Jesse C. Trentadue (#4961)
Carl F. Huefner (#1566)
Britton R. Butterfield (#13158)
**SUITTER AXLAND, PLLC**
8 East Broadway, Suite 200
Salt Lake City, UT  84111
Telephone: (801) 532-7300
Facsimile: (801) 532-7355
E-Mail: jesse32@sautah.com
E-Mail: chuefner@sautah.com
E-Mail: bbutterfield@sautah.com

*Attorneys for Defendant*

## UNITED STATES DISTRICT COURT
## DISTRICT OF UTAH, CENTRAL DIVISION

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| NAVAJO NATION, a federally recognized Indian tribe, et al., | **SAN JUAN COUNTY'S  MOTION FOR SUMMARY JUDGMENT AS TO FOURTH CLAIM FOR RELIEF** |
| Plaintiffs, | Civil No. 2:12-cv-00039-RJS |
| | Judge Robert J. Shelby |
| v. | Magistrate Judge Dustin B. Pead |
| SAN JUAN COUNTY, a Utah governmental sub-division; | |
| Defendant. | |

Plaintiffs are the Navajo Nation and six of its members: Lorena Atene, Tommy Rock,

Harrison Hudgins, Wilfred Jones, Elsie Billie and Herman Farley.  Plaintiffs' *Second Amended*

*Complaint* consists of four *Claims for Relief*.  The San Juan County School Board has five

members, who are elected from five single-member election districts.  In their *Fourth Claim for*

*Relief*, Plaintiffs allege a violation of the one-person, one-vote requirement of the *Fourteenth*

*Amendment* insofar as School Board Election Districts are not equal in proportion to the

population.  Plaintiffs do not assert either a *Fifteenth Amendment* or *Voting Rights Act* violation

in their *Fourth Claim for Relief*.[1]

Pursuant to *Federal Rule of Civil Procedure* 56, San Juan County hereby

moves for partial summary judgment as to Plaintiffs' *Fourth Claim for Relief*.  The County's

*Motion* is based, in part upon the fact that, as currently drawn, the School Board Election

Districts do not violate the one-person, one-vote requirement of the *Fourteenth Amendment*; the

fact that American Indians comprise a majority of the voting-age population in Districts 3, 4 and

5; the fact that, as drawn, the School Board Election Districts further legitimate educational

needs whereby election districts are essentially drawn around communities so that the elected

representative to the School Board from each district will have a strong interest in supporting the

schools within his or her community, and be easily accessible to the parents whose children

attend those schools, which furthers the School Board's statutory mandate to insure the

maintenance, prosperity, and success of the San Juan County public schools; and the fact that

Plaintiffs lack standing insofar as they are over-represented in comparison to voters who reside in

the other School Board Election Districts.

## INTRODUCTION

San Juan County is entitled to summary judgment because:

●        As currently drawn, American Indians comprise a majority of the voting-age

population in School Board Election Districts 3, 4 and 5 and two of the five elected School Board

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[1] *See Second Amended Complaint*, Doc. 75, ¶¶ 60-65.

members are Navajo;[2]

- The size of San Juan County (over 8,100 square miles) and sparse, rural population (14,476 people of which about 3,000 are children attending San Juan County Schools, with 25% or less of the County's residents having a street address) justify the disparity in voting-age population among the five School Board Election Districts;[3]

- The School Board Election Districts are designed to foster and promote the "*School Community*" concept/philosophy whereby the schools in a community make up the Election District so that the elected representative from that district has a vested interest in the local schools and is accessible to people whose children attend those local schools, which likewise justifies the disparity in voting-age population among the School Board Election Districts;

- Plaintiffs' expert, Mr. Cooper, has proposed two redistricting plans for the School Board, which they insist the Court adopt so as to give American Indians a majority of the

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[2] Simply stated, there is no case or controversy so as to vest the Court with jurisdicition over this *Claim for Relief* or, perhaps, it is as simple as Plaintiffs not having a valid claim for relief since they already have the relief that they seek by way of their *Fourth Claim for Relief* and this *Motion*.

[3] In their *Motions for Partial Summary Judgment*, Plaintiffs frequently refer to total population figures for the five School Board Election Districts, but the controlling population is the voting-age population, which even their expert William S. Cooper conceded when he was deposed: "When it comes to drawing the districts, voting age population is more important." *Cooper Depo.*, p. 31, *Appendix Vol. II*, Exhibit D, Doc. 191-1.   *Accord*, *Negron v. City of Miami Beach*, 113 F.3d 1563, 1569 (11th Cir. 1997); *Romero v. City of Pomona*, 883 F.2d 1418, 1425 (9th Cir. 1989); *African American Voting rights Legal Defense Fund, Inc. v. Villa*, 54 F.3d 1345, 1352-53 (8th Cir. 1995)(and cases cited therein).

possible votes in proposed Districts 3, 4 and 5.  These plans, however, not only destroy the

*School Community* approach to the drawing of School Board Election Districts,[4] which the

County and School Board support for the purposes of better schools County-wide through better

and more attentive elected representatives, but in both of Plaintiffs' proposed plans there is not

even a public school in Plaintiffs' proposed District 3;

●        The individual Navajo plaintiffs have no children enrolled in San Juan County

public schools and they are over-represented in that the population of the School Board Election

Districts in which they live have fewer people than Districts 1 and 2 where the larger population

of non-American Indians live, which means that as a matter of law they have no standing to

mount a challenge to the existing School Board Election District boundaries under either the

*Fourteenth Amendment* or the *Voting Rights Act* because they actually benefit from any

malapportionment in that their votes count more;

●        Although the County is charged by law with setting School Board Election

Districts, it only does so with input from the School Board, which did not want the Election

District redrawn following the 2000 Census or 2010 Census;

●        Prior to bringing this lawsuit, Plaintiffs never approached either the County or

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[4] To the extent possible, School Board Election Districts were established around the four high schools in San Juan County and each of their feeder schools establishing, insofar as possible, the situation in which an individual Board member represents her/his community and the schools in that community.  It is believed by the School Board that as a member of the community, the elected Board member will have a strong interest in supporting the schools within his/her community, and will be more readily accessible to the parents whose children attend those schools.  *Wright Dec.*, ¶ 15, *Appendix Vol. V*, Exhibit O, Doc. 196-10.

School Board and asked to have the Election Districts redrawn; and

●          There is no evidence that race or ethnicity rather than the *School Community*
philosophy played any role in the establishment and/or continuance of the School Board Election
Districts boundaries.

## BACKGROUND

This case is about 89 people of voting-age who reside in San Juan County. Those 89
people are those who, on the 2010 Census questionnaire, identified themselves as being
American Indian and of some other race. Mr. William S. Cooper, Plaintiffs' demographic-
redistricting expert, testified during his deposition that according to the 2010 Census data the
total population of San Juan County was approximately 50% American Indian and 50% non-
Indian, and that the same was true for the County's voting-age population.[5]

> Q.       So without the any part [Indian calculation], it still comes out about
> 50/50 Indian, non-Indian in San Juan County?

> A.       **According to the 2010 census, that's right**.[6]

Mr. Cooper likewise conceded during his deposition that in presenting his assessment of
the 2010 Census population statistics to the Court, he counted
these 89 people solely as American Indian,[7] which was enough for him to represent to the Court
that America Indians comprised a majority of San Juan County's voting-age population:

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[5]  *See Cooper Depo.,* pp. 28, 32 and 95, *Appendix Vol II*, Doc, 191-1.

[6]  *Cooper Depo*., p.95, *Appendix Vol. II*, Doc. 191-1.(emphasis added).

[7]  *Id*. at pp. 69-70.

A.   For the single-race Indian population, the percentage is 49.4 percent . .
. . **So the difference between the single-race Indian and any-part
Indian in the county is 89 people voting age**. So its very modest. I
mean, it's not–I mean it doesn't really matter, when you get to the
point of drawing districts, whether you report one figure of the other.
I prefer to report both. But there's so little difference that if someone
elects or prefers to focus on one as opposed to the other, that's fine.[8]

But Mr. Cooper's alleged majority is tenuous at best because he conceded that in order to

designate oneself as "American Indian" on the Census questionnaire you did not have to be a

member of a federally recognized tribe,[9] and because these 89 people, who may not even be a

member of a federally recognized tribe, were only enough to move the County's American Indian

voting-age population from 49.4 % to 50.33%.[10] In his report, Mr. Cooper also determined that

American Indian voters comprised a majority of the population in Election Districts 3, 4 and 5.[11]

Despite the foregoing conclusion of their own expert, which are confirmed (albeit

on the basis of somewhat different percentages) by Defendant's expert, Mr. Brace, Plaintiffs are

seeking a finding from the Court that the existing apportionment of the School Board Election

Districts violates the one-person, one-vote principle of the *Equal Protection Clause*. Plaintiffs

are also seeking an order of the Court imposing one of the Plaintiffs' two preferred

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[8]  *Id*. (emphasis added).

[9] *Id.* at p. 71. Mr. Cooper was apparently also of the opinion that the 500 hundred persons
of Mexican descent living in San Juan County were Indians, but it is not clear that he counted
them as such in his analysis of the 2010 Census data. *See id.* at pp. 56-57.

[10]  *Id*.

[11]  *Cooper Report,* Exhibit I-1, Doc. 172-4 at p. 13.

apportionment plans.

## STATEMENT OF ELEMENTS AND UNDISPUTED FACTS

### A.        Elements

In order to prevail on their *Fourth Claim for Relief*, Plaintiffs must show that the current

School Board Election Districts violate the one-person one-vote requirement of the *Fourteenth*

*Amendment* either because of the disparity in the voting-age population between the Election

Districts which disparity does not further a legitimate governmental policy, or that these Districts

were created and maintained solely on the basis of race.  In deciding whether Plaintiffs can meet

or have met these elements, the Court does so according to the following principles of law:

1.        A 10% or less deviation from the "ideal population" is considered to be a minor

deviation that is consistent with the *Fourteenth Amendment*.[12]  Neither are deviations above the

10% standard *per se* violations of the *Equal Protection Clause*.[13]

2.        It is also important to recognize that the 10% standard for analyzing purported

violations of the *Fourteenth Amendment* and *Voting Rights Act* was devised for elections in large

electoral units or populations.[14]  Furthermore, each claim of an alleged malapportionment in

election districts is judged as to the particular facts of the case and the reasons, if any, for the

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[12] *See   Gaffney v. Cummings*, 412 U.S. 735, 753 (1973).  *See also Alabama Legislative Black Caucus*, 575 U.S. __, 135 S. Ct. 1257 (2015).

[13] *See Frank*, 336 F.3d 570 (7th Cir. 2003)(18% deviation); *Mahan v. Howell*, 410 U.S. 315 (1973)(16.4% deviation); *Brown v. Thomas*, 462 U.S. 835, 843 (1983)(80% deviation).

[14]  *See Frank*, 336 F.3d at 573.

malapportionment.

3.        Thus, an election district exceeding this 10% standard does not violate the

*Fourteenth Amendment* if it furthers legitimate governmental policies such as maintaining the

integrity of political subdivisions, the maintenance of compactness and contiguity of election

districts, the recognition of natural or historical boundary lines, etc.[15]

4.        More importantly, the 10% deviation from the ideal population standard was

developed for application to large population areas, such as Congressional election districts;

whereas a greater flexibility is afforded in redistricting sparsely populated counties such as San

Juan County because a few people can constitute a significant percentage of the population and it

is difficult to maintain compactness and contiguity of districts and/or precincts in sparsely

populated areas.[16]

5.        Under this case-by-case approach to analyzing alleged malapportionment, the key

elements are the existence of a legitimate governmental policy being advanced by the election

districts as drawn, and the absence of arbitrariness or discrimination in setting those district

boundaries.[17]  Thus, under this approach deviations of as much as 80% have been allowed.[18]

6.        In fact, the Supreme Court has cautioned that "it is neither practicable nor

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[15]  *See Swann v. Adams*, 385 U.S. 440, 443-44 (1967).

[16]  *See Frank,* 336 F.3d at 572-74 (7th Cir. 2003) (18% deviation did not violate either *Fourteenth Amendment* or *Voting Rights Act* in a county of 1,014 square miles and 10,000 people). By contrast, San Juan County contains 8,104 square miles and just 14,746 people.

[17]  *See Swann,* 385 U.S. at 444.

[18]  *Brown v. Thomson*, 462 U.S. at 843.

desirable to establish rigid, mathematical standards for evaluating the constitutional validity of a

state legislative apportionment scheme under the *Equal Protection Clause*, the proper judicial

approach is to ascertain whether, under the particular circumstances existing in the individual

State whose legislative apportionment is at issue, there has been a faithful adherence to a plan of

population-based representation, with such minor deviations only as may occur in recognizing

certain factors that are free from any taint of arbitrariness or discrimination."[19]

7.       Hence, under this case-by-case approach there is a redistricting trend, and

rightfully so, to accept a greater than 10% deviation from the ideal population in smaller

populations because a very few people can result in a significant percentage,[20] which is especially

true in the case of San Juan County.

8.       This trend is also reflected in Supreme Court precedent.  In *Reynolds*, for

example, the Court noted that somewhat more flexibility maybe constitutionally permissible with

respect to state legislative apportionment than in congressional districting.[21]  Therefore, in

analyzing the one-person, one-vote requirement of the *Fourteenth Amendment* in a state

apportionment context, the test is whether the election districts are "as nearly of equal population

as is practicable" and that "[s]o long as the divergences from a strict population standard are

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[19] *Roman v. Sinock*, 377 U.S. 695, 710 (1964).

[20] *See Frank*, 336 F.3d at 570 (18% deviation did not violate either *Fourteenth Amendment* or *Voting Rights Act* in a county of 1,014 square miles and 10,000 people). By contrast, San Juan County contains 8,104 square miles and just 14,746 people).

[21] *Reynolds v. Sims*, 377 U.S. 533, 578(1964).

based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible. . . ."[22]

9.       Simply stated, the "very essence of districting is to produce a different—a more politically fair—result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats."[23]  And that "an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State,"[24] which undoubtedly gave rise to the over- versus under- represented analysis in a one-person, one-vote context.

10.       Voters in an election district with fewer individuals than the average or ideal voting population are referred to as being "over-represented" because their individual vote carries more weight than those in other districts with more people.  Conversely, when a district has more people than the ideal, it is described as being "under-represented" because each individual's vote carries less weight than in other districts with fewer people.  More importantly, though, only those voters domiciled in the under-represented voting districts have standing to challenge an apportionment plan.[25]

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[22]  *Id.* at 577.

[23]  *Gaffney,* 412 U.S. at 753.

[24]  *Reynolds*, 377 U.S. 568.

[25]  *See  Fairley v. Patterson*, 493 F.2d 598, 603 (5th Cir. 1974) (citing *Skolnick v. Board of Commissioners of Cook County*, 435 F.2d 361 (7th Cir.1970)).

B.        Undisputed Facts

Set out below are the undisputed facts entitling San Juan County to summary judgment, including (1) American Indians only comprise 50% of the County's total population and voting-age population; (2) American Indians already constitute a majority of the voting-age populations in three of the five School Board Election Districts;[26] (3) as currently drawn, the School Board Election Districts further legitimate educational needs whereby election districts are essentially drawn around communities so that the elected representative to the School Board from each district will have a strong interest in supporting the schools within his or her community, and be easily accessible to the parents whose children attend those schools, which furthers the School Board's statutory mandate to insure the maintenance, prosperity, and success of the San Juan County public schools; (4) insofar as the individual Plaintiffs have no children in San Juan County Public Schools and live in over-represented Election Districts, they have no standing to mount a challenge under the *Equal Protection Clause* of the *Fourteenth Amendment*; and (5) there is no evidence that race played any role in the establishment of the School Board Election Districts.

(1)      Plaintiffs:

1.        Plaintiff Lorena Atene lives at Navajo Mountain, Utah and votes in the  Navajo

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[26]  *See Cooper Expert Report*, Exhibit I-1, Doc. 172-4, p. 13.

Mountain Precinct,[27] which is in School Board Election District 5.[28]

      2.      Ms. Atene does not have children attending a public school in San Juan County.[29]

      3.      Plaintiff Tommy Rock lives at Oljato, Utah and votes in the Oljato Precinct,[30] which is in School Board Election District 5.[31]

      4.      Mr. Rock does not have children attending a public school in San Juan County.[32]

      5.      Plaintiff Harrison Hudgins lives at Westwater, Utah and votes in the Southwest Blanding Precinct,[33] which is in School Board Election District 3.[34]

      6.      Mr. Hudgins does not have children attending a public school in San Juan County.[35]

      7.      Plaintiff Wilfred Jones lives at Red Mesa, Utah and votes in the Montezuma

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[27]  *See First Amended Complaint*, Doc. 47, ¶ 11.

[28]  *See Cooper Depo*, Exhibit 3, *Appendix Vol II*, Exhibit D, Doc. 191-4 .

[29]  *Wright Dec.*, ¶ 22, *Appendix Vol. V*, Exhibit O, Doc. 196-10.

[30]  *See First Amended Complaint*, Doc. 47, ¶ 12.

[31]  *See Cooper Depo*, Exhibit 3, A*ppendix Vol. II*, Exhibit D, Doc. 191-4 .

[32]  *Wright Dec.*, ¶ 22, *Appendix Vol. V*, Exhibit O, Doc. 196-10.

[33]  *See First Amended Complaint*, Doc. 47, ¶ 13.

[34]  *See Cooper Depo*, Exhibit 3, *Appendix Vol. II*, Exhibit D, Doc. 191-4.

[35]  *Wright Dec.*, ¶ 22, *Appendix Vol. V*, Exhibit O, Doc. 196-10.

Creek Precinct,[36] which is in School Board Election District 4.[37]

     8.      Mr. Jones does not have children attending a public school in San Juan

County.[38]  Furthermore, children in his community, which is on the Utah/Arizona border,

apparently attend school in the Red Mesa School District in Arizona.[39]

     9.      Plaintiff Leslie Billie lives at Aneth, Utah and votes in the Aneth Precinct,[40] which

is in School Board Election District 4.[41]

     10.     Ms. Billie does not have children attending a public school in San Juan

County.[42]

     11.     Plaintiff Herman Farley lives at Red Mesa, Utah and votes in the Red Mesa

Precinct,[43] which is in School Board Election District 4.[44]

     12.     Mr. Farley does not have children attending a public school in San Juan

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[36] *See First Amended Complaint*, Doc. 47, ¶ 14.

[37] *See Cooper Depo*, Exhibit 3, *Appendix Vol. II*, Exhibit D, Doc. 191-4.

[38] *Wright Dec.*, ¶ 22, *Appendix Vol. V*, Exhibit O, Doc. 196-10.

[39] *Id.* at ¶10.

[40] *See First Amended Complaint*, Doc. 47, ¶ 15.

[41] *See Cooper Depo*, Exhibit 3, *Appendix Vol. II*, Exhibit D, Doc. 191-4.

[42] *Wright Dec.*, ¶ 22, *Appendix Vol. V*, Exhibit O, Doc. 196-10.

[43] *See First Amended Complaint*, Doc. 47, ¶ 16.

[44] *See Cooper Depo*, Exhibit 3, *Appendix Vol. II*, Exhibit D, Doc. 191-4.

County.[45]

13.     Furthermore, prior to bring this lawsuit neither the individual Plaintiffs nor the

Navajo Nation ever approached either the County or the San Juan County School Board about

any need to redraw School Board election district boundaries.[46]

<div align="center"><b>(2)     Unique Characteristics of San Juan County</b>:</div>

14.     The 2010 population of San Juan County had only increased by 333 people since

the 2000 Census to a total population of just 14,746 people.[47]

15.     San Juan County, which is approximately 8,100 square-miles in size, is one of the

largest counties in the United States.[48]

16.     Vast regions of the County are uninhabited and according to Norman Johnson, the

former San Juan County Clerk-Auditor, only about 25% of the County's registered voters have a

physical address.[49]

17.     The remainder use only a post office box for their address and, a consequence, it

is difficult to place those persons without a physical address within or without a particular

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[45] *Wright Dec.*, ¶ 22, *Appendix Vol. V*, Exhibit O, Doc. 196-10.

[46] *Wright Dec.* ¶23, *Appendix Vol. V*, Exhibit O, Doc. 196-10; *See Norman Johnson* Depo., pp. 56-58, *Appendix Vol. IV*, Exhibit H, Doc. 193-10.

[47] *Brace Dec.*, ¶ 10, *Appendix Vol. V*, Exhibit M, Doc. 196-1.

[48] *Brace Dec.*, ¶ 16, *Appendix Vol. V*, Exhibit M, Doc. 196-1.

[49] *Brace Dec.*, ¶ 16, *Appendix Vol. V*, Exhibit M, Doc. 196-1.

election district or precinct.[50]

18.     The small population is a serious problem for any redistricting or analysis of the

need to reconfigure election districts because just one hundred and forty-seven people, for

example, would be 1% of the County's total population and just ninety-seven people would 1%

of the County's voting-age population.[51]

19.     Another complicating factor is how election districts are established and how

Census data is gathered and reported in San Juan County which, as with most of the counties in

the State of Utah, County Commission and School Board Election Districts are drawn along

section boundaries.[52]

20.      Census data, on the other hand, is gathered and reported by geographical

areas known as "*Census Blocks*."[53]

21.     Unlike sections, which are surveyed and have legal descriptions *Census Blocks*,

especially in a sparsely populated area such as San Juan County, are defined by physical features

that can be seen and documented by a census worker, such as streets, streams, railroads, etc.[54]

22.     These different geographies pose yet another difficult problem in determining

whether there is a need to redistrict and, if so, how to accomplish the redistricting process after

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[50]  *Brace Dec.*, ¶ 16, *Appendix Vol. V*, Exhibit M, Doc. 196-1.

[51]  *Id.* at ¶ 17

[52]  *Id.* at ¶ 18.

[53]  *Id.* at ¶ 18.

[54]  *Id.* at ¶ 19.

each Census.[55]

23.     This problem arises because *Census Blocks* are not consistent with section lines. *Census Blocks* can cross, and usually do cross section boundaries and election district and precinct boundaries, which then results in what are referred to as "*Split Census Blocks*."[56]

24.     The problem inherent in *Split Census Blocks* is how to allocate the population within that *Census Block* that is *Split* to the two or more election districts that may comprise a particular *Census Block*.[57]

25.      This is made even more difficult when so many people in San Juan County do not have a physical address whereby one can easily determine where within the *Split Census Block* they reside and, therefore, into which election district they should be placed.[58]

26.     When *Split Census Blocks* exist whereby part of the population in that *Census Block* lives in one election district and part in another election district, in order to properly establish the population of both election districts the populations within that *Census Block* that is *Split* must be allocated to the election district in which they reside; otherwise, the population of the election districts will not be accurate for determining the need to redistrict and/or how any redistricting should be done.[59]

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[55]  *Id.* at ¶ 19.

[56]  *Id.* at ¶ 20.

[57]  *Id.* at ¶ 20.

[58]  *Id.* at ¶ 20.

[59]  *Id.* at ¶ 21.

27.     There are 4,546 *Census Blocks* in San Juan County, but only 815 (or only 17.9%) are reported in the 2010 Census as having people living in them.[60]

28.     In addition, only 17 blocks have more than 100 persons living there, with the largest populated block having just 328 people.[61]

29.     In doing his population analysis or calculations with respect to the 2010 Census data, Mr. Cooper states in his expert report that he "**did not apply a formula to split the population blocks**."[62]

According to Mr. Cooper, "**I simply assigned the blocks *en toto* to one district or the other based upon a visual assessment**."[63]

30.     According to the 2010 Census the San Juan County Commission Election Districts have 442 people in *Split Census Blocks*, which is more than either of Plaintiffs' experts are willing to concede, and that is 3% of the total population.[64]

31.     Therefore, depending into which Commission or School Board Election District these people were assigned, it could have and would have a significant effect on any alleged malapportionment.[65]

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[60]  *Id.* at ¶ 22.

[61]  *Id.* at ¶ 22.

[62]  *Cooper Second Supplemental Declaration*, Doc. 172-9, ¶ 20 (emphasis added).

[63]  *Id.* (emphasis added).

[64]  *Brace Dec.*, ¶ 22, *Appendix Vol. V*, Exhibit M, Doc. 196-1.

[65]  *Brace Dec.*, ¶ 22, *Appendix Vol. V*, Exhibit M, Doc. 196-1.

32.    In a normal situation, the assignment of a *Split Census Block* population to the election district or precinct where those people lived would be done by the street address of each person.[66]

33.    One could tell by the person's physical address where within the *Split Census Block* that person lived and place them in the election district that encompassed people living in that particular area so as to accurately determine the population of each election district or precinct for redistricting purposes.[67]

34.    But that cannot be done in San Juan County because so few of the registered voters have a street address, while the rest have a Post Office Box.[68]

35.    Rather than assign the *Split Census Block* populations *en toto* to a particular County Commission Election District or School Board Election District as Mr. Cooper did, the better and more accurate approach is to consult persons with mapping skills and knowledge of the County's residents, which is the method San Juan County's expert, Mr. Brace, employed to help resolve the *Split Census Block* issue.[69]

### (3)    Results of 2010 Census:

36.    As noted above, the 2000 and 2010 Census questionnaires allowed those responding to designate or claim up to six racial categories: White, African American, American

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[66]  *Id.* at ¶ 23.

[67]  *Id.* at ¶ 23.

[68]  *Id.* at ¶ 23.

[69]  *Id.* at ¶ 24.

Indian or Alaska Native, Asian, Pacific Islander or "some other race," and that there are at least three basic ways to calculate the racial breakdown for the 2000 and 2010 Census: "Race-Alone-Method," "Combo Method," and "OMB Method."

37.     Mr. Cooper used the latter method which counts anyone who identified themselves as American Indian and some other race solely as an "American Indian."[70]

38.     According to Mr. Cooper, anyone who identified themself as American Indian and another race was counted solely as American Indian.  In fact, Mr. Cooper was asked in his deposition how he would have reported the racial data if all 14,746 people living in San Juan County had identified themselves as being both white and American Indian, and he said: "People who identified as American Indian and white would be considered American Indian" under his "Any-Part Indians" definition.[71]

39.     In his deposition, Mr. Cooper testified that by using the OMB Method he was able to claim that the American Indian voting-age population of San Juan County was 58.33 % and that American Indians comprised 52.17% of the County's total population.[72]

40.     But shortly thereafter, upon cross-examination, Mr. Cooper did a wholesale retreat from these percentages and admitted that in reality American Indian and non-American Indian populations and voting-age populations were equally split at 50%.[73]

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[70]  *Cooper Depo.*  pp. 65-67, *Appendix Vol II*, Exhibit D, Doc. 191-1.

[71]  *Id*.

[72]  *Id.* at pp. 67-68.

[73]  *See id.* at pp. 28, 32 & 95.

41.     Mr. Cooper further conceded on cross-examination that, according to the 2010 Census data without using his "Any-Part Indian" definition, the total population of San Juan County was approximately 50% American Indian and 50% non-Indian, and that the voting-age population was 49.57% American Indian,[74] which means that non-Indians comprised 50.03% of the voting-age population.[75]

42.     San Juan County's expert, Mr. Brace, however, calculated the American Indian population and voting-age population of San Juan County from the 2010 census data using all three of the methods described herein above.[76]

43.     Mr. Brace determined that under the Race-Alone Method,

a.      There are 7,431 American Indians in the County, which is 50.39% of the population, and

b.      The American Indian voting-age population is 4,806 or 49.40% of the voting-age population.[77]

44.     Mr. Brace also determined that under the Combo Method,

a.      There are 7,693 American Indians in the County, which is 52.17% of the total population, and

b.      The American Indian voting-age population is 4,897 or 50.33% of the voting-age

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[74]   *Id.* at pp. 95, 28 and 32.

[75]   *Brace Dec.*, ¶ 33, *Appendix Vol. V*, Exhibit M, Doc.196-1.

[76]   *Brace Dec.*, ¶ 33, *Appendix Vol. V*, Exhibit M, Doc.196-1.

[77]   *Brace Dec.*, ¶ 33, *Appendix Vol. V*, Exhibit M, Doc.196-1.

population.[78]

45.     However, as noted in the discussion of this method above, it actually inflates the

percentage since persons of multiple races are counted more than once.[79]

46.     Consequently, when all of the racial categories are totaled, they add up to

102.34% of the total population and 101.24% of the voting-age population.[80]

47.     Mr. Brace also determined that under the OMB Method whereby individuals who

identified themselves as American Indian and some other race are counted solely as American

Indian, the American Indian population of San Juan County is 7,536, which is 51.11% of the

total population.[81]

48.     The County's voting-age American Indian population under the OMB Method is

4,873 or 50.09%.[82]

49.     Mr. Brace concluded that the 2010 Census shows that San Juan County had a total

population of 14,746 people of which 9,729 or 65% were of voting-age.

50.     Most individuals reported just a single race, but 339 or 2.3% said that they were of

two or more races.[83]

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[78]  *Id.* at ¶ 34.

[79]  *Id.* at ¶ 34.

[80]  *Id.* at ¶ 34.

[81]  *Id.* at ¶ 35.

[82]  *Id.* at ¶ 35.

[83]  *Id.* at ¶ 36.

51.     Thus, depending upon how race is determined (*i.e.*, Race-Alone Method, Combo Method or OMB Method), the American Indian total population in San Juan County for 2010 varies from 7,431 up to 7,693 people, which constitutes between 50.39% and 52.17% of the total population.[84]

52.     For those persons of voting-age, the American Indian population ranges between 4,806 and 4,897 persons, which constitutes between 49.40% and 50.33% of the voting-age population.[85]

53.     As previously noted, between the 2000 and 2010 Census, the total population of San Juan County grew by 2.31% or 333 people.[86]

54.     During this same time period, depending upon which of the three methods is used for determining race from the Census data, the American Indian population of the County has fallen significantly since the 2000 Census when it ranged between 55.14% to 56.64% of the population; whereas the 2010 Census puts that range as between 49.40% and 52.17% of the County's total population.[87]

55.     In raw numbers, the Indian population actually dropped between 470 and 640 people from 2000 to 2010, depending on how one counts the Indian population.  At the same

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[84]  *Id.* at ¶ 36.

[85]  *Id.* at ¶ 36.

[86]  *Id.* at ¶ 51.

[87]  *Id.* at ¶ 51.

time, the white population in the county increased by between 764 and 959 people.[88]

56.     It is widely recognized by redistricters that the Census is not totally accurate because of over-counting and undercounting.[89]

57.     When dealing with large populations these mistakes tend to cancel each other out.[90]

58.     But this should not be presumed to occur when dealing with very small populations like that of San Juan County, where over-counting and/or under-counting by a few hundred people can make a significant difference with respect to any deviation from the ideal population for an election district.[91]

59.     With that in mind, in actuality the total population of San Juan County and the voting-age population of the County are both approximately equally spit between American Indians and non-American Indians.[92]

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[88]  *Id.* at ¶ 51.

[89]  *Id.* at ¶ 52.

[90]  *Id.* at ¶ 52.

[91]  *Id.* at ¶ 52.

[92]  *Id.* at ¶ 52.

**(4)      School Board Election Districts**:

60.      The San Juan County School Board is comprised of five members.[93]

61.      There are five members because there are only about 3,000 students enrolled in the San Juan County public schools, and Utah law provides that with so few students the School Board shall consist of five members.[94]

62.      These members are elected from the five School Board Election Districts established by San Juan County.[95]

63.       The registered voters in each of the five Districts elect one member of the School Board who also must be a resident of that District.[96]

64.      School Board members are elected in nonpartisan elections.[97]  They each serve a term of four (4) years.[98]

65.      The duties and responsibilities of the School Board are defined by statute,[99] and include the following, among others: set the core curriculum for students; administer tests

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[93]  *Wright Dec.*, ¶ 4, *Appendix Vol V*, Exhibit O, Doc. 196-10.  *See also Utah Code* §20A-12-202(1)(a).

[94]  *Wright Dec.*, ¶ 4, *Appendix Vol V*, Exhibit O, Doc. 196-10.  *See also Utah Code* §20A-12-202(1)(a).

[95]  *Wright  Dec.*, ¶ 5, *Appendix Vol. V*, Exhibit O, Doc. 196-10.  *See also Utah Code* §20A-12-201.

[96]  *Id.  See also Utah Code* §20A-12-202(3).

[97]  *Wright  Dec.*, ¶ 6, *Appendix Vol. V*, Exhibit O, Doc. 196-10.

[98]  *Wright  Dec.*, ¶ 6, *Appendix Vol. V*, Exhibit O, Doc. 196-10.

[99]  *Id.* at ¶ 7.  *See also Utah Code*  §53A–3-303.

required by the State Board of Education; use progress-based assessments as part of a plan to identify schools, teachers and students that need remediation, determine the type of remediation that is necessary, and the amount of resources to effect any remediation; purchase, sell, construct and/or make improvements to schools; establish and support libraries; establish rules that are necessary for the control and management of the Districts' schools; and do everything necessary for the maintenance, prosperity, and success of the schools and the promotion of education.[100]

66.     The current members of the San Juan County School Board are Bill Boyle from District 1, Merri Shumway from District 2, Debbie Christiansen from District 3, Elsie Dee from District 4, and Nelson Yellowman from District 5.  Ms. Dee and Mr. Yellowman are members of the Navajo Nation.[101]

67.     As previously stated, there are currently approximately 3,000 students enrolled in San County public schools.[102]

68.     However, not all of the children in San Juan County attend its public schools.[103]

69.     Children who live in the Spanish Valley, near Moab, Utah, for example, attend schools in Grand County, Utah because there are no San Juan County public schools in that

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[100] *Wright  Dec.*, ¶ 7, *Appendix Vol. V*, Exhibit O, Doc. 196-10.  *See also Utah Code* §53A–3-402.

[101] *Id.* at ¶ 8.

[102] *Id.* at ¶ 9.

[103] *Id.* at ¶ 9.

area.[104]

70.     For similar reasons, some children living in the Cedar Point area of the County

attend school in Dove Creek, Colorado and students living near the Utah-Arizona state line may

choose to attend school in the Red Mesa School District in Arizona.[105]

71.     There are several Bureau of Indian Education grant schools in School Board

Districts 4 and 5. These grant schools are not part of the San Juan School District.[106]

72.     The County's expert, Mr. Brace prepared a map showing the San Juan School

Board Districts from which each of the five Board members are elected.[107]

73.     This map also shows the public schools within each of the five Districts as well as

the Spanish Valley area in northern San Juan County that is now part of the Grand County

School District.  The School Board members for each of the five districts are also shown on this

map.[108]

74.     School Board Election District boundaries are set in furtherance of the Board's

"*School Community*" policy/philosophy.[109]

75.     With the establishment of the School Board Election Districts in 1992 (and

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[104]   *Id.* at ¶ 10.

[105]   *Id.* at ¶ 10.

[106]   *Id.* at ¶ 11.

[107]   *See* Exhibit A to *Brace Declaration, Appendix Vol. V*, Exhibit M, Doc. 196-2, a copy
of which is attached hereto as Exhibit A for ease of reference.

[108]   *See id.*

[109]   *Wright  Dec.*, ¶ 14, *Appendix Vol. V*, Exhibit N, Doc. 196 -10.

before), the Board has operated on the philosophy that the best representation comes when the elected Board member lives in close proximity to the schools and communities he/she represents.[110]

76.  Consequently, the five districts are formed around the schools in the local community whereby individual Board members represent a community and the schools in that community so as to have a strong interest in supporting the schools within their community, and to be easily accessible to the parents whose children attend those schools.[111]

77.  The School Board believes that the current School Board Election Districts provide for representation that is responsive and attentive to the varied interests and desires of the communities within the District, helping assure that the Board is able to discharge its statutory duty to provide for the maintenance, prosperity, and success of the schools and the promotion of education.[112]

78.  The establishment and maintenance of these five School Board Election Districts based upon the *School Community* concept or policy assures compliance with the requirement that the five districts be contiguous.[113]

79.  Given the immense size of San Juan County and uneven distribution of the voting population throughout the County, the reconfiguration of election districts with an equal

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[110]  *Wright  Dec.*, ¶ 14, *Appendix Vol. V*, Exhibit N, Doc. 196 -10.

[111]  *Id.* at ¶ 15.

[112]  *Id.* at ¶¶ 15 & 16.

[113]  *Id.* at ¶ 17.

number of voters will not allow for the continuation of the representation concept, and may result

in some school communities losing direct representation.[114]

80.     Neither would it be a good thing to have the five School Board members selected

in a county-wide at-large election.[115]

81.     The danger of a County-wide at-large election is that the population is

concentrated in and around Blanding, Utah, which means that the voters in that area could elect a

majority of School Board.[116]

82.     If so, then these Blanding area Board members would undoubtedly be more

attentive to the schools in their community rather than schools in other parts of the County.[117]

83.     Similarly, if School Board Election Districts were drawn in such a fashion as to

encompass several communities, the person elected would tend to favor the public schools in the

community in which he or she lived over those in other communities that comprised the election

districts.[118]

84.     The *School Community* approach to establish School Board Election Districts

avoids this danger of under-representation and possible lack of support for schools in certain

communities, and produces the best possible overall representation and support for local schools

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[114]   *Id.* at ¶ 17.

[115]   *Id.* at ¶ 20.

[116]   *Id.* at ¶ 20.

[117]   *Id.* at ¶ 20.

[118]   *Id.* at ¶ 21.

when it comes to elected members who answer to those in their community and provide the best

possible support for the local schools in their community.[119]

85.     It has always been the policy and practice of San Juan County to consult with the

School Board with respect to changing the boundaries of School Board Election Districts.[120]

86.     Mr. Johnson, the San Juan County Clerk-Auditor and person responsible for

reviewing the 2000 and 2010 Census data for redistricting purposes, said that while the County

Commission sets the School Board Election Districts it does so "with the advice and consent of

the School Board."[121]

87.     Mr. Johnson testified that he reviewed the results of the 2010 Census with respect

to the possible need to redistrict the School Board.[122]

88.     But the School Board has never requested that the County change those

boundaries.[123]

89.     District 1 is in the northern part of the County and borders Grand County, Utah.[124]

90.     In 2011, the School Board and the County Commission approved a process

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[119]  *Id.* at ¶ 21.

[120]  *Id.* at ¶ 24; *Norman Johnson* Depo., p.18, *Appendix Vol. IV*, Exhibit H, Doc. 193-10.

[121]  *Norman Johnson* Depo., pp.18-19, *Appendix Vol IV*, Exhibit H, Doc. 193-10.

[122]  *Id*.

[123]  *Wright  Dec.*, ¶ 24, *Appendix Vol. V*, Exhibit O, Doc. 196-10.  It is not surprising,
therefore, that following the 2000 Census the County Commissioners, including Commissioner
Maryboy who is Navajo, unanimously voted to maintain the 1992 School District Election
Boundaries.  *Bailey Depo.*, pp. 40-41, *Appendix Vol. I*, Exhibit B, Doc. 190-2.

[124]  *Brace Dec.*, ¶42, *Appendix Vol. V*, Exhibit M, Doc. 196-1.

whereby a portion of the County population in the "Spanish Valley" of District 1 near Moab, Utah was transferred to the Grand County School District for the administration of the schools in that remote area.[125]

91.   This did not change who lived in San Juan County, but it did change the overall School Board population by moving 487 out of the base population to be considered for configuration of the School Board.[126]

92.   With removal of the 487 people form District 1, the ideal size for each of the five Districts would be 2,852 in population.[127]

93.   Under the 10% standard, each of the five School Board Districts would have to be within 143 people above and/or below the ideal population figure.[128]

94.   After assigning the *Split Census Block* populations as described above, San Juan County's expert, Mr. Brace, determined that:

a.   District 1 has a population of 3,285, which is 433 people more than the ideal population size of 2,852;

b.   District 2 has a population of 2,820, which is 32 fewer people than the ideal number;

c.   District 3 has a population of 2,899, 47 more people than the ideal number;

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[125] *Brace Dec.*, ¶42, *Appendix Vol. V*, Exhibit M, Doc. 196-1.

[126] *Brace Dec.*, ¶42, *Appendix Vol. V*, Exhibit M, Doc. 196-1.

[127] *Id.* at ¶ 44.

[128] *Id.* at ¶ 44.

d.  District 4 has 3,060 people, 208 more than the ideal number; and

e.  District 5 has a population of 2,195, which is 657 fewer people than the ideal

number of 2,852 persons.[129]

95.  Mr. Brace also determined that School Board Election Districts 2, 3 and 4 all fall

within the 10% standard.[130]

96.  However, because of Districts 1 and 5, the overall all deviation for the School

Board Election Districts is 38.22%.[131]

97.  Those people residing in Districts 3, 4 and 5, which include the individual

Plaintiffs in this case, are also over-represented and, therefore, cannot mount a challenge to the

current School Board Election Districts because "injury results only to those persons domiciled

in the under-represented voting districts."[132]

98.  Using the three methods for determining race described above, including

allocation the 1,002 people residing in *Split Census Blocks* within the five School Board Election

District boundaries, Mr. Brace found that:

a.  the voting-age population of District 1 is 2,263 and the American Indian voting-

age population ranges between 3.74% and 5.23%;

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[129]  *Id.* at ¶ 45.

[130]  *Id.* at ¶ 46.

[131]  *Id.* at ¶ 46.

[132]  *See  Farley v. Patterson*, 493 F.2d 598, 603 (5th Cir. 1974)(citing *Skolnick v. Board of Commissioners of Cook County*, 435 F.2d 361 (7th Cir. 1970)).

b.  the voting-age population of District 2 is 1,847 and the American Indian voting-age population ranges from 22.96% to 24.58%;

c.  the voting-age population of District 3 is 1,923 of which American Indians comprise from 54.89% to 56.46%;

d.  the voting-age population of District 4 is 1,959 of which between 96.60% and 97.94% are American Indian; and

e.  in District 5 the total voting-age population is 1,387 with American Indians comprising between 94.52% and 95.37%.[133]

99.  American Indians, therefore, constitute a majority of the voting-age population in three out of the five School Board Election Districts.[134]

100.  The current School Board Election Districts have been in existence since 1992.[135]

101.  While the overall deviation of 38.22% from the ideal population might be considered high under traditional redistricting standards, Mr. Brace is of the opinion that in assessing the constitutionality of School Board's Election Districts one must also take into account the following facts:

a.  The very small population that is scattered over 8,100 square miles;

b.  The isolated communities and community schools;

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[133]  *Id.* at ¶ 46.

[134]  *Brace Dec.*, ¶47, *Appendix Vol. V*, Exhibit M, Doc. 196-1, and Exhibits B, Doc. 196-3, and C, Doc. 196-4, attached hereto as Exhibits B and C for ease of reference.

[135]  *Id.* at ¶ 48.  This 38.22% figure is larger than the 37.69% deviation identified by Mr. Cooper.  *See* Doc. 173, p. 3.

c.      The historic nature of the School Board Election District boundaries;

d.      The fact that following the 2000 Census and 2010 Census the School Board,

including its Navajo members opted not to change the School Board's historic

election districts; and

e.      The "*School Community*" representation philosophy that the County and School

Board are trying to foster whereby individual Board members represent a

community and the schools in that community so as to have a strong interest in

supporting the schools within their community and to be easily accessible to the

parents whose children attend those school.[136]

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**ARGUMENT: THE SCHOOL BOARD ELECTION DISTRICT
BOUNDARIES ARE CONSTITUTIONAL**

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While an overall deviation of more than 10% from the ideal of equal population

establishes a *prima facie* case of violation of the one-person, one-vote principle under the *Equal

Protection Clause*, the existence of such an overall deviation does not establish a *per se* violation

of that principle.  The U.S. Supreme Court has noted that the *prima facie* presumption of

invalidity may be overcome when the larger deviation is supported by legitimate, non-

discriminatory governmental interests.  Moreover, such governmental interests may also justify a

much larger overall deviation in those contexts that involve small populations, and particularly

where a small population is spread over a very large geographic area, where access to remote

areas is limited and even circuitous, as is the case in San Juan County.

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[136]  *Id.* at ¶ 48.  This 38.22% figure is larger than the 37.69% deviation identified by Mr.
Cooper.  *See* Doc. 173, p. 3.

I.    **The Existence of an Overall Deviation Among Districts Does Not Conclusively Establish a Violation of the *Equal Protection Clause*.**

There is no dispute that the School Board Election Districts have a maximum population deviation exceeding 10%, but that fact does not establish that the apportionment arrangement violates the *Equal Protection Clause* or entitle Plaintiffs to the requested summary judgment with respect to their *Fourth Claim for Relief.* Summarizing its own precedent adopting the standard that a maximum deviation above 10% establishes a *prima facie* violation, the United States Supreme Court stated:

> In *Reynolds v. Sims, 377 U.S. 533, 568 (1964)*, the Court held that "the *Equal Protection Clause* requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis." This holding requires only "that a State make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable," for "it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters." *Id., at 577.* See *Gaffney v. Cummings, 412 U.S. 735, 745-748 (1973)* (describing various difficulties in measurement of population).

> We have recognized 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." *Reynolds, supra, at 578.* As the Court stated in *Gaffney*, "[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.*

> In view of these considerations, we have held that "minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State." *Id., at 745.* 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. *See, e. g., Connor v. Finch, 431 U.S. 407, 418 (1977); White v. Regester, 412 U.S. 755, 764 (1973).* A plan with larger disparities in population, however, creates a

prima facie case of discrimination and therefore 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 approved without a satisfactory explanation grounded on acceptable state policy"). The ultimate inquiry, therefore, is whether the legislature'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." *Mahan v. Howell, 410 U.S. 315, 328 (1973).*[137]

Thus, while a maximum deviation in excess of 10% requires a governmental entity to show that the disparity is based on legitimate, non-discriminatory governmental interests, it is only the beginning of the analysis. Moreover, the Court has specifically noted that "[somewhat more flexibility may be constitutionally permissible with respect to state legislative apportionment than in congressional districting."[138] It stands to reason that even greater flexibility must be accorded to units of local government.

Judge Posner of the Seventh Circuit Court of Appeals looked at this issue in case remarkably similar to the present case:[139]

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[137] *Brown v. Thomson*, 462 U.S. 835, 842-43 (1983). Significantly, the *Brown* decision upheld a Wyoming state legislature apportionment plan with a maximum disparity of 89%, that was justified by the State's policy of respecting traditional political boundaries and giving each county at least one representative in its house of representatives. *Id. at* 839, 846.

[138] *Reynolds v. Sims*, 377 U.S. 533, 578 (1964); *see also Gaffney v. Cummings*, 412 U.S. 735, 744 (1973).

[139] In *Frank v. Forest County*, 336 F.3d 570 (7th Cir. 2003), an Indian tribe had challenged the apportionment of the board of supervisors of Forest County, Wisconsin, which Judge Posner described as follows: "Forest County is a large (1014 square miles) but sparsely populated (barely 10,000 people) county in the extreme northeastern corner of Wisconsin, fronting on Lake Superior. The population is unevenly distributed across the county; 57 percent of the 1620 census blocks into which the county is divided have no human inhabitants at all. The

. . . [T]he judicial tendency has been to insist on a very close approach to mathematical equality, and one of the devices used is the 10 percent norm. "Our decisions have established, as a general matter," the Supreme Court has said, "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 discrimination and therefore must be justified by the State." *Brown v. Thomson*, [*supra*]. [Citation omitted]

Rules are attractive devices for economizing on litigation costs and minimizing judicial discretion; and safe harbors are particularly welcome to the bar. But a rule applied to circumstances remote from those contemplated when it was adopted can produce perverse results. The 10 percent rule, viewed not as a safe harbor (which it is in part, and unexceptionably) but as a rule of prima facie liability (which it also is--both aspects are clear from the passage we quoted from *Brown v. Thompson*) was devised for elections in large electoral units. [Citations omitted.] The smaller and more scattered the population of the area to be redistricted and the more numerous the districts, making it harder to create districts of equal population without creating weird shapes that straddle the boundaries of the smaller government units, as recognized early on by the Supreme Court in *Abate v. Mundt, 403 U.S. 182, 185 (1971)* [parallel citations omitted], the more arbitrary the rule of 10 percent prima facie liability becomes, until finally it becomes absurd. . . . At all events, even if intended to apply to the tiniest electoral districts, the 10 percent rule is merely one of prima facie liability, and is therefore rebuttable, *Voinovich v. Quilter, 507 U.S. [146,] 161-62 [(1993)]* -- and more easily so the smaller the population of the area to be redistricted, the more unevenly the population is distributed across the area, and the more numerous the districts. Let us elaborate on these points, beginning with population size.[140]

That opinion upheld a district court's grant of summary judgment to Forest County with respect

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county is governed by a board of supervisors each of whose 21 members is elected from a single-member district in nonpartisan elections held every two years." *Id.* at 571.  By contrast, San Juan County, Utah is almost eight times as large (8,103 square miles), but its population as counted in the 2010 Census (14,746) is only half-again as large, and contains 4,546 *Census Blocks*, of which only 815 (or 17.0%) are reported as having people living in them. *See* San Juan County's Statement of Additional Facts, ¶¶ 8-9 & 15, *supra*.

[140]  *Frank v. Forest County*, 336 F.3d 570, 572-73 (2002), *cert. denied*, 540 U.S. 570 (2003).

to the apportionment of its board of supervisors that had a maximum deviation that exceeded the

10 percent norm, on the grounds that there was no evidence that the county's apportionment was

not gerrymandered and that the county in question was "tiny."[141]

San Juan County respectfully submits that, under the precedent applying the 10%

threshold, the existing configuration of the School Board Election Districts does not violate the

one-person, one-vote principle under the *Equal Protection Clause* because of both the legitimate

interests upon which the appointment plan is based, as discussed below, and the small and sparse

population of the County.

## II.     San Juan County Has Legitimate Governmental Interests That Justify the Population Deviations Among the School Board Election Districts.

As noted above, the United States Supreme Court has recognized that the *prima facie*

case of a violation of the *Equal Protection Clause* attributable to a maximum deviation in excess

of 10% may be overcome by the demonstration of legitimate governmental interests that justify a

greater deviation.[142]  San Juan County's *Statement of Additional Facts* above demonstrates that

such governmental interests exist with respect to the existing boundaries of School Board

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[141]  *Id*. at 572, 574.

[142]  *See Swann v. Adams*, 385 U.S. 440, 444 (1967), stating:

"[V]ariations from a pure population standard might be justified by such state
policy considerations as the integrity of political subdivisions, the maintenance of
compactness and contiguity in legislative districts or the recognition of natural or
historical boundary lines. Likewise, the Court stated that the Constitution permits
'such minor deviations only as may occur in recognizing certain factors that are
free from any taint of arbitrariness or discrimination.'"

(Citations omitted).

Election Districts.[143]

In particular, the following considerations establish that substantial governmental

interests support the greater maximum deviation:

(1)    The large size and uneven geographic topology of San Juan County and its

small population, coupled with the fact that only about 25% of the County's registered

voters have a physical address (the rest using only Post Office Box addresses), making it

difficult (and expensive) to move such persons from one district or precinct to another;

(2)    San Juan County's voting precincts have been established along survey

section lines, and in some areas of the County, there are limited locations where polling

places may be housed and voters have access to them;

(3)    Most significant of all, since 1992 it has been the consistent belief and

objective of the San Juan School Board, which has been respected by the San Juan

County Commission in the consideration of School Board Election Districts, that each

school within the San Juan District have specific representation on the School Board in a

manner that, to the extent possible, voters who are within the school boundaries of the

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[143] While *Utah Code* § 20A-14-201 (1953, as amended), places the responsibility for apportioning school board election districts on the County Commission, Mr. Norman Johnson, San Juan County's Clerk-Auditor at the time of the 2010 Census, testified in his deposition that it has been San Juan County's consistent policy to consult with the San Juan School Board as to the need for any re-apportionment in light of the needs and perspectives of the School District with respect to School Board representation. *See* San Juan County's Statement of Additional Facts, ¶44, *supra*. Moreover, he testified that in connection with the consideration of the 2010 Census enumeration, the San Juan School Board communicated to his office that the Board saw no reason that the School Board election districts needed to be re-apportioned. *See* San Juan County's Statement of Additional Facts, ¶45, *supra*.

same District schools voting for the same member of the School Board to increase both

accountability of Board members and a sense of *School Community*;

(4)     Because of the *School Community* objective, combined with the fact that

there are only approximately 3,000 students in the San Juan District schools, adjusting

boundaries to come within a 10% maximum deviation would not be possible; and

(5)     The 38.22% overall deviation is attributable to the fact that District 1 (the

population of which is overwhelmingly non-Hispanic White) has 433 people more than

the ideal division and is therefore under-represented, while District 5 (the population of

which is overwhelmingly American Indian) has 657 fewer people than the ideal division

and is therefore over-represented.

Significantly, in all considerations related to apportionment, San Juan County's Clerk-

Auditor and the staff of that office have considered *only* the Census enumeration numbers for the

population of San Juan County and its constituent districts and precincts as a whole and without

consideration of their ethnic make-up.[144]  As such, San Juan County's governmental interests

have been taken into account in a non-discriminatory fashion consistent with the requirements of

*Reynolds v. Sims* and its progeny.

In light of the foregoing, the undisputed facts make clear that San Juan County has

refuted the *prima facie* violation attribution to the fact that the maximum deviation among

School Board election districts is greater than 10% by demonstrating the existence of legitimate,

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[144]  *Norman Johnson* Depo., p. 61, *Appendix Vol IV*, Exhibit H, Doc. 193-10; *see also Norman Johnson Dec.*, Doc. 111-4, at ¶8.

non-discriminatory governmental interests directly related to the representation of patrons of the

San Juan School District.

III.     The *Equal Protection Clause* Does Not Require the Establishment of Election
         Districts with the Least Possible Population Deviation or That Designation of Which
         Fails to Take into Account Other Legitimate Governmental Interests.

Plaintiffs have proposed two alternative apportionment plans with respect to School

Board Election Districts which they assert are designed to accomplish three objectives: (1)

reduce the maximum population deviation among the districts so as to a figure that is less than

the 10% threshold; (2) create three districts with an American- Indian majority to reflect their

position that American Indians comprise a majority in San Juan County as a whole; and (3)

eliminate alleged "packing" of American Indians in existing Districts 4 and 5.   However, both of

Plaintiffs' plans fail to take into account any of the legitimate, non-discriminatory governmental

interests which, as demonstrated in the preceding section, establish that the greater maximum

deviation among the School Board Districts satisfies the requirements of the *Equal Protection

Clause*.[145]  Furthermore, Plaintiffs' alternative proposed plans establish three American-Indian

majority districts in which the percentage of American Indians exceeds their representation

within the County as a whole, which is statistically evenly split between American Indians and

others, thereby failing to eliminate the alleged packing.  Finally, as demonstrated by Mr. Brace,

American Indians already comprise a majority within existing Districts 3, 4 and 5, making

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[145] *See generally Alabama Legislative Black Caucus v. Alabama*, 575 U.S. at ___, 135
S.Ct. at 1270-71 (reiterating that a claimant asserting racial gerrymandering under the *Equal
Protection Clause* must show that "race was the predominating factor motivating" the
apportionment decision, and the government "subordinated *traditional race-neutral districting
principles* . . . to racial considerations" quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)).

Plaintiffs' quest to establish three American-Indian majority Districts a moot point in comparison to the existing apportionment of the School Board Election Districts.

With respect to the failure to take into consideration other legitimate, non-discriminatory governmental objectives, Plaintiffs' plans ignore the *School Community* policy/objective so completely that District 3 under both of Plaintiffs' plans does not have a single school within the proposed Districts.[146]  Further, Plaintiffs' alternative plans fail to consider traditional community interests by dividing the County's largest city, Blanding, between three separate districts.[147] Plaintiffs' proposed plans are based on *Census Block* boundaries,[148] thereby ignoring San Juan County's traditional use of section line boundaries for voting precincts, and increasing the difficulty of establishing polling places within precincts that are accessible to voters within the districts.

Plaintiffs' proposed alternative plans would establish three districts having American-Indian voting-age majorities of at least 65.73% (in District 3 of Plaintiffs' Demonstration Plan A), with the next *lowest* concentration of voting-age American Indians being 80.57% (in District 5 of Plaintiffs' Demonstration Plan A) and at least one district (District 4) in each plan having an American-Indian majority of approximately 90% (90.02% in Plaintiffs' Demonstration Plan A

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[146]  *Brace Dec.* at ¶ 49, *Appendix Vol. V*, Exhibit M, Doc. 196-1; *Wright Dec.*, ¶ 19, *Appendix Vol. V*, Exhibit O, Doc. 196-10.

[147]  *See* Exhibits S-3 (Demonstration Plan A) and T-3 (Demonstration Plan B), included in Exhibit 1, 7 of 7 to Cooper Report, Doc. 172-7, at pp. 6 &10.

[148]  *See* Cooper Report, ¶¶113 & 120, at pp. 34-3 (Demonstration Plan A), 127, at p. 40 (Demonstration Plan B), Doc. 172-1.

and 89.46% in Plaintiffs' Demonstration Plan B).[149]  On the other hand, the San Juan County

population as a whole is almost evenly split.[150]  As such, despite the fact that San Juan County

has not considered race or ethnicity in connection with the apportionment of School Board

Election Districts,[151] Plaintiffs' alternative plans include a dose of their own preference for

"packing" election districts.

Finally, as demonstrated by Mr. Brace, three of the existing School Board Election

Districts already include an American Indian majority.[152]  Moreover, Mr. Cooper's own data

demonstrated this existence of American Indian majorities in Districts 3, 4, and 5,[153] but

Plaintiffs have failed to acknowledge this fact.  As such, Plaintiffs' third objective is one that is

already in place under the current apportionment plan.

Litigants contesting the apportionment of election districts, whether on the basis of race

or ethnicity or vote dilution, are not entitled to have a court impose a remedy based on their own

preferred apportionment plan, particularly where, as here, the apportionment plan adopted by the

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[149]  *See* Plaintiffs' Statement of Material Facts, ¶¶ 33 & 35, *supra*.

[150]  *See id.* at ¶¶ 24-29, *supra*.

[151]  Mr. Johnson testified that San Juan County does not consider race or ethnicity in apportionment determinations.  *Norman Johnson* Depo., p. 61, *Appendix Vol IV*, Exhibit H, Doc. 193-10; *see also Johnson Dec.*, Doc. 111-4, at ¶8.  Dr. Wright has indicated the *School Community* philosophy is the single most significant consideration from the School District with respect to the establishment of Board Member election districts. *Wright  Dec.*, ¶ 14, *Appendix Vol. V*, Exhibit N, Doc. 196 -10.

[152]  *See Brace  Dec.* ¶49, *Appendix Vol. V*, Exhibit M, Doc. 196-1.

[153]  *See Cooper Expert Report*, Exhibit I-1, Doc. 172-4, p. 13.

governmental entity is based on legitimate, non-discriminatory government interests.[154]   San Juan

County respectfully submits that the existing apportionment of School Board Election Districts

satisfies that standard.   As such, Plaintiffs in this case are not entitled to an order of the Court

adopting one of their proposed alternative apportionment plans.

<div align="center">**ARGUMENT: PLAINTIFFS HAVE SUFFERED NO INJURY**</div>

Plaintiffs' malapportionment claim focuses solely upon District 1, which contains 433

people more than the ideal population size of 2,852.   But none of the individual Plaintiffs live in

District 1.   Plaintiffs all reside in Districts 3, 4 or 5 wherein American Indians comprise a

majority of the voting-age population and, as a matter of law, Plaintiffs are over-represented in

that their votes count more that those persons living in District 1 who are under-represented.

And these facts are not only significant, but they are also fatal to Plaintiffs' one-person, one-vote

claim under the *Fourteenth Amendment* and their *Voting Rights Act* claim.

There are numerous decisions from the United States Court of Appeals holding that a

plaintiff who resides in a voting district that is "over-represented" (meaning that the district has

fewer residents than the ideal number that would reflect strictly equal apportionment) do not

have standing to make a "vote dilution" claim under the one-person, one-vote standard of the

*Fourteenth Amendment* (including claims asserted under the *Voting Rights Act*).   The Eleventh

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[154]   *See Perry v. Perez*, 565 U.S. __, 132 S. Ct. 934, 943 (2012) ("In the absence of any
legal flaw in this respect [i.e., a reapportionment plan in which population variations were
unlawful], the District Court had no basis to modify that plan"); *see generally Gaffney v.
Cummings*, 412 U.S. at 750-51 (noting that state's failure to adopt one of plaintiffs' plans having
a smaller maximum deviation did not compel the courts to step into the essentially legislative and
political process of redistricting when the plan adopted satisfied the requirements of the *Equal
Protection Clause*).

Circuit Court of Appeals stated the rule as follows:

> [T]he appellants have failed to meet the second prong of the 'injury in fact' test for they have not suffered any harm or injury by the malapportioned voting districts; in fact they have benefitted from it. This court noted in *Fairley v. Patterson* that "the Supreme Court has conclusively established [citations omitted], that sufficient damage through underrepresentation to obtain standing will be inflicted if population equality among voting units is not present.' 493 F.2d 598, 603 (5th Cir.1974).   In this regard this court held that 'injury results only to those persons domiciled in the under-represented voting districts.' *Fairley*, 493 F.2d at 603. (citing *Skolnick v. Board of Commissioners of Cook County*, 435 F.2d 361 (7th Cir.1970) (finding that plaintiff's [*sic*] lacked standing because they were not harmed by the malapportionment but in fact were benefitting from it)). Further, over-represented voting district members are barred from bringing suit on behalf of persons who reside in under-represented voting districts.[155]

This doctrine is based on the fact that a resident of an overrepresented district does not suffer an "injury in fact" under the general principles of federal standing jurisprudence, as applied by the U.S. Supreme Court in *United States v. Hays*,[156] which dealt with alleged racial gerrymandering in the reapportionment of Louisiana's congressional districts:

> Where a plaintiff resides in a racially gerrymandered district, . . . the plaintiff has been denied equal treatment because of the legislatures's reliance on racial criteria, and therefore has standing to challenge the legislature's action. Voters in such districts may suffer the special representational harms racial classifications can cause in the voting context.  On the other hand, where a plaintiff does not live in such a district, he or she does not suffer those special harms and any inference that the plaintiff has personally been subjected to a

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[155] *Wright v. Dougherty County, Ga.*, 348 F.3d 1352, 1355 (11th Cir. 2004)(footnote omitted). *See also Garcia v. 2011 Legislative Reapportionment Commission*, 559 Fed. Appx. 128, 133-35 (3rd Cir. 2014) (unreported); *League of Women Voters of Nassau County v. Nassau County Board of Supervisors*, 737 F.2d 155, 161 (2nd Cir. 1984); *Minority Police Officers Association of South Bend v. City of South Bend, Ind.*, 721 F.2d 197, 202 (7th Cir. 1983); *Lopez v. Merced County*, 473 F.Supp.2d 1072, 1080 (E.D. Cal. 2007); *Lopez v. Merced County, Cal.*, 2008 WL 170696, *11-*12 (E.D. Cal. 2008)(unreported).

[156]  515 U.S. 737 (1995).

racial classification would not be justified absent specific evidence tending to support that inference.  Unless such evidence is present, the plaintiff would be asserting only a generalized grievance against governmental conduct of which he or she does not approve.[157]

The Supreme Court in *Hays* went on to find that the plaintiffs in question lacked standing.

Notably, the *Hays* decision specifically rejected arguments that the plaintiffs in question had standing because they allegedly resided in a "'segregated' voting district,"[158] (the Court noting that "the record [does not] appear to reflect that the legislature intended [the district in question] to have any particular racial composition"), or because they claimed to challenge the reapportionment "in its entirety, not [the district] in isolation,"[159] (the Court noting that "[t]he fact that [the reapportionment plan] *affects* all Louisiana voters by classifying them as a member of a particular congressional district does not mean–even if [it] inflicts race-based injury on *some* Louisiana voters—that *every* Louisiana voter has standing to challenge [it] as a racial classification").

Similarly, the Eleventh Circuit's decision in *Wright* also rejected alternative theories advanced to support a more expansive application of standing.

> Appellants contend that, although this court explicitly held in *Fairley* that over-represented voting district members lacked standing to bring suit for malapportionment what it really meant was that voting districts that were slightly over-represented also had standing because they were under-represented in comparison to the other over-represented districts in their county. The basis of this contention is dicta in the decision, which states, "the electors of Supervisory

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[157]  *Id*. at 744-45 (citation omitted).

[158]  *Id*. at 746.

[159]  *Id*.

Districts Nos. 1, 2, and 3 were underrepresented". *Fairley*, 493 F.2d at 603-4. The appellants contend that based on the voting district population numbers showed in footnote 7 of the decision, district 2 was in fact over-represented by approximately 16%, but was underrepresented in comparison to districts 4 and 5, which were over-represented by approximately 84% and 85%, respectively.

Appellants' argument is without merit for three reasons. First, as aforementioned, *Fairley* stands for the proposition (1) that only persons residing in underrepresented districts have standing for only they fulfill the three prong test of "injury in fact," and (2) an over-represented (aka uninjured) person may not bring suit on behalf of persons who are underrepresented. 493 F.2d at 603-604. Second, the one sentence contained in *Fairley* stating that district 2 voters had standing is at best dicta, and thus, "it is neither the law of the case nor binding precedent." Third, our sister circuits have reaffirmed the holding of *Fairley*, which limits standing to persons who reside in underrepresented voting districts. *League of Women Voters of Nassau County v. Nassau County Board of Supervisors*, 737 F.2d 155, 161 (2nd Cir.1984); *Minority Police Officers Association of South Bend v. City of South Bend, Ind.*, 721 F.2d 197, 202 (7th Cir.1983).[160]

Therefore, Plaintiffs, residing only in districts that are overrepresented, lack standing to raise claims against the alleged malapportionment of the School Board Election Districts and their claims must be dismissed.

## CONCLUSION

For the reasons set forth above, including the individual Plaintiffs, having suffered no injury with respect to the population deviations among the School Board Election Districts and, therefore do not, have standing to raise any claim within the *Fourth Claim for Relief*, San Juan County is entitled to summary judgment.

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[160]  348 F.3d at 1356 (quoted citation omitted).

DATED this 1st day of October, 2015.

SUITTER AXLAND, PLLC

 /s/ jesse c. trentadue
Jesse C. Trentadue
Carl F. Huefner
Britton R. Butterfield
*Attorneys for Defendant*

## CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of October, 2015, I electronically filed the foregoing document with the U.S. District Court for the District of Utah.  Notice will automatically be electronically mailed to the following individual(s) who are registered with the U.S. District Court CM/ECF System:

Steven C. Boos
Maya Leonard Kane (Pro Hac Vice)
MAYNES, BRADFORD, SHIPPS & SHEFTEL, LLP
835 East Second Avenue, Suite 123
P.O. 2717
Durango, CO 81301
E-Mail: sboos@mbssllp.com
E-Mail: mayakanelaw@gmail.com
*Attorneys for Plaintiffs*

Eric P. Swenson
1393 East Butler Avenue
Salt Lake City, Utah 84102
E-Mail: e.swenson4@comcast.net
*Attorneys for Plaintiffs*

Katherine Belzowskri *Pro Hac Vice*
Navajo Nation Department of Justice
P.O. Box 2010
Window Rock, Arizona 86515
E-Mail: kbelzowski@nndoj,org
*Attorneys for Plaintiff*

/s/ jesse c. trentadue

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