CASE NO. 18-4005

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NAVAJO NATION, a federally recognized Indian tribe, LORENA ATENE, TOMMY ROCK, HARRISON (HUTCHINS) HUDGINS, WILFRED JONES, ELSIE BILLIE, and HERMAN FARLEY,
Plaintiffs-Appellees

v.

SAN JUAN COUNTY, a Utah governmental sub-division,

Defendant-Appellant.

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

APPELLEES' OPENING BRIEF

Respectfully Submitted,

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RULE 31.3(B) STATEMENT

Lorena Atene, Tommy Rock, Harrison Hudgins, Wilfred Jones, Elsie Billie and Herman Farley have interests that have diverged from those of the Navajo Nation. Their strategies for handling this appeal are different than those of the Navajo Nation. These Plaintiffs-Appellees have therefore requested that the attorneys who have represented them in this matter since the beginning of this case file this separate Answer Brief on their behalf alone.

PRIOR OR RELATED APPEALS

None.

STATEMENT OF ISSUES PRESENTED

1. Whether the District Court had subject matter jurisdiction over the First Claim because that claim did not constitute a collateral attack on the 1984 *Agreed Settlement and Order* entered in *United States v. San Juan County, et al*. because (1) the United States did not bring the case on behalf of the Navajo Nation; (2) the Agreed Settlement and Order did not require submission of a redistricting plan that was acceptable to the United States and did not require creation of a racially-packed Indian district at the insistence of the United States; and (3) did not require that a racially-packed district could never be changed except with the participation of the United States?

2. Whether the District Court properly granted summary judgment, finding that race predominated in the creation and maintenance of County Commission District 3 in violation of the Equal Protection Clause and Defendant-Appellant did not have a compelling interest in maintaining this race-based election district?

3. Whether the District Court properly granted summary judgment in finding that the 38% population deviation for School Board election districts violated the Equal Protection Clause and that the Defendant-Appellant did not present any legitimate interest in maintaining this districting plan?

4. Whether the District Court (1) correctly determined that Defendant-Appellant's proposed remedial plans violated the Equal Protection Clause because race was the predominant factor in the decision to place a significant number of voters within particular election districts; and (2) whether the Defendant-Appellant's proposed remedial plans were not narrowly tailored to achieve a compelling governmental interest?

5. Whether the District Court properly established the Special Master's proposed remedial redistricting plans, with modifications, as Court-ordered plans and whether the District Court committed no error when it ordered special elections for all seats affected by the unconstitutional plans?

INTRODUCTION

San Juan County, Utah, (County) drew election districts for its School Board with a 38% deviation between the population size of the largest and the smallest districts, in violation of the Equal Protection Clause. The County drew election districts for its County Commission based on racial classifications, in violation of the Equal Protection Clause. After the District Court declared that both the County Commission and School Board election districts violated the Equal Protection Clause, the Court gave the County an opportunity to draw remedial election district plans for both entities. The County once again drew districting plans for both the Commission and the School Board based on racial classifications and the District Court, once again, determined that those remedial plans violated the Equal Protection Clause. The District Court then appointed a Special Master to draw districting plans that comply with the Equal Protection Clause, the Voting Rights Act and traditional districting principles. After providing extensive opportunity for comment from the County and the public, the District Court adopted the plans proposed by the Special Master.

The County appeals many of the decisions made by the District Court during the six-year history of this case. Most of the County's challenges hinge on a 1984 *Agreed Settlement and Order* (sometimes referred to as a

consent decree) entered in an unrelated case, *United States v. San Juan County*. A significant part of the County's appeal can be disposed of through a review of that *Agreed Settlement and Order*.

STATEMENT OF THE FACTS

A. A History of Voting Discrimination

Indians were denied the right to vote by Utah law until 1957. U.C.A. § 20-2-14. When a case challenging the constitutionality of this disenfranchisement was pending in the United States Supreme Court, the Utah legislature repealed the law. *Allen v. Merrell*, 353 U.S. 932 (1957). Utah became the last state to end prohibitions against Indian voting, yet this did not eliminate barriers to Indian voting rights in San Juan County.

Legal action was brought in 1972 when the San Juan County Clerk denied two Navajo candidates the right to run for County commission. A three-judge panel of this Court ordered the clerk to place the candidates on the ballot. *Yanito v. Barber,* 348 F. Supp. 587 (D. Utah 1972).

Within a decade, still more litigation was required to protect Indian voting rights in San Juan County. The at-large election of County commissioners was challenged in 1983 by a lawsuit in the United States District Court for Utah brought by the United States. The government alleged that the County's at-large election process illegally diluted Indian

voting strength. The District Court entered a permanent injunction against the County and required it to adopt single-member election districts for the election of commissioners.

B. The 1984 Consent Decree

On November 22, 1983, the United States filed a Complaint against the County and various County officials for declaratory and injunctive relief to remedy violations of the Voting Rights Act and the Fourteenth and Fifteenth Amendments to the Constitution due to the use of at-large voting to elect the three members of the County Commission in violation of the rights of Indian voters. *United States v. San Juan County*, C-83-1286W (1984), Aplt. App. at 000277-000278. The relief requested by the United States narrowly focused on ending the use of at-large voting for elections to the County Commission. *Id.* at 000278-000279. The Plaintiffs-Appellees in the present case, including the Navajo Nation, were not parties to *United States v. San Juan County* and it was not a class-action lawsuit.

On April 4, 1984, the District Court entered an *Agreed Settlement and Order* in which the County agreed that its process for the selection of Commissioners did not fully comply with the Voting Rights Act, further agreed that it would continue implementation of a process to adopt a form of County government through which Commissioners would no longer be

elected at-large, but instead from single-member election districts, denied the specific allegations of the Complaint and reserved all other issues. The County admitted "that the process leading to the selection of [its] County Commissioners fails to comply fully with . . . Section 2 of the Voting Rights Act." The *Agreed Settlement and Order* did not address any other issues, including alleged violations of the Fourteenth and Fifteenth amendments. The District Court retained jurisdiction in the event the "County should for any reason fail to take action . . . to modify the process leading to the selection of County Commissioners . . . ." Aplt. App. at 000211-000215. The District Court did not receive, review or approve any election district plan as part of its ruling. In 1984, the County adopted a system in which Commissioners were henceforth elected from three, single-member districts. In November 1984, the County Commission created and approved a districting plan for those three single-member election districts, but that plan was neither created nor approved by the District Court.

C. The School Board

The County's election district plans for the San Juan County School Board ("School Board") violated the Equal Protection Clause for 23 years. The School Board, which is the governing body of the San Juan School District ("School District"), is divided into five election districts that did not

comply with the one-person-one vote rule established in *Reynolds v. Sims,* 377 U.S. 533 (1964) since at least 1992. Election districts must be in proportion to the population so voters have equal weight in representation. *Id*. An overall deviation of 10% or greater in the populations of districts from an election plan's ideal population distribution is a *prima facie* violation of the Equal Protection clause of the Fourteenth Amendment to the United States Constitution. *Brown v. Thomson*, 462 U.S. 835, 842-843 (1983) (citing *Swann v. Adams*, 385 U.S. 440, 444 (1967)). The County is responsible for reapportioning School Board election districts. UCA § 20A-14-201(1)(a). Reapportionment is required at least every ten years, after each decennial census,[2] to achieve election districts that are substantially equal in population, contiguous, and compact. *Reynolds,* 377 U.S. at 583. Less frequent redistricting will "assuredly be constitutionally suspect." *Id.,* at 583-84. The overall population deviation for School Board election districts under the 1992 plan is 37.69%, nearly four times the constitutional limit. The County had not reapportioned School Board election districts since 1992. Appl. Supp. App. at 002512-0002521; 0000376.

[2]Decennial census data published by the United States Census Bureau are presumptively valid. *Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 853 (5th Cir. 1999).

Because it was undisputed that the County failed to reapportion School District election districts and the population deviation for the election districts under the 1992 plan vastly exceeded the constitutional limit, the District Court granted Plaintiffs-Appellees' summary judgment on their Fourth Claim for Relief. Aplt. App. at 008343-008371

D. The County Commission

In 2011, the County was on notice that, according to the 2010 decennial Census, the total population and voting-age population of the County was majority-Indian. Since their creation in 1986, two County Commission election districts always had inordinately large populations of whites ("White-Majority Districts One and Two") and commissioners elected to represent these districts have always been white. The third Commission election district always had an inordinately large population of Indians ("Super-Majority District Three"), a condition known as "packing," and the commissioner elected to represent District Three was always an Indian. Aplt. App. at 000229.

On November 14, 2011, representatives of the Navajo Nation were present at a Commission meeting and placed the County on notice that the existing plan for Commission election districts was mal-apportioned (that is, like the School Board election districts, they had a deviation that violated the

one-person one vote mandate), and that Super-Majority District Three required modification to address the long-standing issue of packing Indian voters into that district. Aplee. Supp. App. at 001228-001229. Nonetheless, the reapportionment approved by the two white commissioners on November 14, 2011, made population adjustments to White-Majority Districts One and Two that, while fixing the deviation problem, retained the characteristics of dominant white voting districts, while Super-Majority District Three was not changed and retained the characteristics of a packed Indian voting district. *Id*.

The District Court, after an exhaustive district-by-district analysis, determined that race was the dominant and controlling consideration for the County's decision to place a significant number of Indian voters within Commission District 3. The District Court based its decision on direct evidence, including the County's admissions that it intended District 3 to have a "heavy concentration of American Indians." Aplt. App. at 009846. The District Court also found circumstantial evidence probative of a violation, including the fact that the demographic composition of District 3 was difficult to explain on any other basis than race. The District Court held that the Commission districting plan failed strict scrutiny review because the County's purported justification of compliance with the 1984 Consent

Decree was not a compelling governmental interest. Aplt. App. at 009827-009859.

E. Remedial Plans

After the District Court determined that both the County Commission and School Board plans violated the Equal Protection Clause, although for different reasons, the Court gave the County an opportunity to draw remedial plans. The County's plans were drawn intentionally to follow racial proportions as they exist within the County. For the County Commission, this meant that one seat was allotted to white voters, one seat was allotted to Indian voters and the district for the third seat was drawn to contain a population that closely matched the overall racial proportions within the County. A similar formula was used to draw remedial plans for the School Board, with two districts allotted to white voters, two districts allotted to Indian voters, and one district contained a population that reflected the racial composition of the County as a whole. The County calls this race-based approach to districting "proportionality." Aplt. App. at 009822-009823. Because the predominant factor in drawing these remedial plans was race, the District Court determined them to violate the Equal Protection Clause. Aplt. App. at 010825-010866. The District Court then appointed Dr. Bernard Grofman as Special Master to assist in drawing election districts that comply

with the Equal Protection Clause, the Voting Rights Act and traditional districting principles. Dr. Grofman's plans were approved by the Court and ordered to be used in the 2018 election. After an in-depth analysis, the Court ordered special elections for all seats affected by the unconstitutional plans for the 2018 elections. Aplt. App. at 011052-011063.

STATEMENT OF THE CASE

On January 12, 2012, the Plaintiffs-Appellees filed the *Complaint* in this case. Applt. App. at 000074. The *Complaint* alleged that the election districting plan for the County Commission violated the Equal Protection Clause and Section 2 of the Voting Rights Act. *Id*. On December 28, 2012, the Plaintiffs-Appellees filed the *Second Amended Complaint*. Aplt. App. at 00025-000236. The *Second Amended Complaint* dismissed claims against individual County Commissioners, dropped a claim for money damages and added claims that the election districting plan for the School Board violated the Equal Protection Clause and Section 2 of the Voting Rights Act. *Id*.

On February 14, 2014, the County filed *San Juan County's Motion to Dismiss*, which argued that the Plaintiffs-Appellees' claims concerning the County Commission must be dismissed because that plan was governed by the 1984 consent decree in *United States v. San Juan County.* Aplt. App. at 000257-000286. The *Motion to Dismiss* claimed that the Commission

election district boundaries were settled in the 1984 consent decree, could not be altered without amending the consent decree and the consent decree could not be amended without joining the United States as a party, thus depriving the District Court of subject matter jurisdiction over the present case. *Id*. On March 12, 2015, the District Court entered a *Memorandum Decision and Order* denying the motion to dismiss on the grounds that the 1984 consent decree did not establish any particular election district or its boundaries, but only established the form of the County Commission as requiring single-member election districts, and the claims of the *Second Amended Complaint* therefore did not constitute a collateral attack on the terms of the 1984 consent decree or an attempt to modify its terms. Aplt. App. at 000451-000457.

On July 21, 2015, the Plaintiffs-Appellees filed a *Motion for Summary Judgment on Plaintiffs' Fourth Claim for Relief*, which argued that a 37.69% population deviation between the largest and smallest School Board election districts constituted a violation of the one-person one-vote mandate of the Equal Protection Clause. Aplt. App. at 000625- 000837. On September 14, 2015, the County filed *San Juan County's Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment as to Fourth Claim for Relief*, which argued that the deviation of the School Board plan was actually

38.22%, but that the County was exempt from the requirements of the Equal Protection Clause due to circumstances of geography and a policy which sought to have at least one school in each School District election district. *Id.* at 001984-002057. On December 9, 2015, the District Court entered a *Memorandum Decision and Order* granting the Plaintiffs-Appellees' summary judgment motion and finding that the 38% deviation violated the one-person one-vote mandate of the Equal Protection Clause because the County did not articulate a legitimate governmental interest supporting its deviation from equal distribution of voters among election districts. *Id.* at 008343-008371. On December 21, 2015, the District Court ordered the County to draft a remedial plan for School Board election districts, with the remedial districts to be of as nearly of equal population as practicable. *Id.* at 008372-008374.

On September 9, 2015, the County filed *San Juan County's Motion for Summary Judgment on First Claim for Relief*, which argued that the County Commission election district plan did not violate the one-person one-vote demand of the Equal Protection Clause and was not established or maintained on the basis of racial discrimination. Aplt. App. at 002154-002193. The County also argued that the 1984 consent decree required it to establish and maintain Commission District Three as a racially-packed

Indian election district. *Id.* at 002068-002069. On October 26, 2015, the Plaintiffs-Appellees filed *Plaintiffs' Cross Motion for Summary Judgment and Memorandum of Law in Support on First Claim for Relief*, which pointed out that the Plaintiffs-Appellees had not made a claim that the County Commission election districts violated the one-person one-vote mandate and then showed that the County Commission had drawn Commission District Three intentionally to have a heavy majority of Indian voters; in short, that the Commission had used a racial classification as the predominant factor in drawing Commission District Three. Aplt. App. at 005572-005596. On February 19, 2016, the District Court entered a *Memorandum Decision and Order* granting the Plaintiffs-Appellees' summary judgment motion and finding that the 1984 consent decree did not require the County to draw and maintain Commission District Three as a racially-packed Indian district and that the County lacked a compelling governmental interest for its racially-motivated districting decisions. Aplt. App. at 009827-009859 The Court also ordered that the County Commission election districts be redrawn.

On January 20, 2016, the County submitted its remedial plan for the School Board election districts. Aplt. App. at 008378-008397. On June 28, 2016, the District Court entered an order allowing the parties to conduct

discovery into the evidence and methodologies used to develop the remedial plans. *Id.* On July 13, 2016, the District Court entered a Minute Order clarifying the procedures to be used for this remedial stage discovery. On July 14, 2016, the County submitted its remedial plan for the County Commission election districts. *Id.* at 009933-009990. Discovery concerning the remedial plans was then conducted.

On October 12, 2016, the Plaintiffs-Appellees filed *Plaintiffs' Objections to San Juan County's Proposed Districting Plans*, which pointed out that race was the dominant and controlling consideration in the development of the County's remedial plans, as they were once again designed to track racial proportions in the County. Aplt. App. at 010058- 010691. On July 14, 2017, the District Court entered a *Memorandum Decision and Order* finding that the County's remedial plans failed to pass constitutional muster and violated the Equal Protection Clause because race was the predominant factor in the development of District Three of the School Board plan and Districts One and Two of the County Commission plan. *Id*. at 10825-010866. The District Court then decided it would appoint a special master to assist the Court in drawing lawful districting plans. *Id*.

After soliciting recommendations from the parties, on September 29, 2017, the District Court appointed Dr. Bernard Grofman to serve as the

special master. Aplt. App. at 010869-010877. On November 13, 2017, Dr. Grofman circulated his Preliminary Report, which included his proposed districting plans for the County Commission and the School Board, to the parties for their review and comments. *Id.* at 010957-011008. On November 16, 2017, the District Court held public hearings in Monticello and Bluff, Utah, to receive public input concerning Dr. Grofman's proposed plans. On December 5, 2017, Dr. Grofman circulated his Final Report, which contained revised remedial plans based on comments submitted by the parties and the public. *Id.* at 011009-011042.

On December 21, 2017, the District Court entered a *Memorandum Decision and Order* adopting Dr. Grofman's proposed remedial districting plans, ordering their use in the November 2018 election and further ordering that all seats for the County Commission and the School Board be placed on the 2018 ballot pursuant to the newly adopted plans. Aplt. App. at 011064-011120. On January 11, 2018, the District Court entered a *Judgment* incorporating the orders of the *Memorandum Decision and Order* and closing the case. *Id*. at 011147-011150. On the same day, the County filed a *Notice of Appeal* and a *Motion to Stay Enforcement of Judgment*. *Id*. at

011153-011155. On February 16, 2018, the District Court entered an order denying the stay.[5] Aplee. Supp. App. at 002497-002512.

ARGUMENT

I. The 1984 *Agreed Settlement and Order* entered in *United States v. San Juan County, et al.* has no bearing on this case.

The County makes two central arguments whose foundation is the 1984 *Agreed Settlement and Order* (sometimes referred to in this case as a consent decree) entered in an unrelated case, *United States v. San Juan County*. First, the County argues that the complaint in this case represents a collateral attack on the consent decree because this case sought to modify the consent decree, thereby making the United States an indispensable party and depriving the District Court of subject matter jurisdiction because the United States was not joined as a party. Second, the County uses the consent decree to argue that it had a compelling state interest to maintain a racially-packed County Commission district because the consent decree directed it to do so.

On November 22, 1983, the United States filed a Complaint against the County and various County officials for declaratory and injunctive relief to remedy violations of the Voting Rights Act and the Fourteenth and Fifteenth

[5] There have been several post-judgment issues brought before the District Court, such as the *Motion for Attorneys' Fees and Costs* filed by the Plaintiffs-Appellees on February 15, 2018, but those post-judgment motions have no bearing on the present appeal.

Amendments to the Constitution due to the use of at-large voting to elect the three members of the County Commission in violation of the rights of Indian voters. *United States v. San Juan County*, C-83-1286W (1984), Aplt. App. at 000277-000278. The relief requested by the United States narrowly focused on ending the use of at-large voting for elections to the County Commission. *Id.* at 000277-000279. The Plaintiffs-Appellees in the present case, including the Navajo Nation, were not parties to *United States v. San Juan County* and it was not a class action lawsuit.

On April 4, 1984, the District Court entered the *Agreed Settlement and Order* in which the County agreed that its process for the selection of Commissioners violated the Voting Rights Act, further agreed that it would continue implementation of a process to adopt a form of County government through which Commissioners would no longer be elected at-large, but instead from single-member election districts, denied the specific allegations of the Complaint and reserved all other issues. The *Agreed Settlement and Order* did not address any other issues, including the alleged violations of the Fourteenth and Fifteenth Amendments. The Court retained jurisdiction in the event the "County should for any reason fail to take action . . . to modify the process leading to the selection of County Commissioners . . . ." Aplt.

App. at 000212-000213.[6] In November 1984, the County adopted a system in which Commissioners were henceforth elected from three single-member districts. That plan was neither created nor approved by the District Court.[7]

A. The District Court had subject matter jurisdiction over the First Claim because that claim did not constitute a collateral attack on the 1984 consent decree.

On February 13, 2014, the County filed a motion to dismiss the First and Second Claims (Motion) of the Second Amended Complaint. The specific grounds cited by the County to support its Motion were that the First and Second Claims constituted an impermissible collateral attack on the *Agreed Settlement and Order*. The specific grounds cited by the County in support of its Motion under Rules 12(b)(7) and 19 is that the United States, as one of the parties to the 1983 litigation and a signer of the *Agreed Settlement and Orde*r, is an indispensable party to the present case. The County argued that only the United States could challenge the County's unconstitutional failure to reapportion election districts following each

[6] The case was subsequently closed without further filings or orders.
[7] The County makes a number of misleading characterizations about this plan in its Opening Brief, implying that the United States was aware of the plan and gave its tacit approval to the plan. *See e.g.* Aplt. Opening Brief at 43. However, there is simply no evidence in the record that the United States or the District Court in any way participated in the creation, approval or implementation of the plan.

decennial census, presumably by re-opening the *Agreed Settlement and Order*.

The District Court denied the motion to dismiss. Aplt. App. at 000449-000458. The District Court agreed that parties to a consent decree cannot collaterally attack the judgment in a separate action, but pointed out that the Navajo Nation and the individual Plaintiffs-Appellees were not parties to the 1984 consent decree nor were they in privity with parties to the consent decree. *Id.* The District Court also ruled that the Plaintiffs-Appellees were also not in any event seeking to modify the 1984 consent decree. *Id.*

On appeal, the County raises these arguments once again in largely unmodified form, correctly pointing out that denial of a motion to dismiss for lack of subject matter jurisdiction are subject to de novo review by the Court of Appeals. However, while the County manages to identify the standard of review, the rest of its analysis founders on the lack of any evidentiary record to support it. The County argues the following:

1. The United States brought the 1983 case on behalf of the Navajo Nation;

2. The County had to submit a redistricting plan that was acceptable to the United States and created County Commission

District Three as a packed Indian district at the insistence of the United States;

3. Once racially packed District Three was created, it could never be changed except with the participation of the United States.

The problem with these arguments is that they are either inconsistent with the explicit terms of the 1984 consent decree or are completely unsupported in, or contradicted by, the record. The only evidence the County ever provided to the District Court in support of these arguments is the entirely conjectural opinion of a former County Clerk/Auditor that she believed the United States Department of Justice wanted the County to create a packed Indian district. Aplt. App. at 002159, 007213. The language of the consent decree does not discuss District Three and does not say that this district must be heavily concentrated with Indian voters. The County provided no evidence that it had to submit its districting plans to the United States or that it ever submitted its plans to the United States.

The record and the plain language of the 1984 consent decree annihilate the County's arguments. As the District Court correctly pointed out, the "substance" of the 1984 consent decree "was the establishment of an election system in which San Juan County Commissioners were selected from three single-member districts rather than through at-large voting." Aplt.

App. at 000453. It was the alteration of a form of government (at-large to single member election districts) that was the object of the 1984 consent decree. The document does not define the boundaries of districts nor does it state anywhere that such districts had to be maintained in perpetuity. The document does not discuss the specific demographic composition of such districts. *Id*.

The present case did not seek to change the 1984 consent decree in any way. The Plaintiffs-Appellees did not seek a return of at large-voting or an end to the current system of having three-single member election districts. The present case sought only to adjust the boundaries of those three districts to make them consistent with the requirements of the Equal Protection Clause and Section 2 of the Voting Rights Act and comply with state law requiring redistricting after the 2010 decennial census. None of the relief sought by the Plaintiffs-Appellees and none of the relief ordered by the District Court required modification of the 1984 consent decree; the system of at-large voting established by the 1984 consent decree remains intact. Aplt. App. at 009851. Because the Plaintiffs-Appellees never sought to

modify the 1984 consent decree, this case is not a collateral attack on the 1984 consent decree.[8]

The County also argues that the United States is an indispensable party to this case for the same reason: that this case sought to modify the 1984 consent decree. But as is discussed above, the Plaintiffs-Appellees did not seek relief under the 1984 consent decree, were not seeking to modify it, and their Complaint did not in any way address the subject matter of the 1984 consent decree; that is, the establishment of a system of county governance based on single-member election districts. Therefore, the relief requested and ordered in this case leads to no impairment of any interest contemplated by the 1984 consent decree, nor does it violate or contradict any order

[8] The County also makes an odd argument that the collateral attack doctrine applies to the Plaintiffs-Appellees in this case because they are somehow in privity with the plaintiff, the United States, in the 1983 case. Even if this were true, it would be irrelevant because, as discussed above, the Plaintiffs-Appellees in this case have never sought to end the single-member election district system of County government established in the 1984 consent decree and are perfectly content to concede that the United States, the County and the Plaintiffs-Appellees *all* remain bound by the express terms of the 1984 consent decree. That aside, the Plaintiffs-Appellees were not parties to the 1983 case, notwithstanding the unsupported assertion of the County that the case was brought by the United States "on behalf" of the Plaintiffs-Appellees, which is the *sine qua non* of the collateral attack doctrine. *Ashley v. City of Jackson*, *Miss*., 464 U.S. 900, 902 (1983) ("It is fundamental premise of preclusion law that nonparties to a prior action are not bound by the judgment.").

entered in the earlier case. The United States is simply not an indispensable party to this case.

B. The County Did Not Have a Compelling Interest in Maintaining County Commission District Three as a Racially-Packed District.

Because the County believes the 1984 consent decree required it to create Commission District Three as racially-packed with Indian voters, it further believes that compliance with this alleged mandate gives it a compelling state interest that passes strict scrutiny in creating and maintaining that racially-packed district in perpetuity. This argument fails for the same reason as its argument that this case is a collateral attack on the 1984 consent decree. The 1984 consent decree does nothing more than commit the County to creating a system of County government based upon single-member election districts: it does not create or approve any of those districts and it does not state that one of the districts must be racially-packed with Indian voters. It does not discuss the specific demographic composition of any election district. The consent decree was merely a vehicle to transition from at-large to single member election districts. The consent decree did not propose or fix lines. The 1984 consent decree established no district lines, nor specific requirements for the contemplated districts, other than that they be "'fairly drawn single member districts as authorized by state law.'" Aplt.

App. at 009833. Consequently, there is nothing in the 1984 consent decree that supports the County's contention that it was required to create and maintain a racially-packed County Commission district.

The County also believes that it was compelled to create a racially-packed County Commission election district in order to comply with Section 2 of the Voting Rights Act. This is a largely incomprehensible argument. Although the County acknowledged that it had "not fully complied with" Section 2 of the Voting Rights Act in the 1984 consent decree (a more palatable way of acknowledging a violation, perhaps), this applied only to its past actions bearing on at-large voting. Neither the County nor the District Court made any statement in the 1984 consent decree that bears on future Section 2 compliance, namely, the apportionment and composition of election districts following decennial censuses. And in this latter regard, the County has consistently argued throughout the present case that it has never violated Section 2.[9] Compliance with Section 2 cannot be used as a pretext

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[9] The County acknowledged a violation of Section 2 in the 1984 consent decree but only that it had not fully complied with Section 2 with regard to at-large voting. The County denied the existence of the threshold factors requisite to establish Section 2 violations throughout this litigation, opposing motions by the Plaintiffs-Appellees to establish the component parts of a Section 2 violation. For example, the County argued in opposition to one of the Plaintiffs-Appellees' motions that Indian population of the County lacked political cohesion and that white voters did not vote as a bloc to

by a government for creating a racially-packed election district when the government consistently denies that it has ever violated Section 2 with regard to the racial composition of districts.

The County has not provided a compelling state interest supporting the creation and maintenance of racially-packed County Commission District 3 and the decision of the District Court in this regard must be upheld.

II. The County Did Not Present Any Special Circumstances to the District Court That Justify the County's 38% Population Deviation Between School Board Election Districts.

A. The County's claimed policy of placing a school in each School Board election district, variously called the School Community Principle and the School Community Concept and the School Community Philosophy, is largely unsupported in the record.

The County's opening brief heavily emphasizes a purported policy of placing a school in each School Board election district. Whether this policy even exists is based on a single declaration written in 2015 from a former School District superintendent, which explains the policy in the most superficial terms. Aplee. Supp. App. at 002035-002043. The declarant variously described this as a "policy," a "philosophy" or both. *Id.* at ¶ 21. The County never placed in evidence an actual written policy, adopted prior to the 1992 School Board districting plan (which the County admitted was

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defeat the preferred candidates of Indian voters. *See e.g.* Aplt. App. at 007391, 007393, 07435-007439; 010556-010557; 010861.

never amended after 1992), a resolution of the School Board explaining the policy and the reasons for its adoption, or any evidence of how it was used in practice to create the five districts under the 1992 districting plan that the District Court eventually determined to violate the Equal Protection Clause. In this regard, it is interesting to note that the "policy" evolved over the course of the litigation, changing from making it desirable to having at least one school in each district to having an elementary school, a middle school and a high school in each district; a distribution that did not even exist under the 1992 plan.

In the end, however, the District Court did take the claimed policy into account in determining whether a 38% deviation was justified. Aplt. App. at 011077-011079.The District Court even considered this hazy policy when adopting the Special Master's proposed plan. The District Court considered the balance of school attendance, catchment populations and school attendance. The District Court then made adjustments to deal with a potential Section 2 issue. The record amply documents that the District Court gave thoughtful consideration to the School Board's "policy/philosophy/concept." Aplt. App. at 011078-011079. The County's belief that the "School Community Concept" or "School Community

Principle" somehow justifies a massive departure from the one-person one-vote mandate of the Equal Protection Clause is implausible, at best.

B. The District Court applied the correct level of scrutiny in deciding whether the County's asserted justifications for a 38% deviation failed to demonstrate a legitimate governmental interest sufficient to support a facial violation of the Equal Protection Clause.

In addition to the ever-evolving "School Community Principle," the County cited to a number of factors to justify its violation of the one-person one-vote mandate: 1) the County is large and has a difficult geography; 2) the County's belief that it needed to follow survey section lines and polling places in drawing district boundaries; 3) the need to adhere to the "School Community Concept"; 4) the County's inability to draw election districts with a 10% or less deviation in light of these special problems; and 5) the fact that just two districts account for the high overall deviations. The District Court examined each of these justifications in turn to determine whether they supported a departure from the one-person one-vote mandate.

In so doing, the District Court applied a lower standard, one less stringent than strict scrutiny: a "legitimate considerations" test. The Anderson-Burdick test used by the District Court is an intermediate balancing analysis. *Burdick v. Takushi*, 504 U.S. 428 (1992); *Anderson v. Celebrezze*, 460 U.S. 780 (1983). This test looks at the magnitude of the

constitutional injury against asserted justifications of the government entity claimed to support the injury. "Under Anderson-Burdick, a 'court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the rights protected by the Fourteenth Amendment [] that the plaintiff seeks to vindicate against the precise interests put forward by the [government] as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789) (internal quotation marks omitted).

Using this test, the District Court weighed the character and magnitude of the constitutional injury imposed by the 1992 School Board districting plan against the interests asserted by the County in support of that injury, taking into consideration the extent to which those interests made it necessary to burden the Plaintiffs-Appellees' rights. Aplt. App. at 008360 (quoting *Obama for America. v. Husted*, 697 F.3d 423, 433 (6th Cir. 2012) (quoting *Burdick*, 504 U.S. at 434)). The constitutional injury was crystal clear: an extraordinarily high 38% deviation in population between election districts that had been left in place for more than 20 years without any effort by the County to address the problem. The District Court determined that

this stark and dramatic population deviation increased the magnitude of the constitutional injury and rendered the population apportionment of the 1992 Plan more constitutionally suspect. Aplt. App. at 008362.

The District Court then addressed each justification provided by the County in support of this departure from the one-person one-vote mandate and found that the County did not carry its burden to demonstrate that the unequal distribution serves a legitimate governmental interest. The District Court disposed of each of the County's asserted justifications after a thorough review as follows: (1) established Supreme Court precedent has disposed of the notion that sparse population may justify departure from population equality; (2) existing survey section lines and polling places are not relevant political subdivisions and the County uses vote-by-mail, which undermines the importance of polling locations; (3) the School Community Concept may not be relied upon as a justification when its implementation violates state law, or when it would entitle families with children to a greater voice in School Board decisions and because it may be realized in districts of equal population; (4) it is feasible to redistrict within 10% deviation; and (5) the fact that two districts are responsible for the high deviation is unremarkable and the fact that the under-represented district is majority white is irrelevant. Aplt. App. at 008362-008370.

The County now attacks the District Court's careful and exacting analysis by asserting that it applied the wrong level of scrutiny. The Court carefully analyzed the Supreme Court's jurisprudence stemming from *Reynolds v. Sims*. The Court concluded that a less stringent standard applied, and even provided the County with "some level of deference to the districting governmental entity." Aplt. App. at 00834-008356.

Nevertheless, the County claims the District Court should have applied a rational basis standard of review but provides no authority to support this claim. As well, the County offers no explanation why the rational basis standard would change the result where the Court had employed a flexible intermediate standard that may be viewed as lenient. It also argues the District Court should have considered all of the County's asserted justifications as a whole when applying the Anderson-Burdick test, but again provides no authority in support of this argument. In any event, the County also fails to explain how it has divined that the District Court did not, in fact, consider those justifications as a whole. A set of inherently weak, poorly developed justifications for a massive constitutional injury are just as unlikely to support the injury when examined separately or as a whole.

The District Court applied the correct level of intermediate scrutiny. And it may be that intentionally maintaining election districts with a

deviation of nearly four times over the constitutional limit and ignoring the duty to evaluate and revise election districts at every decennial census, coupled with weak excuses, would fail even the strictest standards. The Court properly concluded that the County's asserted justifications did not demonstrate a legitimate governmental interest to support its enormous departure from the one-person one-vote mandate of the Equal Protection Clause.

III. The Court correctly reviewed the County's proposed remedial plans and appropriately determined that such plans were unlawful.

A. Standard of Review

The standard of review for the District Court's determination that the County's proposed remedial plans violated the Equal Protection Clause is clear error standard. *Cooper v. Harris*, 137 S. Ct. 1455, 1459 (2017). Under this standard, the District Court's findings that race predominated the drafting of the Commission and School Board districting plans must be upheld because there cannot be "two permissible views of the evidence." *Id.* at 1460 (quoting *Anderson v. Bessemer City*, 470 U.S. 564 (1985)). The County's actions, as determined by the District Court's exhaustive district-by-district analysis, were clearly unlawful.

B. The Court correctly determined that race was the predominant factor for certain election districts in the County's proposed remedial plans.

The County asserts that the District Court limited its ability to draw lawful remedial election districts because it required the County to respect the Equal Protection Clause, comply with the Voting Rights Act, and achieve as nearly equal population as practicable among election districts. *See Reynolds*, 377 U.S. at 577; *Chapman v. Meier*, 420 U.S. 1, 22 (1975). The District Court was well within its discretion to instruct the County to draft remedial plans according to these guidelines. *Id.*

First, District Courts have broad discretion to fashion appropriate remedies for violations of federal law found in election districting plans. *Karcher v. Daggett*, 466 U.S. 910, 910 (1984).[14] Although federal courts must respect the state's interest in managing its own elections to the extent they are consistent with federal law, once judicial authority is invoked, "the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *See e.g.*

[14] "While a legislatively enacted reapportionment plan is the preferred remedy after a judicial finding of unconstitutional apportionment, I believe that the Supreme Court cases articulating this preference do not contemplate that a legislature can satisfy this responsibility—and therefore avoid the more stringent requirements applicable to court-ordered plans—by submitting a plan that not only has not been enacted pursuant to valid state procedures governing reapportionment but also has in fact been fashioned in derogation of those procedures." *Large v. Fremont Cty., Wyo.*, 670 F.3d 1133, 1144 (10th Cir. 2012) quoting *Tallahassee Branch of NAACP v. Leon Cty., Fla.*, 827 F.2d 1436, 1447 (11th Cir. 1987).

Milliken. v. Bradley, 433 U.S. 267, 281 (1977) (citing *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15 (1971)). The District Court's broad authority includes ordering remedial election districts that are of nearly equal population as is practicable. *Reynolds,* 377 U.S. at 577.

Second, it was appropriate for the District Court to require "as nearly of equal population as practicable" as a standard for remedial election districts. The goal of population equality is not a traditional redistricting principle. Rather, it is a background rule, which is "taken as a given, when determining whether race, or other factors, predominate in a legislator's determination as to how equal population objectives will be met." *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1270 (2015). It is not one factor to be weighed against the use of race. *Id*.

The County points to two Supreme Court cases, *Evenwel v. Abbott* and *Brown v. Thomson* to assert that it should have been granted more leniency. Aplt. Opening Brief at 60. But neither case supports the assertion that a court may not order districting plans of nearly equal population in the context of court-ordered remedial plans. *See Evenwel v. Abbott* 136 S. C.t 1120, 1124 (2016); *Brown v. Thomson*, 462 U.S. 835, 842 (1983).[15] The

[15] *Brown v. Thomson* can easily be distinguished on many grounds, including the fact that an entirely consistent and nondiscriminatory

standard does not imply that the overall population deviation must be zero, but rather that is must be as close to zero as is practicable. The record does not support that had the County been granted more lenient standard than "practicable," it would have abandoned its unlawful policy of proportionality and prioritizing racial targets. Perhaps most importantly, remedial plans drafted by the Special Master and implemented by the District Court demonstrate that it is entirely feasible to achieve equal population among districts in remedial plans that otherwise comply with the Equal Protection Clause and Voting Rights Act. The County does not, and cannot, link the requirement to achieve equal population within districts to the County's application of proportionality (i.e. impermissible use of race) to its drawing of Commission District 1 and 2 and School Board District 3.

Third, it is evident that the District Court did not give the County an impossible task nor place the County in a "catch-22" when it required compliance with the Equal Protection Clause and the Voting Rights Act. Certainly, neither Plaintiffs-Appellees' expert nor the Special Master encountered any difficulties in fashioning a suitable remedy. The Supreme Court instructs courts to engage in a district-by-district analysis to determine

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application of a legitimate state policy was the basis for that county's apportionment. 462 U.S. at 835.

whether race was subordinated to traditional redistricting principles in terms of the decision to place a significant number of voters within or without particular districts. In this case, the District Court engaged in the requisite district-by-district analysis in concluding that race was the predominant factor in the development of Commission Districts 1 and 2 and School Board District 3.

In entering judgment against the County, the District Court found that the County Commission placed race above all other redistricting criteria. The County ran afoul of the Constitution in deliberately maintaining a Commission seat based solely on race. Yet, without a hint of remorse or apology, the County now claims that Section 2 compliance requires a racial quota in certain districts that matches the overall racial demographic composition of the County. The County has never offered any authority in support of this constitutionally offensive notion. Aplt. App. at 010825 - 010864.[16] The District Court then found that race was the predominant factor in the development of School Board District 3 because the County placed a

[16] The fact that the County's expert testified that he was unable to complete any Section 2 analyses was instructive. Aplt. App. at 010852. The District Court considered direct evidence of the County's proportionality goal (expert testimony) and circumstantial evidence (demographic composition of election districts) to determine that the County achieved racial proportionality in its remedial plans.

significant number of voters in this district with the express goal of mirroring the overall racial demographic composition of the County. *Id*. at 010855.[17] Similarly, the District Court determined that Commission District 2 was created on the basis of race. Testimony by the County's expert described how he intentionally sought to alter the racial composition of this district by altering district lines. This was proof of racial animus. *Id*. at 010857.[18]

C. The Court correctly determined that the County's proposed remedial plans were not narrowly tailored to achieve a compelling governmental interest.

The County argues that its attempt to comply with the Voting Rights Act constitutes a compelling interest. Although the Supreme Court has assumed that Section 2 compliance may be a compelling interest, the District Court properly found that Section 2 compliance was not available to the

[17] Circumstantial evidence the District Court relied on included the "oddly-shaped, non-compact District 3," the fact that it is an outlier compared to other districts, unusually high number of precinct splits created by the district, and the lack of any explanation for the district. Aplt. App. at 010855- 010857.

[18] The evidence that race predominated in Commission District 1 was tightly bound to District 2, due to the decision to split Navajo communities and to pair the disparate Spanish Valley and Navajo Mount precincts, which are "hundreds of miles apart, share no common infrastructure, and share few common interests." Aplt. App. at 010858. The County's expert testified that he looked only at race and did not consider these other factors in delineating boundaries and placing voters within Districts 1 and 2. Aplt. App. at 010858.

County as a justification for race-based redistricting, even under the relaxed version of narrow tailoring.[19] Aplt. App. at 010860. *See Cooper*, 137 S. Ct. at 1469 (2017). The County needed a "strong basis in evidence" demonstrating that it had good reasons to believe its actions were required by statute. Aplt. App. at 010860 (*citing Cooper*, 137 S. Ct. at 1464; *Sanchez v. Colorado*, 97 F.3d 1303, 1328 (10th Cir. 1996)).

The District Court found no evidence on the record that the County had good reason to think it would violate the Voting Rights Act if it did not use race to draw district lines. In fact, the record instead supports a conclusion that, throughout this case, the County consistently argued that the Navajo Nation failed to establish the *Gingles* factors, which are the threshold requirements to a Section 2 violation. Aplt. App. at 010861. The County Commissioners explicitly rejected the existence of a Section 2 violation and the County vigorously denied the existence of a Section 2 violation. *Id*. *See Thornburg v. Gingles*, 478 US 30 (1986). In its opening brief, the County provides no evidence, other than an awareness of the "Consent Decree's implications" and the Navajo Nation's allegations, to show that it had good

[19] The Tenth Circuit has accepted that compliance with the Voting Rights Act is a compelling governmental interest. See Aplt. App. at 10860 *citing Sanchez*, 97 F.3d at 1328 ("[C]ompliance with § 2 of the VRA constitutes a compelling governmental interest.").

reason to think its race-based decisions were necessary. Aplt. Opening Brief at 64. This falls far short of a strong basis in evidence. The District Court properly found that Section 2 compliance is not available to the County as a defense.

After suggesting that it complied with Section 2 as a defense to race-based redistricting, the County then admits it never performed the requisite Section 2 analysis. Aplt. Opening Brief at 57. It blames its inability to perform a Section 2 analysis on the Navajo Nation's unwillingness to provide it with certain data that it requested and asserts that it was "forced" to use proportionality as a result. Aplt. Opening Brief at 65. The County's argument that it was "forced" to use proportionality to achieve Section 2 compliance is directly at odds with its argument that it had "good reason" to use proportionality. This argument is merely a distraction and was not an issue properly raised before the District Court. The data at issue is voter data maintained by the Navajo Nation. These data are relevant only to elections on the Navajo Nation because individuals vote by their Navajo Nation chapter of their birth, and not at their current physical residence.[20] Aplee. Supp. App. at 000307-000325.

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[20] Importantly, after filing a motion to compel the Navajo Nation to provide these data, the County failed to follow up.

The Section 2 analyses at issue here, namely the threshold *Gingles* factors, which include geographic distribution of minority populations and an analysis of racially polarized voting, may be completed entirely on the basis of publicly available data from the U.S. Census Bureau and data on voter turnout, which the County maintains. Aplee. Supp. App. at 002404-002416; Aplt. App. at 010810-010824.

Even if the County could prove that it had good reason to believe a Section 2 violation required a remedy, the District Court properly found that its "broad use of proportionality" was not narrowly tailored and may not be leveraged as a safe harbor from Section 2 liability. Aplt. App. at 010862 (citing *Johnson v. De Grandy*, 512 U.S. 997, 1019-20 (1994)).

IV. The Court correctly adopted the Special Master's proposed remedial redistricting plans and ordered special elections.

A. Standard of Review

The County incorrectly asserts that the Court's remedy in this case is subject to review de novo. The appropriateness of the District Court's chosen remedy is reviewed for an abuse of discretion. *See Large v. Fremont Cty., Wyo.*, 670 F.3d 1133, 1139 (10th Cir. 2012) (citing *Connor v. Finch*, 431 U.S. 407, 415 (1977)). Under this highly deferential standard, the District Court's chosen remedy must be upheld. *See e.g. In re Bolar Pharm.*

Co. Sec. Litig., 966 F.2d 731, 732 (2d Cir. 1992) (per curiam); *see also Wayte v. United States*, 470 U.S. 598, 624–25 (1985).

The County argues that the Court of Appeals must apply strict scrutiny to the District Court's remedial districting plans because those plans were impermissibly based on race. The County has not met its burden of showing that race predominated. *See Miller v. Johnson*, 515 U.S. 900, 913 (1995). It fails to point to any relevant circumstantial or direct evidence of intent in the record that resulted in the Special Master placing a significant number of voters within a particular election district. *See* Aplt. App. at 011082-011088. The County also alleged that the Special Master improperly considered political affiliations and perpetrated a fraud on the Court. No evidence was presented regarding that claim. *Id*., at 011087; 011629-011713. Therefore, the strict scrutiny standard does not apply.

B. The District Court's remedial districting plans for Commission and School Board are lawful.

The Court implemented, with modifications, the Special Master's recommended remedial districts, which were supported by specific factual analyses and based on substantial evidence in the record. Aplt. App. at 011009-011042. Prior to implementing election districts, the District Court established an in-depth process for the development of remedial plans, including appointing a special master, providing detailed instructions for the

development of plans, allowing for the input of parties' experts, providing for multiple public hearings, and reviewing and refining the remedial plans based on input from the parties and the public over many weeks. The District Court adopted the final recommended plans only after careful review.

The County makes baseless arguments that the final court-ordered remedial plans are unlawful. It suggests, without evidence, that the plans were drawn on the basis of race while at the same time accusing the Special Master of fraud. Aptl. App. at 011639-011651. However, the District Court considered whether the Special Master committed fraud and lied to the District Court. The District Court found that the County had no evidence and the accusations were "entirely unsubstantiated." Aplt. App. at 011084-011085. The District Court rejected the County's claim that the Special Master's proposed School Board Districts violated Section 2 of the Voting Rights Act. The District Court found that there was no violation because the County failed to substantiate the factors required to prove a violation. Aplt. App. at 011091-011092. The District Court considered the County's contention that Section 2 was violated because the plan discriminates against white citizens. Despite being challenged by the District Court at a hearing, the County could not cite specific evidence in support of its claim. *Id.* at

011092-011093. The District Court carefully considered other County arguments and found them unsupported by law or completely lacking in evidence. *Id.* at 011093-011094. The District Court was especially concerned about the County's apparent embrace of predominately white election districts based on unlawful racial quotas. *Id.* at 011095.

The County argues that because the community of Blanding is split, the Court-ordered plans do not respect traditional redistricting criteria.[23] This argument is entirely without merit because, as the County acknowledges, "satisfying the constitutional requirement of one person, one vote requires that Blanding, which has a population within its city boundaries that is greater than the ideal district size for a Commission district, be divided." Aplt. App. at 10904. The Special Master concurred that a split of the City of Blanding is "mathematically mandated." Aplt. App. at 011011. Even the unconstitutional districting plans in effect before this litigation divided Blanding. Aplt. App. at 11010–11011. It is abundantly clear that the District

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[23] The County argues that the Blanding "community," whose existence or boundaries the County never bothered to prove to the District Court, rather that the City of Blanding with legally defined boundaries, should have been the basis of redistricting. The City itself has also made such an argument in an amicus brief. Amicus of Amicus Curiae, City of Blanding at 8. These speculative arguments simply have no support in the record. Aplee. Response to Motion to File Amicus Brief at 4-5.

Court went to great lengths to consider Blanding's interests in the development of the remedial plans. *See e.g.* Aplt. App. at 011064-011120

C. The District Court did not err when it ordered Special Elections.

The District Court had broad discretion to order appropriate remedial relief, including ordering special elections, and its decision to implement special elections must be upheld under review for an abuse of discretion. *Ketchum v. City Council of City of Chicago, Illinois*, 630 F. Supp. 551, 565 (N.D.Ill. 1985); *Bell v. Southwell*, 376 F.2d 659, 664 (5th Cir. 1967). Remedial relief in the context of redistricting should be "'fashioned in the light of well-known principles of equity.'" *North Carolina v. Covington*, 137 S. Ct. 1624, 1625, 198 L. Ed. 2d 110 (U.S. 2017) (*quoting Reynolds*, 377 U.S. at 585). In determining appropriate relief, "[a] district court … must undertake an 'equitable weighing process' to select a fitting remedy for the legal violations it has identified." *Covington*, 137 S. Ct. at 1625 (quoting *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 183, n. 36, 105 S.Ct. 1128, 84 L.Ed.2d 124 (1985)). The Court must take into account "'what is necessary, what is fair, and what is workable.'" Aptl. App. at 011099 quoting *Covington*, 137 S. Ct. at 1625 *(internal quotations omitted*).

In *Covington*, the Court outlined three factors to consider when imposing special elections, including "the severity and nature of the

particular constitutional violation, the extent of the likely disruption to the ordinary processes of governance if early elections are imposed, and the need to act with proper judicial restraint when intruding on state sovereignty." *Covington,* 137 S. Ct.. at 1626. *See* Aplt. App. at 011100.

The record shows that the Court carefully analyzed the Special Master's findings in detail and incorporated these findings in its final decision to adopt the remedial plans and order new elections for all Commission and School Board districts and seats in 2018. It did so in light of the three *Covington* factors by determining that the constitutional violations were longstanding and severe, there would be no significant disruption to governance, the County did not object to the recommendation that special elections occur, and that such elections would not intrude on state sovereignty. Aplt. App. at 011097-011100. Because the Court found, after a painstaking factual analysis, that racial discrimination was the basis for the County's Commission plan and interim School Board plan and that all plans violated the Equal Protection Clause and met the factors outlined in *Covington*, it was well within the Court's discretion to order elections for all seats affected by those unconstitutional plans.

CONCLUSION

The linchpin that holds the County's arguments together is its oft repeated belief that the 1984 consent decree required it to establish a racially-packed County Commission district and maintain that district in perpetuity. That belief informed the County's decision to use racial proportions to draw remedial election districts even after the District Court made it crystal clear to the County that it could not use racial classifications in that way.

The plain and simple language of the 1984 consent decree does not say anything that the County, in its heated imagination, hopes and dreams it says. It commits the County to establish single-member election districts; nothing more. It did not establish any election district plan. It did not approve the configuration of any election district. It did not relieve the County of the duty to comply with the Equal Protection Clause.

Once that linchpin is gone, the wheels fall off the County's case. Once that linchpin is gone, it is clear that the District Court's remedies were entirely appropriate.

There are a handful of issues, like the massive 38% deviation for the School Board election districts, which are unrelated to the 1984 consent decree. But even those are easily disposed of because they are all premised on an inadequate record. For example, the County argues that a claimed

"School Community" concept/policy/philosophy justifies its departure from the one-person one-vote mandate, but provided no evidence to the District Court of the very existence of this in 1992 when the School Board districting plan was drawn. Nonetheless, the District Court accommodated this "policy." Other claims, that the Special Master defrauded the District Court or lied to the District Court, or that the District Court's remedial plans illegally discriminated against "white Republicans" are all unsupported in the record, despite efforts by the District Court to solicit evidence from the County.

Gertrude Stein once said of Oakland, California that "there is no there there," a statement now often taken to mean that nothing significant is occurring in a given situation. The same could be said of the County's arguments in this case. Once one reads the 1984 consent decree and comes to understand that there is no evidence in the record supporting any of the County's remaining arguments, the only thing one can say about the County's excuses for disenfranchising Indian voters for decades is that "there is no there there."

DATED: June 28, 2018

MAYNES, BRADFORD, SHIPPS & SHEFTEL, LLP

/s/ Steven C. Boos
Steven C. Boos

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

The undersigned hereby certifies that this APPELLEE'S OPENING BRIEF complies with type-volume and typeface requirements of Fed. R. App. P. 32(a)(7) as follows:

1.This response complies with the word limit of Fed. R. App. P. 27(d)(2)(A), because this document contains 10,655 words, excluding the parts of the document exempted by Fed. R. App. P. 27(a)(2)(B).

2. This APPELLEE'S OPENING BRIEF complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this response has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

3.As permitted by Fed. R. App. P. 32(a)(7)(C)(i), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

DATED: June 28, 2018

MAYNES, BRADFORD, SHIPPS & SHEFTEL, LLP

/s/ Steven C. Boos
Steven C. Boos

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing APPELLEES' OPENING BRIEF:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, AVG AntiVirus Business Edition, Version No. 16.161.8039, and according to the program are free of viruses.

DATED: June 28, 2018

MAYNES, BRADFORD, SHIPPS & SHEFTEL, LLP

/s/ Steven C. Boos
Steven C. Boos

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of June, 2018, I electronically filed the foregoing APPELLEES' OPENING BRIEF with the United States Court of Appeals for the Tenth Circuit. Notice will automatically be electronically mailed to the following individual(s) who are registered with the Court CM/ECF System:

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