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**

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.

REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON *GINGLES* II AND *GINGLES* III

Plaintiffs have no answer for the basic logic that the only reason a majority population (with equal registration and turnout) in a district does not elect its candidate of choice is due to its lack of cohesion. Dr. Barreto's opinions are Plaintiffs' sole evidence. But his generalized, county-wide analysis glosses over the lack of cohesion in the current District 2 in 2022, which is the most probative election data. Plaintiffs fail to present the required district-level analysis of the second and third *Gingles* preconditions for the actually challenged district. Instead, Plaintiffs would have the Court let Dr. Barreto, by himself, establish the second and third *Gingles* preconditions,

usurping the Court's fact-finding responsibility to consider all the material evidence. Instead, this Court should consider the divergent voting patterns among the Navajo Nation Chapters, the testimony from Plaintiffs themselves and District 2's commissioner, and the undisputed actual registration and turnout numbers for District 2.

The Court should reject Plaintiffs' and Dr. Barreto's proposition that anything over 50% is a cohesive vote, which would result in *always* finding cohesion. *Sanchez v. State of Colo.*, 97 F.3d 1303, 1320 (10th Cir. 1996) ["*Sanchez*"] (instructing district courts not to assume that any "candidate who has received more than 50% of the minority vote" is the minority's candidate of choice). Logically, attaining legally significant minority cohesion means that if the minority is a majority in a district (such as District 2), it will have the opportunity to elect candidates of its choice. Critically, *Gingles* held that "minority bloc voting within the context of § 2" requires "a *significant* number of minority group members" voting for the same candidates—not just a simple majority. *Gingles*, 478 U.S. at 56. It just makes sense that a minority group must be closer to complete cohesion than to complete lack of cohesion to find legally significant cohesion greater than 75%.

Plaintiffs refer to 60% minority cohesion as "landslide levels" but a 60% minority vote for a particular candidate only results in a landslide if the district is 100% minority, which Section 2 does not require. Rather, it is the balanced combination of having a majority of voting population and legally significant cohesion that provides the opportunity to elect. If either is missing, Section 2 provides no remedy. Similarly, Plaintiffs refer to 60% as "strong cohesion" even though it is closer to complete lack of cohesion (50%) than it is to complete cohesion (100%). If 60% is "strong" then what is the 80-95% levels that the leading cases relied on?

I. UNDISPUTED MATERIAL FACTS REMAIN UNDISPUTED

Plaintiffs do not dispute UMF Nos. 1-5, 9, 12-13, 20, 26-27, and 30. But the remaining UMFs generally require substantial guesswork to decipher what Plaintiffs' purported dispute supposedly is, or what the actual evidence is that Plaintiffs are citing to support their dispute. Rather than cite to evidence and particular facts of record, Plaintiffs only generally cite to their own additional facts, without further explanation, sometimes citing to nearly their entire body of 10 pages and 42 paragraphs of additional facts, leaving Defendants to search for the dispute and evidence. This does not comply with Rule 56(c) or D.N.M.LR-Civ. 56.1(b).

Plaintiffs' purported disputes only arise in UMF subsections (b) the 2022 District 2 Commissioner Election Contest, (c) the 2018 District 2 Commissioner Contest, and (d) Dr. Barreto's Analysis for Plaintiffs, which Defendants address by addressing Plaintiffs' additional facts since they are the only support cited for the disputes. Importantly, with respect to the 2022 District 2 Commissioner Contest, Plaintiffs purportedly dispute the detailed table summary of voting patterns by precinct in UMF No. 6 that leads to the additional facts in UMF Nos. 7-11 by citing to almost the entirety of their additional facts. Doc. 119, Resp. 3 ¶ 6 (citing PSOF ¶¶ 8-42).

With respect to Plaintiffs' additional facts, referred to as "PSOF," PSOF ¶¶ 1-6 are undisputed for the purposes of this motion and PSOF ¶¶ 29-38 are undisputed to the extent that Defendants agree they do not have an expert who conducted ecological inference analysis. But the Court may still properly consider evidence other than ecological inference statistics in a Section 2 case, especially the actual undisputed registration and turnout numbers, and testimony from Plaintiffs and elected officials. *Sanchez v. Bond*, 875 F.2d 1488, 1494 (10th Cir. 1989).

PSOF ¶ 7 is disputed because it is undisputed that District 2 has historically elected more Native American candidates over the last 40 years than any other ethnic group when its percentage of Native American voting age population was in the exact same range that it is now: between 40-

60%. Doc. 101, UMF Nos. 15-21. The current District 2 did not elect Zac George in 2022 as its commissioner because there was not cohesive Native American support for him, despite there being a clear Native American majority in the district. UMF Nos. 5-15. The Native American majority in District 2 has the opportunity to elect any candidate of its choosing by voting cohesively. Moreover, Plaintiffs cite solely to Dr. Barreto's Dec. ¶¶ 14-17 to support this contention, but those paragraphs assert that District 2 will not perform due to lower turnout and registration, which is just not true. And Dr. Barreto fails to show any empirical evidence that would controvert UMF No. 6 and the table showing higher turnout and registration amount for the 11 Native American dense precincts. PSOF ¶ 7 does not raise a genuine dispute with UMF Nos. 5-11, which rely on uncontroverted registration and turnout numbers. Doc. 101-1, Ex. A, Shelby Dec. ¶¶ 11, 20-23 (Dec. Ex. 7, 11, 12, 13).

PSOF ¶¶ 8-24 rely solely on Dr. Barreto's declaration, which failed to provide meaningful analysis of District 2 by only looking at four contests there, three of which occurred when District 2 was not the Native American majority that it is now. And now Plaintiffs argue that the Court should ignore two of those four contests in 2018 and 2022.[1] In other words, Dr. Barreto and Plaintiffs want to only rely on the 2010 and 2014 District 2 commissioner contests (when NAVAP was 47% and 43%, respectively), and ignore the seven contests before those that saw six Native American commissioners elected when NAVAP was the same as it is now, and ignore the two after where there was near complete lack of cohesion among Native American voters. The two District 2 contests in 2010 and 2014 that Plaintiffs want the court to rely on are incomparable to

[1] Plaintiffs' reliance on the special circumstances doctrine is misplaced, since it only applies to elections that occur during the pendency of the lawsuit where the minority candidate wins. *See, e.g.*, *Ruiz v. City of Santa Maria*, 160 F.3d 543, 556 (9th Cir. 1998) (analyzing *Gingles* discussion of "special circumstance of minority success in an election during the pendency of litigation challenging the existing system"). The doctrine Plaintiffs try to invoke does not apply to these facts, where during the pendency of the litigation Native American support for the white candidate increased. And the 2018 contest was not during the pendency of this lawsuit.

the current, majority-minority District 2, which has a demographic composition more similar to its form from 1982 – 2010, when Native American candidates won 6 of 8 contests.

Dr. Barreto and Plaintiffs ignore that it is their burden to show the second and third *Gingles* preconditions specifically for the challenged District 2, and that the 2022 District 2 commissioner contest shows the specific voting patterns in the *current* District 2—it is the only election results in the record for that District's voters alone. Plaintiffs are wrong that "[i]n the last four election cycles in District 2 the candidate preferred by American Indian voters lost every time." District 2, a majority-minority district, has only had a single commissioner contest in 2022, not four. *See* Doc. 119, Resp. 20. The other three that Plaintiffs reference were in the prior District 2, which was not a majority-minority district. Truly, Dr. Barreto could have analyzed the countywide elections for just District 2 to show its specific voting patterns, but he did not. His self-proclaimed "most comprehensive" analysis is almost entirely immaterial. *Gingles*, 478 U.S. 30, 59 n.28 (holding that a district court cannot aggregate racial polarization numbers across several districts because "inquiry into the existence of vote dilution caused by submergence . . . is district specific"). That Dr. Barreto believes he has shown racially polarized voting patterns countywide does not satisfy *Gingles*' district-specific required analysis for the challenged District 2. *Id.*

PSOF ¶¶ 8-24 do not specifically controvert the evidence supporting UMF Nos. 5-18 and UMF Nos. 19-29 regarding UMF subsections (b) the 2022 District 2 Commissioner Election Contest, (c) the 2018 District 2 Commissioner Contest, and (d) Dr. Barreto's Analysis for Plaintiffs. Rather than rely only on Dr. Barreto's opaque statistical predictions of voting by ethnicity, *Sanchez v. Bond*, 875 F.2d 1488, 1496 (10th Cir. 1989), the Court can just look at the actual numbers for District 2 presented in UMF No. 6 and the evidence cited.

PSOF ¶¶ 25-28 rely on Mr. Adair's report and Dr. Barreto's "rebuttal" declaration and original declaration. First, the Court may properly strike Dr. Barreto's rebuttal declaration and its

attempt to bolster Dr. Barreto's Rule 26(a)(2) disclosure. *See* Doc. 107. Second, these PSOF do not controvert UMF Nos. 21-22 and the fact that Gertrude Lee carried 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). This shows the lack of cohesion among Native American voters in District 2 resulting from the different Chapters having different candidates of choice, an argument and issue that Plaintiffs try to avoid by not directly addressing it. And of course, Gertrude Lee's substantial support from white voters also is highly relevant as the Court considers whether there is racially motivated voting in San Juan County, rather than just partisan politics.

PSOF ¶¶ 39-42 are disputed because Plaintiffs have presented no empirical evidence that Native Americans in District 2 on the Enacted Plan have lower registration or turnout—and the opposite is true based on UMF No. 6 and Doc. 101-1, Ex. A, Shelby Dec. ¶¶ 11, 20-23 (Dec. Ex. 7, 11, 12, 13). UMF No. 6 and the evidence cited presents actual empirical registration and turnout data instead of an unsupported conclusory opinion. Plaintiffs fail to controvert that for the 2022 District 2 commissioner contest, the 11 precincts with over 90% Native American voters had a higher average turnout than the remaining precincts in District 2 (48.73% compared to 47.85%). 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). Plaintiffs rely on Dr. Barreto's conclusory, unsupported opinion in paragraph 17 of his declaration that fails to deal with the actual registration and turnout data that Defendants have presented in UMF No. 6.[2] The remainder of evidence Plaintiffs cite in PSOF ¶¶ 40 and 42 are national surveys and studies

[2] The Court may properly strike Dr. Barreto's unsupported conclusory opinions on lower registration and turnout. See Doc. 104.

that say nothing about District 2. And PSOF ¶ 39 actually asserts that "Hispanic citizens of any race of voting age" have lower registration rates than white voters, which clearly says nothing material about Native American registration rates (especially considering Plaintiffs now want to combine the Hispanic and white voters to prove *Gingles* 3). PSOF ¶¶ 39-42 do not specifically controvert UMF Nos. 5-11.

II. ARGUMENT

a. Plaintiffs did not present compelling district-specific evidence.

Plaintiffs' entire case rests on the conclusory opinions of Dr. Barreto and his admittedly inflated numbers,[3] which in any event fail to engage in meaningful, district-specific analysis. It is Plaintiffs' burden to show the second and third *Gingles* preconditions for the district at issue—not for the entire county. *Gingles*, 478 U.S. at 56, 59 n.28, 79; *LULAC v. Perry*, 548 U.S. 399, 437, 126 S. Ct. 2594 (2006); *Abbott v. Perez*, 138 S. Ct. 2305, 2332 (2018); *Shaw v. Hunt*, 517 U.S. 899, 917, 116 S. Ct. 1894 (1996). The question is not "whether County elections are racially polarized." Doc. 119, Resp. 9, PSOF ¶ 13. The question is whether Native American voters in District 2 are a politically cohesive bloc, and whether there is a white majority in District 2 that votes as a bloc against the District 2 Native American's candidate of choice (assuming they cohesively support one). *Gingles*, 478 U.S. at 56, 59 n.28, 79. "[T]the ultimate 'inquiry into the existence of vote dilution caused by submergence . . . is district specific.'" *Pope v. Cnty. of Albany*, 687 F.3d 565, 582 (2d Cir. 2012) (quoting *Gingles*, 478 U.S. at 59 n.28). It remains undisputed that Plaintiffs only present the voting behavior of District 2 voters once, for the 2022 commissioner

[3] For example, despite Dr. Barreto's declaration claiming that the average cohesion for the 57 elections he analyzed is 70%, Doc. 119-2, Ex. 2, Barreto Dec. ¶ 31, Plaintiffs now concede and do not dispute that the number is actually closer to 66%, Doc. 119, Resp. 11 PSOF ¶¶ 23-24, and even that number is only based on Dr. Barreto's selective ignorance of critically important contests that go against his conclusions, such as the 2010 and 2014 governors contests, one of which even involved a Native American candidate, Deb Haaland, in 2014. Dr. Barreto's selective analysis boosts his numbers, and then he boosts those number further by rounding up.

contest. *See* dispute of **PSOF ¶¶ 8-24**, *supra*. Moreover, the Tenth Circuit has strongly cautioned against sole reliance on statistical evidence. *Sanchez*, 97 F.3d at 1313, n.15 (questioning sole reliance on statistical methodologies to arrive at conclusions of law).

b. Caselaw supports a finding of legally significant cohesion at levels over 75%.

The only two Tenth Circuit cases on this issue support Defendants' position that 75% average cohesion is required, especially when read in light of the reasoning in *Bartlett* and *Abrams*. *See Bond*, 875 F.2d at 1495 (affirming district court finding that Hispanics were not politically cohesive); *Sanchez*, 97 F.3d at 1317 (finding cohesion where Hispanics supported same candidate at rates of over 86% for all endogenous contests); *Bartlett*, 556 U.S. at 14-15, 26 (plurality op.). A threshold of 60% is not a demanding enough standard based on *Bartlett*'s reasoning. In this case it will force the dilution of the 40% or more of Native Americans in District 2 that vote Republican, a number that is growing each election cycle. The *Bartlett* court was "skeptical" that the "majority-bloc-voting requirement" could be satisfied when 20% of white voters supported minority preferred candidates. *Bartlett*, 556 U.S. at 16. By the same reasoning and logic, where there are similar or even higher levels of minority crossover votes for the white candidate, there is no legally significant cohesion. *Abrams v. Johnson*, 521 U.S. 74, 92, 117 S. Ct. 1925 (1997). Indeed, this scenario is just like the district requiring 20% white crossover vote that the *Bartett* court rejected in imposing the bright line threshold for the first *Gingles* precondition. *Bartlett*, 556 U.S. at 16. Where a minority group only votes with 60% or less cohesion, it likewise would require significant white crossover vote to cancel out the minority crossover vote for the white candidate. This is not a situation that Section 2 can rectify. *Smith v. Brunswick Cnty., Va., Bd. of Sup'rs*, 984 F.2d 1393, 1401 (4th Cir. 1993).

c. Plaintiffs' attempts to distinguish Defendants' caselaw is not on point, and Plaintiffs' cited cases are not binding on this Court, or not on point.

Contrary to Plaintiffs' arguments, courts have not "rejected" a 75% threshold. Defendants' cited Supreme Court precedent clearly recognizes legally significant cohesion at levels well over 75%, starting with *Gingles*. Plaintiffs try to distinguish *Gingles*, but miss the mark entirely by claiming that the court only found cohesion levels from "71 percent to 92 percent in just 11 out of 16 primary elections." Doc. 119, Resp. 21 (citing *Gingles*, 478 U.S. at 59, 80-82). But this overlooks that in all "the general elections [where there was opposition], black support for black Democratic candidates ranged between 87% and 96%." *Gingles*, 478 U.S. at 59. A close look at the cited appendix to Justice Brennan's opinion shows that for the primary races at issue, the five contests that were not included in the analysis are marked with "n/a" (indicating they ran uncontested or did not run) and not because "a majority of black voters did not agree on a candidate" as Plaintiffs claim. *Gingles*, 478 U.S. at 80; *Gingles v. Edmisten*, 590 F. Supp. 345, 369-371 (E.D.N.C. 1984), *aff'd in part, rev'd in part sub nom. Gingles*, 478 U.S. 30. And the challenged districts in *Gingles* were multi-member districts with at-large elections. Plaintiffs are mistaken that somehow this supports a finding of cohesion where average levels are well-below 75% in single member district contests.

Plaintiffs' only cited Circuit Court case is inapposite as Plaintiffs continue to try to blur the difference between whether there is a preferred candidate and whether there is legally significant cohesion. The court in *Ruiz v. City of Santa Maria* was analyzing preferred candidate—not legally significant cohesion—when it held less than 50% would do in election contests that involved many more than two candidates in that case where an at-large voting system was challenged. 160 F.3d 543, 552 (9th Cir. 1998) (emphasis added) ("that a candidate receive 50 percent or more of the votes cast by a minority group *to qualify as minority-preferred* can be too restrictive, particularly

in a city such as Santa Maria, where all candidates routinely receive fewer than 50 percent of the Hispanic vote"). Plaintiffs misunderstand the *Ruiz* holding and the difference between a preferred candidate, and whether there is legally significant cohesion, which under *Sanchez* is more demanding than merely showing majority support for a candidate. *Sanchez*, 97 F.3d at 1320.

The only other cases Plaintiffs cite to support their position that 60% is legally sufficient cohesion are district court decisions, only one of which is from within the Tenth Circuit. But in *Large v. Fremont Cnty., Wyo.*, the levels of cohesion for the district at issue were 84% or higher. 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."). And unlike what Plaintiffs want the Court to consider here, in *Large* the court considered elections going all the way back to 1982. *Large*, 709 F.Supp.2d at 1194, 1202. The remaining district court decisions similarly seem to misunderstand that legally significant cohesion is not the same as having a preferred candidate. The Court need look no further than to binding Tenth Circuit precedent to know that legally significant cohesion is not the same as merely having a preferred candidate, and that the Court need not blindly accept opaque statistical predictions. *Sanchez*, 97 F.3d at 1313, n.15, 1320; *Bond*, 875 F.2d at 1495 (affirming district court finding that Hispanics were not politically cohesive based on lay witness testimony and rejecting statistical evidence as unreliable).

d. The Tenth Circuit has not addressed whether Plaintiffs could ever satisfy the third *Gingles* precondition where the white population is a small minority of 26%.

Plaintiffs argue that the small minority white population of 26% should be combined with the Hispanic population in District 2. Doc. 119, Resp. 29-32. But the result is the same—it is still not a majority in which the Native American population is submerged. This is also the first time Plaintiffs make this argument, having previously continually and consistently argued that it is

"white bloc voting" that is defeating Native American candidates of choice in District 2, not Hispanic voters. *See, e.g.*, Doc. 1, Compl. ¶ 81 (emphasis added) ("Navajo voters do not have an equal opportunity to elect their candidates of choice in District 2 because of . . . legally significant racially polarized voting in which *non-Hispanic white voters* vote sufficiently as a bloc to usually defeat the candidate of choice of Navajo voters.").

The cases Plaintiffs cite for this new theory of the third *Gingles* precondition are distinguishable or no longer good law. First, *Metts* was decided pre-*Bartlett*, and rested on the "possibility, that *Gingles*' first precondition . . . could extend to a group that was a numerical minority but had predictable cross-over support from other groups," the very possibility that *Bartlett* rejected. *Metts v. Murphy*, 363 F.3d 8, 11 (1st Cir. 2004). Even so, just like *Bartlett* ultimately reasoned in adopting the bright line threshold for *Gingles* I, the *Metts* court also doubted that Plaintiffs could satisfy the third *Gingles* precondition where their proposed district required white crossover voting. *Id.* at 12 (if minority "voters have to rely on cross-over voting to prove they have the 'ability to elect' a candidate of their choosing, their argument that the majority votes as a bloc against their preferred candidate is undercut"). *Metts* does not support Plaintiffs' argument and is based on a possibility that *Bartlett* has since foreclosed. Then, in *Meek*, there was actual evidence of "a 'keen hostility' exists between blacks and Hispanics." *Meek v. Metro. Dade Cnty., Fla.*, 985 F.2d 1471, 1481 (11th Cir. 1993). In this case, Plaintiffs present no similar evidence of "keen hostility" between the Hispanics and Native Americans in District 2. The Court can properly reject Plaintiffs' novel theory of the third *Gingles* precondition.

Lastly, the historical success of minority candidates is always relevant to the totality of the circumstances—it is literally a Senate Factor that must be considered. *Thornburg v. Gingles*, 478 U.S. 30, 51, n.15, 106 S. Ct. 2752 (1986) (recognizing one of the most important Senate Report factors bearing on § 2 challenges is the "extent to which minority group members have been elected

to public office in the jurisdiction"); *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").

III. CONCLUSION

Plaintiffs' evidence does not controvert Defendants' UMFs and the inference drawn from them that demonstrate the particular voting patterns at the district level, for the most probative and only election in the challenged District 2 in 2022. Plaintiffs miss the nuances of District 2 in San Juan County, New Mexico, and its common voting behavior of Native Americans in San Juan County that contributes to electing Republican candidates due to their divergent political interests. Looking at the details, Plaintiffs fail to establish the second and third *Gingles* preconditions.

Respectfully Submitted:

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I HEREBY CERTIFY that on August 8, 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
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