IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CLAUDETTE CHAVEZ-HANKINS,
PAUL PACHECO, and **MIGUEL VEGA**,

Plaintiffs,

vs. NO. 1:12-cv-00140-HH-BB-WJ

DIANNA J. DURAN, in her official capacity as New Mexico Secretary of State, and **SUSANA MARTINEZ**, in her official capacity as Governor of New Mexico,

Defendants,

and

BEN LUJAN, SR., in his official capacity as Speaker of the New Mexico House of Representatives, and **TIMOTHY Z. JENNINGS**, in his official capacity as President Pro Tempore of the New Mexico Senate,

Intervenors,

and

BRIAN EGOLF, MAURILIO CASTRO, MEL HOLGUIN, HAKIM BELLAMY, and **ROXANNE SPRUCE BLY**,

Intervenors.

GOVERNOR SUSANA MARTINEZ AND SECRETARY OF STATE DIANNA J. DURAN'S OPENING BRIEF ON JURISDICTION, ABSTENTION, PRECLUSION, AND DEFERRAL ISSUES

Susana Martinez, in her official capacity as Governor of New Mexico (hereinafter referred to as "Governor"), by and through counsel of record, Paul J. Kennedy and Jessica

M. Hernandez; and Dianna J. Duran, in her official capacity as New Mexico Secretary of State (hereinafter referred to as "Secretary of State"), by and through counsel of record, Doughty & West, P.A. (Robert M. Doughty and Judd C. West), hereby submit their opening brief on the issues of jurisdiction, abstention, preclusion, and deferral pursuant to the Court's instructions at the status conference held on Friday, February 17, 2012. For the reasons set forth below, this Court has jurisdiction over this action and should not abstain from, or defer ruling on, the merits. Time is of the essence, and this Court should not defer consideration of the merits any longer based on the remote and speculative possibility that this action might later become moot if the state proceedings were to eventually result in a constitutional redistricting plan. In the more likely event that speculative possibility does not come to pass, any further deferral by this Court would leave no time to put a constitutional plan in place before the next primary election, and the constitutional rights of voters and candidates in that election would be irretrievably lost.

I. THIS COURT HAS JURISDICTION TO DECIDE THE MERITS OF PLAINTIFFS' CLAIMS.

A. The Governor and Secretary of State do not contest that Plaintiffs have standing to pursue their claims in this Court.

The Governor and Secretary of State do not contest that Plaintiffs have standing to pursue this action under Article III of the United States Constitution or that the federal question presented in this controversy is ripe for adjudication. To have standing to challenge a redistricting plan as a violation of the equal-protection principles first articulated in

Reynolds v. Sims, 377 U.S. 533, 557 (1964), a plaintiff need only allege at the pleadings stage that he is either a candidate or a voter who resides in a district that was changed by the new plan. *See Shaw v. Hunt*, 517 U.S. 899, 904 (1996) (citing *Miller v. Johnson*, 515 U.S. 900, 909 (1995)).

At the pleadings stage, the Court "must presume that the general allegations in the complaint encompass the specific facts necessary to support those allegations." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 104 (1998). "[G]eneral factual allegations of injury resulting from the defendant's conduct may suffice" to establish standing, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992), and "it is easy to presume specific facts under which [Plaintiffs] will be injured," *Bennett v. Spear*, 520 U.S. 154, 168 (1997). The Tenth Circuit has "emphasized that the requirements at the pleading stage are *de minimis*." *United Steelworkers of Am. v. Oregon Steel Mills, Inc.*, 322 F.3d 1222, 1228 (10th Cir. 2003). "[S]tanding allegations need not be crafted with precise detail, nor must the plaintiff prove his allegations of injury." *Baur v. Veneman*, 352 F.3d 625, 631 (2nd Cir. 2003). "As long as the pleadings realistically allege actual, imminent harm, standing has been established." *Arrington v. Elections Bd.*, 173 F. Supp. 2d 856, 862 (E.D. Wis. 2001) (citing *Bennett*, 520 U.S. at 167-68).

The Article III standing necessary to confer jurisdiction on this Court does not require that Plaintiffs show they will prevail on the merits of the claims asserted in their pleadings. "For purposes of the standing inquiry, the question is not whether the alleged injury rises

to the level of a constitutional violation. That is the issue on the merits. For standing purposes, we only ask if there was an injury in fact, caused by the challenged action and redressable in court." *Initiative and Referendum Inst. v. Walker*, 450 F.3d 1082, 1088 (10th Cir. 2006).

Under the clearly-established framework for adjudicating claims under the Equal Protection Clause of the Fourteenth Amendment:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.

Northeastern Fla. Chapter, Associated Gen. Contractors of Am. v. Jacksonville, 508 U.S. 656, 666 (1993) (citations omitted); *see United States v. Hays*, 515 U.S. 737, 745 (1995) (applying this principle to a redistricting case). To establish standing, therefore, parties challenging a redistricting plan need only allege at the pleadings stage that they are "able and ready" to vote or become a candidate in a district at issue and that the alleged constitutional violation prevents them from doing so "on an equal basis." *Jacksonville*, 508 U.S. at 666. "Standing predicated upon denial of a fair opportunity to compete for a position ... is well established in the law," *Colo. Envt'l Coalition v. Wenker*, 353 F.3d 1221, 1235 (10th Cir. 2004), and such an "equal footing analysis" has been routinely applied "in this circuit," *Schutz v. Thorne*, 415 F.3d 1128, 1134 (10th Cir. 2005).

B. This Controversy is Ripe for Adjudication in Federal Court.

The ripeness component of Article III's "case or controversy" requirement is satisfied here because of "the very realistic and practical problems faced by all the parties and the public--that they must now begin preparing for the primary election." *Montano v. Suffolk County Legislature*, 263 F. Supp. 2d 644, 648 (E.D.N.Y.2003); *see Graves v. City of Montgomery*, 807 F. Supp. 2d 1096, 1105-08 (M.D. Ala. 2011) (collecting cases and declining to place "the merits cart before the jurisdictional horse"). With Election Code deadlines looming, this case is now distinct from those in which a complaint was filed when elections are so far in the future that the redistricting procedures mandated by state law have not even begun. *See, e.g., Mayfield v. Texas*, 206 F. Supp. 2d 820, 824 (E.D. Tex. 2001).

The ripeness required to satisfy Article III's "case or controversy" requirement also must be distinguished from the prudential doctrine under which a federal court may defer ruling until state redistricting procedures run their due course. *See Growe v. Emison*, 507 U.S. 25, 36-37 (1993). That doctrine is not a jurisdictional requirement but rather a waivable defense which does not apply at this juncture for the reasons stated in later sections of this brief. For jurisdictional purposes, this case becomes ripe for adjudication "when citizens need to start preparing for the primary elections," regardless of whether state redistricting proceedings remain pending. *See Arrington*, 173 F. Supp. 2d at 865 (citing *New York v. United States*, 505 U.S. 144, 175 (1992)). That time is now upon us. It is therefore appropriate for this Court to exercise jurisdiction and hear the merits of Plaintiffs' claims.

C. The *Rooker-Feldman* Doctrine does not apply because Plaintiffs are not parties to the state-court litigation and are not invoking appellate jurisdiction over any state-court judgment.

The *Rooker-Feldman* doctrine is not a constitutional limitation on this Court's exercise of judicial power, but rather a matter of statutory interpretation arising from 28 U.S.C. § 1257(a), which charts the course by which parties to state-court judgments may seek appellate review in the Supreme Court of the United States. *See Mo's Express, LLC v. Sopkin*, 441 F.3d 1229, 1233 (10th Cir. 2006) (citing The Federalist No. 82, at 494 (Alexander Hamilton) (Clinton Rossiter ed. 1961)). As such, the *Rooker-Feldman* doctrine has no application here, because Plaintiffs in this case are not seeking to invoke *appellate* jurisdiction over a state-court judgment. Rather, they are asserting *original* jurisdiction in the district court under 28 U.S.C. §§ 1331, 1343(a)(3)-(4), 2201, 2202, and 2284. The appointment of a three-judge panel under 28 U.S.C. § 2284 does not change the fact that this matter is proceeding before "a *district court* of three judges." *Id.* (emphasis added).

The *Rooker-Feldman* doctrine is limited to "cases brought by state-court losers complaining of injuries caused by state-court judgments . . . and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005). This doctrine is "inapplicable where the party against whom the doctrine is invoked was not a party to the underlying state court proceeding." *Lance v. Dennis*, 546 U.S. 459, 464 (2006); *see Mo's Express, LLC*, 441 F.3d at 1234-35 (collecting cases). Plaintiffs in the present case are not parties to the state-court litigation and are not asking this

Court to conduct appellate review of any final judgment in that litigation, which has not yet been entered as of the date of this brief. *Cf. Guttman v. Khalsa*, 446 F.3d 1027, 1031 (10th Cir. 2006) (concluding that the *Rooker-Feldman* doctrine did not apply because "[s]tate proceedings had not ended when Guttman filed his federal court claim").

In determining whether someone qualifies as a "party" to a state-court proceeding for purposes of invoking the *Rooker-Feldman* doctrine, the concept of privity emanating from traditional preclusion doctrines such as *res judicata* does not apply. *See Mo's Express, LLC*, 441 F.3d at 1235-37. "The *Rooker-Feldman* doctrine does not bar actions by nonparties to the earlier state-court judgment simply because, for purposes of preclusion law, they could be considered in privity with a party to the judgment." *Lance*, 546 U.S. at 466. Thus, "any 'group[] of individuals' faced with the same legal problem is free to pursue different avenues of relief," and "[t]o the extent that strategic behavior by similarly situated parties is a concern, the proper safeguard against relitigation is *res judicata*, not *Rooker-Feldman*." *Mo's Express, LLC*, 441 F.3d at 1236-37.

II. PRECLUSION AND ABSTENTION DOCTRINES ARE NON-JURISDICTIONAL AFFIRMATIVE DEFENSES WHICH THE INTERVENORS HAVE FAILED TO SUFFICIENTLY PLEAD, MUCH LESS PROVE, IN THIS INSTANCE.

A. The Intervenors fail to meet their burden of pleading and proving that preclusion, abstention, or deferral apply here.

Unlike constitutional limitations (such as Article III's "case or controversy" requirement) or statutory limitations (such as the *Rooker-Feldman* doctrine), common-law

preclusion doctrines such as *res judicata* do not present a jurisdictional question that this Court must answer *sua sponte* before it can proceed to hear the merits of a case. Rather, such preclusion doctrines are just one of a myriad of affirmative defenses that must be proven at later stages of the litigation by the parties who specifically raise them in their pleadings. *See Taylor v. Sturgell*, 553 U.S. 880, 907 (2008) ("Claim preclusion, like issue preclusion, is an affirmative defense."); *Pelt v. Utah*, 539 F.3d 1271, 1283 (10th Cir. 2008) (holding that "claim preclusion is an affirmative defense and it is incumbent upon the defendant to plead and prove such a defense"); *St. Clair v. County of Grant*, 110 N.M. 543, 549, 797 P.2d 993, 999 (Ct. App. 1990) (concluding that *res judicata* "is an affirmative defense which must be specifically pled or it is waived").

Abstention doctrines are affirmative defenses too, and thus they may be waived if not specifically pleaded and proven. *See Guillemard-Ginorio v. Contreras-Gomez*, 585 F.3d 508, 517 (1st Cir. 2009) (holding that "abstention is a waivable defense"). Courts have declined to consider such abstention doctrines *sua sponte*, especially when "unsupported by developed argumentation" and there is not enough time left, as a practical matter, for plaintiffs "to obtain the requested relief from a state court." *Bonas v. Town of N. Smithfield*, 265 F.3d 69, 76 n.5 (1st Cir. 2001).

"Several courts have declined to abstain when a state failed to raise a *Younger* defense because, by voluntarily submitting to suit in federal court, the state has indicated that it is not concerned with the principles of comity underpinning the abstention doctrine." *Guttman v.*

New Mexico, 325 Fed. Appx. 687, 693 (10th Cir. 2009) (unpublished disposition collecting additional cases). Thus, even when an abstention doctrine might "in all probability have required the district court to abstain from adjudicating" a civil action if a state defendant had properly raised it, appellate courts have declined to address the issue when the state chose instead to waive it. *Kyricopoulos v. Town of Orleans*, 967 F.2d 14, 16 (1st Cir. 1992).

In this case, the Governor and the Secretary of State do not raise any preclusion or abstention doctrines as affirmative defenses in their Answer [Doc. 12] and are voluntarily submitting to this suit in federal court. In addition, Plaintiffs do not bear any burden of disproving affirmative defenses in their initial pleadings filed with the Court. *See Jones v. Bock*, 549 U.S. 199, 216 (2007); *cf. Currier v. Doran*, 242 F.3d 905, 916 (10th Cir. 2001) (rejecting a heightened-pleading standard for civil-rights complaints).

The pleadings filed by the Intervenors[1] thus far contain only vague and conclusory allegations that generically list affirmative defenses based on unspecified preclusion and abstention doctrines. Such "threadbare recitals" supported by mere "conclusory statements" lack the plausibility and specific factual basis necessary to meet the federal pleading standard articulated in *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009), which a majority

[1]This brief uses the term "Intervenors" to refer to the parties who have filed responsive pleadings [Doc. 5-1, 10-1] as of the date of the Court's status conference on February 17, 2012, *i.e.*, the Egolf Parties, the Speaker of the New Mexico House of Representatives, and the President Pro Tempore of the New Mexico Senate. The pleading later submitted by the prospective Navajo Nation Intervenors [Doc. 21-1] does not appear to raise any preclusion or abstention doctrines or other affirmative defenses.

of district courts now apply to affirmative defenses. *See, e.g., Haley Paint Co. v. E.I. Du Pont de Nemours and Co.*, No. RDB-10-0318, 2012 WL 380107, at *3 (D. Md. Feb. 3, 2012); *Smithville 169 v. Citizens Bank & Trust Co.*, No. 4:11-CV-0872-DGK, 2012 WL 13677, at *1 (W.D. Mo. Jan. 4, 2012); *Francisco v. Verizon South, Inc.*, No. 3:09cv737, 2010 WL 2990159, at *6 (E.D. Va. Jul. 29, 2010). Even if the pleadings filed by the Intervenors clear the hurdle presented by the *Iqbal* standard, they still have not satisfied their burden of proving that preclusion, abstention, or deferral apply here. *See Pelt*, 539 F.3d at 1283-84 (citing *Taylor*, 553 U.S. at 907).

The Intervenors bear the burden of proof as to each of the preclusion and abstention doctrines at trial, and thus "a more stringent summary judgment standard" applies as well, under which "the moving party must establish, as a matter of law, all essential elements of . . . [those doctrines] before the nonmoving party can be obligated to bring forward any specific facts alleged to rebut the movant's case." *Id.* at 1280. As the Intervenors have not even met their initial burden of pleading any preclusion or abstention doctrines with specificity and plausibility--much less come forward with evidence establishing a *prima facie* case for summary judgment--the other parties are not obligated to bring forward any specific facts in rebuttal. The Court can dispense with these unproven and poorly pleaded doctrines, and instead proceed to the merits of Plaintiffs' claims.

B. The pending state-court action does not preclude Plaintiffs from now litigating their federal claims in federal court.

The Intervenors' pleadings do not specify which preclusion doctrine they wish to

invoke in this action, much less which elements or facts essential to that doctrine are in dispute. Instead, they generically and implausibly plead only that "Plaintiffs' Complaint is barred by one or more of the applicable preclusion doctrines." [Doc. 5-1, at 10; Doc. 10-1, at 15.] Such pleading is insufficient to satisfy the standards set forth above and leaves the remaining parties without enough information to frame a response at this preliminary juncture. The Governor and the Secretary of State reserve the right to respond with further argument and evidence if and when they are provided with adequate, timely notice of which preclusion and/or abstention doctrines are specifically raised in this proceeding and which elements of those doctrines, if any, are in dispute.

While the parties lack such notice at this point, it bears emphasis that Plaintiffs in the present action are not the same as, or in privity with, the parties in the state-court litigation. This fact alone defeats the preclusion doctrines available under the common law, and it is not Plaintiffs' burden to disprove whether they are in privity with parties to the state-court litigation. "[T]he issue of whether privity exists is a question of fact," *Pelt*, 539 F.3d at 1280, on which the "party raising the affirmative defense of *res judicata* has the burden" of proof as a matter of federal procedural law, *id.* at 1283.

While federal courts may give full faith and credit to state-court judgments under 28 U.S.C. § 1738, *see Strickland v. City of Albuquerque*, 130 F.3d 1408, 1411 (10th Cir. 1997), New Mexico courts require a "case-by-case analysis," *Deflon v. Sawyers*, 2006-NMSC-025, ¶ 4, 139 N.M. 637, 137 P.3d 577, to determine "whether a party is 'so identified in interest

with another' that the party 'represents the same legal right'" in a state-court action. *Bounds v. Hamlett*, 2011-NMCA-078, ¶ 30, 150 N.M. 389, 258 P.3d 1181 (quoting *Lewis v. City of Santa Fe*, 2005-NMCA-032, ¶ 15, 137 N.M. 152, 108 P.3d 558). Under this approach, New Mexico courts have determined that there is no privity between an association and its members because the legal rights of an association differ from those of its members with regard to voting in association elections. *See id.* ¶ 30-31. Similarly, the Tenth Circuit has noted that "[g]overnment employees in their *individual* capacities are not in privity with their governmental employer." *Willner v. Budig*, 848 F.2d 1032, 1034 n.2 (10th Cir. 1988).

Plaintiffs in the present action are individuals who wish to invoke their right to vote or become candidates in the next state election for the House of Representatives. As such, the mere possibility that they may belong to the same political party as some of the litigants in the state-court action does not place them in privity with those litigants with respect to their own candidacy and voting rights as individuals. Similarly, the possibility that litigants in the state-court action may also be voters or future candidates does not necessarily align them with Plaintiffs in the present action. Even within the same political party, candidates may oppose one another in primary elections, and by the same token voters may cast their ballots for different candidates within the same party, thereby representing or identifying with different interests. Thus, on this sparse record, the Intervenors have not met their burden of demonstrating that Plaintiffs' interests are so closely aligned with parties to the state-court litigation as to meet the requirement of privity that is a prerequisite to the

application of common-law preclusion doctrines.

The application of such preclusion doctrines also falters on other elements. For example, *res judicata* requires not only parties that are the same or in privity with one another, but also a final decision adjudicated on the merits in the first suit, *see Johnson v. Aztec Well Servicing Co.*, 117 N.M. 697, 700, 875 P.2d 1128, 1131 (Ct. App. 1994), in which the parties had a full and fair opportunity to litigate the issues arising out of the claim, *see City of Las Vegas v. Oman*, 110 N.M. 425, 432, 796 P.2d 1121, 1128 (Ct. App.1990). Because they were not parties to the state-court action, the Plaintiffs in this federal action did not have a full and fair opportunity to litigate the issues in this case. To the extent there was a full and fair opportunity for anyone to litigate which plan the state court should have adopted, that opportunity occurred in the trial conducted by Judge Hall. It follows that Plaintiffs did not have a full and fair opportunity to litigate these issues, and there is no basis for giving the result of the state proceeding any preclusive effect in this federal action.

C. There is no basis for this Court to abstain or defer adjudication of this case based on the pendency or result of state proceedings.

The pleadings filed by the Intervenors do not specify which, if any, of the various abstention doctrines recognized under federal law they are invoking in this case. In any event, "[t]here are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled . . . to accept instead a state court's determination of those claims." *England v. La. State Bd. of Med. Examiners*, 375 U.S. 411, 464 (1964). Thus, the general

rule is that "'the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction.'" *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (quoting *McClellan v. Carland*, 217 U.S. 268, 282 (1910)). Abstention remains "the exception, not the rule" to the federal courts "virtually unflagging" duty "to adjudicate claims within their jurisdiction." *New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 359 (1989). The Intervenors have not met their burden of specifically pleading, much less proving, that such an exception should give pause to this litigation.

1. The Younger Abstention Doctrine does not apply here.

Federal courts have found it appropriate to abstain "where, absent bad faith, harassment or a patently invalid state statute, federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings, state nuisance proceedings antecedent to a criminal prosecution, which are directed at obtaining the closure of places exhibiting obscene files, or collection of state taxes." *Colorado River Water Conservation Dist.*, 424 U.S. at 816 (citing *Younger v. Harris*, 401 U.S. 37 (1971)) (additional citations omitted). Redistricting cases are absent from this list, and thus the doctrine has no application here.

Even with respect to the short list of cases to which it may apply, the *Younger* "abstention doctrine is not triggered unless the federal injunction would create an 'undue interference with state proceedings.'" *Wexler v. Lepore*, 385 F.3d 1336, 1339 (11th Cir. 2004) (quoting *New Orleans Pub. Serv., Inc.*, 491 U.S. at 359). "In addition, the state

proceedings at issue must involve 'certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions'" before *Younger* abstention can apply. *Wexler*, 385 F.3d at 1339 (quoting *New Orleans Pub. Serv., Inc.*, 491 U.S. at 368).

These considerations make it important to focus on the type of state-court proceeding which forms the basis for an affirmative defense of *Younger* abstention. *See Brown ex rel. Brown v. Day*, 555 F.3d 882, 888 (10th Cir. 2009). Noting the doctrine's origin in cases seeking to enjoin state criminal prosecutions, courts have limited its application to civil actions that serve an analogous goal as "enforcement proceedings" or are otherwise "'uniquely in furtherance of the state courts' ability to perform their judicial functions.'" *Id.* at 889 n.5. The present case fails to meet these criteria because the state-court proceedings are by no means analogous to a criminal prosecution seeking to enforce a state statute, nor is redistricting a uniquely judicial function under New Mexico law.

New Mexico's statutes provide only the briefest of guidance on the creation of districts for its House of Representatives; the state statutes merely provide for the total number of state lawmakers and require that districts be contiguous and as compact as is practical and possible. NMSA 1978, § 2-7C-3. Further, where the New Mexico Constitution addresses redistricting, it allows for permissive, rather than mandatory, action to reapportion legislative seats. N.M. Const., Art. IV, § 3 ('[t]he legislature may by statute reapportion its membership."). Unlike Arizona and other states, New Mexico's constitution and statutes do not provide for a permanent redistricting commission or special tribunal for adjudicating

legislative redistricting disputes with an established set of procedures or criteria to follow. Instead, New Mexico law says very little about redistricting procedures, leaving them largely in the hands of the Legislature to sort out in the first instance, subject to the Governor's veto powers.

The New Mexico Supreme Court has not established clear and uniform rules for adjudicating such disputes when the legislative process reaches an impasse. In this instance, the state justices instead followed the unorthodox path of issuing a series of extraordinary writs to decide what procedures they would employ when it became necessary to devise a redistricting plan in the absence of a timely plan enacted by the Legislature and signed by the Governor. At first, the state supreme court chose to defer to the time-honored procedure of convening a full trial on the merits before a well-respected state district judge. But then four of the state justices abruptly jettisoned that approach in favor of an *ad hoc* procedure for coming up with a new plan after the trial had already run its course.

There is no principle of comity which requires a federal court to defer to a state court's answer to substantive questions of federal law, and in contrast to the New Mexico Supreme Court's somewhat novel use of its extraordinary-writ procedures, the federal courts have available an established statutory procedure for handling statewide redistricting cases, which provides a uniform avenue for expedited consideration and accelerated appeals. *See* 28 U.S.C. §2284. In the present posture of this case, such an established federal procedure provides an appropriate mechanism for this Court to answer the distinctly federal, substantive

questions posed by Plaintiffs' claims without undue risk of "meticulous and burdensome federal oversight of state court or court-like functions." *Wexler*, 385 F.3d at 1340. "As presented here, an exercise of jurisdiction by the [federal] district court merely preserves the federal forum for federal claims raised by plaintiffs in a federal proceeding, although a similar state action was also filed." *Id.* It follows that *Younger* abstention is not warranted at this late stage of the game.

2. The Burford Abstention Doctrine does not apply here.

Another abstention doctrine that has no application here derives from *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). *See Colorado River Water Conservation Dist.*, 424 U.S. at 814. The requirements for *Burford* abstention have been summarized as follows:

> Where *timely and adequate* state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

New Orleans Pub. Serv., Inc., 491 U.S. at 361 (quoting, with emphasis added, *Colorado River Water Conservation Dist.*, 424 U.S. at 814).

While the *Younger* abstention doctrine has its origins in cases where a federal court is asked to enjoin a state's criminal prosecution, *Burford* abstention is rooted in federal actions directed at state administrative agencies. "A central purpose furthered by *Burford* abstention is to protect complex state administrative processes from undue federal

interference." *Siegel v. LePore*, 234 F.3d 1163, 1173 (11th Cir. 2000) (citing *New Orleans Pub. Serv., Inc.*, 491 U.S. at 361). Thus, "*Burford* is implicated when federal interference would disrupt a state's effort, through its administrative agencies, to achieve uniformity and consistency in addressing a problem." *Id.* (citing *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 727-28 (1996)).

As noted above, the State of New Mexico has not established any permanent commission or administrative agency to adjudicate or decide legislative redistricting disputes, nor has the State's highest court established a set of uniform and consistent rules of procedure for handling such disputes when a constitutionally adequate redistricting plan fails to timely result from the State's legislative process. Instead, the New Mexico Supreme Court has spontaneously fashioned a set of *ad hoc* procedural measures through its extraordinary-writ proceedings, which are hardly a model of uniformity or consistency given that court's decision to abruptly change the result of the very process to which the state justices had given their blessing only a few months earlier. In any event, whatever procedures the State's highest court has cobbled together for coming up with a redistricting plan on this occasion have run their course, leaving no difficult questions of state law to decide and no time left on the clock to defer a decision on the remaining substantive federal questions. *Burford* abstention is therefore not warranted at this late juncture. *See Siegel*, 234 F.3d at 1173.

3. Abstention or Deferral under the Pullman-Growe Doctrine is not warranted here.

The so-called "*Pullman* abstention doctrine" arises "in cases presenting a federal

constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law." *Colorado River Water Conservation Dist.*, 424 U.S. at 814 (citing *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941)). In contrast to other abstention doctrines discussed above, there is a clear line of precedent applying *Pullman* abstention in the context of election and redistricting disputes when adequate and timely state proceedings are ongoing. *See Growe v. Emison*, 507 U.S. 25, 32-33 & n.1 (1993) (citing *Scott v. Germano*, 381 U.S. 407, 409 (1965) (per curiam)). Also in contrast to some of the other affirmative defense discussed above, the *Pullman-Growe* doctrine does not result in "abstention" in the form of dismissal of a pending federal lawsuit, but simply "require[s] postponing consideration of its merits." *Growe*, 507 U.S. at 32 n.1. Thus, it is preferable to speak of *Pullman-Growe as a* "deferral" doctrine which recognizes that "federal courts should not prematurely involve themselves in redistricting." *Id.*

This temporal element of the *Pullman-Growe* doctrine is sometimes echoed in cases applying *Burford* abstention, which also may result in a stay or postponement of federal litigation, rather than outright dismissal or remand. *See Quackenbush*, 517 U.S. at 719-20 (collecting cases). Thus, district courts may find this aspect of *Burford* and its progeny "instructive" in applying the *Pullman-Growe* doctrine to election disputes that turn on uncertainties in the construction of a state election code, the resolution of which "could obviate the need to determine whether there has been a violation of equal protection under the Fourteenth Amendment." *Pierce v. Allegheny County Bd. of Elections*, 324 F. Supp. 2d

684, 703-04 (W.D. Pa. 2003).

But none of these doctrines require a federal court to postpone resolution of such an equal-protection claim when, as here, a party raising abstention as an affirmative defense has proven neither the *substantive* component (*i.e.*, an as-yet unresolved question of state law) nor the *temporal* component (*i.e.*, an adequate period of time to resolve that question in a state tribunal) required for deferral under *Pullman-Growe*. *See Branch v. Smith*, 538 U.S. 254, 261-62 (2003). "In the present case, unlike in *Growe*, there is no suggestion that the [United States] District Court failed to allow the state court adequate opportunity to develop a redistricting plan." *Id.* at 262. On the contrary, it is the New Mexico Supreme Court which threw the state redistricting process into disarray by abruptly failing to defer to the result of the redistricting procedure that court itself established a few months earlier, leaving insufficient time left on the clock for a federal court to defer adjudication of the federal claim while awaiting a new result to arise from the ashes of the state proceedings.

One element that must be clear and present for the *Pullman-Growe* doctrine to apply in this circumstance is a showing that "'the constitutional adjudication [in the federal case] can be avoided if a definite ruling on the state issue would terminate the controversy.'" *Cano v. Davis*, 191 F. Supp. 2d 1140, 1142 (C.D. Cal. 2002) (quoting *Columbia Basin Apt. Ass'n v. City of Pasco*, 268 F.3d 791, 801 (9th Cir. 2001)). "'[T]he relevant inquiry is not whether there is a bare, though unlikely, possibility that state courts might render adjudication of the federal question unnecessary.'" *Id.* at 1145 (quoting *Hawaii Housing Auth. v. Midkiff*, 467

U.S. 229, 237 (1984)). This Court cannot stand by and defer any longer based on such a remote and unproven possibility "in light of the independent concern that a delay would severely hamper plaintiffs' ability to pursue their important statutory and constitutional voting rights in federal court." *Id.* At this late stage with impending election deadlines fast approaching, that independent concern obliges this Court "to act with as much dispatch as possible" when "it is clear that abstention would foreclose any possibility that the fundamental voting rights violation that plaintiffs allege could be remedied prior to the next statewide election." *Id.* "Once it is apparent that a state court, through no fault of the [federal] district court, will not develop a redistricting plan in time for an upcoming election, *Growe* authorizes a federal district court to go ahead and develop a redistricting plan." *Wesch v. Folsom*, 6 F.3d 1465, 1473 (11th Cir. 1993). That time has come, and this Court must now act to decide the merits of Plaintiffs' claims.

III. CONCLUSION

Were this Court to defer consideration of the merits any longer, there will be insufficient time left to implement a constitutional redistricting plan in advance of the next primary election, and the rights of voters and candidates in that election will be irretrievably lost. The Governor and Secretary of State oppose such a result and implore this Court to act without undue delay.

Accordingly, the Governor and the Secretary of State respectfully request that this Court exercise jurisdiction and promptly decide the merits of the claims presented in

Plaintiffs' Complaint. The Governor and the Secretary of State do not raise, join, or concur in the preclusion or abstention doctrines to which the Intervenors vaguely refer as affirmative defenses in their pleadings. The Governor and Secretary of State further request that the Court find the Intervenors have not met their burden of proving that any of those doctrines apply to this case at this juncture.

Respectfully submitted,

KENNEDY & HAN, P.C.
/s/ Paul J. Kennedy
Paul J. Kennedy (pkennedy@kennedyhan.com)
201 Twelfth Street, N.W.
Albuquerque, New Mexico 87102
(505) 842-8662

Jessica M. Hernandez (jessica.hernandez@state.nm.us)
Office of the Governor
490 Old Santa Fe Trail #400
Santa Fe, NM 87401-2704
(505) 476-2200

Attorneys for Defendant Susana Martinez, in her official capacity as Governor of New Mexico

and

Robert M. Doughty, III (rob@doughtywest.com)
Judd West (judd@doughtywest.com)
DOUGHTY & WEST, P.A.
20 First Plaza NW, Suite 412
Albuquerque, NM 8102
(505) 242-7070

Attorneys for Defendant Diana J. Duran, in her official capacity as New Mexico Secretary of State

I hereby certify that a copy of
the foregoing was filed and served
electronically via CM/ECF and/or
emailed this 22nd day of February, 2012,
to the following counsel of record:

David A. Garcia (lowthorpe@msn.com)
David A. Garcia, LLC
1905 Wyoming Blvd. NE
Albuquerque, NM 87112
(505) 275-3200

Patrick J. Rogers (pjr@modrall.com)
Modrall, Sperling, Roehl, Harris & Sisk, P.A.
P.O. Box 2168
Albuquerque, NM 87103
(505) 848-1800

Paul M. Kienzle (paul@kienzlelaw.com)
Scott & Kienzle, P.A.
1011 Las Lomas NE
Albuquerque, NM 87103
(505) 246-8600

and

Henry M. Bohnhoff (hbohnhoff@rodey.com)
RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.
P.O. Box 1888
Albuquerque, NM 87103
(505) 765-5900

Attorneys for Plaintiffs Claudette Chavez-Hankins,
Paul Pacheco, and Michael Vega

Luis G. Stelzner (LGS@stelznerlaw.com)
Sara N. Sanchez (ssanchez@stelznerlaw.com)
STELZNER, WINTER, WARBURTON,
FLORES, SANCHEZ & DAWES, P.A.
302 Eighth Street NW, Suite 200
P.O. Box 528
Albuquerque, NM 87103
(505) 938-7770

and

Richard E. Olson (rolson@hinklelawfirm.com)
Hinkle, Hensley, Shanor & Martin, LLP
P.O. Box 10
Roswell, NM 88202-0010
(575) 622-6510

Attorneys for Intervenors Speaker of the
New Mexico House of Representatives
Ben Lujan, Sr., in his official capacity, and
President Pro Tempore of the New Mexico Senate
Timothy Z. Jennings, in his official capacity

Joseph Goldberg (jg@fdblaw.com)
John W. Boyd (jwb@fdblaw.com)
David H. Urias (dhu@fdblaw.com)
Freedman Boyd Hollander Goldberg
Ives & Duncan, P.A.
20 First Plaza NW, Suite 700
Albuquerque, NM 87102
(505) 842-9960

and

Ray M. Vargas (ray@garcia-vargas.com)
David P. Garcia (david@garcia-vargas.com)
Erin B. O'Connell (erin@garcia-vargas.com)
Garcia & Vargas, LLC
303 Paseo de Peralta
Santa Fe, NM 87501
(505) 982-1873

Attorneys for Intervenors Brian Egolf, Maurilio Castro, Mel Holguin, Hakim Bellamy, and Roxane Spruce Bly ("Egolf Parties")

Jerry Todd Wertheim (todd@thejonesfirm.com)
John V. Wertheim (jvwertheim@thejonesfirm.com)
Jones, Snead, Wertheim & Wentworth, P.A.
Post Office Box 2228
Santa Fe, NM 87504-2228
(505) 989-6288

Attorneys for Antonio Maestas, June Lorenzo Alvin Warren, Eloise Gift and Henry Ochoa ("Maestas Parties")

Patricia G. Williams (pwilliams@wwwlaw.us)
Jenny J. Dumas (jdumas@wwwlaw.us)
WIGGINS, WILLIAMS & WIGGINS
A Professional Corporation
1803 Rio Grande Blvd. N.W. (87104)
P.O. Box 1308
Albuquerque, New Mexico 87103-1308
(505) 764-8400

Attorneys for Prospective Intervenors Navajo Nation, a federally recognized Indian tribe, Lorenzo Bates, Duane H. Yazzie, Rodger Martinez, Kimmeth Yazzie, and Angela Barney Nez (collectively "Navajo Intervenors")

/s/ Paul J. Kennedy