IN THE UNITED STATED DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

NAVAJO NATION, a federally recognized Indian Tribe; NAVAJO NATION HUMAN RIGHTS COMMISSION; LORENZO BATES; JONNYE KAIBAH BEGAY; GLORIA ANN DENNISON; TRACY DEE RAYMOND; and BESSIE YAZZIE WERITO,

Plaintiffs,

v. **Case 1:22-cv-00095-JB-JFR**

SAN JUAN COUNTY, NEW MEXICO; SAN JUAN COUNTY BOARD OF COMMISSIONERS; JOHN BECKSTEAD, in his official capacity as Chairman; TERRI FORTNER, in her official capacity as Commissioner; STEVE LANIER, in his official capacity as Commissioner; MICHAEL SULLIVAN, in his official capacity as Commissioner; GLOJEAN TODACHEENE, in her official capacity as Commissioner; and TANYA SHELBY, in her official capacity as COUNTY CLERK,

Defendants.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON *GINGLES* I

Under the Voting Rights Act and the first *Gingles* precondition, Plaintiffs must show that an additional majority-minority district could have been drawn, but was not. In 2021, Defendants enacted a redistricting plan that created a second majority Native American district in District 2 where there previously was not one under the 2012 map, resulting in two majority Native American Districts in the Enacted Plan for the San Juan County Board of Commissioners.

Here, Plaintiffs have produced maps that also only have two (2) majority Native American districts, just like the Enacted Map. As a consequence, Plaintiffs have not met the first *Gingles* precondition and Defendants respectfully request that the Court grant summary judgment.[1]

I. NARRATIVE FACTUAL BACKGROUND[2]

As part of the settlement of a prior lawsuit regarding the previously existing multimember districts, since 1981, San Juan County, New Mexico, has been divided into five (5) single-member commission districts. Based on the 2020 Decennial Census, San Juan County's population decreased between 2010 and 2020. But that population shift did not occur evenly across the county. Generally, the white population decreased and the Native American population increased, but at different rates in each District, with an increase in Native Americans living in the metropolitan areas. Due to the unequal populations in each District on the redistricting map adopted in 2011 (the "Existing Plan"), redistricting was required pursuant to the Equal Protection principle of "one person one vote." The Existing Plan, upon adoption, had the following characteristics of total population:

2012 Existing Plan Demographic Characteristics when adopted in 2011

District	Ideal Pop.	Population	Deviation	% Deviation	% Hispanic	% N/H Indian	% Anglo
1	26,009	24,883	-1126	-4.33	3.68	87.47	6.82
2	26,009	25,721	-288	1.11	23.01	43.63	30.94
3	26,009	25,536	-473	-1.82	25.35	9.84	62.34
4	26,009	27,218	1209	4.65	19.47	12.76	64.21
5	26,009	26,686	677	2.6	22.46	25.26	45.06

This first table is from the 2011 redistricting cycle, produced in this litigation as SJ00560_Plan Summary 2011**.** *See* Declaration of Tanya Shelby (Jul. 10, 2023) (attached as "**Exhibit A**") ¶ 5(b) (Dec. Ex. 2). Defendants' disclosed expert witness, Thomas Bryan, created the next two tables

[1] Pursuant to D.N.M.LR-Civ. 7.1, on July 10, 2023, Defendants sought Plaintiffs' concurrence in the requested relief. Plaintiffs oppose.

[2] Pursuant to D.N.M.LR-Civ. 10.5, Defendants sought Plaintiffs agreement to allow Defendants to exceed the page limit for exhibits to this motion. Plaintiffs agree to Defendants exceeding the page limit for exhibits to this motion.

below. Expert Report of Thomas M. Bryan (May 10, 2023) (attached as "**Exhibit B**") at 15-16 (Table III.B.1a and III.B.1b).[3]

2010 Census Total Population for 2012 Existing Districts

District	Total	WNH Alone	AI NH Alone	AI NH Any Race	Any Part AI
1	24,883	1,698	21,766	22,161	22,539
2	25,620	7,897	11,205	11,590	12,169
3	25,637	15,978	2,539	2,858	3,207
4	27,218	17,478	3,472	3,893	4,171
5	26,686	12,203	7,339	7,794	8,293
Grand Total	**130,044**	**55,254**	**46,321**	**48,296**	**50,379**

Source: 2010 Census PL94-171. Calculations by BGD.

2010 Census Total Percentages for 2012 Existing Districts

District	WNH Alone	AI NH Alone	AI NH Any Race	Any Part AI
1	6.8%	87.5%	89.1%	90.6%
2	30.8%	43.7%	45.2%	47.5%
3	62.3%	9.9%	11.1%	12.5%
4	64.2%	12.8%	14.3%	15.3%
5	45.7%	27.5%	29.2%	31.1%
Total	**42.5%**	**35.6%**	**37.1%**	**38.7%**

Source: 2010 Census PL94-171. Calculations by BGD.

In November 2021, the redistricting process started after the Census data was released and the precincts had been redrawn. By that time, based on the 2020 Census, the Existing Plan had the following characteristics:

2012 Existing Plan Demographic Characteristics in 2020

District	Population	Deviation	% Dev.	Hispanic	Anglo	NH Indian
1	22,531	-1,801	-7.4%	3.35%	5.35%	88.57%
2	22,712	-1,620	-6.7%	23.01%	26.48%	47.04%
3	23,547	-785	-3.2%	27.21%	53.54%	14.15%
4	26,938	2,606	10.7%	21.72%	53.06%	18.30%
5	25,933	1,601	6.6%	20.79%	36.49%	36.68%
Total	121,661	1	0.0%	19.42%	35.82%	39.79%

[3] Mr. Bryan uses color coding that he describes as follows: "In the tables following immediately and in subsequent tables going forward – individual values are color-coded. Within each table, dark green represents higher values, followed by light green for high values, then light red for low values and dark red for the lowest values (including in many cases negative values indicating population decline)." Ex. B, Bryan Rep. at 14, ¶ 38.

This first table is from the 2021 redistricting cycle, produced in this litigation as SJ00223-00225_San Juan County Commission, Redistricting 2021, All Plans, Demographic Comparisons. Ex. A, Shelby Dec. ¶ 5(a) (Dec. Ex. 1). The next three tables below are from the expert report of Thomas M. Bryan. Ex. B, Bryan Rep. at 17-20 (Tables III.B.1e, III.B.1f, III.B.1h).

2020 Census Total Population for 2012 Existing Districts

District	Total	WNH Alone	AI NH Alone	AI NH Any Race	Any Part AI
1	**22,532**	1,206	19,956	20,277	20,613
2	**22,711**	6,015	10,683	11,111	11,652
3	23,547	12,608	3,333	3,883	4,400
4	**26,938**	14,292	4,929	5,691	6,333
5	25,933	9,462	9,512	10,249	10,900
Grand Total	**121,661**	**43,583**	**48,413**	**51,211**	**53,898**

Source: 2020 Census PL94-171. Calculations by BGD.

2020 Census Total Percentages for 2012 Existing Districts

District	% WNH Alone	% AI NH Alone	% AI NH Any Race	% Any Part AI
1	5.4%	88.6%	90.0%	91.5%
2	26.5%	47.0%	48.9%	51.3%
3	53.5%	14.2%	16.5%	18.7%
4	53.1%	18.3%	21.1%	23.5%
5	36.5%	36.7%	39.5%	42.0%
Total	35.8%	39.8%	42.1%	44.3%

Source: 2020 Census PL94-171. Calculations by BGD.

2020 VAP Percentages for 2012 Existing Districts

District	% WNH Alone	% AI NH Alone	% AI NH Any Race	% Any Part AI
1	5.9%	89.1%	90.1%	91.2%
2	29.8%	46.3%	48.0%	49.5%
3	58.4%	12.6%	14.6%	16.1%
4	58.3%	16.9%	19.3%	20.8%
5	41.1%	34.3%	36.6%	38.1%
Total	39.6%	38.7%	40.6%	42.0%

Source: 2020 Census PL94-171. Calculations by BGD.

For the 2021 redistricting cycle, the Commission hired and relied on consultant demographer Rod Adair and his company New Mexico Demographic Research to draw maps and advise the Commission. Throughout the process, Mr. Adair drew over 12 map proposals. The Navajo Nation Human Rights Commission also submitted what it referred to as the "Navajo Plan." The Navajo Plan had the following characteristics:

Navajo Plan Demographic Characteristics

	Navajo Plan					
District	Population	Deviation	% Dev.	Hispanic	Anglo	NH Indian
1	24,387	55	0.2%	7.94%	23.89%	63.73%
2	24,359	27	0.1%	15.53%	18.84%	62.70%
3	24,764	432	1.8%	28.38%	53.07%	13.41%
4	24,638	306	1.3%	23.34%	50.40%	20.14%
5	23,513	-819	-3.4%	21.83%	32.37%	39.62%
Total	121,661	1	0.0%	19.42%	35.82%	39.79%

This first table is from the 2021 redistricting cycle, produced in this litigation as SJ00223-00225_San Juan County Commission, Redistricting 2021, All Plans, Demographic Comparisons. Ex. A, Shelby Dec. ¶ 5(a) (Dec. Ex. 1). The second table below is from the expert report of Thomas M. Bryan. Ex. B, Bryan Rep. at 31 (Table III.F.1d).

2020 VAP Percentages for Navajo Nation Plan

District	% WNH Alone	% AI NH Alone	% AI NH Any Race	% Any Part AI
1	26.1%	63.3%	64.9%	66.2%
2	20.7%	63.2%	64.6%	65.8%
3	57.7%	11.9%	13.9%	15.4%
4	55.5%	19.0%	21.2%	22.8%
5	37.1%	37.0%	39.2%	40.9%
Total	39.6%	38.7%	40.6%	42.0%

Source: 2020 Census PL94-171. Calculations by BGD.

However, Commissioner GloJean Todacheene, the sole Navajo on the Commission in 2021, opposed the Navajo Plan. Primarily, she did not agree with moving additional Navajo Nation Chapters out of her district, District 1, and placing them in District 2. She saw this dividing her

district's community of interest. Commissioner Todacheene also opposed taking into District 1 more of the La Plata area, which previously was in District 5, because the La Plata area did not share her current district's interests. She expressed her concerns on the record at the Dec. 7, 2021 and Dec. 14, 2021 Commission meetings, where the redistricting and all the potential maps, including the Navajo Plan, were discussed.

Throughout the process, Mr. Adair worked with Commissioner Todacheene and the other Commissioners to ensure that they would create an additional majority Native American district, while also balancing that objective with respecting Commissioner Todacheene's interest in preserving her district and its community of interest. The other Commissioners deferred to Commissioner Todacheene and her concerns as the sole Navajo Commissioner in deciding between the potential maps.

Commissioner Todacheene, a Democrat (and the sole Democrat at the time), also sensed that she would have difficulty being elected on the Navajo Plan in her district, and that a Republican candidate could prevail instead. In fact, although Mr. Adair stated on the record that the Navajo Plan was a "superb plan," he privately told the County Manager that the Navajo Plan could easily result in the election of five Republican Commissioners, and the loss of Commissioner Todacheene as District 1's candidate of choice. However, formal partisan performance analysis could not be completed on the maps considered by the Commission during the redistricting cycle because Research and Polling had not completed recompiling past election results into the newly adopted precincts in time for that analysis to be completed.

Despite the reality that the Navajo Plan was a "Republican" plan and would put the sole Navajo Commissioner at risk, the Navajo Nation Human Rights Commission, through Leonard Gorman, advocated strongly for San Juan County to adopt it. He even went as far as claiming that

a district needed 63% Native American Voting Age Population ("NAVAP") to allow for the "opportunity to elect a candidate of their choice" and that the Navajo Plan satisfies the Voting Rights Act. He also took the position that anything over 70% was "packing."

Ultimately, on Dec. 14, 2021, the Commission adopted what was labeled Plan A-5 (the "Enacted Plan"), which Mr. Adair also described as an excellent plan. The Enacted Plant created two majority Native American districts, just as the Navajo Plan did, while also respecting the current Navajo Commissioner's interest, such that it would be a compromise between Commissioner Todacheene, the Navajo Nation Human Rights Commission, and the other Commissioners. Commissioner Todacheene insisted on seconding the motion to adopt the Enacted Plan so that she could explain on the record why she was giving up the precincts associated with the Crystal and Naschitti Chapters of the Navajo Nation, which she felt were part of her district's community of interest. The Enacted Plan has the following characteristics:

The 2021 Enacted Plan Demographic Characteristics

	Enacted Plan					
District	Population	Deviation	% Dev.	Hispanic	Anglo	NH Indian
1	23,294	-1,038	-4.3%	5.31%	8.87%	82.67%
2	24,549	217	0.9%	20.51%	24.07%	52.32%
3	25,187	855	3.5%	27.85%	53.47%	13.50%
4	24,551	219	0.9%	21.35%	54.96%	16.63%
5	24,080	-252	-1.0%	21.19%	35.92%	36.66%
Total	121,661	1	0.0%	19.42%	35.82%	39.79%

The first table is from the 2021 redistricting cycle, produced in this litigation as SJ00223-00225_San Juan County Commission, Redistricting 2021, All Plans, Demographic Comparisons (Plan A-5). Ex. A, Shelby Dec. ¶ 5(a) (Dec. Ex. 1). The table below is from the expert report of Thomas M. Bryan. Ex. B, Bryan Rep. at 24 (Table III.C.1i).

2020 VAP Percentage for 2021 Enacted Plan

District	WNH Alone	AI NH Alone	AI NH Any Race	Any Part AI
1	9.6%	83.3%	84.6%	85.7%
2	26.8%	52.3%	53.8%	55.4%
3	58.3%	11.9%	14.0%	15.5%
4	60.1%	15.5%	17.8%	19.3%
5	40.6%	34.0%	36.3%	37.9%
Total	39.6%	38.7%	40.6%	42.0%

Source: 2010 Census PL94-171. Calculations by BGD.

Notably, the Enacted Plan created two majority Native American districts. It decreased the percentage of Native Americans in District 1. And it increased the percentage of Native Americans in District 2, from the Existing Plan's percentage of 46% up to approximately 53%. This resulted in a clear majority Native American district in District 2.

Plaintiffs in this case fail to produce a map that creates more Native American majority districts than the Enacted Plan. Instead, Plaintiffs allege that District 2 under the Enacted Plan "will not 'perform' or elect Navajo candidates of choice . . . ." Doc. 1, Compl. ¶ 79. But from 1982 to the present, San Juan County Commission District 2 has elected 6 Native American Commissioners in 11 election contests, and all of the Native American Commissioners were elected when the percentage of Native American population in District 2 was similar to the Enacted Plan.

II. STANDARD OF REVIEW

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). For Voting Rights Act Section 2 cases, the appellate courts treats "the ultimate finding of vote dilution as a question of fact subject to the clearly-erroneous standard of Rule 52(a)." *Sanchez v. State of Colo.*, 97 F.3d 1303, 1309 (10th Cir. 1996) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 78, 106 S. Ct. 2752 (1986)).

III. UNDISPUTED MATERIAL FACTS[4]

1. According to the 2020 Census, San Juan County has a total population of 121,661.Of that total, the Racial and Hispanic profile of San Juan County is as follows: White alone 54.1%; Black or African American alone 0.8%; American Indian and Alaska Native alone 41.6%; Asian alone 0.6%; Native Hawaiian and Other Pacific Islander alone 0.1%; Two or More Races 2.9%; Hispanic or Latino 20.6%; White alone, not Hispanic or Latino 37.5%.[5] Of San Juan County's 121,661 residents, 39.8% are non-Hispanic American Indian, and 38.7% of the total adult population of 89,664 are non-Hispanic American Indian.[6] Doc. 1, Compl. ¶¶ 37, 40-42 (Figure 1).

2. The 2012 Existing Plan contained only a single majority Native American district based on 2010 and 2020 Census data, in District 1; and District 2 only had a minority Native American population. Ex. B, Bryan Rep. at 15 ¶ 41, 18 ¶ 49. On the 2012 Existing Plan, District 2 was also a minority considering Citizen Voting Age Population or "CVAP." Ex. B, Bryan Rep. 34, ¶ 86.

3. The 2021 Enacted Plan contains two (2) majority Native American districts. Ex. B, Bryan Rep. at 79 ¶ 162.

4. Districts 1 and 2 on the Enacted Plan also are majority-minority districts considering Citizen Voting Age Population. Ex. B, Bryan Rep. 35, ¶ 87.

5. The Navajo Plan contains only two majority Native American districts. Ex. B, Bryan Rep. at 79 ¶ 162.

6. Both plans that Plaintiffs' expert witness Mr. Tye Rush submitted in his report contain only two majority Native American districts. Ex. B, Bryan Rep. at 79 ¶ 162.

[4] Defendants refer to the numbered Undisputed Material Facts as "UMF No(s)" in Section IV.
[5] https://www.sjcounty.net/about-us.
[6] The Census uses the term "American Indian" which is used interchangeably with the term Native American in this motion, although there are various definitions with different characteristic used in the Census. *See* Ex. B, Bryan Rep. 13, ¶ 35.

7. Commissioner GloJean Todacheene, the sole Democrat, Navajo Commissioner, did not support the Navajo Plan and instead preferred the Enacted Plan. Deposition of GloJean Todacheene (Feb. 1, 2023) (attached as "**Exhibit C**") 108:10-21, 144:12-145:14.

8. Three of the white Republican Commissioners deferred to Commissioner GloJean Todacheene as the sole Democrat, Navajo Commissioner in determining what communities and precincts to include in her District 1, whether to support the Navajo Plan, and in adopting the Enacted Plan as a compromise. Deposition of Terri Fortner (Feb. 8, 2023) (attached as "**Exhibit D**") 98:17-99:4; Deposition of John Beckstead (Feb. 3, 2023) (attached as "**Exhibit E**") 144:5-145:15; Deposition of Steve Lanier (Feb. 2, 2023) (attached as "**Exhibit F**") 34:7-18, 102:15-103:8.

9. All of Plaintiffs' maps that purport to satisfy the first *Gingles* precondition place the precincts primarily containing the Sanostee, Two Grey Hills, Newcomb and Sheep Springs Chapters of the Navajo Nation into District 2, specifically Precincts 8, 11, 133 (Sanostee); Precincts 8, 10, 11, 12 (Two Grey Hills); and Precincts 10, 11, 12 (Sheep Springs). Supplemental Expert Report of Thomas M. Bryan (May 31, 2023) (attached as "**Exhibit B-1**") at 11; Ex. B, Bryan Rep. at 69-73, ¶¶ 149-152.

10. The Sanostee, Two Grey Hills, Newcomb and Sheep Springs Chapters of the Navajo Nation are aligned with District 1's community of interest that Commissioner Todacheene currently represents, which is different than the Navajo Nation Chapters in District 2 under the Enacted Plan. Ex. C, Todacheene Dep. 109:1-110:14.

11. Commissioner Todacheene supported the lines between District 1 and District 2 on the Enacted Plan because of the two different Agencies, with the Northern Agency, which is mostly in District 1, being a farming and irrigation community and the Eastern Agency, which is in District

2 having allottees with oil and gas royalties. Ex. C, Todacheene Dep. 109:1-110:9; 110:11-21 (recently Sanostee (District 1, Northern Agency) came out with a resolution that was anti-extraction and that put the Eastern and Northern Agency against each other); *id.* 234:6-235:3 (describing the different tensions between allotees who get royalties and are "very much pro oil and gas" and non-allottees, and stating that it would be hard to represent both district's interests at the same time, because she would be "caught in the middle between the two agencies.").

12. Districts 1 and 2 on the Enacted Plan also have disparate interests based on regional and cultural differences. Ex. C, Todacheene Dep. at 105:15-106:3 (Describing communities as people who grew up together and know each other, who are neighbors and went to school together); *id.* 107:2-12 (A "community of interest" is a community that is "culturally together"; "it's like with Navajos where they're connected by clans," "We have names for our . . . land formations, so it's easy for us to maneuver within . . . our areas."); *id.* 108:10-21 (explaining that preserving communities of interest were the main reason she voted for the final Enacted Plan, Plan A-5, and stating that Navajos are "related by clan" and "know each other by clan, by families, marriages.").

13. The Northern Agency has different needs than the Eastern Agency. Deposition of Bessie Werito (Feb. 28, 2023) (attached as "**Exhibit G**") at 17:19 – 18:3.

14. Plaintiffs' maps do not preserve the communities of interest that exist between District 1 and District 2 as well as the Enacted Plan based on the different Agencies and their disparate interests. Ex. B, Bryan Rep. 48-49, ¶¶ 108-109 (defining "community of interest" and what it means to preserve them); *id.* at 48-63, ¶¶ 110-133 (explaining Differential Core Retention Analysis of San Juan's Communities of Interest, including testimony from San Juan County Commissioners' meeting and the depositions of Rod Adair, GloJean Todacheene and Leonard Gorman, and a detailed Geographic Information System analysis of existing administrative and

geographic features of San Juan County); *id.* at 65-73, ¶¶ 140-153 (explaining how the Bureau of Indian Affairs ("BIA") broke up the Navajo Nation into five separate Agencies, describing the four Navajo Nation Agencies that intersect San Juan County and analyzing whether the proposed maps preserve the communities of interest inherent therein); *id.* at 74-75, ¶¶ 153-154 (analyzing how many schools changed districts under each of the four 2021 plans relative to the 2012 Existing Plan and finding that the 2021 Enacted Plan only barely disrupts the continuity of representation of San Juan's schools, while the Demonstration Plans and Navajo Nation plan are "significantly more disruptive"); *id.* at 75-76, ¶¶ 155-156 (finding the same with regard to churches).

15. From 1982 to the present, San Juan County Commission District 2 has elected six Native American Commissioners in 11 election contests. Ex. A, Shelby Dec. ¶¶ 13-15 (Dec. Ex. 8).

16. Specifically, the following Native American candidates were elected since 1982 as District 2 Commissioners:

a. 1982 – Wallace Davis;

b. 1990 – Ervin Chavez;

c. 1994 – Ervin Chavez;

d. 1998 – Wilson Ray;

e. 2002 – Ervin Chavez; and

f. 2006 – Ervin Chavez.

Ex. A, Shelby Dec. ¶¶ 13-15 (Dec. Ex. 8).

17. From 1982-1990, District 2 had approximately 40% Non-Hispanic American Indian voting age population. Ex. A, Shelby Dec. ¶¶ 5(g), 16 (Dec. Exs. 5, 9).

18. From 1992-2000, District 2 had approximately 50%-60% Non-Hispanic American Indian total population. Ex. A, Shelby Dec. ¶¶ 5(e), (f), (g), 17-18 (Dec. Exs. 9, 10).

19. From 2002-2010, District 2 had approximately 47%- 50% Non-Hispanic American Indian total population. Ex. A, Shelby Dec. ¶¶ 5(b), 18-19 (Dec. Exs. 10, 2).

20. From 2012-2020, District 2 had approximately 43%-46% Non-Hispanic American Indian adult population ("Native American Voting Age Population" or "NAVAP"). Ex. B, Bryan Rep. at 16-17 (Table III.B.1d), 19 (Table III.B.1h).

21. Currently, on the Enacted Plan District 2 has at least 52.3% Non-Hispanic American Indian adult population. Ex. B, Bryan Rep. at 22 (Table III.C.1d).

22. Plaintiffs fail to present or identify evidence that District 2 does not provide an equal opportunity for Native Americans to elect their candidate of choice. *See* Pls.' Answer and Suppl. Answer to Interrog. No. 1 (attached as "**Exhibit H**").

23. Plaintiffs fail to present or identify empirical evidence that Native Americans in District 2 have lower political participation, including lower registration rates or lower turnout rates. *See* Ex. I, Pls.' Answer and Suppl. Answer to Interrog. No. 2.

24. Plaintiffs fail to identify what percentage of Native American voting age population they want in District 1 and District 2 for each to purportedly provide an opportunity to elect.

25. Even Tye Rush as the architect of his proposed maps could not explain why he arrived at the percentages of Native American population in Districts 1 and 2. Deposition of Tye Rush 90:6-22 (Apr. 25, 2023) (attached as "**Exhibit I**").

IV. ARGUMENT

With respect to redistricting, a violation of Section 2 of the Voting Rights Act only exists where a redistricting plan denies a minority population an equal opportunity to participate in the political process and to elect a candidate of their choice. 52 U.S.C. § 10301(b) (also known as "Section 2 of the Voting Rights Act or VRA"). But "nothing in this section establishes a right to

have members of a protected class elected in numbers equal to their proportion in the population." 52 U.S.C. § 10301. As a threshold showing to establish a claim under § 10301, the plaintiffs must first show that a "bloc voting majority must usually be able to defeat candidates supported by a politically cohesive, geographically insular minority group." *Thornburg v. Gingles*, 478 U.S. 30, 49, 106 S. Ct. 2752 (1986). This breaks down into the three *Gingles* preconditions: "First, a 'minority group' must be 'sufficiently large and geographically compact to constitute a majority' in some reasonably configured legislative district. Second, the minority group must be 'politically cohesive.' And third, a district's white majority must 'vote [ ] sufficiently as a bloc' to usually 'defeat the minority's preferred candidate.'" *Cooper v. Harris*, 581 U.S. 285, 301–02, 137 S. Ct. 1455 (2017) (quoting *Gingles*, 478 U.S. at 50-51); *see also Sanchez v. State of Colo.*, 97 F.3d 1303, 1310 (10th Cir. 1996) (identifying the three *Gingles* preconditions).

a. The first *Gingles* precondition requires the plaintiffs to show an additional majority-minority district could have been drawn, but was not.

"When applied to a claim that single-member districts dilute minority votes, the first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." *Johnson v. De Grandy*, 512 U.S. 997, 1008, 114 S. Ct. 2647 (1994). The *Gingles* I precondition employs the majority-minority rule that is an objective, numerical test: "Do minorities make up more than 50 percent of the voting-age population in the relevant geographic area? That rule provides straightforward guidance to courts and to those officials charged with drawing district lines to comply with § 2." *Bartlett v. Strickland*, 556 U.S. 1, 18, 129 S. Ct. 1231 (2009).[7] It is only

[7] As the *Bartlett* court wisely states: "It is appropriate to review the terminology often used to describe various features of election districts in relation to the requirements of the Voting Rights Act. In majority-minority districts, a minority group composes a numerical, working majority of the voting-age population. . . . At the other end of the spectrum are influence districts, in which a minority group can influence the outcome of an election even if its preferred candidate cannot be elected." *Bartlett*, 556 U.S. at 13. Plaintiffs in this litigation have used the term "opportunity district" in what appears to be a reference to a majority-minority district.

when "an election district could be drawn in which minority voters form a majority but such a district is not drawn, or where a majority-minority district is cracked by assigning some voters elsewhere, [that]—assuming the other *Gingles* factors are also satisfied—denial of the opportunity to elect a candidate of choice is a present and discernible wrong . . . ." *Bartlett*, 556 U.S. at 18–19. *See also Allen v. Milligan*, 143 S. Ct. 1487, 1504 (2023) (finding first *Gingles* precondition satisfied because black voters could constitute a majority in an additional district that was not drawn).

The three *Gingles* preconditions work together to show that "the challenged districting thwarts a distinctive minority vote *by submerging it in a larger white voting population*." *Growe v. Emison*, 507 U.S. 25, 40, 113 S. Ct. 1075 (1993) (emphasis added). The three *Gingles* preconditions "are needed to establish that 'the minority [group] has the potential to elect a representative of its own choice' in a possible district, but that racially polarized voting prevents it from doing so in the district as actually drawn *because it is 'submerg[ed] in a larger white voting population.*'" *Cooper*, 581 U.S. at 302 (2017) (emphasis added) (quoting *Growe*, 507 U.S. at 40); *see also Milligan*, 143 S. Ct. at 1503 (emphasis added) ("Such a risk is greatest . . . *where minority voters are submerged in a majority voting population*"). Harmonizing *Gingles*, *Growe*, *De Grandy*, *Bartlett*, *Cooper*, and *Milligan*, Plaintiffs must show that an additional majority-minority district could have been drawn but was not and that the district as drawn submerges the minority population in a white majority district.

b. Plaintiffs fail to draw an additional minority majority district, and Defendants complied with *Bartlett*'s directive and complied with the VRA in adopting the Enacted Map.

The Tenth Circuit has not had occasion to address whether it would allow a plaintiff's claim to move forward despite failing to show an additional district could be drawn but was not, leaving only the Supreme Court's bright line majority-minority definition and rule in *Bartlett* to govern

this case. *See, e.g.*, *Sanchez*, 97 F.3d at 1308 (10th Cir. 1996) (challenging district drawn with 42.38% Hispanic voting age population and only analyzing compactness of the plaintiffs' proposed majority district). The courts and legislatures alike need clear, workable standards to know how to comply with the requirements of the VRA without running afoul of Equal Protection. *Bartlett*, 556 U.S. at 17 ("We find support for the majority-minority requirement in the need for workable standards and sound judicial and legislative administration. The rule draws clear lines for courts and legislatures alike."). As *Bartlett* reaffirmed, "'[u]nless minority voters possess the potential to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice.'" *Bartlett*, 556 U.S. at 15 (quoting *Gingles*, 478 U.S., at 50, n.17). The Tenth Circuit has stated the first precondition "simply asks whether any remedy is possible in the first instance." *Sanchez*, 97 F.3d at 1311. In other words, can a majority-minority district be drawn where there is not already one?

Bartlett reasoned that there is a special significance to a majority in the democratic process. *Bartlett*, 556 U.S. at 19 ("The special significance, in the democratic process, of a majority means it is a special wrong when a minority group has 50 percent or more of the voting population and could constitute a compact voting majority but, despite racially polarized bloc voting, that group is not put into a district."). A clear majority-minority rule also prevents forcing racial considerations to be infused into every redistricting decision, as *Bartlett* cautioned against. *Id.* at ("To the extent there is any doubt whether § 2 calls for the majority-minority rule, we resolve that doubt by avoiding serious constitutional concerns under the Equal Protection Clause.").

As the Fourth Circuit has held on this issue, "[i]f the voting group of [a minority] have the numbers necessary to win and members of the group are allowed equal access to the polls, it cannot

be rationally maintained that the vote is diluted." *Smith v. Brunswick Cnty., Va., Bd. of Sup'rs*, 984 F.2d 1393, 1401 (4th Cir. 1993).

As the Fourth Circuit further explained on this issue:

> The state must guarantee equality of voting opportunity, but it cannot guarantee equality of success, and the Voting Rights Act expressly so specifies. Moreover, the state need not draw district lines to give greater weight to the portion of the [minority] population which votes for [minority] candidates than the portion which votes for white candidates. There is simply no precedent or principle to support the argument that the vote of cross-over [minority] voters must be undervalued.

Id. Quite simply, a minority group already "has the potential to elect a representative of its own choice in some single-member district" if it is already a majority in that district. *Milligan*, 143 S. Ct. at 1503 (quoting *Growe*, 507 U.S. at 40).

In this case, Plaintiffs fail to establish the first *Gingles* precondition because the challenged District 2 is already a majority-minority district under *Bartlett*'s definition and rule. UMF Nos. 3-4. Quite simply, in San Juan County, currently Native Americans as a minority group already compose "a numerical, working majority of the voting-age population" in two commission districts in San Juan County. *Bartlett*, 556 U.S. at 13; UMF Nos. 3-4. The San Juan County Board of Commissioners adopted a map with a majority Native American district of 82.67% in District 1—deferring to the Native American Commissioner for that district and the community of interest she wanted to protect—and with a second majority Native American district of 52.32% in District 2. UMF Nos. 3-4, 7-8. This satisfies *Gingles*, *Growe*, *De Grandy*, *Bartlett*, *Cooper*, and *Milligan*.[8] As *Bartlett* directs, Defendants had no obligation under § 2 "to give minority voters the most potential, or the best potential, to elect a candidate" or to maximize minority voting strength. *Bartlett*, 556 U.S. at 15-16.

[8] Indeed, the facts of this case are the opposite of *Allen*, in which Alabama only drew one majority-minority district but could have drawn two.

All of Plaintiffs' offered maps only have two minority-majority districts—just like the Enacted Plan. UMF Nos. 5-6. As a consequence, Plaintiffs fail to show that an additional majority minority district could have been drawn, but was not. Plaintiffs fail to show that the Native American population in District 2 is "submerg[ed] in a larger white voting population." *Cooper*, 581 U.S. at 302 (quoting *Growe*, 507 U.S. at 40). Indeed this showing is not possible, because District 2 already is a majority-minority district, and Native Americans cannot be submerged in a District that has only 26% non-Hispanic white voters. UMF Nos. 3-4; Ex. B, Bryan Rep. at 24 (Table III.C.1i). Accordingly, Plaintiffs' fail to establish the first *Gingles* precondition. District 2 already complies with *Bartlett* and the VRA.

The Supreme Court has only indicated in dicta that despite a district being a majority-minority, it may still violate Section 2. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 428, 126 S. Ct. 2594 (2006) ["*LULAC*"] ("Though it may be possible for a citizen voting-age majority to lack real electoral opportunity, the Latino majority in old District 23 did possess electoral opportunity protected by § 2."). But that discussion arose from analyzing a district where the citizen voting age population was not a majority even though the voting age population was. Interestingly, the *LULAC* court found that the state had drawn a district that was only a majority in a hollow sense because it did not have a majority of minority citizen voting age population, but also concluded that a prior district in which the minority preferred candidate had not won an election yet, but was close to it, was sufficient. Here, there is no similar issue because District 2 is a majority Native American district by its CVAP.

The Court may properly dismiss Plaintiffs' claim for failure to meet the first *Gingles* precondition as a matter of undisputable population demographics.

c. District 2 and the Enacted Plan provides equal opportunity for Native Americans to elect their candidates of choice.

Even if Plaintiffs are allowed to proceed, despite failing to show a possible, additional majority-minority district was not drawn, they still fail to show that District 2 and the Enacted Plan do not provide equal opportunity for Native Americans to elect their candidate of choice. It is Plaintiffs' burden to demonstrate all elements of their vote dilution claim. *Voinovich v. Quilter*, 507 U.S. 146, 155–56, 113 S. Ct. 1149 (1993). Critically, just because the minority candidate in District 2 lost in the 2022 General election does not mean that Native Americans are denied the opportunity to elect their candidate of choice on the Enacted Map.

A minority group still has the opportunity to elect their candidate of choice in a majority-minority district even when that candidate may have lost in the most recent election. *LULAC*, 548 U.S. at 428. "The circumstance that a group does not win elections does not resolve the issue of vote dilution." *Id.* The Supreme Court has repeatedly held that "the ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race." *De Grandy*, 512 U.S. at 1014, n.11. "Section 2(b) promises protected minorities an even playing field, not a certain victory." *Sanchez*, 97 F.3d at 1309. "The lack of electoral opportunity is the key." *Id.* at 1310.

For example, the Supreme Court in *LULAC* held that the district court was incorrect to the extent that it "suggested that District 23 was not a Latino opportunity district in 2002 simply because Bonilla[, the non-minority preferred candidate,] prevailed" in the 2002 election contest. *LULAC*, 548 U.S. at 428. "A politically cohesive minority group that is large enough to constitute the majority in a single-member district has a good chance of electing its candidate of choice, if the group is placed in a district where it constitutes a majority." *Voinovich*, 507 U.S. at 153.

Just as in *LULAC*, the same is true here for District 2. Over the last 40 years, District 2 has elected six Native American commissioners in 11 election contests. UMF Nos. 15-16. And its Native American total population has never been over 60%. UMF Nos. 17-20. Indeed, in the 1980s and the 2000s it's Native American population was between 40% and 50%, with Native American candidates only losing in 1986 and 2010 in those same decades. UMF Nos. 15-17, 20. Just as it has over the last 40 years, District 2 provides the opportunity for Native Americans to elect their candidates of choice with its current NAVAP of approximately 53-55%. UMF No. 21; Ex. B, Bryan Rep. at 24 (Table III.C.1i). The Enacted Plan provides Native Americans equal opportunity to elect candidates of their choice in District 1 and District 2.

d. The Commission had broad discretion to draw the District lines as it saw fit to comply with the Voting Rights Act, and the law cannot require race to predominate the redistricting process over traditional redistricting principles.

Redistricting lies with the authority of the state and its political subdivisions, and the courts should not intervene unless there is a clear violation of law. *Voinovich*, 507 U.S. at 156 ("Federal courts are barred from intervening in state apportionment in the absence of a violation of federal law precisely because it is the domain of the States, and not the federal courts, to conduct apportionment in the first place."). "States retain broad discretion in drawing districts to comply with the mandate of § 2." *Shaw v. Hunt*, 517 U.S. 899, 917, n.9, 116 S. Ct. 1894 (1996). "[T]he federal courts are bound to respect the States' apportionment choices unless those choices contravene federal requirements." *Voinovich*, 507 U.S. at 156. "[T]he Supreme Court has routinely cautioned that 'redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt.'" *Large v. Fremont Cnty., Wyo.*, 670 F.3d 1133, 1138 (10th Cir. 2012) (*Wise v. Lipscomb*, 437 U.S. 535, 539, 98 S. Ct. 2493 (1978) (plurality) (White, J.)). Ultimately, "[F]ederal courts must defer to the judgment of a state legislative body in the area of reapportionment. Principles of federalism and common sense

mandate deference to a plan which has been legislatively enacted." *Large*, 670 F.3d at 1139 (quoting *Tallahassee Branch of NAACP v. Leon Cnty., Fla.*, 827 F.2d 1436, 1438 (11th Cir.1987)).

The bright line majority-minority rule stated in *Bartlett* "provides straightforward guidance . . . to those officials charged with drawing district lines to comply with § 2." *Bartlett*, 556 U.S. at 18. "The law cannot insist that a state legislature, when redistricting, determine precisely what percent minority population [the VRA] demands." *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 278 (2015); *see also Cooper*, 581 U.S. at 306 (quoting *Alabama Legislative Black Caucus*, 575 U.S. at 278 ("We by no means 'insist that a state legislature, when redistricting, determine precisely what percent minority population [§ 2 of the VRA] demands.'"). "Much like § 5, § 2 allows States to choose their own method of complying with the Voting Rights Act . . . ." *Bartlett*, 556 U.S. at 23. "[R]eapportionment is a complicated process. Districting inevitably has sharp political impact and inevitably political decisions must be made by those charged with the task." *White v. Weiser*, 412 U.S. 783, 795–96, 93 S. Ct. 2348 (1973).

Further, Section 2 of the Voting Rights Act simply does not require a redistricting plan to maximize the political strength of a minority group. *De Grandy*, 512 U.S. at 1017 ("Failure to maximize cannot be the measure of § 2."). "[T]he mandate of § 2 . . . is not concerned with maximizing minority voting strength . . . ." *Bartlett*, 556 U.S. at 23. The *Bartlett* court affirmed that the VRA does not require a redistricting body to maximize minority voting strength. *Id.* at 15–16 ("the Court rejected the proposition, inherent in petitioners' claim here, that § 2 entitles minority groups to the maximum possible voting strength."). Quoting *De Grandy*, the *Bartlett* court reiterated that: "[R]eading § 2 to define dilution as any failure to maximize tends to obscure the very object of the statute and to run counter to its textually stated purpose. One may suspect vote dilution from political famine, but one is not entitled to suspect (much less infer) dilution from

mere failure to guarantee a political feast." *Id.* at 16 (quoting *De Grandy*, 512 U.S. at 1016–17). "Section 2 does not guarantee minority voters an electoral advantage." *Id.* at 20. "[M]inority voters are not immune from the obligation to pull, haul, and trade to find common political ground." *Id.* at 15 (quoting *De Grandy*, 512 U.S. at 1020).

Lastly, a redistricting body cannot use race as the predominant factor when drawing district lines without running afoul of Equal Protection. *Navajo Nation v. San Juan Cnty.*, 929 F.3d 1270, 1286 (10th Cir. 2019). Under the Equal Protection Clause, a redistricting body cannot subordinate "traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Id.* As *Bartlett* cautioned, without a clear majority-minority rule every county will be forced to engage in intensive race-based line drawing implicating the Equal Protection Clause. *Bartlett*, 556 U.S. at 21. This is because merely using racial targets to achieve proportionality does not per se subordinate traditional redistricting criteria. *Navajo Nation*, 929 F.3d at 1286. In New Mexico, traditional redistricting principles include: having contiguous precincts; having reasonable compactness; preserving communities of interest; considering political and geographic boundaries, to the extent feasible, to preserve the core of existing districts; and considering the residence of incumbents. *Maestas v. Hall*, 2012-NMSC-006, ¶ 34, 274 P.3d 66, 78. Where the defendants have engaged in this balancing act to create majority-minority districts in proportion to the minority share of total population, the mere fact that the plaintiffs may use labels such as "packing" and "cracking" does not equate to vote dilution and indicates "only that lines could have been drawn elsewhere, nothing more." *De Grandy*, 512 U.S. at 1015–16 ("Attaching the labels 'packing' and 'fragmenting' to these phenomena, without more, does not make the result vote dilution when the minority group enjoys substantial proportionality.").

In this case, Defendants actively strengthened the NAVAP in District 2 to ensure they created a majority where there previously was not one, so as to not dilute Native American voting strength—while also balancing important community of interest considerations, and deferring to the sole seated Native American Commissioner's concerns regarding the redistricting of her district. UMF Nos. 2-4, 7-8, 11-12. The result in the form of the Enacted Map is exactly what the political process of redistricting envisions: a compromise. There is nothing obviously wrong, much less actually unlawful about the Enacted Plan—especially in light of District 2's long history of electing Native American Commissioners with the same NAVAP.[9] UMF Nos. 15-21. There is no need for the Court to tinker with the legislative process here to merely have the lines drawn elsewhere, with the same resulting two majority-minority districts and the same electoral opportunity (maybe just balanced differently between Districts 1 and 2).

Moreover, here, the Plaintiffs themselves cannot even establish what percentage of Native American population is allegedly needed in District 2 to be VRA compliant. UMF Nos. 22-25. During redistricting, the Navajo Nation Human Rights Commission claimed both District 1 *and* District 2 only needed 63%, and that anything over 70% is packing. *See* Ex. B, Bryan Rep. at 31 (Table III.F.1d). Then during litigation, their expert drew maps with 74% in District 1 and 66% in District 2, but could not explain why. UMF No. 25. And Plaintiffs have failed to answer this question in written discovery to simply identify what size majority they want. UMF No. 24. As the Court stated in *Abbott v. Perez*:

> Courts cannot find § 2 effects violations on the basis of uncertainty. In any event, if even the District Court remains unsure how to draw these districts to comply with § 2 (after six years of litigation, almost a dozen trials, and numerous opinions), the Legislature surely had the "'broad discretion'" to comply as it reasonably saw fit in 2013.

[9] Plaintiffs ignore this history, and instead only focus on the elections that occurred when District 2's NAVAP was between 43%-47% from 2010 to 2020.

Abbott v. Perez, 201 L. Ed. 2d 714, 138 S. Ct. 2305 (2018) (quoting *LULAC*, at 429). With only uncertainty as to how much more of a District 2 majority-minority above the Enacted Map District 2 majority-minority Plaintiffs think the VRA requires, their claim fails.

e. The Court must also consider that proportionality of the Enacted Plan provides equal opportunity for Native Americans to elect their candidate of choice.

When considering the totality of the circumstances, the Court must consider proportionality. "[N]o violation of § 2 can be found here, where, in spite of continuing discrimination and racial bloc voting, minority voters form effective voting majorities in a number of districts roughly proportional to the minority voters' respective shares in the voting-age population." *De Grandy*, 512 U.S. at 1000. *De Grandy*'s "central teaching is that proportionality—defined as the relationship between the number of majority-minority voting districts and the minority group's share of the relevant population—is always relevant evidence in determining vote dilution . . . ." *Id.* at 1025 (O'Conner, J. concurring). "Treating equal political opportunity as the focus of the enquiry, we do not see how these district lines, apparently providing political effectiveness in proportion to voting-age numbers, deny equal political opportunity." *Id.* at 1014.

In this case, Native Americans in San Juan County have a majority of voting age population in two out of five commission districts, in proportion to their approximately 40% share of the overall population and the adult population in San Juan County. UMF Nos. 1, 3-4. Therefore, no violation of § 2 can be found.

f. District 2 in all of Plaintiffs' proposed plans is not compact under *LULAC* because it combines two separate communities of interest within the Native American population.

With respect to the first *Gingles* precondition, the Supreme Court has held that "[l]egitimate yet differing communities of interest should not be disregarded in the interest of race." *LULAC*, 548 U.S. at 434. "The practical consequence of drawing a district to cover two

distant, disparate communities is that one or both groups will be unable to achieve their political goals." *Id.* In *LULAC*, the Supreme Court rejected Texas' adopted new majority-minority district because it was not compact due to combining disparate communities of interest within the Hispanic population. *Id.* at 402. A district that covers "enormous geographical distances separating the two communities, coupled with the disparate needs and interests of these populations" renders a proposed district "noncompact for § 2 purposes" because a district that "reaches out to grab small and apparently isolated minority communities" is not reasonably compact. *Id.*

Just like the state in *LULAC*, in this case the Plaintiffs have proposed creating a majority-minority district that assumes all Navajo voters have the same interests and are a single community of interest by placing Chapters that align with District 1 into District 2, trying to force together two distinct Navajo communities that have disparate interests in at least two different respects. UMF Nos. 9-13. Moreover, the Enacted Plan does a better job of preserving the core of the districts and preserving communities of interest than any of Plaintiffs' proposed maps. UMF Nos. 11, 14. Therefore, the compactness inquiry from *LULAC* renders Plaintiffs' various proposed District 2s non-compact and fails to satisfy the first *Gingles* precondition. *LULAC*, 548 U.S. at 402.

V. CONCLUSION

Defendants engaged in a collegial, complicated process in ultimately adopting the Enacted Plan with two majority Native American Districts. And the sole Navajo Commissioner did not support the Navajo Plan, the only offering from Plaintiffs at the time. All of Plaintiffs' plans have the same two majority Native American districts. Just because the lines can be drawn elsewhere does not change that the Enacted Plan already has two majority-minority districts and provides Native Americans an equal opportunity to elect their candidates of choice, just as it has over the last 40 years. The law requires nothing more. Plaintiffs' claims should be dismissed.

Respectfully Submitted:

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I HEREBY CERTIFY that on July 11, 2023, the foregoing was filed electronically through the CM/ECF system, which caused all parties and counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

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