IN THE UNITED STATES 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**

RETRIEVED FROM DEMOCRACYDOCKET.COM

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' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON *GINGLES* I

The facts are undisputed that District 2 is a majority-minority district, both in the Enacted Plan, and in all of Plaintiffs' proposed plans. Plaintiffs cannot show that an additional majority-minority district could have been drawn but was not. Plaintiffs' theory of this case would turn Section 2 jurisprudence on its head and dismantle any semblance of a clear, workable standard for local governments like San Juan County to follow.

Plaintiffs fail to controvert and instead ask the Court to ignore the 40-year history of successful Native American candidates in District 2 when its percentage of Native Americans was

the same or even less than the current District 2. Not only is this history material, but it is also dispositive when combined with the undisputed fact that District 2 is already a majority-minority district. A majority that votes cohesively already has the potential and equal opportunity to elect candidates of its choosing.

I. UNDISPUTED MATERIAL FACTS REMAIN UNDISPUTED

Plaintiffs' Response falls short of complying with Rule 56(c) and D.N.M.LR-Civ. 56.1(b),[1] which require the non-movant cite actual evidence for each disputed fact. D.N.M.LR-Civ. 56.1(b); Fed. R. Civ. P. 56(c) ("A party asserting that a fact . . . is genuinely disputed must support the assertion by . . .citing to particular parts of materials in the record"); *Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990). As a consequence, Defendants' Undisputed Material Facts remain undisputed. D.N.M.LR-Civ. 56.1(b) ("[a]ll material facts set forth in the Memorandum will be deemed undisputed unless specifically controverted").

RETRIEVED FROM DEMOCRACYDOCKET.COM

The only semblance of compliance with the rules is Plaintiffs' response to UMF No. 1, for which they cite paragraph 10 of their own Statement of Facts ("PSOF") to purportedly controvert the 2020 Census data. But PSOF ¶ 10 states that "[t]he Board was presented with several maps prepared by Rod Adair as well as a map prepared by the Navajo Nation Human Rights Commission (the "NNHRC Proposed Plan")" and only cites to the San Juan County Commission meeting minutes for Dec. 7, 2021 (Doc. 118-10, Ex. 10) and the NNHRC Proposed Plan (Doc. 118-11, Ex. 11), neither of which have any 2020 Census data in them that would controvert UMF No. 1. The only other "Dispute" that Plaintiffs' Response cites anything in support of is with respect to UMF

[1] Plaintiffs also fail to adhere to D.N.M.LR-Civ. 10.7 (Non-duplication of Exhibits) by attaching a 123-page exhibit twice (Doc. 118-2 and Doc. 119-3) that was already submitted by Defendants as Doc. 101-2. Also, Doc. 118-4 and Doc. 118-10 are the same document attached as Plaintiffs' Exhibit 4 and 10. Then at the same time, Plaintiffs claim that Defendants violated D.N.M.LR-Civ. 7.5 by filing two motions for summary judgment that are each less than 27 pages, making up an imaginary rule that a party is only allowed to file one motion for summary judgment, without citing any authority.

No. 21. But that citation is to paragraph 67 of the Complaint—merely an allegation. It is well-settled that "the nonmoving party may not rest on its pleadings but must set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." *Quiroz v. ConocoPhillips Co.*, 310 F. Supp. 3d 1271, 1304 (D.N.M. 2018) (quoting *Vitkus v. Beatrice Co.*, 11 F.3d 1535, 1539 (10th Cir. 1993)).

Pursuant to D.N.M.LR-Civ. 56.1(b), the entirety of Defendants' UMFs are deemed undisputed.

II. PLAINTIFFS' STATEMENT OF FACTS SUPPORT DEFENDANTS' UMFS OR ARE THEMSELVES UNSUPPORTED AND IMMATERIAL.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Plaintiffs present their own "Undisputed Material Facts" that they refer to as "PSOF." Many of the PSOF are consistent with Defendants' UMFs. Specifically, PSOF ¶¶ 1-12, 15, 20-22 are consistent with Defendants' narrative and UMFs. For the purposes of this Motion, Defendants do not dispute PSOF ¶¶ 26-34, and the ultimate conclusion that the Navajo Plan, the Rush Maps and the Enacted Plan all consist of the same two majority Native American districts and comply with the first *Gingles* precondition. The legal issue for the Court is whether Plaintiffs can proceed where they fail to present any maps that contain an additional minority-majority district, and the challenged district is already majority-minority in compliance with *Gingles* I. *Johnson v. De Grandy*, 512 U.S. 997, 1008, 114 S. Ct. 2647 (1994); *Bartlett v. Strickland*, 556 U.S. 1, 18, 129 S. Ct. 1231 (2009); *Allen v. Milligan*, 143 S. Ct. 1487, 1504 (2023).

Defendants dispute that PSOF ¶¶ 13-14, 16-19, 23-25, 35-37 are material to the Motion. The Court need not consider these facts to determine that Plaintiffs have failed to show that an additional majority-minority district could have been drawn but was not, and thus fail to establish the first *Gingles* precondition. Specifically, Defendants address these PSOF as follows, numbered corresponding with the PSOF paragraph appearing in the Response.

PSOF ¶¶ 13-14, 15, 16-17. These disputed facts cite solely to Dr. Barreto's Declaration ¶¶ 14-17. More narrowly, Plaintiffs' assertions rest on Dr. Barreto's unsupported premise that Native Americans in District 2 on the Enacted Plan have lower turnout and lower registration. But neither is true[2] and Defendants have already challenged this conclusory opinion.[3]

For example, Plaintiffs' entire assertion that "districts that are narrowly majority-minority in population do not perform as minority equal opportunity districts in elections" relies solely on Dr. Barreto's Declaration ¶ 14, which actually states "[i]n some instances, jurisdictions draw facade districts that appear to be narrowly majority-minority, but due to low turnout these districts do not perform for minority candidates of choice." Doc. 118-3 at 3-4, ¶ 14. Likewise, Dr. Barreto's entire reasoning in paragraph 17 of his Declaration that Plaintiffs rely on for his conclusory opinion that the *current* District 2 on the Enacted Plan will not perform is that: "Lower voter registration and voter turnout rates caused by historic discrimination reveal that this district would not perform to elect American Indian preferred candidates. Indeed, among actual votes cast, D2 is not majority-American Indian." Doc. 118-3, Ex. 3, Barreto Dec. ¶ 17. But Plaintiffs identify no authority for this proposition and Dr. Barreto's bald assertion also provides no citation to any sources that would support his opinion. His declaration fails to provide any empirical evidence that there actually is lower turnout or lower registration. Plaintiffs fail to show that Native American turnout or registration is actually lower in District 2. The conclusion is that it is not.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Indeed, Defendants have presented empirical evidence that Native American turnout and registration is the same or higher in District 2 on the Enacted Plan. Doc. 103, UMF No. 6. In fact, for the 2022 general election (the only election under the current District 2), registration rates were very high in the precincts with the densest Native American population, and turnout was also

[2] *See* Doc. 103, Defs.' Mot. Summ. J. Gingles II & III (UMF No. 6)
[3] Defendants incorporate by reference Doc. 104, Defs.' Mot. Strike Certain Opinions of Dr. Barreto.

higher in many of those precincts than it was for some of very precincts that Dr. Barreto claims are the most polarized, such as Precincts 52 and 54. Doc. 103, UMF No. 6.

PSOF ¶ 18. Whether Plaintiffs can satisfy the second and third *Gingles* precondition is immaterial to the reality that District 2 is already a majority Native American district. *De Grandy*, 512 U.S. at 1008. Indeed, "[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). In any event, here, Native Americans in District 2 are not cohesive and that is the reason that Commissioner McDaniel defeated Zac George in the only election held under the Enacted Plan and the current District 2. Moreover, that Dr. Barreto professes to have undertaken "one of the most comprehensive reviews" is simply mistaken in terms of conducting the district-specific analysis that the law requires for the second and third *Gingles* preconditions. *See* Doc. 103 at 13-14, §III(a).

RETRIEVED FROM DEMOCRACYDOCKET.COM

PSOF ¶ 19. Defendants dispute that Native Americans had a clear candidate of choice in the 2022 District 2 commissioner contest on the Enacted Plan. Doc. 103, UMF Nos. 5-15. Defendants also dispute that Native Americans had a clear candidate of choice in the 2018 District 2 commissioner contest under the prior, Existing Plan, in which District 2 was not a majority-minority district. Doc. 103, UMF Nos. 16-18. And that the Native American candidate lost in 2010 and 2014 on the Existing Plan, when the Native American VAP was 47% and 43%, respectively, does not change the fact that District 2 on the Enacted Plan has a clear majority Native American VAP. Thus, it provides equal opportunity for Native Americans to elect their candidate of choice just like it did from 1982-2006, and considering Native American candidates won 6 of the last 11 contests from 1982-2022. UMF Nos. 15-21. Moreover, Zac George's loss in 2022 to

Commissioner McDaniel was due to Commissioner McDaniel being the candidate of choice in some precincts associated with the Huerfano Chapter, and Zac George only being the clear candidate of choice for Native American Voters in the precincts associated with the Crystal and Naschitti Chapters of the Navajo Nation. Doc. 103, UMF Nos. 5-15.

PSOF ¶¶ 23, 25. Plaintiffs assert that the Rush Demonstrative Maps "perform and can elect American Indian candidates of choice," citing paragraph 41 of Dr. Barreto's Declaration. But Dr. Barreto's opinion on the performance of the Rush Maps is devoid of any basis or empirical evidence, and lacks a reliable methodology. Dr. Barreto failed to empirically show the outcome of the election contests he claims to have analyzed, and the Court is left to guess. The Court may properly exclude Dr. Barreto's conclusory opinions. *See* Doc. 104.

PSOF ¶ 24. Plaintiffs assert that Mr. Rush did not consider race, but he admitted that he did consider race in the form of considering the demographics to determine that he would draw a map with two majority Native American districts. *See* Doc. 118-5, Ex. 5, Rush Dec. 7, ¶ 19. *See also* Doc. 118-7, Ex. 7, Rush Dep. 136:20-22. This purported fact is also immaterial to whether Plaintiffs fail to satisfy the first *Gingles* precondition because District 2 is already a majority-minority district. *De Grandy*, 512 U.S. at 1008; *Bartlett*, 556 U.S. at 18.

PSOF ¶ 35. That Defendants did not conduct a performance analysis of the proposed maps during the redistricting process is immaterial to whether the Enacted Plan already has two majority-minority districts, just like all the maps proposed by Plaintiffs. *Bartlett*, 556 U.S. at 18. And this hardly shows that there was some alleged effort to dilute the Native American vote—there was an effort to make Native Americans a majority in District 2.

PSOF ¶¶ 36-37. Plaintiffs again cite solely to Dr. Barreto's Declaration paragraphs 17-18 for their bald assertion that the Enacted Plan will not perform and that for the "last 17 years" Native

RETRIEVED FROM DEMOCRACYDOCKET.COM

American candidates have lost in District 2 due to "bloc voting by non-Hispanic white voters." First, it is undisputed that 17 years ago, in 2006, District 2 elected Commissioner Ervin Chavez, a Navajo. UMF No. 16. Plaintiffs have presented no evidence to suggest that Ervin Chavez was not the Native American preferred candidate in 2006 or not Navajo. Commissioner Chavez served from 2002-2010. Plaintiffs' assertion that for the "last 17 years" Native American candidates have lost is demonstrably false.

Further, Dr. Barreto's actual statement in paragraph 17 of his declaration that Plaintiffs rely on is that lower registration and lower turnout is why District 2 will not perform, but he fails to empirically demonstrate that. *See* dispute of PSOF ¶¶ 13-14, 15, 16-17, *supra*. And Dr. Barreto's assertion in paragraph 18 of his declaration ignores the tremendous success of Native Americans in District 2 commissioner contests since 1982. UMF Nos. 15-20. It instead focuses on the contests that occurred from 2010 to 2020 when the NAVAP was between 43% and 47% and District 2 was not a majority-minority district as it is now. The fact that Native American candidates lost when District 2 was not a majority Native American district is immaterial to whether the current District 2, which is undisputedly a majority-minority district now, satisfies *Gingles* I and provides an equal opportunity for Native Americans to elect their candidate of choice now, just as it has in the past when it was a majority-minority district. And Commissioner McDaniel's success in 2022 was not due to the 26% non-Hispanic white voters in the district—it was due to Commissioner McDaniel being the candidate of choice for some Navajo Chapters in District 2 and the high crossover votes he received from Native Americans who did not vote with legally-significant cohesion. Doc. 103, UMF Nos. 5-15. *See also League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 428, 126 S. Ct. 2594 (2006) ["*LULAC*"] (citations omitted) ("to the extent the District Court suggested that

RETRIEVED FROM DEMOCRACYDOCKET.COM

District 23 was not a Latino opportunity district in 2002 simply because [the candidate not preferred by Latinos] prevailed, it was incorrect").

III. A MINORITY GROUP THAT IS AN UNDISPUTED MAJORITY IN A DISTRICT ALREADY HAS THE OPPORTUNITY TO ELECT CANDIDATES OF ITS CHOOSING IF IT VOTES WITH LEGALLY SIGNIFICANT COHESION.

All the language from *Gingles*, *Growe*, *De Grandy*, *Bartlett*, *Cooper*, and *Milligan* is consistent with a minority group not being a majority in a geographic area where it could be (i.e. being "submerged" in a white majority). In that situation, the first *Gingles* precondition makes sense. But here, under these undisputed facts, it does not, without some clear threshold rule as *Bartlett* stated that applies to these facts as well. The *Bartlett* court cautioned that without bright-line guidance, race would be infused into every districting decision, from Congress down to school boards and counties like San Juan. *Bartlett*, 556 U.S. at 19. As Plaintiffs argue, the first *Gingles* precondition is designed to show that a minority group would have "the *potential* to elect representatives" by showing that the group could "constitute a majority in a single-member district." *Gingles*, 478 U.S. 30, 51, n.17, 106 S. Ct. 2752 (1986); Doc. 118, Resp. 17. Implicit in this reasoning is that where a minority group "constitutes a majority" in a district, it has "the *potential* to elect representatives." *Gingles*, 478 U.S. 30, 51, n.17.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Here, where Native American's are already a majority in District 2, they already have the potential to elect representatives, just as they had Native American Commissioners from 1982-2010. White voters are currently a 26% minority and are not blocking anything by themselves. The only reason a CVAP majority-minority district with equal registration and turnout would not be able to elect a minority's candidate of choice is due to a lack of legally significant cohesion among the minority voters. *Smith*, 984 F.2d at 1401; *Voinovich v. Quilter*, 507 U.S. 146, 153, 113 S. Ct. 1149 (1993) ("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."). Indeed, Plaintiffs' detailed case summary of *Smith* elucidates the relationship between legally significant minority cohesion and the ability for a minority group to elect their candidate of choice in a district where they are already a majority. Doc. 118, Resp 16, n.2. Quite simply, if a minority group has legally significant cohesion, all it needs is a majority-minority district. Here, the problem is not due to the size of the majority of Native Americans in District 2—it's the lack of legally significant cohesion in the 2022 Commissioner contest. District 2 would have needed near 100% Native American population for Zac George to have won in 2022 given the high level of crossover voting. Section 2 does not require that because the *Gingles* preconditions fail under these facts.

Neither the Tenth Circuit nor the Supreme Court have directly addressed whether a case under these facts may move forward or satisfy the first *Gingles* precondition. But counties like San Juan need guidance. Applying the bright-line majority-minority rule stated in *Bartlett* to the facts of this case "provides straightforward guidance . . . to those officials charged with drawing district lines to comply with § 2." *Bartlett*, 556 U.S. at 18. And as already discussed, the single statements that Plaintiffs rely on from *LULAC* was stated in dicta. *See LULAC*, 548 U.S. at 428. Critically, the phrase "facade majority" from LULAC was referring to a district that was majority VAP but not majority CVAP. *Id.* at 429.

RETRIEVED FROM DEMOCRACYDOCKET.COM

The other circuits that have addressed this issue are distinguishable. To start, New Mexico is worlds and decades away from Mississippi in the Fifth Circuit case of *Monroe*. But even in that case there was no vote dilution because the minority group was already a majority in the jurisdiction, and the white minority was not blocking anything. *See Monroe v. City of Woodville, Miss.*, 881 F.2d 1327, 1332 (5th Cir. 1989), *opinion corrected on reh'g,* 897 F.2d 763 (5th Cir. 1990) ("The district court evidently found it difficult, as do we, to analyze 'legally significant'

white bloc voting in a jurisdiction where blacks are the numerical majority."). In *Monroe*, similar to here, the Fifth Circuit upheld the district court's reasoning that where the minority is already a majority, "the evidence does not support the Plaintiffs' arguments that the white bloc vote usually defeats the minority's preferred candidates. *Monroe*, 881 F.2d at 1333. The district court explained "[t]here is no 'submergence of the minority' since minority citizens (Blacks) are actually in the majority in the City of Woodville." *Id.* And in *Monroe*, just like here, "White candidates win not because of the white bloc vote, but because of the [minority] crossover vote." *Id.*

And unlike the pre-*Gingles* other Fifth Circuit case of *Moore*, where there had been a substantial reduction in the black majority districts, here Defendants created a majority-minority district where there had not been one for the last 10 years, strengthening the Native American vote in District 2. *See Moore v. Leflore Cnty. Bd. of Election Comm'rs*, 502 F.2d 621, 624 (5th Cir. 1974) ("The extent of each majority, however, is diluted in all but one of the districts when compared to pre-redistricting figures."). The footnote Plaintiffs cite from *Pope* merely cites the dicta of *LULAC*, but the *Pope* footnote is dicta as well because the issue in *Pope* was whether the plaintiffs needed to show more than numerical majority for the first *Gingles* precondition. *Pope v. Cnty. of Albany*, 687 F.3d 565, 576, n.8 (2d Cir. 2012) ("while a defendant's creation of MMDs with simple majority representation does not necessarily *close* the gate to a potential finding of vote dilution, plaintiffs need not show more than a simple majority at the first step of the *Gingles* analysis to *open* the gate to further Section 2 inquiry"). In *Missouri State Conf. of the NAACP v. Ferguson-Florissant Sch. Dist.*, the parties disputed whether the challenged district was a majority black district because American Community Survey (ACS) estimates "suggested the black voting age population within FFSD was approximately 50.3%" but Census data put it below 50%. 894 F.3d 924, 932 (8th Cir. 2018). Here, unlike that case, Plaintiffs agree that District 2 is a

RETRIEVED FROM DEMOCRACYDOCKET.COM

clear majority by all estimates. Moreover, under facts more like this case, Eighth Circuit district courts have applied *Bartlett* to find that the first *Gingles* precondition was not met and there was no vote dilution. *Jeffers v. Beebe*, 895 F. Supp. 2d 920, 932 (E.D. Ark. 2012) ("the plaintiffs have not established a claim for vote dilution under § 2 because the 2011 Senate District 24—the challenged district—is *already* a majority-minority district under *Bartlett* 's definition").

In *Kingman Park Civic Ass'n v. Williams*, the court analyzed whether the pleadings were sufficient and remanded on evidentiary issues related to the *Gingles* preconditions. 348 F.3d 1033, 1040 (D.C. Cir. 2003) (holding that in order to survive a motion to dismiss under Rule 12(b)(6), appellants were required only to allege that the Ward Redistricting Act dilutes minority voting strength such that minority voters in the relevant wards have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."). And *Meek v. Metro. Dade Cnty.* addressed the third *Gingles* precondition—not the first *Gingles* precondition. 908 F.2d 1540, 1546 (11th Cir. 1990) ("the district court here properly rejected the county's contention that *Gingles* could not apply at all in a setting where the Non Latin White bloc did not constitute a majority of the total population").

RETRIEVED FROM DEMOCRACYDOCKET.COM

Lastly, contrary to Plaintiffs' claim that they are not seeking to maximize their political strength, they are precisely bringing a challenge to a District 2 that is already a majority and arguing it needs to be more of a majority, at the expense of the voting strength in District 1. This is another maximization situation on par with what the Supreme Court has previously addressed. *See, e.g.*, *De Grandy*, 512 U.S. at 1017 ("Failure to maximize cannot be the measure of § 2."). Plaintiffs want to maximize the NAVAP percentage in District 2, but the law does not require that because a majority population already has "the *potential* to elect representatives." *Thornburg v. Gingles*, 478 U.S. 30, 51, n.17. Whether it is an issue of maximizing the number of majority-

minority districts within a political subdivision, or maximizing the number of minority voters in the district, "the mandate of § 2 . . . is not concerned with maximizing minority voting strength . . . ." *Bartlett*, 556 U.S. at 23.

IV. CONCLUSION

In the end, this Court need not follow the dicta of *LULAC*, nor other Circuit decisions with uniquely different histories. Under these facts, Plaintiffs cannot create another majority-minority district. That should end the inquiry. District 2 provides Native Americans an equal opportunity to elect their candidates of choice, just as it has over the last 40 years with the same Native American population. The only reason it would not is due to a lack of legally significant cohesion.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Respectfully Submitted:

SAUCEDOCHAVEZ, P.C.

By: */s/ Brian Griesmeyer*
Christopher T. Saucedo
Brian Griesmeyer
800 Lomas Blvd. NW, Suite 200
Albuquerque, NM 87102
(505) 338-3945
csaucedo@saucedochavez.com
bgriesmeyer@saucedochavez.com

Attorneys for Defendants

I HEREBY CERTIFY that on August 7, 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.