18-4005

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NAVAJO NATION, a federally recognized Indian tribe, et al.,	:
Appellees/Plaintiffs,	:
v.	:
SAN JUAN COUNTY, a Utah governmental sub-division,	:
Appellant/Defendant.	:

On Appeal from the United States District Court
for the District of Utah Central Division
Honorable Robert J. Shelby
D.C. No. 2:12-cv-00039-RJS

APPELLANT SAN JUAN COUNTY, UTAH'S OPENING BRIEF

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STATEMENT OF PRIOR AND/OR RELATED APPEALS

There are no prior or related appeals.

TENTH CIRCUIT RULE 31.3 STATEMENT

San Juan County is a governmental entity not subject to *Rule* 31.1.

CORPORATE DISCLOSURE STATEMENT

Because San Juan County is a governmental entity, no such statement is required.

NATURE OF THE CASE

This redistricting case involves a challenge by the Navajo Nation and several of it members (collectively "Navajo Nation") to County Commission and School Board election districts in San Juan County, Utah (the "County"). But this is not an ordinary redistricting case due to the County's: geography (it is almost twice the size of Connecticut; and it takes almost five hours to drive the length of the Coouny); demographics (the population is less than 15,000, the few towns are widely separated and, as a result of the United States' creation of the Navajo Reservation, the majority of the County's Navajo live in the southern portion of the County); voting patterns (the population is almost equally split between Navajo residents, who comprise 52% of the population and tend to vote Democratic whereas the non-Navajo residents tend to vote Republican); redistricting history(in 1984, the County and United States entered into a court-approved *Consent Decree* whereby Navajo voters were concentrated in Commission District-3 so as to guarantee that they would always elect one of the three County Commissioners); and effects of geography and demographics upon the School District that was resolved by a "*Community School Concept*" for establishing School Board districts (each of the districts being drawn around a high school and the elementary and

middle schools that feed students into that high school so as to ensure, to the greatest extent possible, active and interested participation by parents in their local schools and accountability of Board members to a cohesive constituency).

The United States Supreme Court has repeatedly stated that redistricting is the role of State and local governments—and not the role of the federal courts.[1] "Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions."[2] "Electoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests."[3]

This case is about the repeated intrusion by the District Court on San Juan County's districting role: when it ordered the County to redistrict the County Commission and School Board voting districts; when it rejected the County's remedial plans for both the Commission and School Board voting districts; when it ordered the County to adopt the Court's redistricting plans; and finally, when it

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[1] *See, e.g., Miller v. Johnson*, 515 U.S. 900, 915 (1995) ("It is well-settled that 'reapportionment is primarily the duty and responsibility of the State.'" (quoting *Chapman v. Meier,* 420 U.S. 1, 27 (1975)).

[2] *Id.*

[3] *Id.*

ordered special elections be held in November 2018 for all offices, regardless of the term limits of Commissioners and School Board members currently holding office.

After the 2010 Census, the County redrew the boundaries of its Commission voting districts to comply with the "one-person, one-vote" mandate of the *Equal Protection Clause*. The County understood the gravity of its role in redistricting. In 1983, the United States sued the County for a violation of Section 2 of the *VRA*, alleging that the County's use of at-large voting denied Indian residents of the County full participation in the political process. The County settled the case with the federal government, resulting in a *Consent Decree.* That *Consent Decree* required the County to move from at-large voting for County Commissioners to single-member voting districts, with the understanding that one district would be guaranteed a Navajo commissioner. The County is still bound by this *Consent Decree*, which is why when the County Commissioners redrew the voting districts in 2011 they only changed the boundaries of Districts-1 and -2 to comply with one-person, one-vote. They knew that District-3 was to remain a Navajo-majority district—which it was—and so they did not alter the boundaries.

Navajo Nation sued the County, alleging that the Commission voting district

boundaries violated both the *Equal Protection Clause* and Section 2 of the Voting Rights Act ("*VRA*"). They further alleged that the School Board voting district boundaries, which were drawn based on the location of community schools, violated the *Equal Protection Clause* and Section 2 of the *VRA*.

The District Court held that both the County Commission and the School Board voting districts violated the *Equal Protection Clause*.[4] It found that the County did not have a compelling government interest for maintaining a Navajo-majority county Commission voting district. In doing so, it failed to recognize the significance of the *Consent Decree*. Similarly, it failed to credit the County's legitimate interest in organizing School Board districts by community—particularly against the unique geography and population of the County.

The District Court ordered the County to redraw the boundaries of the County Commission and School Board voting districts. As part of its order, the Court instructed the County that the population deviation should not exceed 4% for the purposes of "one-person, one-vote." It also instructed the County to consider and remedy any potential Section 2 violations, which required the County

[4] Because the District Court held that the County Commission and School Board voting districts violated the *Equal Protection Clause*, which would require them to be redrawn, it did not reach the allegations of violations under the *VRA*. App. 11064.

to pay attention to and consider the racial make-up of each district. The County followed these instructions and proposed new districts based on the 4% population deviation and traditional districting principles that would not violate Section 2. Despite having given these instructions which the County followed in preparing its remedial plans for the Commission and School Board voting districts, the Court held that the County's new plans impermissibly used race as the predominant factor, did not meet strict scrutiny, and as such violated the *Equal Protection Clause*.

The District Court then created its own plans—plans which failed to account for traditional districting principles and which clearly used race as a predominant factor. Despite these flaws, the court ordered the County to adopt the plans. The Court also ordered the County to hold special elections in November 2018 for all new districts, regardless of officials' terms.

The District Court erred in five key decisions over the course of this case. Each decision ignored the Supreme Court's directive that redistricting is the role of local government and not the federal courts. First, the Court erred when it determined that by abiding by the *Consent Decree* when it drew the 2011 Commission voting district boundaries, the County had violated the *Equal*

Protection Clause. Second, the Court erred when it held that maintaining School Board district boundaries defined by community schools and geography was not a "legitimate consideration incident to the effectuation of a rational state policy."[5] Third, the Court erred in rejecting the County's remedial districting plans which followed the court's instructions to account for "one-person, one-vote" and remedy potential violations of Section 2. Fourth, the Court erred in adopting its own plans which failed to follow traditional districting principles and violated the *VRA* and *Equal Protection Clause*. And finally, the Court erred when it ordered special elections for all County Commissioners and School Board members to be held in November 2018. For each of these reasons, this Court should overturn the decisions of the District Court.

[5] *Harris v. Arizona Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1306 (2016) (quoting *Reynolds v. Sims*, 377 U.S. 533, 579 (1964)).

JURISDICTION

Navajo Nation brought claims under in the *Equal Protection Clause* and the *Voting Rights Act*.[6] The District Court had jurisdiction under 28 U.S.C. § 1331.[7] The District Court's *Judgment*, which was a final order disposing of all claims, was entered on January 11, 2018,[8] and the County filed its *Notice of Appeal* that same day,[9] followed by an *Amended Notice of Appeal* on January 17, 2018.[10] The County appeals the final decisions of the District Court. This Court has jurisdiction under 28 U.S.C. § 1291.

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[6] App. 225.

[7] The County argued that the District Court lacked subject matter jurisdiction because the *Consent Decree* was still in effect and Navajo Nation had failed to join the United States, an indispensable party. The Court denied the County's *Motion to Dismiss*, which is one of the decisions the County is now appealing, so the Court's subject mattter jurisdiction remains an issue.

[8] App. 11151.

[9] App. 11153.

[10] App. 11156. Copies of the orders being appealed are also contained in the Addendum to this *Brief*, which will be referenced by "Addendum" followed by an exhibit number.

STATEMENT OF ISSUES

Compliance with the Voting Rights Act is a Compelling Interest: In 1983, the United States sued the County for allegedly violating Section 2 of the *VRA* and the *Equal Protection Clause* because a Navajo had never been elected County Commissioner under the existing at-large voting system. The United States brought that lawsuit on behalf of the Navajo Nation and its members, that resulted in a *Consent Decree* requiring the County to move from at-large voting for County Commissioners to single-member districts, with District-3 being specifically created with a Navajo-majority in order to always guarantee the election of a Navajo Commissioner. When the County redistricted after the 2010 Census, it did not change the boundaries of District-3 because the County believed that to do so would violate the *Consent Decree*. **Issues:** Did the District Court have subject matter jurisdiction to hear this case without the United States, an indispensable party? And did the District Court err in holding that the County violated the *Equal Protection Clause* by maintaining the boundaries of District-3?

One-person, one-vote: The Supreme Court has held that the "one person, one vote" provision of the *Equal Protection Clause* is not violated when a population deviation greater than 10% is based on legitimate considerations

incident to the effectuation of a rational state policy. The County's School Board voting districts were drawn according to the School Board's *Community School Concept*: each district encompassed one of the County's public high schools and the elementary and middle schools that feed those highs schools. This ensured that board members represent the schools in their districts. The districts were determined, in part, by the County's unique geography and population distribution, which has resulted in the public school communities being widely disbursed throughout the County. **Issue:** Did the District Court err in holding that the County's interest in keeping community schools within the same School Board voting district was not a legitimate consideration incident to the effectuation of a rational state policy?

Remedial Plans: The Supreme Court has repeatedly stated that federal courts should not intrude on state and local redistricting. The Court has further held that the "one-person, one-vote" principle of the *Equal Protection Clause* is not violated when the overall population deviation of state or county legislative districting is 10% or less. The Court has likewise allowed local governments to consider race when redistricting if it is not the predominant factor. In this case, the District Court ordered the County to submit remedial plans for both the County

Commission and School Board voting districts that were as "equal population as is practicable," but in no event having more than a 4% overall deviation. The Court also required the County to account for and remedy potential *VRA* violations. In preparing its remedial plans, the County met the court-ordered "one-person, one-vote" threshold, applied traditional redistricting principles, and remedied potential *VRA* violations, which required the County to consider race. **Issue:** Did the District Court err by requiring the County to submit proposed plans with no more than 4% overall population deviation and that complied with the *VRA* and then rejecting the County's proposed remedial plans?

The Court's Remedial Plans: The Supreme Court has stated that redistricting is the role of local governments, and not the role of the federal courts. After the District Court rejected the County's remedial plans, it enlisted the help of a special master to assist the Court in redistricting the Commission and School Board election districts. The final court-ordered redistricting plans do not observe traditional redistricting principles and are clearly predominated by race. **Issue**: Did the district court err in ordering the County to adopt redistricting plans that violate the *Equal Protection Clause*?

Special Elections: The Supreme Court has cautioned that in removing

elected officials from office and ordering special elections, a district court must engage in more than a "cursory" review. Instead, the district court must do a "careful case specific analysis" and that in conducing that review the district court must "grapple" with the interests of all involved. As a key component of its redistricting plans, the District Court removed all County Commissioners and members of the School Board from office, both Navajo and non-Navajo office holders, and ordered special elections for these vacated offices. The only basis the District Court gave for ordering special elections was that "[i]t is critically important that the officials representing the citizens of San Juan County are elected under constitutional district—not districts that have been racially gerrymandered,"[11] which reasoning the Supreme Court has rejected in other cases.

Issue: Did the Court err by ordering special elections for all County Commission and School Board seats?

STATEMENT OF THE CASE

The *Statement of the Case* provides the factual background on: (1) the geographic and population characteristics of the County; (2) the San Juan School District; (3) the procedural history of the case, including the *Consent Decree*

[11] App. 11101.

entered into between the County and the United States that, with Court approval, created District-3 with a supermajority of Navajo voters, formed the basis of the District Court's finding that San Juan County had engaged in racial gerry-mandering in violation of the *Equal Protection Clause*; and (4) the District Court's redistricting plans.

1. Geographic and Population Characteristics of San Juan County

San Juan County is one of the largest counties in the United States. At approximately 8,100 square miles,[12] it is almost twice the size of Connecticut. According to the 2010 Census,[13] the County has 14,746 citizens,[14] of which the Court found that approximately 52% are American Indian, consisting mostly of members of the Navajo Nation, with the remaining County residents being non-Indians who comprise approximately 48% of the total population.[15] The Court apparently arrived at these percentages based upon the Navajo Nation's analysis of

[12] App. 8344.

[13] Between the 2000 and 2010 Census, the County's population increased by 333 people. App. 1931, ¶ 10.

[14] App. 8344.

[15] *See* App. 11095.

the 2010 Census data.

The Census questionnaire allowed those responding to designate or claim up to six racial and/or racial categories: White, African American, American Indian or Alaska Native, Asian, Pacific Islander or "some other race."[16] The Navajo Nation's demographic-redistricting expert, William Cooper, stated that if anyone identified themself on that questionnaire as American Indian and/or another race, he counted them solely as American Indian, and that if everyone in the County had identified themselves as both American Indian and White, they all would be "Indian."[17] In other words, those County residents who reported themselves on the 2010 Census as American Indian and some other race or ethnicity, Cooper counted solely as American Indian.[18]

By using this method of interpreting census data, Cooper was able to represent to the Court that American Indians comprised 52.17% of the County's total population,[19] which appears to be the source of the Court's breakdown as to

[16] App. 1931, ¶ 26.

[17] App. 1004.

[18] App. 993, 994, & 1010.

[19] App. 993–994 & 1003. *See also* App. 995 & 1005. Cooper said, too, that his estimate of the County's population of Indian being 52.17% was actually low because the

the County's Indian verses non-Indian population. Cooper said that he felt comfortable doing this even though to designate yourself as "American Indian" on the Census questionnaire one does not have to be a member of a federally recognized tribe.[20] Cooper also admitted that without using this "Any-Part Indian" definition the total population of San Juan County was approximately 50% American Indian and 50% non-Indian.[21]

Navajo and non-Navajo residents are concentrated in separate areas of the County. Navajo residents are concentrated on the Navajo Reservation, which is along the County's southern border whereas non-Navajo residents are concentrated in the northern portion of the County. The central portion of the County is almost equally divided between Navajo and non-Navajo residents.

Navajo voters within the County also prefer Democratic candidates over Republican candidates. Political party affiliation among Navajo voters is so strong that they will vote for a non-Navajo Democratic candidate rather than a

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County's Hispanic population should also be counted as "Indian" since according to him they were obviously of Native American decent but did not recognize that fact. App. 997.

[20] App. 1004.

[21] App. 1004.

Navajo Republican candidate; whereas the County's non-Indian residents tend to vote Republican.[22]

Vast regions of the County are uninhabited and, only about 25% of the County's registered voters have a physical address. The remainder use a post office box for their address. Hence, it is difficult to place those persons without a physical address into the correct election district, and that is very problematic given the small population dispersed over a vast land area.[23] It is a problem because it is important to know where each registered voters resides, especially with the County's vote-by-mail system, since each voter's place of residence will determine the form of ballot that they receive and the candidates for whom they can vote.[24]

To address this problem, the County developed a precinct system based upon survey section lines with legal descriptions and a large map of the County on which the County's 20 voting precincts are marked or drawn. When, as is typical, a resident registers to vote and lists their place of residence as 20 miles west of

[22] *See e.g.,* App. 1510-1512 & 7228.

[23] App. 1931, ¶ 16.

[24] App. 9994, ¶¶ 14 & 17.

Lasal Creek,[25] or at the end of Highway 275,[26] they are asked to point on the precinct map where within the County they live.[27] That way the voter can be placed within the correct precinct and the Clerk/Auditor can make sure that each voter receives the correct ballot, which is very important due to the small population of the County where, in past elections, as few as 16 votes has determined the outcome.[28] The District Court, however, ordered the County to abandon its surveyed precinct system and to implement one based upon Census Blocks.[29]

Census Blocks are what the Census Bureau uses to gather and report census population data. Census Blocks are designated by the Census Bureau and, in the absence of a street address, consist of geographical areas defined by physical features such as streams or railroads that can be seen and recognized by a

[25] App. 10909.

[26] App. 10910.

[27] App. 9994, ¶¶ 13-15.

[28] App. 11056, ¶ 25.

[29] App. 11098.

census worker. Census Bureau also changes Census Blocks with each Census.[30]

For the 2010 Census, there were 4,546 Census Blocks in the County but only 815 (or 17.9%) were populated.[31] Census Blocks are not only small but they are irregularly shaped and not consistent with the County's surveyed precincts. There can be hundreds of Census Blocks within a precinct, and many overlap several election districts or precincts, which makes it virtually impossible for a voter to identify by use of Census Blocks exactly where he or she lives.[32]

The District Court ordered the County to abandon its survey precincts and to draw new precincts and election districts using Census Blocks. Consequently, approximately 74% of the County's voters will need to be located, identified and reassigned to a new precinct constructed of Census Blocks. To do this, the Clerk/Auditor's staff will have to travel the County in order to identify voters living in each Census Block and then, based upon where the voter lives, assign them to a new precinct. This is not only unduly burdensome on the administration

[30] App. 1931, ¶¶ 18-22.

[31] App. 196-1.

[32] *See, e.g.,* Addendum p.192, which is a map of the School Board districts overlaying Census Blocks.

of elections, but this canvasing process will have to be repeated each time the County redistricts following a Census. It also increases the likelihood of errors. Even when voters have a street address, nationally between 10% and 12% are assigned to the wrong precinct.[33]

2. San Juan County School District:

The School Board is comprised of five members, one for each election district, who must also reside in the district.[34] Since at least 1992, 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,[35] which gave rise to the *Community School Concept* whereby the five school districts are formed around the County's high schools and the elementary and middle schools that feed them.

Under this approach, individual Board members represent a constituency with common interests serving the schools and that community and Board Members have a strong interest in supporting the schools within their community

[33] App. 11056, ¶¶ 19-24.

[34] App. 8344 & Addendum p.193, ¶ 6.

[35] *Id.* ¶ 14.

and are easily accessible to parents whose children attend those schools. The School Board is committed to the *Community School Concept* because it provides 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.[36] Given the immense size of San Juan County and uneven distribution of population throughout the County, the reconfiguration of election districts with an equal number of voters does not allow for the continuation of the *Community School Concept*, and would result in some school communities losing direct representation.[37]

The County Commission is charged with drawing School Board election districts,[38] but it does so "with the advice and consent of the School Board."[39] The County reviewed the results of the 2010 Census with the School Board.[40] But the

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[36] *Id.* at ¶¶ 15 & 16.

[37] *Id.* at ¶ 17.

[38] *Id.* at ¶ 5. *See also Utah Code* § 20A-12-201.

[39] App. 3231-3232.

[40] *Id.*

Board never requested that the County change the boundaries of its election districts.[41] As a result, Districts-2, -3 and -4 all fell within the acceptable 10% deviation standard. However, District-1 was 433 people over the ideal population size of 2,852 and District-5 had 32 fewer people than the ideal population size, which resulted in an overall population deviation of 38.22%.[42]

While the overall deviation of 38.22% exceeded that 10% threshold of presumptive validity, that deviation was justified by the very small population that is scattered over a vast area, the isolated communities and their schools, the historic nature of the School Board election district boundaries, the fact that the School Board, including its Navajo members, opted not to recommend changes to the historic election districts, and the "*Community School Concept*".[43]

[41] Addendum p.193, ¶ 24. Following the 2000 Census the County Commissioners, including Commissioner Maryboy who was Navajo, unanimously voted to maintain the 1992 School District Election Boundaries. App. 886.

[42] App. 1931, ¶¶ 45-46.

[43] *Id.* at ¶ 48.

3. Procedural History:

In 1983, the United States sued the County on behalf of the Navajo Nation and its members because the at-large election of County Commissioners allegedly violated Section 2 of the *VRA* as well as the *Equal Protection Clause.* That lawsuit resulted in a *Consent Decree* whereby three single-member County Commission districts were created.[44] Pursuant to that *Consent Decree,* District-3, largely consisting of the Navajo Reservation, created to have a supermajority of Navajo thereby ensuring that one of the elected County Commissioners would always be Navajo.

The *VRA* itself provides that the *Consent Decree* could not be modified without Court approval.[45] The *Consent Decree* also provided that the Court "retained jurisdiction for all purposes."[46] Following the 2010 Census, the County never changed District-3 because its officials all believed that the County was legally required to leave the lines of District-3 in place so as to provide for a

[44] See Addendum pp. 179-187. At-large commission districts are mandated by Utah's Constitution. The *Consent Decree* required a constitutional amendment to permit the single-member districts.

[45] *See* 52 U.S.C. § 10302(c).

[46] Addendum p. 187.

majority of Navajo voters in that district.[47]

There was no negotiation with the United States over the terms of the *Consent Decree*.[48] County officials were told that they were going to do what the United States government wanted,[49] which was to establish District-3 heavily loaded with Navajo voters.[50] The United States government had to approve the Commission election district boundaries,[51] and the United States likewise made it very clear to County officials that the County could not amend or change District-3's boundaries without the government's approval.[52] County officials understood that District-3 had been created with a supermajority of Navajo to guarantee them a seat on the County Commission, that the boundaries of District-3 could not be changed by them, and that if they did modify District-3 the County "would be in

[47] App. 11065.

[48] App. 1510-1512.

[49] App. 1509-1510.

[50] App. 1507.

[51] App.1513.

[52] App. 1510.

trouble."[53] Therefore, other than attempting to comply what it understood was required by the *Consent Decree*, race played no role in the County's maintenance of District-3 with a supermajority of Navajo.

Neither were County officials alone in the belief that the *Consent Decree* was binding with respect to the configuration of District-3. When asked about the binding effect of the *Consent Decree* the Navajo Nation's redistricting expert, William Cooper, said that: " **[I]t's binding in that there must be one Indian majority district, yes**."[54] Cooper also said that if the Navajo were ever deprived of a supermajority in District-3: "[T]hat would violate the *Voting Rights Act*. **It would be in direct conflict with the 1984 settlement decree from the U.S. Department of Justice lawsuit**."[55]

The Navajo Nation even made an attempt to re-open the 1984 *Consent Decree* case when, as result of the 2010 Census, a Navajo Nation Deputy Attorney General wrote to the United States asserting that the Commission election districts needed to be redrawn in light of the Census results and stating that since the Court

[53] App. 858, 857, 3265 & 3266.

[54] App. 999 (emphasis added).

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

had retained jurisdiction over the *Consent Decree,* the United States "has an interest and obligation to monitor and enforce this decree."[56]

Nevertheless, despite acknowledging that the *Consent Decree* was binding, the Navajo Nation commenced this action seeking modification of the *Consent Decree* to reflect the results of the 2010 Census. The County moved to dismiss the Navajo Nation's *First Claim for Relief*, which was an *Equal Protection Clause* to the County's creation and maintenance of District-3, on the basis that the Court lacked subject matter jurisdiction because this action was an impermissible collateral attack upon the *Consent Decree*, and that the United States was an indispensable party.[57] The Court denied that *Motion*.[58]

The parties also moved for summary judgment on Navajo Nation's *First Claim for Relief,* which challenged the creation and maintenance of District-3 with a supermajority Navajo population, under the *Equal Protection Clause*.[59] The

[56] See App. 193-22.

[57] App. 287 & App. 105.

[58] App. 449. The County has appealed that ruling.

[59] App. 2154 & 5572.

Court granted Navajo Nation's *Motion* but denied the County's.[60] Notwithstanding the *Consent Decree* and the County officials' belief that they could not alter the boundaries of District-3, the Court found that District-3 "was racially gerrymandered in violation of the *Equal Protection Clause*."[61] The Court reasoned that District-3 was based upon a racially-motivated redistricting decision for which the County was unable to show any overriding compelling governmental interest.[62]

The Court rejected the County's argument that there was no evidence that the creation and/or maintenance of the boundaries for the election districts were due to anything other than the County officials' understanding of the County's obligations under that *Consent Decree*; that there was no evidence that the County's creation and/or maintenance of District-3 with a supermajority of Navajo voters was due to purposeful racial discrimination or, that race played any role in the Commissioners' redistricting decisions; that District-3 with its concentration of Navajo voters was established in 1986 to remedy alleged violations of the *VRA*;

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[60] App. 9827. The County has appealed that ruling.

[61] App. 11066.

[62] *See* App. 9827.

that District-3 was established with the consent and approval of the United States and the District Court; that if District-3 with its supermajority of Navajo did not violate §2 of the *VRA* or the *Equal Protection Clause* when it was created, it did not do so under the County's 2011 redistricting plan; and that the County's compliance with the *Consent Decree,* which was a federal court mandate imposed as a remedy for alleged discrimination, not only provided the compelling state interest necessary to justify the maintenance of District-3, but that it was also an affirmative defense.[63] It is noteworthy, however, that the Court never found that there was any bad faith on the part of the County in preserving District-3 with a supermajority of Navajo.[64]

The parties moved for summary judgment on the School Board election districts' alleged violation of the one-person, one-vote requirement of the *Equal Protection Clause,* which was the Navajo Nation's *Fourth Claim for Relief*.[65] The Court granted Navajo Nation's *Motion* but denied the County's.[66] In doing so, the

[63] App. 9827.

[64] *See.* App. 9856.

[65] App. 449 & App. 3317.

[66] App. 8343. The County has appealed that ruling.

Court never found that race played any role in the drawing of the School Board election districts. Nonetheless, the Court not only rejected the County's argument that the *Community School Concept* was a compelling government interest,[67] but it would eventually do away with the Community School election districts with the implementation of its redistricting plans.

4. The Court's Redistricting Plans:

The County submitted a proposed Commission remedial plan[68] and a School Board remedial plan,[69] both of which complied with the District Court's mandate that those plans not have an overall population deviation of more than 4% and were designed using traditional redistricting principles. Under the County's Commission plan, the overall population deviation was 0.24%.[70]

District-1 consisted of 28.47% Navajo and 71.26% non-Navajo; District-2 consisted of 51.94% Navajo and 48.06% non-Navajo; and District-3 consisted of

[67] App. 8393.

[68] App. 9933 & 9955.

[69] App. 8378 and App. 8409.

[70] App. 9994, ¶9.

75.88% Navajo and 24.12% non-Navajo.[71] These percentages reflected the overall population make up of the County as well as how the respective populations are distributed within the County, and provide Navajo voters with the opportunity to elect candidates of their choice in two of the three districts. More importantly, the County was able to maintain in large part its surveyed section line precincts to conduct elections.[72]

With respect to the County's proposed School Board election plan, the overall population deviation was .03506%, with Navajo comprising 53.14% of the population in District-3, 96.84% of District-4 and 87.17% of District-5, which was because these school districts encompassed community schools in the central and southern part of County on or near the Navajo Reservation. The County was likewise able to keep its surveyed section line precincts mostly intact and preserve the *Community School Concept*.[73]

The Court rejected the County's proposed plans because it believed that "race was the predominant factor" in the development of District-1 and District-2

[71] *See* Addendum p.189.

[72] App. 9955, ¶ 41.

[73] *See* Addendum p. 188.

of the County Commission plan with, respectively, Navajo populations of 28.47% and 51.94%, and District-3 of the School Board plan with a Navajo population of 53.14%.[74] After it rejected the County's proposed remedial plans, the Court appointed a special master to assist it in drawing new Commission and School Board districts.[75] During a hearing on Court's proposed remedial plans, it came to light that the special master had used the same criteria for testing compliance with the *VRA* as had the County's redistricting expert, Kimball Brace. When the County's attorney informed the Court of this, the Court responded: "we're not going to relitigate my ruling about that."[76]

The County objected to the court-ordered plans as racially and politically gerrymandered because they pack non-Navajo into Commission District-1 and into two School Board election districts, virtually guaranteeing Navajo the election two of the three Commissioners and three of the five members of the School Board. The Court summarily dismissed this objection,[77] including rejecting the County's

[74] App. 10825. The County has appealed that ruling.

[75] App. 10869.

[76] App. 11621.

[77] *See* App. 11088-11089.

arguments that when white citizens are in the minority they, too, are entitled to the protections of the *VRA* and the *Equal Protection Clause*,[78] and that this packing also violated the "principle of proportionality in the apportionment of elections districts."[79]

The County objected to the court-ordered plans because they split communities of interest such as Blanding City, with its heavy concentration of Republican voters, which the Special Master had repeatedly tried to make part of all three Commission election Districts thereby adding potential confusion for voters and candidates as well as diluting the vote of Republicans. The Court summarily dismissed this objection stating that the County was mistaken because Blanding was just part of two election districts.[80] But that was not exactly so because the Special Master actually assigned the City to District-1 and District-2, but put of the surrounding area or suburbs into District-3.[81]

The County objected to the court-ordered plans because they pose an undue

[78] *See* App. 11091-11092.

[79] *See* App. 11094.

[80] *See* App. 11097.

[81] *See* App. 11043-11051.

burden upon election administration by requiring the County to abandon its surveyed section line precincts, to establish new precincts based upon Census Blocks, and to conduct future elections using these Census Block precincts, which means that the County will have to engage in the arduous task of redrawing precincts every ten years because Census Blocks change with each Census. The Court summarily dismissed this objection because it wanted even in this case concerning local redistricting "to ensure that population variation under one-person, one-vote is de minimus" notwithstanding the 10% overall deviation allowed by law.[82]

The County objected to the court-ordered plans because all County Commission and School Board offices were vacated and special elections were ordered for these offices to be held in the General Election of November 2018.[83] The Court summarily dismissed this objection, too, reasoning that it was necessary in order to remedy election "districts that have been racially gerrymandered," and due to the total dismantling of the County's precincts voters would not know who

[82] *See* App. 11098.

[83] *See* App. 11135..

represented them.[84] This is illogical since Commission District-3 was formed and maintained on the basis of the *Consent Decree,* there is no evidence or finding by the Court that race played any role in the County's drawing of the School Board election districts and, given the small number of registered voters, the Clerk/Auditor could have sent each one a letter advising them as to the identity of the Commissioner and School Board member who represented them.

The Court ordered the County to implement the Court's redistricting plans to hold special elections for the Commission and School Board offices in the November General Election.[85] The Court also denied the County's *Motion to Alter or Amend Judgment*, including its request for findings.[86]A final *Judgment* was entered by the Court on January 11, 2018.[87] The County filed a *Notice of Appeal* and an *Amended Notice of Appeal* on, respectively, January 11, 2018 and January 17, 2018.[88] The County also moved to stay the special elections pending this

[84] *See* App. 011101.

[85] The County has appealed from those rulings.

[86] App. 11147. The County has appealed from that ruling.

[87] App. 11151.

[88] App. 11153 and 11156.

appeal, which the Court denied.

SUMMARY OF ARGUMENT

This Court should reverse each of the District Court's rulings in this case and return the role of districting to the County. The District Court first erred when it denied the County's *Motion to Dismiss* the case for subject matter jurisdiction. The continued effect of the 1984 *Consent Decree* made the United States an indispensable party to this action.

The Court next erred when it held that, in maintaining a Navajo-majority County Commission voting district, the County had violated the *Equal Protection Clause*. The United States Supreme Court has held that compliance with Section 2 of the *VRA* is a compelling interest, justifying race-based decisionmaking if narrowly tailored. Compliance with Section 2 is narrowly tailored if the legislative body has good reason to believe its actions were necessary. The County was—and is—subject to the *Consent Decree*, which required compliance with Section 2 in the form of three single-member districts that ensured Navajo citizens could elect their preferred candidate. Accordingly, the County's continued compliance with Section 2 met strict scrutiny.

The Court further erred when it ruled that the School Board voting districts

violated the "one-person, one-vote" principle of the *Equal Protection Clause*. Although the School Board districts' population deviation is above ten percent, requiring a "satisfactory explanation grounded on acceptable state policy," the County set forth just such an explanation. Due to the County's unique size, geography, and population distribution, the County has found that the County's schools are best served when School Board voting districts encompass community schools—in other words, the high schools and the elementary and middle schools that feed into them. This ensures that the School Board member who represents the district is tied to the schools he or she represents. This long-standing policy justifies the greater population deviation.

After the District Court held that both the County Commission and School Board voting districts violated the *Equal Protection Clause*, it ordered the County to draw up remedial plans. The court erred in placing unnecessary restrictions on the County. It first instructed the County that the plans could not have a population deviation of more than 4%, a limit much more restrictive that the Supreme Court's ten percent. And it cautioned the County to resolve any potential Section 2 violations.

The County submitted plans that met these limitations, as well as traditional

districting principles. But the court found that, by taking Section 2 into consideration, the County had used race as a predominant factor in redistricting. The court created a catch-22 for the County and held that the plans violated the *Equal Protection Clause*—again, in error.

The Court took it upon itself to draw new districts for the County. The Court followed the same instructions it had given the County, but held that its plans did not use race as a predominant factor. The Court's plans, however, had used race as a predominant factor and further, failed to follow traditional districting principles. The Court furthered erred when it ordered the County to hold special elections in November 2018 for all officials under the court-ordered districting plans without the necessary analysis required by the Supreme Court.

The County asks this Court to reverse the rulings of the District Court and return the role of redistricting to the County, either in the form of the County's 2011 districting plans or the remedial plans the County submitted in this case.

ARGUMENT: THE COURT ERRED IN STRIKING DOWN THE 2011 COUNTY COMMISSION ELECTION PLAN

A. Subject Matter Jurisdiction and Indispensability

1. Standard of Review.

This Court reviews "de novo the district court's denial of a motion to dismiss for lack of subject matter jurisdiction."[89]

2. The District Lacked Jurisdiction and the United States Was An Indispensable Party.

The County moved to dismiss the Navajo Nation's *First Claim for Relief* for lack of subject matter jurisdiction as a result of the *Consent Decree* and for failure to join the United States as an indispensable party.[90] The District Court denied that *Motion*, and in doing so it clearly erred an should be reversed. The Court acknowledged that "it is well established that parties to a consent decree may not collaterally attack the judgment in a separate action"[91] but reasoned that this lawsuit that "Navajo Nation is not a party to the 1984 Settlement, nor is it in

[89] *Opala v. Watt*, 454 F.3d 1154, 1156–57 (10th Cir. 2006).

[90] App. 257.

[91] App. 452. *See also*, *O'Burn v. Shapp*, 70 F.R.D. 549 (E.D. Pa 1976).

privity with anyone who is."[92] The Court was nevertheless mistaken because, pursuant to 25 U.S.C. §125 and 42 U.S.C.§ 1971 (currently codified at at 52 U.S.C. § 10101(1)(c)), the United States brought the 1983 lawsuit on behalf of Navajo Nation.[93]

Next, the Court reasoned that the *Consent Decree* only concerned the creation of single member commission districts and had nothing to do with the population demographics of those districts, which is strange reasoning indeed since the County was require to draw and submit a redistricting plan that was acceptable to the United States, which it did. That plan, at the insistence of the federal government, created District-3 with a Navajo population of 88.77%.[94] Furthermore, once District-3 was created, not only did the *Consent Decree* provide that the District Court retain jurisdiction, but must follow the *VRA* with respect to any changes.[95]

The District Court reasoned, too, that the *Consent Decree* was not binding

[92] App. 452

[93] *See App.* 98-2

[94] App. 9834.

[95] *See* 52 U.S.C. §10101(1)(c).

because in 2011 the County had redistricted as a result of the 2010 Census.[96] The Court, however, clearly misunderstood the nature of the 2011 redistricting, which did not involve any changes to District-3. Instead, the County redistricted by moving two precincts from District-1 into District-2 and thus left District-3 untouched.[97]

The District Court summarily dismissed the notion that the United States was an indispensable party on the theory that, since Navajo Nation was not seeking to modify the *Consent Decree*, the United States had no interest in this litigation. But, again, the Court's reasoning is flawed because a judgment by consent or by stipulation is an agreement between the parties.[98] The essence of a judgment by consent is that the parties to the litigation have voluntarily entered into an agreement settling their dispute and, upon that agreement, the court has entered judgment conforming to the terms of the agreement.[99] It is a contract,[100]

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[96] App. 445.

[97] App. 1931, ¶ 13.

[98] *In Matter of Estate of Anderson*, 671 P.2d 165, 168 (Utah 1983).

[99] *Bernett v. Bernett*, 745 A.2d 827, 831 (Conn. 1999).

[100] *United States v. ITT Continental Banking Co.,* 420 U.S. 223 (1975).

which means that a Court is not empowered to modify a judgment by consent to impose additional conditions or duties upon the parties to that contract.[101] It is likewise well established that a "contracting party is the paradigm of an indispensable party."[102] And the fact that the United States is a party to a contract that is, directly or indirectly, in litigation but the federal government is not a party does not alter the foregoing statements of the law with respect to indispensability.[103]

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[101] *See International Technologies Consultants, Inc. v. Pilkington PLC*, 137 F.3d 1382, 1387 (9th Cir. 1998); *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971).

[102] *Rozsenzweig v. Brunswick Corp.*, No. 08-807, 2008 U.S. Dist. LEXIS 63655, 2008 WL 3895485, at *6 (D.N.J. Aug. 20, 2008); *Travelers Indem. Co. v. Household Int'l, Inc.*, 775 F. Supp. 518, 527 (D. Conn. 1991). *See also Capitol Med. Ctr., LLC v. Amerigroup Md., Inc.*, 667 F. Supp.2d 188, 192-93 (D.D.C. 2010)(finding that seller hospital corporation was a party to a medical services contract and thus indispensable).

[103] *See Ogden River Water Users' Association v. Weber Basin Water Conservancy,* 238 F.2d 936 (10th Cir. 1956). *But see Mescalero Apache Tribe v. State of New Mexico,* 131 F.3d 1379, 1383 (10th Cir. 1997) (United States was found not to be an indispensable party in a lawsuit to have a tribal-state compact declared invalid because the federal government was not a party to that compact).

B. There Was a Compelling State Interest to Maintain a Navajo-Majority District.

1. Standard of review.

The Supreme Court has held that "'*all* racial classifications [imposed by government] . . . must be analyzed by a reviewing court under strict scrutiny.' Under strict scrutiny, the government has the burden of proving that racial classifications are 'narrowly tailored measures that further compelling governmental interests.'"[104]

2. The County Had a Compelling Interest to Abide by the *Consent Decree*.

The *Equal Protection Clause* "requires state legislation that expressly distinguishes among citizens because of their race to be narrowly tailored to further a compelling government interest."[105] The District Court found that the County had violated the *Equal Protection Clause* by making "redistricting decisions predominated by racial classifications" without the necessary

[104] *Johnson v. California*, 543 U.S. 499, 505 (2005) (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) (emphasis added)); *accord Save Palisade FruitLands v. Todd*, 279 F.3d 1204, 1210 (10th Cir. 2002) ("When legislation categorizes persons based on suspect classifications, such as race . . ., we apply strict scrutiny.").

[105] *Shaw v. Reno (Shaw I)*, 509 U.S. 630, 643 (1993).

"compelling government interest."[106] The Court erred in concluding that the County's continued adherence to a 1984 *Consent Decree* did not constitute a compelling government interest, and that ruling should be reversed.

The creation of Commission District-3 was, admittedly, based on race; it was intentionally created to have a heavy concentration of the County's Navajo population. But the County created and maintained District-3 to remedy alleged violations of Section 2 of the *VRA, and* "[C]ompliance with § 2 of the VRA constitutes a compelling governmental interest."[107]

A Section 2 violation "flows from the fact that individuals in [an] area 'have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.'"[108] The *Consent Decree* and resulting single-member districts remedied the County's alleged Section 2 violations. District-3 was designed to give the County's Navajo residents an equal opportunity to participate in the county government and to elect representatives of

[106] App. 9859.

[107] *Sanchez v. State of Colorado*, 97 F.3d 1303, 1328 (10th Cir. 1996); *see also Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017) ("This Court has long assumed that one compelling interest is complying with operative provisions of the *VRA* of 1965.").

[108] *Shaw v. Hunt (Shaw II)*, 517 U.S. 899, 917 (1996) (quoting 42 U.S.C. § 1973(b)).

their choice, and since its creation there has always been a Navajo member of the County Commission.

The *Consent Decree* not only justified the compelling government interest for creating District-3, but it also justified the maintenance of District-3. The *Decree* states that the District Court "has jurisdiction over this matter and shall retain jurisdiction for all purposes."[109] The County Commission has operated under the *Consent Decree* for over thirty years. When the County redrew the County Commission voting district boundaries in 2011, it made a minimal change to bring the districts in compliance with "one-person, one-vote." The County moved two precincts from District-1 to District-2 to equalize the population in the three commission districts.[110] The County did not change District-3's boundaries.

The District Court emphasized that the County officials misunderstood the content of the *Consent Decree* .[111] While it is true that the *Consent Decree* does not dictate that the boundaries of District-3 remain unchanged or even that District-3 be a Navajo-majority, the import of the *Consent Decree* is clear. The

[109] Addendum p.187.

[110] App. 3273.

[111] *See* App. 9827.

County was to remedy the alleged Section 2 violations. In order to do so, it moved from at-large voting to three single-member districts, including one "with the largest number of minorities" that would allow Navajo residents "'to participate in the political process and to elect representatives of their choice.'"

Furthermore, the County's plans were narrowly tailored to meet the compelling interest of complying with the *VRA*. "When a State invokes the VRA to justify race-based districting, it must show (to meet the 'narrow tailoring' requirement) that it had a 'strong basis in evidence' for concluding that the statute required its action. Or said otherwise, the State must establish that it had 'good reasons' to think that it would transgress the Act if it did *not* draw race-based district lines."[112] The County created three single-member districts to comply with the *Consent Decree* , including a Navajo-majority district. These plans were submitted to the Department of Justice for approval.[113] The County has maintained the boundaries of the federally approved plans.

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[112] *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017) (quoting *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1274 (2015)).

[113] App. 9834 n. 34 ("In the court's view, it is reasonable to infer from the record that the County presented a final plan to the Department of Justice before enacting it.").

ARGUMENT: THE COUNTY'S PARTICULAR CIRCUMSTANCES JUSTIFY THE SCHOOL BOARD VOTING DISTRICTS' POPULATION DEVIATION

1. Standard of Review

"That a law or state action imposes some burden on the right to vote does not make it subject to strict scrutiny. Accordingly, the Supreme Court has held that the appropriate level of scrutiny into the propriety of a state law or action regulating elections 'depends upon the extent to which the challenged regulation burdens First and Fourteenth Amendment rights.'"[114] In other words, "a court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden

[114] *Donatelli v. Mitchell*, 2 F.3d 508, 513–14 (3d Cir. 1993) (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)). *See also Burdick,* 504 U.S. at 433–34 ("Election laws will invariably impose some burden upon individual voters. . . . Consequently, to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently.").

the plaintiff's rights."[115]

2. The County's Had a Satisfactory Explanation to Deviate from "One-Person, One-Vote"

In *Reynolds v. Sims*, the Supreme Court announced the principle of "one-person, one-vote": "the overriding objective [in redistricting] must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State."[116] At the same time, the Court recognized that "some deviations from the equal-population principle" may be necessary in creating voting districts.[117] "So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy," these deviations "are constitutionally permissible."[118] But while "*[d]e minimis* deviations are unavoidable," deviations above 10% require "a satisfactory

[115] *Burdick*, 504 U.S. at 434 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)).

[116] *Reynolds v. Sims*, 377 U.S. 533, 579 (1964).

[117] *Id.*

[118] *Id.*

explanation grounded on acceptable state policy."[119]

When the Supreme Court analyzes population deviation, it takes into account all facts informing the state policy that required that deviation. "The only clear rule that emerges from the Supreme Court's cases as to the permissible population deviation is that 'each case must be evaluated on its own facts, and a particular population deviation from the ideal may be permissible in some cases but not in others.'"[120] "[C]onsideration must be given 'to the character as well as the degree of deviations from a strict population basis.' The consistency of application and the neutrality of effect of the nonpopulation criteria must be considered along with the size of the population disparities in determining whether a state legislative apportionment plan contravenes the *Equal Protection Clause*."[121] For example, in *Brown v. Thomson*, the Court considered the Wyoming

[119] *Swann v. Adams*, 385 U.S. 440, 444 (1967). Population deviations that fall under 10% are "minor deviations . . . insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State." *Brown v. Thomson*, 462 U.S. 835, 842 (1983) (quoting *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973)).

[120] *Kostick v. Nago*, 960 F. Supp. 2d 1074, 1101–02 (D. Haw. 2013), *aff'd*, 134 S. Ct. 1001 (2014).

[121] *Brown*, 462 U.S. at 845–46 (quoting *Reynolds*, 377 U.S. at 581).

Constitution, the fact that the policy had "been followed for decades," the consistent application of the policy, "the peculiar size and population of the State[,] and the nature of its governmental structure" before holding that Wyoming's policy of preserving political subdivisions justified its deviation from the equal-population principle.[122] Conversely, in *Chapman v. Meier*, the Court held that "a sparse population . . . without more, does not permit a substantial deviation from the average."[123] In other words, a sparse population alone will not justify deviation from the equal-population principle, but a sparse population paired with other reasons could.

The District Court parsed the County's proffered policy into five separate reasons, which the court rejected as failing to "serve[] legitimate government interests."[124] But the court took the wrong approach and applied the wrong test. The court should have considered whether the County's proffered policy—as a whole—was a rational state policy that justified the greater-than-10% deviation.

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[122] *Id.*

[123] 420 U.S. 1, 25 (1975).

[124] App. 8370.

The County School Board has five members, as required under Utah law,[125] who are elected from five single-member election districts. As previously stated, the County is vast and sparsely populated, which in turn effects the locations of county schools. School Board voting districts are essentially drawn around these schools, creating communities of interest. This has been the County's plan for at least three decades, ensuring that each school within the San Juan School District has specific representation on the School Board by placing voters who are within the school's boundaries in the voting district for that school's board member. This increases both the accountability of the School Board members to the schools and communities they represent and creates a sense of community. In order to draw the boundaries in a way that incorporates school communities, some deviation from the equal-population principle is both necessary and a legitimate consideration in the effectuation of this rational state policy.

For these reasons, the District Court's ruling that the School Board voting districts violated the "one-person, one-vote" principle of the *Equal Protection Clause* should be reversed.

[125] Utah Code § 20A-14-202.

ARGUMENT: THE COURT ERRED WHEN IT REJECTED THE COUNTY'S REMEDIAL REDISTRICTING PLANS

1. Standard of Review.

"A district court's assessment of a districting plan" for alleged violations of the *Equal Protection Clause* "warrants significant deference on appeal to this Court. We of course retain full power to correct a court's errors of law, at either stage of the analysis. But the court's findings of fact—most notably, as to whether racial considerations predominated in drawing district lines—are subject to review only for clear error."[126] "[I]f racial considerations predominated over others, the design of the district must withstand strict scrutiny."[127]

2. Race Was Not the Predominant Factor in the County's Remedial Plans.

The Supreme Court has consistently acknowledged that "[e]lectoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests."[128] The "overriding objective [in redistricting] must be substantial

[126] *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017).

[127] *Id.*

[128] *Miller v. Johnson*, 515 U.S. 900, 915 (1995).

equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State."[129] But after creating districts of equal populations, the redistricting body must then take into account other interests. The Court instructs the lower courts that, "in assessing the sufficiency of a challenge to a districting plan, [they] must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus. Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process."[130] In fact, "redistricting differs from other kinds of state decisionmaking in that the legislature is always aware of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of consciousness does not lead inevitably to impermissible race discrimination."[131]

In order to find "that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a

[129] *Reynolds v. Sims*, 377 U.S. 533, 579 (1964).

[130] *Miller*, 515 U.S. at 915–16.

[131] *Shaw v. Reno (Shaw I)*, 509 U.S. 630, 646 (1993).

particular district," a court must determine that the legislature subordinated "traditional race-neutral districting principles . . . to racial considerations."[132] Traditional race-neutral districting principles "are numerous and malleable,"[133] but the Court has consistently recognized compactness, contiguity, respect for political subdivisions, maintaining communities of interest, and incumbency protection.[134]

Rather than appreciate the difficult task set before the County, the District Court in this case placed the County in a catch-22: Even though it had not reached Navajo Nation's allegations of Section 2 violations, the court cautioned the County to remedy any potential Section 2 violations in redistricting[135] and then, after the County followed its instructions, it found that the County had violated the *Equal Protection Clause* because the County had necessarily used race to address

[132] *Miller*, 515 U.S. at 916.

[133] *Bethune-Hill v. Virginia State Bd. of Education*, 137 S. Ct. 788, 799 (2017).

[134] *See, e.g., Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1270 (2015).

[135] The District Court cautioned the County that the plan could be "constitutionally infirm if the [C]ounty chooses not to take into account the Section Two issues that might arise." App. 11273.

potential violations of Section 2.[136]

The Court further limited the County by instructing that it would only accept a maximum population deviation of "two, three or four percent, not eight or nine or ten or 12 percent."[137] In this instruction, the Court ignored the Supreme Court's repeated counsel that "when drawing state and local legislative districts, jurisdictions are permitted to deviate somewhat from perfect population equality to accommodate traditional districting objectives, among them, preserving the integrity of political subdivisions, maintaining communities of interest, and creating geographic compactness."[138] The County's expert testified that as "a direct result of the Court's directive that the population deviation among districts be as small as possible," "[i]nstead of allowing for up to a 10 percent population window, as recognized by the U.S. Supreme Court, the line-drawing exercise turned into a search along district boundaries for just the right number of people to move out of one district or to put into another district."[139]

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[136] App. 10825.

[137] App. 11274.

[138] *Enwel v. Abbott*, 136 S. Ct. 1120, 1124 (2016).

[139] App. 9970. *See, e.g., Brown v. Thomson*, 462 U.S. 835, 842 (1983) (Population deviations that fall under 10% are "minor deviations . . . insufficient to make out a prima

In addition to complying with the Constitution, traditional districting principles, and the *VRA*, the County had unique criteria to incorporate in its plans.[140] The County was still bound by the *Consent Decree*, which required a Navajo-majority district. The County also wanted to continue to observe its community school plan, keeping as many schools within community districts as possible while complying with the court's instructions.

The County also accounted for the fact that less than half of the County's voting population has physical addresses. The lack of physical addresses makes it difficult to ensure voters cast the correct ballot when districts or precincts change. When county citizens without a physical address register to vote, the County Clerk's staff ask them to indicate on a map where they live. This allows the County to assign the voter to the correct district and precinct. As this system has developed over the years, precincts are the only way the County knows where voters reside. Without the precincts, there is no way to readily reassign voters to districts, creating an intense and expensive administrative burden on the County

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facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State.").

[140] *See Miller v. Johnson*, 515 U.S. 900, 915 (1995) ("Electoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests.").

and its taxpayers. So the County's plan tried to maintain existing precinct boundaries.

The District Court found that, despite all of these interests, race was the predominant factor motivating the County's decision to place voters in County Commission voting Districts 1 and 2 and in School Board voting District-3.[141] The court erroneously found that, in attempting to remedy potential Section 2 violations, the County had used proportionality to the exclusion of all other principles and so had allowed race to predominate the redistricting plan.

The County was certainly conscious of race—it was the impetus for this case and the redistricting process. But race consciousness does not mean that race predominated the process. The County's expert testified that the County Commission election districts were designed to be "as nearly of equal population as is practicable, as well as giving due consideration to preserving to the extent possible existing precinct boundaries, and maintain communities of interest (such as boundaries of cities and Census Designated Places, as well as the Navajo Nation Reservation and Chapter lines).

[141] App. 10862.

3. Alternatively, the County's Use of Race in Redistricting Was Narrowly Tailored to Achieve a Compelling Interest.

If this Court affirms the District Court's ruling that race was the predominant factor in redistricting, it should then rule that the District Court erred in concluding that the County's use of race was not narrowly tailored to achieve a compelling interest—specifically, to satisfy the District Court's instructions and the *Consent Decree*. The District Court found that the "County predominated racial considerations over other traditional districting criteria when drawing its County Commission Districts 1 and 2 and School Board District-3, and it did so without providing any reason to think it would violate the *VRA* if it simply drew districts based on race-neutral factors."[142] But the court itself had given the County reason to believe it needed to consider whether the plans would violate the *VRA*.

"When a State justifies the predominant use of race in redistricting on the basis of the need to comply with the *VRA*, 'the narrow tailoring requirement insists only that the legislature have a strong basis in evidence in support of the (race-based) choice that it has made.'"[143] "That standard does not require the State to

[142] App. 10862.

[143] *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 801 (2017) (quoting *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1274 (2015)).

show that its action was 'actually . . . necessary' to avoid a statutory violation, so that, but for its use of race, the State would have lost in court."[144] "Rather, the requisite strong basis in evidence exists when the legislature has '*good reasons* to believe' it must use race in order to satisfy the *VRA*, 'even if a court does not find that the actions were necessary for statutory compliance.'"[145]

As previously stated, "complying with the VRA is a compelling interest."[146] The County had good reasons to believe it must use race in order to satisfy Section 2 of the *VRA*. First, the District Court had instructed the County to comply with Section 2 and cautioned that potential Section 2 violations would be a reason for it to find the plans infirm.[147] Second, the County was and is still required to abide by the 1984 *Consent Decree*, which remedied past allegations of Section 2 violations.

Aware of the *Consent Decree*'s implications, Navajo Nation's allegations in this case, and the District Court's concerns, the County's expert, Kimball Brace,

[144] *Id.* (quoting *Alabama*, 135 S. Ct. at 1274)).

[145] *Id.* (quoting *Alabama*, 135 S. Ct. at 1274)).

[146] *Cooper v. Harris*, 137 S. Ct. 1455, 1469 (2017).

[147] *See, e.g.,* App. 11273.

attempted to conduct the necessary analysis under *Thornburg v. Gingles* [148] on the issues of "racial block voting" so as to determine whether Navajo voters were "politically cohesive" and if non-Navajo "'vote . . . sufficiently as a bloc' to usually 'defeat the minority's preferred candidate.'" [149] But he was unable to obtain from the Navajo Nation the data that he needed to do such an analysis.[150]

Without that data, Mr. Brace was forced to rely on proportionality to ensure that "the County proposal provides all voters in San Juan County, including Native American voters, the opportunity to elect candidates of their choice from Districts that reflect the nearly equal division of the population in the County between non-Hispanic Whites and Native Americans."[151] Hence, because the County had good reason to believe it was necessary to use race to satisfy the *VRA*—even if the District Court later found the *VRA* was not at issue—its use of race in redistricting satisfies strict scrutiny. The Court should accordingly reverse the District Court's holding that the County's remedial plans violated the *Equal Protection Clause*.

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[148] *See* 478 U.S. 30, 50–51 (1986).

[149] *Cooper*, 137 S. Ct. at 1470 (quoting *Gingles*, 478 U.S. at 51).

[150] App. 10852, n. 130.

[151] App. 8421 & App. 9973.

ARGUMENT: THE COURT ERRED WHEN IT ORDERED THE COUNTY TO ADOPT THE COURT'S REDISTRICTING PLANS AND HOLD SPECIAL ELECTIONS

1. Standard of Review.

This Court reviews the District Court's legal conclusions de novo.[152] To the extent the District Court's conclusions address voting rights, this Court "must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."[153] But the Court should apply strict scrutiny to the District Court's conclusions that invoke impermissible racial classifications.[154]

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[152] *U.S. Energy Corp. v. Nukem, Inc.,* 400 F.3d 822, 830 (10th Cir. 2005) ("Although this court has not previously stated a standard of review for a district court's review of a special master's legal conclusions, since the district court's review is de novo, it follows that we in turn would review the district court's legal conclusions de novo.").

[153] *Burdick*, 504 U.S. at 434 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)).

[154] *Johnson v. California*, 543 U.S. 499, 505 (2005) (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) (emphasis added)); *accord Save Palisade FruitLands v. Todd*, 279 F.3d 1204, 1210 (10th Cir. 2002) ("When legislation categorizes persons based on suspect classifications, such as race . . ., we apply strict

2. The District Court's Plan Ignores Traditional Districting Principles and Violates the *Equal Protection Clause*

When a court takes upon itself the responsibility of redistricting, it must meet the same standards as a legislative body. In fact, the Supreme Court has held that a "court-ordered plan . . . must be held to a higher standard than a State's own plan."[155] Here, the District Court determined that the plans it adopted "comply with the Constitution, the *VRA*, and traditional redistricting principles to the extent possible,"[156] but the court's analysis was conclusory, relying heavily on the legal conclusions of the Special Master who created the plan.[157] The court's plan did not comply with traditional districting principles—or with the concerns repeatedly professed to the court by the County—but, more significantly, the court's plan used race as the predominant factor in creating the districts.

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scrutiny.").

[155] *Chapman v. Meier*, 420 U.S. 1, 26 (1975).

[156] App. 11064.

[157] Although "a master's findings, to the extent adopted by the court, must be considered the court's findings," Fed. R. Civ. P. 52(a)(4), "[t]he district court reviews the master's legal conclusions de novo." *Nukem, Inc.*, 400 F.3d at 830.

Although traditional districting principles are "numerous and malleable,"[158] there are principles that the Supreme Court has consistently identified: compactness, contiguity, respect for political subdivisions, respect for communities defined by actual shared interests, and incumbency protection.[159] The court's plan ignores these principles.

A significant districting principle is respect for political subdivisions. "Subdivision boundaries tend to remain stable over time. Residents of political units such as townships, cities, and counties often develop a community of interest, particularly when the subdivision plays an important role in the provision of government services."[160] The city of Blanding has a population large enough that in order to meet the equal-population principle of "one-person, one-vote," it must be divided between two County Commission districts and three School Board districts. But the District Court's plan unnecessarily divides the heavily Republican Blanding area among each of the three County Commission districts

[158] *Bethune-Hill v. Virginia State Board of Education*, 137 S. Ct. 788, 799 (2017).

[159] *See, e.g., Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1270 (2015).

[160] *Karcher v. Daggett*, 462 U.S. 725, 758 (1983) (Stevens, J., concurring).

and isolates Blanding Elementary in a School Board voting district with no other schools. Neither of these divisions of political subdivisions were necessary to achieve compliance with the *Equal Protection Clause* or the *VRA*.

As explained above, the County has relied on precinct boundaries to locate the significant number of voters who do not have a physical address. The County expressed this interest to the District Court multiple times, but the Court summarily dismissed the concern in favor of its Special Master's preference for Census Blocks, effectively destroying an election system that has served the County for many decades.[161] In addition to the administrative burden placed on the County to reestablish voter's locations and districts, the risk of even a small number of voters being placed in the incorrect district could have a significant impact on election results.

The court found that "[r]ace entered into [the Special Master's] line drawing calculation only at the final state and only with respect to the School Board districts."[162] But the court clearly erred in this finding. First, each of the Special

[161] *See* the court-ordered School Board and County Commission plans, respectively Addendum pp. 190 & 191.

[162] App. 11083.

Master's 5 proposed plans (3 County Commission and 2 School Board) were drawn in such a way as to always create significant Navajo majorities in two-thirds of the election districts.[163] No plans drawn solely on race-neutral districting principles could achieve such a result.[164]

Second, the court's findings are directly at odds with its findings regarding the County's remedial plans. As previously discussed, the County redistricted mindful of the court's instructions to comply with Section 2 of the *VRA*—even though the court had never found Section 2 violations. The Court said, in regards to the County's remedial plans, that the County "predominated racial considerations over other traditional districting criteria . . . and it did so without providing any reason to think it would violate the Voting Rights Act if it simply drew districts based on race-neutral factors."[165] Yet, the District Court's remedial plans suffer from the same infirmity, which it essentially when the Court was advised that the redistricting procedures used by the Special Master were the same as those used by the County's expert that we found to have been improper attempt

[163] App. 11083.

[164] See App. 10925, ¶¶ 21-22.

[165] App. 10862.

to draw voting districts predominately based upon race.[166]

3. The District Court Erred When It Ordered Special Elections.

After ruling that the County's 2011 and remedial plans were unconstitutionally drawn and adopting its own plan, the District Court ordered the County to hold special elections in November 2018. The Supreme Court has recently declared that "in the context of deciding whether to truncate existing legislators' terms and order a special election, there is much to weigh."[167] "[O]bvious considerations include the severity and nature of the particular constitutional violation, the extent of the likely disruption to the ordinary processes of governance if early elections are imposed, and the need to act with proper judicial restraint when intruding on state sovereignty."[168] "Special elections not only disrupt the decision-making process but also place heavy campaign costs

[166] At the November 15, 2017 hearing on the Special Master's report, the County's attorney presented these arguments to the court, "But with all due respect, if I recall correctly, I think that's exactly what Mr. Brace [the County's expert] did." The court simply responded that "we're not going to relitigate my ruling about that." App. 11621.

[167] *North Carolina v. Covington*, 137 S. Ct. 1624, 1625 (2017).

[168] *Id.* at 1626.

on candidates and significant election expenses on local government."[169] The individuals elected to the County Commission and School Board whose term of office extends beyond the 2018 election cycle were elected by the voters of San Juan County and, without any evidence showing that their election to office was due to what the Court has determined was an unconstitutional election plan, they should not be removed from office,[170] and it is in the public interest that they not be removed from office.

Although the court professed to address the "obvious considerations" set forward by the Supreme Court in *Covington*, the court's reasoning remained the same throughout its analysis: "It is critically important that the officials representing the citizens of [the] County are elected under constitutional districts—not districts that have been racially gerrymandered."[171] That reasoning, however, carried to its logical conclusion means that whenever an election district

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[169] *Gjersten v. Bd. of Election Comm'rs for City of Chicago*, 791 F.2d 472, 479 (7th Cir. 1986).

[170] *Connor v. Williams*, 404 U.S. 549, 550 (1972)(holding that elections held under a plan found to violate the one-person, one-vote requirement does not necessarily require the invalidation of those elections).

[171] App. 11101.

has been found to be unconstitutional, special elections are required, which is something that the Supreme Court has counseled against.[172]

For these reasons, the Court should reverse the District Court's order adopting its own districting plans and ordering special elections.

CONCLUSION

This Court should reverse and remand with instructions to the District Court to reinstate the County Commission and School Board election plans that were in existence at the commencement of this lawsuit or, in the alternative, to adopt the remedial plans that the County submitted to the District Court.

STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

Given the complexity and importance of the legal issues involved, it is respectfully suggested that the parties and the Court would both benefit from oral argument.

[172] *Allen v. State Bd. of Elections*, 399 U.S. 544, 571-72 (1969)(noting that setting aside an election and ordering a new one would be inappropriate if the election was not held in deliberate defiance of the *VRA*); *Covington*, 137 S.Ct. 1625, 1626 (rejecting notion that a special election was required as a result of past racial-gerrymandering because "[t]hat minimal reasoning would appear to justify a special election in *every* racial-gerrymandering case—a result clearly at odds with our demand for careful case-specific analysis").

DATED this 30th day of April, 2018.

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I hereby certify that on the 30th day of April, 2018, I electronically filed the foregoing document with the Tenth Circuit Court of Appeals. Notice will automatically be electronically mailed to the following individual(s) who are registered with the Court's electronic filing system:

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ADDENDUM