert was offered to refute the unequivocal conclusions reached by Drs. Engstrom and Espino. See generally, Trans.

There was substantial and unrebutted evidence presented at trial, therefore, to support the trial court's conclusions regarding the second and third prongs of Gingles.

C. The Navajo Intervenors and Multi-Tribal Plaintiffs Submitted Substantial Evidence that Under the Totality of the Circumstances, the Current Districting Scheme Continues to Dilute the Strength of the Native American Vote in New Mexico.

In assessing the totality of the circumstances pursuant to Gingles, a court considers factors such history of discrimination in voting, whether voting is racially polarized, "the extent to which the 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," and the extent to which minority voters have been elected in the relevant jurisdictions. Gingles, 478 U.S. at 45.

Here, there is no question that Native Americans, and Navajos in particular, have historically been discriminated against in areas of voting. Native Americans were not authorized to vote in state elections in New Mexico until 1948. Sanchez v. King, No. 82-0246-JB, Court's Findings of Fact and Conclusions of Law (U.S. Dist. Ct. N.M., Aug. 8, 1984) at 25. As late as 1962, candidates continued to challenge the

validity of votes cast in state elections by Navajo Indians residing within the Navajo Nation's territorial jurisdiction. See Montoya v. Bolack, 372 P.2d 387 (1962), 70 N.M. 196 (N.M. 1962).

There is no dispute that Native Americans in New Mexico, and Native Americans residing on the Navajo Nation in particular, continue to suffer the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process. See generally, Trans., Dec. 20, 2011, Direct Testimony of Kimmeth Yazzie, p. 103-117; Trans., Dec. 20, 2011, Direct Testimony of Rebecca Tsosie, p. 90, line 5 to p. 91, line 1. Indeed, unemployment on the Navajo Nation, when last officially measured by the United States Department of the Interior Bureau of Indian Affairs, was in excess of 52%. Nav. Ex. 8 at 10. Citizens of the Navajo Nation face additional barriers to voting, including difficulties in registering to vote, poverty, poor road conditions, lack of convenient polling locations or access thereto, and confusion regarding the differences between tribal and state governmental systems. See generally, Trans., Dec. 20, 2011, Direct Testimony of Kimmeth Yazzie, p. 103-117.

Finally, very few Native Amercians hold elective office in New Mexico's House of Representatives. According to the 2010 Census, 9.4% of New Mexico's citizens are American Indian or Alaska Native alone. If Native Americans were

represented in the New Mexico State House of Representatives at the level proportionate to their total population, Native Americans would occupy at least six seats in the House (total population of 193,562.83 (9.4% of 2,059,179) divided by 29,417 (the ideal district size) = 6.579 districts). Id. Native Americans currently hold only three seats in the New Mexico House of Representatives. See Trans., Dec. 21, 2011, Direct Testimony of Rod Adair.

Given the foregoing, the District Court correctly decided that the evidence supported the conclusion that under the "totality of the circumstances test" of Section 2 of the Voting Rights Act and Gingles, the voting strength of Native Americans in New Mexico has been diluted and Native Americans do not have an equal opportunity to participate in the political process and to elect representatives of their choosing.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT THE NAVAJO PLAN IS THE BEST PLAN FOR ADDRESSING VOTING RIGHTS ACT VIOLATIONS AND FOR REDISTRICTING NEW MEXICO'S NORTHWEST QUADRANT.

The selection of one remedy over another is a matter committed to the sound discretion fo the trial court. Beaver v. Brumlow, 2010-NMCA-33, 148 N.M. 172, 175, 231 P.3d 628, 631,¶ 13. "'An abuse of discretion will be found when the trial

court's decision is contrary to logic and reason.'" Id. (citing Three Rivers Land Co. v. Maddoux, 98 N.M. 690, 694 , 652 P. 2d 240, 244 (1982).

As explained in more detail below, in this case, there was evidence overwhelmingly supporting the trial court's conclusion that the Navajo Plan provides for the best overall remedy to the current plan's dilution of Native American voting rights, honors tribal self-determination, and provides the best set of electoral opportunities. The trial court's decision in this regard, therefore, was not an abuse of discretion.

A. Evidence Presented at Trial Establishes that the Navajo Plan Increases Native American Voting Strength in the Six Native American Majority-Minority districts.

The Navajo Plan maintains the six existing Native American majority minority districts created in 2002. Nav. Ex. 3. The Navajo Plan, however, improves upon these districts by increasing the total adult Native American voting age population in each district to between 65.1% and 76.4%, id., and increasing the total Native-American non-Hispanic voting age populations in each of the Navajo Intervenors' proposed districts to between 62.1% and 73.8%. Id. This increase is calculated to improve the chance that Native American constituents can elect a candidate of their choice in each of the six districts. See generally, Trans., Dec. 20, 2011, Direct Testimony of Leonard Gorman, p. 142-161, 187-190.

B. Evidence Presented at Trial Establishes that the Navajo Plan Respects Native American Communities of Interest.

The testimony presented at Trial established that Native American tribes and their representatives are in the best position to define what communities of interest exist within and around their tribal lands. Trans., Dec. 20, 2011, Direct Testimony of Rebecca Tsosie, p. 84, lines 21-23, p. 92, line 12 to p. 93, line 5; Trans., Dec. 20, 2011, Direct Testimony of Leonard Gorman, p. 142-161, 187-190. The Navajo Intervenors and the Multi-Tribal Plaintiffs submitted a plan that respects Native American communities of interest defined by the tribal communities themselves. Id.

C. Evidence Presented at Trial Supports the Conclusion that Adoption of the Navajo Plan Honors the Right of Self-Determination.

The Navajo Nation has a right of self-determination, which requires the Court to consider the Nation's expressed preferences regarding the drawing of house districts in the northwest quadrant of the state. See generally, Trans., Dec. 20, 2011, Direct Testimony of Rebecca Tsosie, p. 70-91. As explained by Professor Rebecca Tsosie:

> [T]he principle of self-determination at the root is a principle of autonomy. . . . [T]he principle of self-determination puts the agency in the indigenous Nation to actually describe what would serve that Nation's aspirations the best. That is a principle that basically overturns a history of essentially injustice where other governments, other people paternalistically told Native

> American people, "Well, this is what you need to do, and this is for your own good."

Trans., Dec. 20, 2011, p. 77-85.

New Mexico has recognized the importance of honoring tribal self-determination, by directing each of its agencies to collaborate with tribes, on a government-to-government basis. New Mexico State-Tribal Collaboration Act (2009) (SB196), submitted as Multi-Tribal Plaintiffs' Exhibit 16. In the last round of redistricting, this court expressly recognized tribal self-determination as a legitimate factor to be considered in drawing legislative districts in New Mexico. Jepsen v. Vigil-Giron, No. D-101-CV-2001 (N.M. First Judicial District Court, January 24, 2002) at p.13, ¶10 (deferring to plans presented by the Navajo and Jicarilla Apache Nations in part because they "further[ed] significant state polices, such as. . . respect for tribal self-determination."). Consistent with that recognized policy, the trial court did not err in honoring the expressed preferences of the tribal entities who are parties to this litigation, as reflected in the Navajo Plan.

Substantial evidence supports the trial court's conclusion that the Navajo Plan provides for the best overall remedy to the current plan's dilution of Native American voting rights, honors tribal self-determination, and provides the best set of electoral opportunities for Native Americans who have historically been deprived of such

opportunities, and that the deviations in that plan are justified by natural, political, and traditional boundaries, the need to comply with the Voting Rights Act, and the principles of tribal self-determination. The trial court did not abuse its discretion in concluding that the Navajo Plan best addresses these issues and should be incorporated into any statewide redistricting plan ultimately adopted by the court.

III. ANY PLAN FOR REDISTRICTING THE NEW MEXICO HOUSE OF REPRESENTATIVES SHOULD INCORPORATE THE NAVAJO PLAN.

The Navajo Intervenors and Multi-Tribal Plantiffs successfully established Voting Rights Act violations which are supported by ample evidence. The Navajo Intervenors and Mulit-Tribal Plaintiffs submitted a partial redistricting plan which, the trial court correctly concluded, best addresses those existing violations while respecting Native American communities of interest and tribal self-determination. Any statewide redistricting plan, therefore, should include the Navajo Plan without alteration. If this Court determines the trial court's adopted plan is not supported by substantial evidence or is legally flawed, the only plans that should be considered for adoption, therefore, are Maestas 2, Egolf 2-5, Executive Alternative 2, Executive Alternative 3, or a version of the Legislative Defendants Plan, or some other plan, that is modified to incorporate the Navajo Plan.

CONCLUSION

The Navajo Intervenors respectfully request that this Court either affirm the decision rendered below, adopt a statewide plan that incorporates the Navajo Plan, or direct the trial court to adopt a statewide plan that incorporates the Navajo Plan.

ORAL ARGUMENT IS REQUESTED

Given the number of plans before the Court, the size of the record, and the detailed arguments to be presented with regard to each plan, Counsel believes that this Court's determination would be materially assisted by oral argument. Oral argument has been scheduled for February 7, 2012.

Respectfully submitted,

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We hereby certify that a copy of the foregoing was electronically mailed and mailed to counsel of record and the Honorable James A. Hall on this 27th day of January, 2011.

WIGGINS, WILLIAMS & WIGGINS, P.C.

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