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.

MOTION FOR SUMMARY JUDGMENT ON *GINGLES* II and *GINGLES* III

    Section 2 Voting Rights Act plaintiffs must establish that a minority group votes as a

politically cohesive unit as a precondition under *Gingles*. Here, on average, much less than 75%

of the minority population of Native American voters vote for the Democratic candidate in the

election contests that Plaintiffs' expert analyzed.[1] And in the district at issue, District 2, there is

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[1] Only for the purposes of this motion, Defendants accept some of Plaintiffs' expert witness, Dr. Barreto's analysis of racially polarized voting despite leaving out critical contests, relying on inaccurate data, and failing to provide an adequate basis for his merged data set.

nearly complete lack of cohesion in the 2022 election for the District 2 commissioner. This falls short of the second *Gingles* precondition.

Further, to establish the third *Gingles* precondition, a plaintiff must demonstrate that white voters vote as a bloc to prevent the preferred minority candidate from being elected in the challenged district. But here, the challenged district is not even a majority white district—it is majority Native American where whites only make up 26% of the voting age population. Thus the white bloc vote can never be solely responsible for preventing minority preferred candidates from being elected. Rather, the minority crossover vote for the white candidate resulted in the election of Commissioner McDaniel in 2022. Accordingly, Defendants respectfully request summary judgment as to the second and third *Gingles* factors.[2]

Plaintiffs erroneously collapse the *Gingles* II and III preconditions into a single analysis of whether there is racially polarized voting in San Juan County. But this ignores that they must prove that Native Americans vote as a cohesive political body *at the district level*. Indeed, Plaintiffs' expert, Dr. Barreto, further conflates these notions, by suggesting that because his analysis may show a supposed "preferred Native American candidate," that there is a cohesive vote. He testified that all that is required is that a candidate receive the most Native Americans votes to conclude Native Americans are cohesively voting for that candidate. *See* Deposition of Matthew Barreto (Apr. 26, 2023) (attached as "**Exhibit J**") 97:8-98:17. If the Courts were to adopt this erroneous opinion, there would never be a situation where there is *not* a cohesive vote. But the law, and the Tenth Circuit requires more. Indeed, just because the American electorate may have voted over 50% for a particular presidential candidate does not mean the American electorate is voting cohesively for that president.

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

I.   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 treat "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)).

II.   UNDISPUTED MATERIAL FACTS

Pursuant to D.N.M.LR-Civ. 10.7, Defendants reference previously filed exhibits by their ECF No. and title. New exhibits are designated in **bold** with lettering continuing from Defendants' Motion for Summary Judgement on *Gingles* 1 (Doc. 101), filed July 11, 2023. Defendants also incorporate the Undisputed Material Fact Nos. 9-13 from Defendants' Motion for Summary Judgement on *Gingles* 1 (Doc. 101), filed July 11, 2023, to the extent they further show the lack of cohesion among the Navajo Nation Chapters and Agencies.

a.   District 2 Precincts and Navajo Nation Chapters

1. San Juan County Precincts 9, 13, 14, 15, 16, 17, 18, 19, 20, 52, 54, 56, 70, 71, 75, 77, 78, 79, 82, 83, 100, 101, 105, and 120 make up District 2 on the Enacted Plan. Doc. 101-1, Ex. A, Shelby Dec. ¶¶ 5(f), 11, 22 (Dec. Ex. 7, Ex. 12).

2. In District 2 under the Enacted Plan, there are 11 Precincts that have over 90% non-Hispanic any-part American Indian voting age population: 9 (97.5%), 13 (98.4%), 14 (93.7%), 15 (99.1%), 16 (97.3%), 17 (98.2%), 18 (98.8%), 19 (98.1%), 20 (98.4%), 83 (98.6%), and 120 (98.9%). Doc. 101-1, Ex. A, Shelby Dec. ¶ 22 (Dec. Ex. 12).

3. District 2 on the Enacted Plan contains the Navajo Nation Chapter Houses for Huerfano, Nageezi, Lake Valley, Whiterock, Burnham, San Juan, Nenahnezad, Upper Fruitland, Naschitti, and Crystal. Not surprisingly, the 11 Precincts identified in UMF No. 2 contain Huerfano Chapter House in Precinct 16 (and the chapter boundary stretches mostly into 83, but touches 19 as well), Nageezi Chapter House in Precinct 15, Lake Valley Chapter House in Precinct 14, White Rock Chapter House in Precinct 14, Burnham Chapter House in Precinct 17, San Juan Chapter House in Precinct 18, Nenahnezad Chapter House in Precinct 18, Upper Fruitland Chapter House in Precinct 120 (and the chapter boundary stretches into 20), Naschitti Chapter House in Precinct 13, and Crystal Chapter House in Precinct 9. Doc. 101-1, Ex. A, Shelby Dec. ¶ 21. *See also* Pls. Supp. Answer Interrog. No. 13 (attached as "**Exhibit K**").

4. Huerfano, Nageezi, Lake Valley, Whiterock Chapters of the Navajo Nation are part of the Crown Point, or "Eastern Agency" of the Navajo Nation. Doc. 101-2, Ex. B-1, Bryan Supp. Rep. 10-11 ¶ 16 (Exhibit V.B.2 San Juan County Navajo Nation Chapters and Agencies).

b. The 2022 District 2 Commissioner Election Contest

5. In the 2022 General Election for San Juan County District 2 Commissioner, Gary McDaniel beat Zac George by a 64% to 36% margin, or a 28 percentage point difference. Doc. 101-1, Ex. A, Shelby Dec. ¶¶ 11-12 (Dec. Ex. 7 and NMSOS website).

6. The following is a demonstrative summary table of the District 2 Precincts for the 2022 election with data for (1) precinct name, (2) percentage of any part American Indian voting age population, (3) registration rates, (4) turnout rates for the 2022 general election, (5) percentage of votes received by Zac George, (6) total votes and votes for each candidate, and (7) Navajo Nation Chapter House (or primary Chapter boundary in Precinct) if applicable:

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Precinct	NAVAP	Reg %	Turnout %	George %	McDaniel	George	Vote Total	Chapter
71	11.1%	115.4%[3]	59.9%	12.7%	262	38	300	
78	13.9%	92.1%	59.0%	13.6%	386	61	447	
82	18.3%	92.0%	58.9%	15.6%	227	42	269	
52	19.4%	78.1%	40.9%	17.1%	189	39	228	
105	20.1%	93.3%	50.3%	18.3%	317	71	388	
77	13.2%	86.7%	53.0%	18.5%	255	58	313	
54	23.1%	69.9%	45.3%	20.6%	254	66	320	
75	28.8%	66.6%	37.8%	21.1%	210	56	266	
70	23.0%	88.0%	49.7%	21.2%	368	99	467	
56	43.5%	62.3%	49.9%	23.0%	295	88	383	
79	28.6%	80.0%	49.7%	23.5%	250	77	327	
100	37.6%	70.5%	37.9%	31.7%	157	73	230	
101	45.2%	81.3%	31.1%	32.4%	127	61	188	
16	97.3%	87.5%	51.1%	44.3%	250	199	449	Huerfano
17	98.2%	121.5%	60.6%	50.0%	60	60	120	Burnham
18	98.8%	115.7%	48.2%	50.0%	262	262	524	Nenahnezad/ San Juan
83	98.6%	72.6%	47.2%	50.4%	59	60	119	(Huerfano)
19	98.1%	78.1%	36.8%	55.0%	68	83	151	(Huerfano)
15	99.1%	92.7%	45.7%	55.0%	126	154	280	Nageezi
120	98.9%	69.0%	46.8%	55.8%	150	189	339	Upper Fruitland (Upper Fruitland)
20	98.4%	87.6%	46.9%	55.9%	160	203	363	Lake Valley/ White Rock
14	93.7%	84.5%	49.1%	57.6%	67	91	158	
13	98.4%	85.9%	52.8%	74.6%	109	320	429	Naschitti
9	97.5%	81.6%	58.0%	76.0%	40	127	167	Crystal
Totals	**55.4%**	**83.1%**	**48.2%**	**35.7%**	**4648**	**2577**	**7225**	

See Doc. 101-1, Ex. A, Shelby Dec. ¶¶ 11, 20-23 (Dec. Exs. 7, 11, 12, 13).

7.   In the Precincts with the highest density of Native American population, registration rates are generally higher than those precincts that have the highest white voting age population. Declaration of Rod Adair (May 10, 2023) (attached as "**Exhibit L**") ¶¶ 15-22; Doc. 101-1, Ex. A, Shelby Dec. ¶ 23 (Dec. Ex. 13).

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[3] In some Precincts the total registered voters as of Nov. 2022 exceed the total adult population counted in the 2020 Census.

8. Voter turnout for the 11 Precincts with over 90% Native American voting age population in the 2022 general election was higher than the remaining precincts in District 2 (48.73% compared to 47.85%). Doc. 101-1, Ex. A, Shelby Dec. ¶ 23 (Dec. Ex. 13). *See also* Ex. L, Adair Dec. ¶ 23.

9. Commissioner Gary McDaniel enjoyed significant support from the Precincts in District 2 containing the highest percentage of Native American voters, particularly in Precinct 16, where the Huerfano Chapter House is located, in which he was the preferred candidate under Dr. Barreto's definition. *See* Doc. 101-1, Ex. A, Shelby Dec. ¶ 23 (Dec. Ex. 13); Ex. J, Barreto Dep. 148:20-149:6.

10. Among the Precincts associated with the Navajo Nation Chapters of Huerfano, Burnham, Nenahnezad/San Juan, Nageezi, Upper Fruitland, and Lake Valley/White Rock (Nos. 14, 15, 16, 17, 18, 19, 20, 83), Zac George barely received 51.98% of the vote. *See* Doc. 101-1, Ex. A, Shelby Dec. ¶ 23 (Dec. Ex. 13).

11. Among Precincts 14, 15, 16 and 83 that are primarily associated with the Navajo Nation Eastern Agency Chapters of Huerfano, Nageezi, Lake Valley and White Rock, Zac George only received 50.099% of the vote. *See* Doc. 101-1, Ex. A, Shelby Dec. ¶ 23 (Dec. Ex. 13).

12. Commissioner McDaniel received support from Cody Charley, a Navajo, who recorded a commercial for Commissioner McDaniel in Navajo. Deposition of Gary McDaniel (Jun 26, 2023) (attached as "**Exhibit M**") 134:16-135:8.

13. Commissioner McDaniel also speaks some Navajo, and visited nearly all the Navajo Chapters in District 2 to ask for their support and vote. Ex. M, McDaniel Dep. 69:20-71:5.

14. In discussing either the 2022 or 2018 election (or both), Plaintiff Bessie Werito testified she did not vote for the Native American candidate, Ervin Chavez. Deposition of Bessie Werito

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(Feb. 28, 2023) (attached as "**Exhibit N**") 24:8-10 ("I voted for [Ervin Chavez] for many years, but he never helped me. So this time, when he ran, I didn't vote for him."); *id.* 24:14 ("This time, I didn't vote for Ervin Chavez.").

15. No Plaintiffs testified that they voted for Zac George in 2022. Ex. N, Werito Dep. 24:12 ("I don't know Zachariah George."); Deposition of Gloria Ann Dennison (Feb. 9, 2023) (attached as "**Exhibit O**") 43:21-44:10 (She did not know Zachariah George nor whether he campaigned in her community because she has "never heard of him."); Deposition of Tracy Dee Raymond (Feb. 13, 2023) (attached as "**Exhibit P**") 26:10-19 (does not know Zachariah George, has never met him and does not know if he campaigned at the Nenahnezad Chapter); Deposition of LoRenzo C. Bates (Feb. 13, 2023) (attached as "**Exhibit Q**") 31:10-17, 49:18-23 (does not know who Zachariah George is or if he campaigned in the Upper Fruitland area because he has never met him).

c.   The 2018 District 2 Commissioner Election Contest

16. In the 2018 general election for San Jun County District 2 Commissioner, in a 3-way contest Commissioner Michael Sullivan (R) beat former Commissioner Ervin Chavez (D) and Plaintiff Lorenzo Bates (I). both of whom were Navajo. Doc. 101-1, Ex. A, Shelby Dec. ¶ 10 (Dec. Ex. 6).

17. The following demonstrative summary chart combines the vote totals for the 2018 District 2 commissioner contest with the percentage of Native American voting age population for each Precinct, and is sorted by % Native American population in the Precinct:

Precinct	MICHAEL B SULLIVAN	ERVIN CHAVEZ	LORENZO C BATES	% NA
PRECINCT 72	300	131	39	2.11%
PRECINCT 77	514	139	63	9.15%
PRECINCT 54	376	115	51	13.56%
PRECINCT 70	315	99	35	16.97%
PRECINCT 52	160	47	16	17.37%
PRECINCT 75	172	79	28	17.37%
PRECINCT 71	418	145	50	22.17%
PRECINCT 56	404	187	81	36.11%
PRECINCT 20	98	257	296	92.94%
PRECINCT 16	106	323	89	92.96%
PRECINCT 19	24	76	32	93.43%
PRECINCT 15	49	222	53	94.00%
PRECINCT 18	104	207	199	94.26%
PRECINCT 17	19	56	43	99.66%
TOTALS	3059	2083	1075	

Doc. 101-1, Ex. A, Shelby Dec. ¶¶ 5((c), 10 (Dec. Exs. 3, 6).

18. Plaintiffs do not agree on supporting Ervin Chavez. Ex. N, Werito Dep. 13:21-23 ("I used to vote for Ervin Chavez, but he doesn't do anything for us, so I don't – I just leave that alone."); *id.* 15:22-16:1 ("Ervin Chavez said they're going to build us a good road, but nothing ever help."); Ex. O, Dennison Dep. 47:9-15 (She did not remember Ervin Chavez campaigning and meeting people in the community); *id.* 46:7-15 (She doesn't remember "I don't remember whether he [Ervin Chavez] even showed up in our community."); Ex. P, Raymond Dep. 25:2-6; 27:2-6 (She did not see Ervin Chavez at Chapter House meetings or campaigning there); *id.* 30:18-31:7 (also is a Republican who believes that Margaret McDaniel (white Republican) has been responsive to the Navajo community); Ex. Q, Bates Dep. 37:21-24 (ran against Ervin Chavez because he thought he "could do just as well, if not better" than him); *id.* 38:4-8 (He felt he "could do a better job than Mr. Ervin Chavez.").

d. Dr. Barreto's Analysis for Plaintiffs

19. Dr. Barreto's King's ecological inference ("King's EI") analysis shows Native American cohesion ranging from 51.4% -80.2% across all of San Juan County in 57 election contests, with only 7 contests having cohesion above 75%, and a the 57 contests having a simple average of 66.84%. *See* Declaration of Matthew Barreto, Ph.D (Feb. 27, 2023) (attached as "**Exhibit R**") at 12-15.

20. Dr. Barreto's report fails to identify the race of the candidates. *See* Ex. R, Barreto Dec. 12-15.

21. Dr. Barreto's report failed to include the Court of Appeals Position 2 contest from the 2022 general election in which a Native American candidate, Gertrude Lee, received majority support from San Juan County, and precincts with high white populations in particular. Ex. L, Adair Dec. 4-5, 9, ¶¶ 24-29, 56.

22. Gertrude Lee carried not only all the Precincts in District 2 with mostly white population, but also Precinct 18, associated with the Nenahnezad/San Juan Chapters of the Navajo Nation, making her their candidate of choice. Ex. L, Adair Dec. 9, ¶ 56; Doc. 101-1, Ex. A, Shelby Dec. ¶ 23 (Dec. Ex 13).

23. Dr. Barreto's report failed to analyze the 2010 and 2014 Governor election contests. *See* Ex. R, Barreto Dec. 12-15.

24. Dr. Barreto failed to analyze the voting behavior of specifically the challenged District 2 on the Enacted Plan in all of his election contests considered, except for one: the 2022 District 2 Commissioner contest. Ex. J, Barreto Dep. 149:21-150:18 (aside from county commissioner elections, "the other elections are analyzed for the county as a whole; they're not analyzed just broken out for District 1 or District 2").

25. In Dr. Barreto's entire report, the only election contests he analyzed that show anything specifically about voting patterns in the area of District 2 on the Enacted Plan are four District 2 commissioner contests in 2010, 2014, 2018 and 2022, in which his Kings EI analysis shows Native American cohesion of 58.6% (2022), 51.4% (2018), 67.2% (2014) and 78.4% (2010). *See* Ex. R Barreto Dec. 12-15 (Table 2).

26. But District 2 had different boundaries and different precincts and precinct boundaries in 2010, and also in 2014 and 2018. Doc. 101-2, Ex. B, Bryan Rep. 37-42, ¶¶ 92-98.[4]

27. District 2 was not a majority-minority district from 2010 to 2020, based on both 2010 Census data and 2020 Census data. Doc. 101-2, Ex. B, Bryan Rep. at 15 ¶ 41, 18 ¶ 49.

28. Dr. Barreto failed to analyze the voting behavior of specifically District 1 as it exists on the Enacted Plan in all of his election contests considered. *See generally* Ex. R, Barreto Dec. 12-15 (no analysis of 2022 District 1 contests).

29. In Dr. Barreto's entire report, the only election contests he analyzed that show anything specifically about voting patterns in the area of District 1 on the Enacted Plan are two District 1 commissioner contests in 2010 and 2014, in which his Kings EI analysis shows Native American cohesion of 63.3% (2014) and 56.5% (2010). Ex. R, Barreto Dec. 12-15.

e. The Demographic Characteristics of District 2 on the Enacted Plan

30. In District 2 under the Enacted Plan, Native Americans make up 52.3%-55.4% of the voting age population, depending on what Census definition of American Indian is used. In contrast, non-Hispanic whites make up only 26.8% of the voting age population.

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[4] Dr. Barreto failed to even use the correct Precincts for the 2022 election, apparently instead using a data set that only contained 97 precincts instead of the actual 103 Precincts that were in use, make up the Enacted Plan and had votes cast in them in 2022. *Compare* Ex. R, Barreto Dec. at 9 (Figure 2 noting "n=97 Precincts") *with* Doc. 101-2, Ex. B, Bryan Rep. 39-40 (Exhibit IV.A.2 and Exhibit IV.A.3) and https://electionresults.sos.state.nm.us/resultsSW.aspx?type=CTYALL&map=CTY&cty=16&name=San%20Juan (reporting 103 precincts for 2022 general election).

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.

Doc. 101-2, Ex. B, Bryan Dec. at 24 (Table III.C.1i).

District 2

Population Statistics

Ideal Population:	24,332		Absolute Deviation:	217
Actual Population:	24,549		Relative Deviation:	0.89%

Total Population

[Hispanic Origin]	NH_Wht	NH_Blk	NH_Ind	NH_Asn	% [Hispanic Origin]	% NH_Wht	% NH_Blk	% NH_Ind	% NH_Asn
5,034	5,908	74	12,845	59	20.51%	24.07%	0.30%	52.32%	0.24%

Voting Age Population

[Hispanic Origin]	NH_Wht	NH_Blk	NH_Ind	NH_Asn	% [Hispanic Origin]	% NH_Wht	% NH_Blk	% NH_Ind	% NH_Asn
3,267	4,832	54	9,424	45	18.13%	26.81%	0.30%	52.29%	0.25%

Doc. 101-1, Ex. A, Shelby Dec. ¶ 5(d) (Dec. Ex. 4).

III.   ARGUMENT

As a threshold showing to establish a claim under 52 U.S.C. § 10301(b) (also known as "Section 2 of the Voting Rights Act or VRA"), 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). "If these conditions are not present, then the challenged electoral practice cannot be considered as the cause of the minority's inability to elect its preferred candidates." *Sanchez v. Bond*, 875 F.2d 1488, 1492 (10th Cir. 1989).

From this framework comes the second *Gingles* precondition that "the minority group must be able to show that it is politically cohesive." *Bond*, 875 F.2d at 1492. The second *Gingles* precondition "concerning the political cohesiveness of the minority group[] shows that a

representative of its choice would in fact be elected" if it is a majority in the district at issue. *Allen v. Milligan*, 143 S. Ct. 1487, 1503 (2023). To determine whether a minority group is politically cohesive the courts will consider not only statistical and election data, but also testimony of lay witnesses. *Bond*, 875 F.2d at 1493 ("We find nothing in *Gingles*, however, to suggest that a trial court is prohibited from considering lay testimony in deciding whether a minority group is politically cohesive."). "The experiences and observations of individuals involved in the political process are clearly relevant to the question of whether the minority group is politically cohesive. This testimony would seem to be required if the court is to identify the presence or absence of distinctive minority group interests." *Bond*, 875 F.2d at 1494.

To establish cohesion or "minority bloc voting within the context of § 2" requires "a *significant* number of minority group members" voting for the same candidates. *Gingles*, 478 U.S. at 56. The second *Gingles* precondition concerning the political cohesiveness of the minority group, is critically important in combination with the first precondition because it shows that a representative of choice would in fact be elected if the minority is placed in a district where there are a numerical working majority. *Milligan*, 143 S. Ct. at 1503 ("The second, concerning the political cohesiveness of the minority group, shows that a representative of its choice would in fact be elected.").

Similarly, for the third *Gingles* precondition, the plaintiffs must show there is "a bloc voting majority" that is the reason the minority preferred candidate is not being elected. *Gingles*, 478 U.S. at 49. In other words, "the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate. *Gingles*, 478 U.S. at 51.

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Together, the second and third *Gingles* preconditions are sometimes referred to as racially polarized voting, but they have two separate purposes: "[1] to ascertain whether minority group members constitute a politically cohesive unit and [2] to determine whether whites vote sufficiently as a bloc usually to defeat the minority's preferred candidates." *Id.* at 56.

> **a. Analysis of cohesive minority voting and white bloc voting must take place at the district level.**

To meet their burden to establish that a minority group is a politically cohesive unit, the plaintiffs must present evidence at the challenged district level. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 437, 126 S. Ct. 2594 (2006) ["*LULAC*"] ("This inquiry requires an 'intensely local appraisal' of the challenged district.") (quoting *Gingles*, 478 U.S. at 79); *Gingles*, 478 U.S. at 56 ("the question whether a given district experiences legally significant racially polarized voting requires discrete inquiries into minority and white voting practices"). It is well-settled that "redistricting analysis must take place at the district level." *Abbott v. Perez*, 138 S. Ct. 2305, 2332 (2018). This is because the Section 2 right belongs to the individual minority members in the challenged district, not the group as a whole in the entire county. *Shaw v. Hunt*, 517 U.S. 899, 917, 116 S. Ct. 1894 (1996) (§ 2 violation for a particular area flows from individuals in this area having unequal opportunity than other members of electorate).

The courts have regularly rejected evidence that only looks at broad voting behavior and fails to examine the district at issue. *Wisconsin Legislature v. Wisconsin Elections Comm'n*, 212 L. Ed. 2d 251, 142 S. Ct. 1245, 1250 (2022) ("Rather than carefully evaluating evidence at the district level, the court improperly relied on generalizations to reach the conclusion that the preconditions were satisfied."); *Cooper v. Harris*, 581 U.S. 285, 304, n.5, 137 S. Ct. 1455 (2017) (rejecting expert analysis that did not address the relevant local question of whether the new version of the challenged district met the second and third *Gingles* preconditions).

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Harmonizing *Gingles*, *Cooper*, *LULAC*, *Wisconsin Legislature*, *Shaw*, and *Abbott*, a *Gingles* plaintiff must show the second and third preconditions for the minority population and white population in the challenged or proposed district. In this case, Plaintiffs challenge the districting of Commissioner District 2 and accordingly they are required to present district specific analysis of voting patterns there.

b. Legally significant minority cohesion for the second precondition must be over 75%, and evidence of a preferred candidate does not equate to cohesion.

There is no bright line cutoff for what is legally significant cohesion among minority voters in the Tenth Circuit. But the Tenth Circuit has cautioned against "the myopic presumption there is a minority preferred candidate in any race in which the minority votes" or assuming that any "candidate who has received more than 50% of the minority vote" is the minority's candidate of choice. *Sanchez v. State of Colo.*, 97 F.3d 1303, 1320 (10th Cir. 1996) ["*Sanchez*"]. And simply establishing a preferred candidate does not equate to establishing that a minority vote is legally cohesive or that there is racially polarized voting. *Id.* at 1320-1321. The Court should reject any arbitrary cohesion threshold, and certainly reject Dr. Barreto's testimony that anything over 50% is cohesion (which would result in there never not being cohesion, as the *Sanchez* court cautioned against). *See* i*d.* Rather, a non-arbitrary threshold can be derived from considering the scale itself. The extent of cohesion varies from no cohesion at a 50%-50% split in a two-candidate contest, to perfect cohesion at 100% of a group voting for the same candidate. In the simplest two-party case, the range of cohesion (from 50% to 100%) covers 50 percentage points. Thus, the halfway point between the complete absence of cohesion at 50% and perfect cohesion at 100% is found at 75%. Cohesion levels below 75% are closer to non-cohesion than they are to complete cohesion. Similarly, cohesion levels above 75% are closer to complete cohesion than they are to the complete absence of cohesion.

The leading cases that have considered the second *Gingles* precondition are in accord, and provide guidance that legally significant minority cohesion exists only in the ranges above 75%. *Gingles*, 478 U.S. at 56 (emphasis added) ("a *significant* number of minority group members usually vote for the same candidates"). This makes sense because a minority group should be closer to complete cohesion that it is close to complete lack of cohesion. For example, in *Gingles*, the level of cohesion ranged between 87% and 96% for black voters in North Carolina. *Gingles*, 478 U.S. at 59 ("in the general elections, black support for black Democratic candidates ranged between 87% and 96%"). Similarly, in the Tenth Circuit, legally significant cohesion among Hispanic voters in Colorado was 83%. *Sanchez*, 97 F.3d at 1317 ("For all of the elections studied, Dr. Bardwell found a mean cohesiveness among Hispanic voters of 83%"). In Alabama, legally significant cohesion among black voters was around 92.3%. *Milligan*, 143 S. Ct. at 1505 (quoting *Singleton v. Merrill*, 582 F. Supp. 3d 924, 1017 (N.D. Ala. 2022), *order clarified,* No. 2:21-CV-1291-AMM, 2022 WL 272637 (N.D. Ala. Jan. 26, 2022), *and appeal dismissed sub nom. Milligan v. Sec'y of State for Alabama*, No. 22-10278-BB, 2022 WL 2915522 (11th Cir. Mar. 4, 2022), *and aff'd sub nom. Allen v. Milligan*, 143 S. Ct. 1487 (2023)) ("on average, Black voters supported their candidates of choice with 92.3% of the vote"). In Wyoming, legally significant cohesion among Native American voters in endogenous elections for Native American candidates was between 84%-90%. *Large v. Fremont Cnty.*, Wyo., 709 F. Supp. 2d 1176, 1194 (D. Wyo. 2010) ("For the County Commission elections, he found that 90% of Indian voters voted for McAdams, 85% for Ratliff, and 84% for Whiteman."). In California, the Ninth Circuit concluded that 95% support for the same candidate in the most densely populated Hispanic precincts was significant cohesion. *Gomez v. City of Watsonville*, 863 F.2d 1407, 1414 (9th Cir. 1988) ("The district court found that 95% of the Hispanic voters in heavily Hispanic precincts support Hispanic candidates

and that Hispanic voters ranked Hispanic candidates first or tied for first."). Conversely, the

Supreme Court affirmed that where "the average percentage of blacks voting for white candidates

ranged from 20% to 23%" there was a lack of cohesive minority vote in Georgia. *Abrams v.*

Johnson, 521 U.S. 74, 92, 117 S. Ct. 1925 (1997).

Establishing a threshold level as low as 60% to demonstrate legally significant cohesion is

problematic considering it means that 40%, a substantial minority, have a different candidate of

choice. *See, e.g.*, *Smith v. Brunswick Cnty., Va., Bd. of Sup'rs*, 984 F.2d 1393, 1401 (4th Cir. 1993)

(finding no support that the VRA requires district lines to dilute the crossover vote of the minority

who support white candidates). This high level of crossover among minority voters destroys the

concept of racially polarized voting, just the same as white crossover voting does. *See Bartlett v.*

Strickland, 556 U.S. 1, 24, 129 S. Ct. 1231 (2009) (areas with substantial crossover voting unlikely

to establish bloc voting). For example, if minority cohesion is less than 60%, and non-minority

cohesion is at 80% (about where it is here in the 2022 George contest), then a district where

minorities are 55% of the voting population will yield a losing vote share for the supposed minority

preferred candidate of only 42%, even if minority voters turn out at the same rate as non-minority

voters. This loss is not a function of the fact that minority voters are submerged in a non-minority

district—they are in fact the clear majority. The loss is a direct function of the failure of the

minority community to provide significant politically cohesive support to a minority preferred

candidate. A district where minority voters provide less than 60% of their votes to the minority

preferred candidate would need to have the other 40% of its voters diluted to make up for the lack

of cohesion in the district. *Smith*, 984 F.2d at 1401. This is not what *Gingles* requires because less

than 75% cohesion is not legally significant, and instead is evidence that the minority group fails

to "constitute a politically cohesive unit" just like that level of crossover white voting would fail

to constitute a majority bloc vote. *See Gingles*, 478 U.S. at 56; *Abrams*, 521 U.S. at 92.

>   **c. The levels of cohesion in this case among Native American voters are not legally significant, even accepting Plaintiffs' analysis.**

In this case, accepting Dr. Barreto's statistical analysis on its face, the levels of cohesion

among Native American voters are not legally significant. Over the countywide analysis he

performed, cohesion levels range from 51.8%-80%, but out of all 57 contests he analyzed, only

seven (7) show candidates receiving over 75% Native American support. UMF No. 19. And eleven

(11) contests showed less than 60% support among Native American voters for the same candidate.

See UMF No. 19 (Barreto Dec.). While Dr. Barreto claims that the level of cohesion averages at

70%, simply averaging his Kings EI results shows an actual average of 66.84%. UMF No. 19

(Barreto Dec). That also assumes all the elections have equal probative weight, despite all but six

not looking at district level voting, and those six that did averaging even lower at 62.57%. UMF

No. 25. And Dr. Barreto conveniently ignores contests that he knew would lower that average

further, such as the 2010 and 2014 Governor's contest that saw Governor Martinez garner

significant democratic votes to secure a first and second term as a Republican candidate, even

though Dr. Barreto did choose to analyze the governors' contests in 2018 and 2022 that support

his skewed and cherry-picked statistical analysis. UMF No. 23 (Barreto Dec.).

Moreover, Dr. Barreto failed to identify the race of the candidates, which is relevant in the

Tenth Circuit. UMF No. 20; *Sanchez*, 97 F.3d at 1320 (quoting *Citizens for a Better Gretna v. City

of Gretna, La.*, 834 F.2d 496, 503 (5th Cir.1987), *cert. denied,* 492 U.S. 905, 109 S. Ct. 3213

(1989)) ("The *Gingles*' majority, then, concluded the candidate's race is never irrelevant but,

generally, is 'of less significance than the race of the voter—but only within the context of an

election that offers voters the choice of supporting a viable minority candidate.'"). When looking

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at election contests that actually pitted a Native American candidate against a white candidate, the analysis falters further. Only one such race shows Native American support for the Native American candidate over 75%. UMF No. 19 (Barreto Dec. – 2010 County Commission # 2).

And Dr. Barreto conveniently left out the 2022 Court of Appeals position 2 contest that saw the white candidate Katherine Wray receive the support of Native American voters over a Native American candidate Gertrude Lee, and precincts with higher white populations voting overwhelmingly for the Native American candidate. UMF Nos. 21-22. But showing the lack of cohesion among the Chapters, Lee was still the candidate of choice for Precinct 18, associated with the Nenahnezad and San Juan Chapters of the Navajo Nation. UMF No. 22. Many other Native American dense Precincts had nearly evenly split votes between Wray and Lee. UMF No. 22. The voting patterns for her contest also indicate that race is really not the driving factor in voters' decisions. This is obviously not about racially motivated voting where the majority of white voters are voting for the Native American candidate. As *Bartlett* acknowledged, "Some commentators suggest that racially polarized voting is waning—as evidenced by, for example, the election of minority candidates where a majority of voters are white." *Bartlett*, 556 U.S. at 25. There is not racially motivated voting where the Native American candidate is the candidate of choice for all of San Juan County. UMF No. 22.

But ultimately, the countywide cohesion data is of little value because Dr. Barreto fails to present, as he must, sufficient evidence of Native American cohesion *for the district at issue*, and fails to analyze any of the county-wide contests in the context of just District 2, or even District 1. UMF Nos. 24-29. There are only 4 contests Dr. Barreto analyzed that tell anything about the Native American voters in the area of District 2, despite the Precinct boundaries being different and the District being a minority Native American from 2010-2020. UMF Nos. 25-27. And in those

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District 2 contests the average levels of support for a preferred candidate pale in comparison with

the leading cases, especially looking at the most recent 2018 and 2022 elections, for which even

his cohesion analysis shows an average of only 55%. The same is true for District 1, but Dr. Barreto

only analyzed two relevant contests there in 2010 and 2014, where cohesion is barely 56.5%-

63.3%. UMF No. 28-29.

> ### d. Native Americans in District 2 are not a "politically cohesive unit" based on the reality of the most recent election on the Enacted Plan and their divergent interests.

The Tenth Circuit has cautioned against allowing ecological inference and other social

science statistical measures to dictate the district court's decisions in the context of finding

cohesion or bloc voting:

> We are wary of the interplay between these statistical proofs arising as they do from
> disciplines foreign to the methodology of the bench and our usual approach to
> judicial resolutions. "This concern has grown with the realization that the esoterics
> of econometrics and statistics which both parties have required this court to judge
> have a centripetal dynamic of their own. They push from the outside roles of tools
> for 'judicial' decisions toward the core of decision making itself." Without the
> exercise of care, these esoterica could transfer the decisional process from the
> courts to social scientists.

Sanchez, 97 F.3d at 1313, n.15 (quoting *In re Fibreboard Corp.*, 893 F.2d 706, 710 (5th Cir.1990)

(citation omitted)). Indeed, where the statistical methods are open to discordant interpretations, or

possibly miss the mark entirely by only looking at generalized results, the actual outcomes in the

district at issue are more probative. *Sanchez*, 97 F.3d at 1319 ("actual outcomes, not predictions

of outcomes, provide a more appropriate test"). Moreover, testimony from the plaintiffs

themselves and the "experiences and observations of individuals involved in the political process

are clearly relevant to the question of whether the minority group is politically cohesive. This

testimony would seem to be required if the court is to identify the presence or absence of distinctive

minority group interests." *Sanchez v. Bond*, 875 F.2d 1488, 1494 (10th Cir. 1989). In fact, the

Tenth Circuit in *Bond* affirmed the district court finding a lack of cohesion relying on a mix of all of the above evidence. *Id.* at 1496.

In this case, there is a lack of consensus among the Plaintiffs themselves as to which candidates they supported in 2018 and 2020. UMF Nos. 14-15, 18. Plaintiff Werito plainly did not vote for Ervin Chavez. UMF No. 14. Plaintiffs apparently had not heard of Zac George and did not support him as their candidate of choice. UMF No. 15. Conversely, Commissioner McDaniel was on the agenda for nearly every Chapter in District 2, and received support from Navajo voters who he spoke with and who recorded campaign commercials in Navajo for him. UMF Nos. 12-13. And there are significantly different political interests between the Eastern Agency Chapters of the Navajo Nation and the Chapters that all of Plaintiffs proposed plans try to combine into District 2, specifically with respect to environmental interests versus oil and gas interests. Doc. 101 (UMF Nos. 9-13). These differing voting patterns and political interests demonstrate the lack of a politically cohesive group.

But most importantly, here the Court has the benefit of an actual election on the Enacted Plan in the challenged District 2. The 2022 election is the only Commissioner District 2 contest to have occurred on the Enacted Plan. In the general election, Zac George, a Navajo, ran as a Democrat against Gary McDaniel, a white Republican. McDaniel beat George by a 28 point margin due to the lack of cohesion among voters in the precincts with the highest density of Native American population, and high levels of crossover votes for McDaniel.[5] UMF Nos. 5-11.

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[5] Commissioner McDaniel's election in District 2 is also not the result of lower turnout or low registration rates among Native Americans in District 2. UMF Nos. 7-8. In the 11 Precincts with over 90% Native American voters had a higher average turnout than the remaining Precincts in District 2. UMF No. 8. Similarly, the registration rate among the 11 Native American Precincts is higher than the remaining District 2 Precincts (87.68% vs 80.07%) when simply dividing registered voters by voting age population. UMF 6, 8, Doc. 101-1, Ex. A, Shelby Dec. ¶ 23 (Dec. Ex. 13).

For example, McDaniel received the majority of votes in Precinct 16 (96% Native American), which is the Precinct containing the Huerfano Chapter House of the Navajo Nation, making him the candidate of choice according to Dr. Barreto. UMF Nos. 6, 9. Then in Precincts 17 (98%) and 18 (97%), associated with the Burnham Chapter and the Nenahnezad Chapter of the Navajo Nation, respectively, the votes were exactly evenly split between McDaniel and George. UMF Nos. 2-3, 6. George only received one more vote than McDaniel in Precinct 83 (93%), which is a Precinct associated primarily with the Huerfano Chapter of the Navajo Nation. UMF Nos. 2-3, 6. Likewise, in all the Precincts associated with Huerfano, the votes were nearly evenly split. UMF No. 2-3, 6. In the Precincts and associated Chapters where George received the majority of votes, the majority was a slight 55% except for Precincts 9 and 13, associated with the Crystal and Naschitti Chapters of the Navajo Nation, respectively, each of which were part of District 1 previously on the Existing Plan from 2011. UMF No. 6. In fact, if Precincts 9 and 13 are taken out of the equation, the remaining 9 Native American Precincts only voted 51.98% for George—approaching mathematically perfect *lack* of cohesion.[6] UMF Nos. 6, 10. In looking at just the Native American Precincts primarily associated with the Eastern Agency of the Navajo Nation, the cohesion basically disappears with George only receiving 50.099% of the vote. UMF Nos. 4, 6, 11. From these results it is clear that there is not legally significant racially polarized voting patterns due to the lack of strong cohesion among Native American voters in District 2 and the high crossover voting for the white candidate. Indeed, District 2 would still not have elected Zac George as Commissioner even if the percentage of NAVAP was 85%. Where a minority group needs a homogeneous *district* to elect a supposed preferred candidate, that is a clear indication that

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[6] This further supports that Precincts 9 and 13, and their associated Chapters Crystal and Naschitti, actually have voting patterns that are distinct from the other Chapters in District 2, demonstrating lack of a cohesive political voting bloc.

the minority vote lacks legally significant cohesion and fails to satisfy the second *Gingles* precondition due to its high levels of cross over voting for white candidates. *Abrams*, 521 U.S. at 92.

The 2018 election saw similar division of Native American votes as well. UMF Nos. 16-17. For example, Plaintiff Bates was the candidate of choice in Precinct 20 (92.94% Native American) and the Upper Fruitland Chapter of the Navajo Nation associated with Precinct 20. UMF No. 17. Obviously Ervin Chavez was not the candidate of choice for Plaintiff Bates in the election where he ran against former Commissioner Chavez. UMF No. 18. Precincts 17 (94.26%) and 18 (99.66%) were also nearly evenly divided between Bates and Chavez, demonstrating that different Chapters had different candidates of choice, and some nearly did not have a candidate of choice with near complete lack of cohesion. UMF No. 17. In 2018, it was not a white voting block that defeated Ervin Chavez—it was the Native American votes that Plaintiff Bates received that defeated Chavez. UMF 17. Indeed, combining the votes of Bates and Chavez would have easily overcome Commissioner Sullivan's votes.

As a consequence of the lack of cohesion, the challenged districting "cannot be considered as the cause of the minority's inability to elect its preferred candidates." *Bond*, 875 F.2d at 1492. Plaintiffs' inability to elect the "preferred" representatives Dr. Barreto has identified in District 2 is caused by lack of cohesion, which Section 2 does not redress.

> **e. White bloc voting alone can never prevent a minority preferred candidate from being elected where the white voting block makes up only 26% of the voting age population in the challenged district.**

The third *Gingles* precondition requires proof that there is "bloc voting by the majority to defeat the minority's preferred candidate." *Abbott v. Perez*, 138 S. Ct. 2305, 2331 (2018). "In areas with substantial crossover voting it is unlikely that the plaintiffs would be able to establish the third *Gingles* precondition—bloc voting by majority voters." *Bartlett*, 556 U.S. at 24. "Legally

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significant 'white bloc voting' occurs when the Anglo vote normally defeats the combined strength of cohesive minority support plus white crossover votes." *United States v. Alamosa Cnty., Colo.*, 306 F. Supp. 2d 1016, 1029 (D. Colo. 2004). But this applies equally in reverse when the cross over vote is actually from the minority to the white candidate, especially where the white voters are an insignificant minority in the district at issue. The Tenth Circuit has not had the occasion to address whether there can be white bloc voting where the white bloc is far less than a majority. But, quite simply, where the white voters in the challenged district are not a majority, plaintiffs cannot show "bloc voting by the majority to defeat the minority's preferred candidate." *Abbott*, 138 S. Ct. at 2331.

Here, white voters in the challenged District 2 are far from a majority and make up only 26% of the voting age population. UMF No. 30. Whether they all vote for the same candidate or not, they can never constitute a bloc *majority* vote as the third *Gingles* precondition requires. Indeed, Zac George lost by a 28% margin—more than the portion of all white voters in District 2. UMF Nos. 5, 30. Truly, his election was blocked by the 43% of Native American who voted for him out of the 55% majority of Native American voters in District 2. This is a circumstance which Section 2 does not redress. Where Native American voters are the voting age majority in District 2, their inability to elect a supposed preferred representative in 2022 is not caused primarily by any claimed racial bloc voting of the only 26% white voting age in the district. It's because they did not agree on who was the preferred candidate. There is no white vote capable of blocking a candidate that actually enjoys cohesive support from the District 2 majority voting age demographic.

Lastly, Plaintiffs simply ignore the long history of success for Native Americans in District 2 starting in 1982. Doc. 101 (UMF Nos. 16-17). Indeed, with only four endogenous races in Dr.

Barreto's analysis, he should have considered all 11 District 2 commissioner contests to truly understand the voting patterns of Native Americans and whites in that specific district. Instead, he and Plaintiffs conveniently avoid the highly probative evidence that did not support their statistical theory. The historical electoral success of Native American candidates running for District 2 commissioner is highly probative that there has been no vote dilution, as argued in Defendants Motion for Summary Judgment on *Gingles* I. *See, e.g.*, *United States v. Alamosa Cnty., Colo.*, 306 F. Supp. 2d 1016, 1032 (D. Colo. 2004) (finding no vote dilution where "Hispanic candidates have been elected as county commissioners not once, but three times in the last twenty years"). There is no vote dilution where Native American candidates have been elected six times in 11 contests over the last 40 years, and the white voting age population in the challenged district is a mere 26% and not a majority bloc. UMF No. 30.

IV.   CONCLUSION

The lack of significant cohesion and lack of a *majority* white bloc is fatal for Plaintiffs in trying to establish the second and third *Gingles* preconditions. This is a case where racially polarize voting does not exist due to the high levels of minority crossover votes for the white candidates, and also the reality that voting is just not racially motivated.

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.

/s/ Brian Griesmeyer
Brian Griesmeyer, Esq.