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

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

BRIAN EGOLF, MAURILIO CASTRO, MEL HOLGUIN, HAKIM BELLAMY AND ROXANE SPRUCE BLY,

Intervenors.

MEMORANDUM OF LAW IN SUPPORT OF EGOLF INTERVENORS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION OR, IN THE ALTERNATIVE, TO DEFER TO ONGOING STATE COURT REDISTRICTING PROCEEDING

Egolf Intervenors, by their undersigned counsel, and pursuant to this Court's direction, provide the following legal memorandum establishing the following:

1. Plaintiffs' complaint should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1) because plaintiffs allege only a potential or speculative future injury that might arise if the New Mexico state courts adopt an unconstitutional redistricting plan. Under controlling legal precedent, standing and ripeness are determined at the time the complaint is filed and cannot be acquired later. Accordingly, this Court lacks subject-matter jurisdiction and should dismiss.

2. If this Court declines to dismiss plaintiffs' complaint, it should nevertheless defer any action until state court redistricting proceedings are concluded and a redistricting plan is in place. Under the controlling federal law established by the Supreme Court in *Growe v. Emison*, 507 U.S. 25 (1993), federal courts must defer redistricting litigation until the state, whether through its legislature or its courts, has completed its redistricting. Only then may this Court consider any allegations that the adopted plan has federal, constitutional infirmities.

3. If this Court does not dismiss or defer, it should next take up the percipient issue that the federal plaintiffs are in privity with state court parties leading to preclusion of their claims in this Court.

I.
FACTUAL AND PROCEDURAL BACKGROUND

A. The State District Court Proceedings

The 2010 census revealed that the population of New Mexico had increased since 2000 by approximately 13.2 percent. That population growth, and shifts in population, resulted in the malapportionment of electoral districts for the New Mexico House of Representatives. Based on the new census numbers, the ideal population for each house district became 29,417. The current house districts have deviations from the ideal population ranging from -24.3% to +100.9%, for a total range of 125.2% deviation. *See* Ex. A (District Court's Finding of Fact No. 6).

Following the receipt of the census data, the Governor called the New Mexico Legislature into a special session that convened on September 6, 2011. Before the special session began, the bi-partisan New Mexico Legislative Council reaffirmed, without dissent, guidelines reflecting the policy of the State of New Mexico with regard to redistricting which had been adopted by the Legislature in 2001. *See* 2001 N.M. Laws, ch. 220, §3(A)(2). Those guidelines include, *inter alia*, crafting State districts to be substantially equal in population, with a

maximum deviation not to exceed plus or minus 5%; using the precinct as the basic building block of each voting district; complying with the Voting Rights Act, including not diluting minority voting strength; and drawing districts consistent with traditional districting principles. *See* Ex. B, 2011 Guidelines for the Development of State and Congressional Redistricting Plans, adopted Jan. 17, 2011 (Leg. Def's House Ex. 2); Ex. A (District Court Finding of Fact No. 15).

During the 2011 Special Session called for the purpose of reapportionment, the New Mexico House of Representatives passed House Bill 39, along party lines, reapportioning the House. The Governor vetoed the bill.

After the Governor's veto, a number of lawsuits were filed in various New Mexico State District Courts, each requesting constitutional redistricting plans for the State House, the State Senate, the United States House of Representatives, and, in some suits, the New Mexico Public Regulation Commission.

The Egolf Plaintiffs (here, the Egolf Intervenors), a state legislator and registered voters, filed suit with the expressed purpose of protecting the voting interests of New Mexico's historic racial and ethnic minorities, consistent with accepted, neutral redistricting principles. While two groups of plaintiffs, the Navajo Intervenors and the Multi-Tribal Plaintiffs addressed the voting interests of Native Americans, only Egolf plaintiffs represented the voting interests of New Mexico's historic Hispanic communities.

The other plaintiffs who filed state court suits included two groups representing Republican Party interests, the James plaintiffs and Sena plaintiffs and one group representing Democratic Party interests, the Maestas plaintiffs. The Sena and James plaintiffs continue to be represented in the state redistricting case by the same lawyers representing the plaintiffs in this federal action. Of the five state official defendants, three represented Republican interests — the

Governor, Lt. Governor and Secretary of State -- who jointly proposed their own redistricting plans. The two other defendants were the Speaker of the House and the President Pro Tempore of the Senate, both Democrats who jointly presented HB 39 to the state court as a redistricting plan.

Because all the lawsuits sought redistricting and were brought against the same state officials, the Egolf Plaintiffs petitioned the Supreme Court of New Mexico for a Writ of Superintending Control, requesting that the cases be consolidated. The Supreme Court issued the Writ on October 12, 2011, consolidated the cases in the First Judicial District Court of New Mexico, and appointed James Hall, a retired Santa Fe District Court Judge as Judge Pro Tempore to preside over the redistricting litigation.

After the Supreme Court appointed him, Judge Hall moved expeditiously and scheduled redistricting hearings to begin in December 2011, to be completed in January 2012. As the hearings played out, the Egolf plaintiffs reached agreement with the Executive Defendants regarding the redistricting plans for Congress and for the State Senate. The District Court adopted those "joint" plans and neither those plans, nor the plan for the Public Regulation Commission became the subject of any appeal.

The evidentiary hearing for the redistricting of the State House of Representatives occurred over eight days, from December 12, 2011, to December 21, 2011. During the hearing, the parties stipulated to the unconstitutional malapportionment of the then-existing legislative electoral districts. All parties introduced proposed remedial plans. At the trial court's repeated invitation, a number of parties introduced numerous modifications to their plans to address the trial courts expressed concerns. Ultimately, the parties presented seventeen (17) prospective remedial plans for New Mexico House redistricting to the trial court.

On the last day of testimony before Judge Hall, the Executive Defendants tendered "Executive Alternative Plan 3," after the executive demographer and other expert witnesses were no longer available to testify. Executive Alternative 3 increased the Republican performance numbers throughout the house districts from previous plans proposed by the Executive Defendants. Judge Hall, adopted Executive Alternative 3 as the new redistricting plan for the New Mexico House of Representatives, with minor modifications.

The district court made clear in its findings and conclusions that it regarded achieving the lowest possible population deviations as the principal, motive force behind its selection of plans. The court explained that it adopted Executive Alternative 3 primarily because it had the lowest population deviations among districts and, according to the trial court, it adhered to the Voting Rights Act (with respect to Native American communities) and reasonably satisfied other reapportionment policies. *See* Ex. A (District Court Conclusions of Law Nos. 34-36).

B. Proceedings before the Supreme Court of New Mexico

After the district court adopted Executive Alternative Plan 3 for the New Mexico House, several plaintiffs/petitioners, including the Egolf Plaintiffs, sought a writ of superintending control in the Supreme Court of New Mexico. Responding to the New Mexico Supreme Court's expedited briefing schedule, the parties raised the following objections to the district court's plan:

The Egolf Petitioners argued that: 1) the district court erred in favoring unnecessarily low population deviations over other traditional redistricting criteria; 2) the plan adopted by the district court incorrectly favored extremely low population variance at the expense of dividing Hispanic communities of interest in New Mexico and diluting the voting strength of Hispanics in those communities; and 3) the plan included unacceptable partisan bias.

The Maestas Petitioners argued that: 1) the district court violated the Maestas Plaintiffs procedural due process rights by allowing the Executive Defendants to submit late filings, including the submission of Executive Alternative Plan 3; 2) the adoption of Executive Alternative 3 deprived the Maestas Plaintiffs of their right to substantive due process; and 3) the district court erred in adopting Executive Alternative Plan 3 because it contained significant partisan bias.

The Legislative Petitioners argued that: 1) the district court erred in concluding that federal law compelled near-zero population deviations in a state court determination of a state legislative plan; 2) the district court improperly disregarded the principle of separation of powers; and 3) the district court failed to afford thoughtful consideration to the legislative plan.

The court heard argument on February 7, 2012. On February 10, 2012, the Supreme Court reversed the district court's judgment adopting the Executive Alternative Plan 3 for the New Mexico House of Representatives and remanded the case to the state district court for further proceedings consistent with the Court's Order. *See* Ex. C, February 10, 2012 Order of the Supreme Court of New Mexico. The Supreme Court noted that the case presented the first opportunity in New Mexico's long history for the Supreme Court to address the overarching legal principles that govern court-drawn redistricting and believed it should "recognize or ratify those legal principles that vindicate statutory and constitutional imperatives while also supporting significant, legitimate state policies that are vital for redistricting." *See id.* at 12.[1] Although it rejected many of the arguments for reversal, it agreed that the district court had erred. In reversing, it expressed three primary concerns with regard to the district court's approach to the selection of a redistricting plan.

[1] More recently, the New Mexico Supreme Court has entered its opinion on February 21, 2012, explaining the bases for its order. That opinion has been filed with this Court separately on February 22, 2012.

1. Population Deviations.

The Supreme Court began by noting that the district court's conclusion that it was bound to close-to-zero population deviations was "inconsistent [with federal and state law] to the extent it precludes greater deviations where justified by existing legal principles and by the precedent and policy of this State . . ." *Id.* at 13-14. The Supreme Court relied almost entirely on precedent from the United States Supreme Court for this conclusion. It noted that in cases such as *Reynolds v. Sims*, 377 U.S. 533, 579 (1964), the Supreme Court had held that deviations from exact population equality are appropriate to address significant state redistricting policies or unique features of the state. *See id.* at 6. "Although maximum population equality and whether a plan dilutes the vote of any racial minority are primary considerations, courts should consider 'the polices and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitution.'" *Id.* at 6-7 (quoting *White v. Weiser*, 412 U.S. 783, 795 (1973)). The Court pointed out that under the principle set forth in *White v. Weiser*, it was "important to consider whether a [redistricting] plan continues the policies of New Mexico as they are expressed in its previous redistricting plans," and that the guidelines adopted by the Legislature were consistent with the policies recognized by the New Mexico courts and were important to the redistricting process. *Id.* at 7. The Court further recognized that state courts in New Mexico had previously adhered to a range of plus-or-minus five-percent deviations in creating a redistricting plan for the State House of Representatives, which was supported by the United State Supreme Court precedent. *See id.* at 7-8 (citing *Jepsen v. Vigil-Giron*, No. D-0101-CV-02177 (D.Ct. Jan. 24, 2002) and *Brown v. Thompson*, 462 U.S. 835, 842 (1983)).

Accordingly, the New Mexico Supreme Court directed that the district court, following remand, should not confine itself to a range of plus-or-minus one-percent population deviations (other than where greater deviations are required to comply with the Voting Rights Act). Instead, the Supreme Court directed the district court to accommodate historically significant state redistricting policies through the use, where necessary, of greater population deviations (within plus-or-minus five-percent) as set forth in the Legislative Council guidelines. *See id.* at 18. The Court acknowledged that Executive Alternative Plan 3 achieved very low population deviations, "but it was at the expense of other traditional state redistricting policies, the most evident being the failure to keep communities of interest, such as municipalities, intact." *Id.*

2. Partisan Bias.

The second concern addressed by the New Mexico Supreme Court was the evident partisan bias in the plan adopted by the district court. The Supreme Court noted that the district court correctly considered evidence regarding the partisan bias in other plans, but did not subject Executive Alternative Plan 3 to the same scrutiny for partisan bias. *See id.* at 14. The Court pointed out that evidence had been introduced at the hearing demonstrating the existence of "significant partisan performance changes" as a result of Executive Alternative Plan 3 and that the district court itself had found that the plan increased Republican swing seats from five to eight over prior executive plans. *Id.* In addition, the Supreme Court noted that the number of majority Republican districts increased from 31 in the original plan submitted by the Executive Defendants to 34 in the plan submitted by the same party on the last day of the hearing (and adopted by the court). *See id.* at 14-15. The Supreme Court expressed concern about the unnecessary partisan bias of the adopted plan, especially given the testimony of the Legislative Defendants' expert that the plan could have been drafted with less partisan bias, perhaps by

employing slightly greater population deviations. *See id.* at 15. "Because of this testimony," the Court observed, "and the district court's rejection of other plans for perceived partisan bias considerations . . . the district court should have rejected Executive Alternative Plan 3 for similar [partisan] bias, at least as it was offered." *Id.*

The New Mexico Supreme Court thus directed that on remand "the goal of any plan should be to devise a plan that is partisan-neutral and fair to both sides." *Id.* at 20. The Court did not preclude the district court from considering the plan it had adopted, but directed that, "If the district court chooses to begin with the plan it adopted previously, it should address the partisan performance changes and bias noted in this order, and if the bias can be corrected or ameliorated with enunciated non-discriminatory application of historical, legitimate and rational state policies, including through the use of higher population deviations, then the district court should do so." *Id.* at 20.

3. Avoidance of Dividing Racial and Ethnic Minority Communities and Unnecessary Minority Vote Dilution.

The final issue addressed by the New Mexico Supreme Court related to its concern that Executive Alternative Plan 3 may have unnecessarily split communities, including ethnic minority communities, and diluted the voting strength of certain minority communities, in violation of Section 2 of the Voting Rights Act. In particular, the Court expressed concern that under Executive Alternative Plan 3 the Hispanic community in Clovis, New Mexico, which had resided in a remedial district created by a federal three-judge panel in *Sanchez v. King*, No. 82-0067-M (D.N.M. 1984), would suffer impermissible vote dilution as a result of being shifted to a neighboring house district where Hispanics would now constitute a minority of the citizen voting age population, whereas under the existing redistricting scheme they constituted a majority. *See id.* at 16-17. The Court correctly noted that there was significant and undisputed evidence

presented at the hearing that all of the prerequisites to finding a Section 2 violation in the area were met, including evidence that demonstrated that "the Hispanic community in and around Clovis is sufficiently large and geographically compact to constitute a majority in a single-member district, that the community is politically cohesive, and that Anglos in the area vote sufficiently as a bloc to enable them to usually defeat the minority's preferred candidate." *Id.* at 16 (quoting District Court's Findings of Fact Nos. 64, 65). The Supreme Court further noted that there was no evidence presented at the hearing that the district containing the Clovis area had materially changed over the years so as to no longer require an effective majority-minority district. *Id.* at 17.

Given the concern that diluting the voting strength of the Hispanic community in Clovis may violate Section 2, the Supreme Court on remand directed that the district court attempt to avoid such a result. The Supreme Court first reminded the district court that the relevant population measure was Hispanic *citizen* voting age population, not total Hispanic voting age population, as the United States Supreme Court held in *LULAC v. Perry*, 548 U.S. 399, 427-28 (2006). *See id.* at 8, 20. The Supreme Court then correctly advised the district court that, in order to avoid the type of vote dilution prohibited by the Voting Rights Act, "Whatever its eventual form, the relevant Clovis community must be represented by an effective, citizen, majority-minority district as that term is commonly understood in Voting Rights Act litigation, and as it has been represented, at least in effect, for the past three decades." *Id.* at 20-21. The Supreme Court also expressed its concern about unnecessarily splitting Deming, Silver City and Las Vegas. *See id.* at 10, 16-17, 19. In the Supreme Court, the Egolf Plaintiffs argued that the district court, in pursuit of zero deviations had needlessly split the minority communities in Deming and Silver City.

The Supreme Court then urged the district court to use every effort to conclude the redistricting process by February 27, 2012.

One day before this brief was due, the district court announced a tentative redistricting plan. On the same day, the New Mexico Supreme Court issued its full opinion that supports the preliminary order it entered, described above. *See* New Mexico Supreme Court's Opinion of February 21, 2012. The Egolf Intervenors understand that this court has required the parties who assert that the Supreme Court's decision is unconstitutional file their briefs on or before Thursday, February 23, 2012 and that any response to those briefs should be filed on or before Monday, February 27. The Egolf Intervenors are in the latter category and will timely file their response, on or before Monday, February 27, demonstrating that the New Mexico Supreme Court's decision closely tracks, and is fully consistent with, controlling United States Supreme Court precedent.

C. Plaintiffs' Complaint in This Case.

On February 13, 2012, before the state district court was required to act (or had acted with respect to adopting a new plan) following remand by the New Mexico Supreme Court, the federal plaintiffs in this case filed suit. The federal plaintiffs are represented by the same attorneys who represented the James and Sena plaintiffs in the state district court and state Supreme Court proceedings. In their federal complaint, these plaintiffs allege (consistent with their lawyers' position in the state Supreme Court proceedings and in their submissions on remand to the state district court) that the district court's original plan met the constitutional standards for redistricting. They then predict that the New Mexico Supreme Court's decision to reverse the district court's decision will "result in a plan that will violate the one person one vote [Constitutional] mandate." Complaint, ¶ 1. In their conflicting prayers for relief, the plaintiffs

request that this court adopt its own redistricting plan for the New Mexico House, retain jurisdiction to pass on whatever plan the New Mexico courts adopt and, further, declare the New Mexico Supreme Court's order of remand unconstitutional. Complaint, pp. 20-21. In summary, these plaintiffs ask this Court to redistrict the New Mexico House of Representatives and effectively enjoin any further proceedings in state court.

After the plaintiffs filed their complaint in federal court, the New Mexico Supreme Court filed its February 21, 2012 Opinion, further explaining the basis for its Order of February 10, 2012. Then, on February 22, 2012, the New Mexico Supreme Court entered a supplemental order, setting an expedited briefing schedule in the event any party to the state court proceeding wished to appeal Judge Hall's plan for the House. *See* Order of February 22, 2012, regarding appeal, by Petition for Writ of Superintending Control by February 29, 2012, with briefing completed by March 5, 2012, attached hereto as Ex. D. There thus can be no serious contention that the New Mexico courts are not acting expeditiously to get a redistricting plan in place.

II.
ARGUMENT

A. This Court Lacks Subject Matter Jurisdiction Over This Action Because Plaintiffs Lack Standing to Challenge the Malapportionment of the Current Redistricting Plan.

Plaintiffs' claims are based on conjecture, are not ripe for adjudication, and do not present a case or controversy. "Article III of the Constitution limits the jurisdiction of federal courts to Cases and Controversies." *San Juan County, Utah v. United States*, 503 F.3d 1163, 1171 (10th Cir.2007). "[A] suit does not present a Case or Controversy unless the plaintiff satisfies the requirements of Article III standing." *San Juan County,* 503 F.3d at 1171. To establish standing, a plaintiff must show three things: "(1) an injury in fact that is both concrete and particularized as well as actual or imminent; (2) a causal relationship between the injury and

the challenged conduct; and (3) a likelihood that the injury would be redressed by a favorable decision." *Protocols, LLC v. Leavitt*, 549 F.3d 1294, 1298 (10th Cir.2008) (internal quotation marks omitted).

As noted above, "an injury in fact must be actual or imminent, not conjectural or hypothetical." *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1155 (10th Cir. 2005) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). "Allegations of *possible future injury* do not satisfy the requirements of Art. III. A threatened injury must be 'certainly impending' to constitute injury in fact." *Id.* (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990)) (emphasis added). In other words, "[a]n Article III injury ... must be more than a possibility.... The threat of injury must be both real and immediate." *Essence, Inc. v. City of Federal Heights*, 285 F.3d 1272, 1282 (10th Cir.2002) (quotation omitted). Standing "cannot be based on speculative injury occurring in the future." *Hobbs v. Sprague,* 87 F.Supp. 2d 1007, 1011 (N.D. Cal. 200), citing *Lujan*, *supra*, 04 U.S. at 560.

The issue of jurisdictional standing in cases such as this also raises ripeness issues about which the United States Supreme Court has been clear: "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300, 118 S.Ct. 1257, 140 L.Ed.2d 406 (1998). (internal quotations omitted). A case that is not ripe is subject to dismissal for lack of subject matter jurisdiction. *Gordon v. Norton,* 322 F.3d 1213, 1219 (10th Cir. 2003).

With the foregoing principles in mind, it is fatal to plaintiffs' standing that they have only speculated that the New Mexico Supreme Court's decision will result in an unconstitutional redistricting. Complaint, ¶ 13. It is true that the New Mexico district court, after the plaintiffs

filed their complaint, will likely adopt a redistricting plan on the deadline imposed by the New Mexico Supreme Court. But this fact will not mean that Plaintiffs will acquire standing at that time, even if they can find a way to allege that the plan contains a constitutional defect. "Standing is determined as of the time the action is brought." *Smith v. U.S. Court of Appeals, for the Tenth Circuit*, 484 F.3d 1281, 1285 (10th Cir.2007) (quoting *Nova Health Sys.*, 416 F.3d at 1154), cert den. 552 U.S. 1182; *see also, Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.* 528 U.S. 167, 168 (2000) (holding that the "case or controversy" limitation on federal jurisdiction "underpins…standing doctrine" and that "this Court has an obligation to assure itself that [the plaintiff] had Article III standing at the outset of the litigation."); *see also*, *Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1263 (10th Cir.2004) ("Standing doctrine addresses whether, at the inception of the litigation, the plaintiff had suffered a concrete injury that could be redressed by action of the court."). As the district court in Kansas succinctly put it, "[p]arties should not be allowed to file a case, and then leave it pending while the court lacks jurisdiction, as a 'placeholder' until an issue ripe for resolution develops." *Columbian Financial Corp. v. BancInsure, Inc.* 2012 WL 280635, 3 (D.Kan., 2012).

In this case, Plaintiffs lack standing because they cannot allege an injury in fact. Rather, plaintiffs have brought a suit in which they allege that they might be injured in the future if New Mexico state courts adopt an unconstitutional plan. While it is now the case that the New Mexico state district court has proposed two tentative redistricting plans and will adopt a final plan on or before February 27, plaintiff's allegation of injury was undeniably speculative when plaintiffs filed their complaint, which is the operative time for assessing standing and injury, and their complaint should be dismissed on that ground alone.[2]

[2] Plaintiffs attempt to escape this doctrine by arguing that the New Mexico Supreme Court's opinion makes it a certainty that the district court will adopt an unconstitutional plan that has too great a population deviation and is

This very issue has arisen in the context of redistricting. In *Mayfield v. Texas*, 206 F.Supp.2d 820 (2001), a three-judge panel considered the standing of a group of registered voters who brought suit against state officials alleging that the existing congressional districts in Texas were unconstitutionally malapportioned because they did not take into account the population shifts revealed by the 2000 Census. The plaintiffs in that case, like the plaintiffs here, charged that the existing districts diluted their voting strength and therefore violated their constitutional right to "one person, one vote." *Id.* at 822. The plaintiffs explained that "[t]here is some reason to believe that the State of Texas will deadlock over congressional redistricting and fail to enact a new plan in the 2000 legislative session," and thus requested that the three-judge panel: 1) declare the existing districts invalid; 2) enjoin state authorities from implementing the current congressional districting plan in future primary and general elections; 3) set a deadline for state authorities to create and implement a new congressional redistricting plan; or 4) create and implement its own congressional districting plan. *See id.*

The three-judge panel in *Mayfield* wasted little time in disposing of the plaintiffs' claims for lack of standing, noting that, "[f]ederal courts consistently deny standing when claimed anticipated injury has not been shown to be more than uncertain potentiality." *Id.* at 823 (quoting *Prestage Farms, Inc. v. Bd. Of Supervisors*, 205 F.3d 265, 268 (5th Cir. 2000)). As explained by the court:

> In this case, there is no threat that an election will be held with the current districting scheme in place, and there is no reason to believe at this time that the Texas Legislature will fail to correct any malapportionment before the next election process begins. Accordingly, we believe that any alleged injury is nothing more

biased. Complaint at ¶ 45. But the plaintiffs cannot and do not know what the population deviations will be and, as to the issue of partisan bias, the New Mexico Supreme Court has instructed the district court to adopt a plan that eliminates partisan bias. Plaintiffs' allegation that they can predict the outcome of the state court redistricting process is no more than an artful (if it merits that adjective) pleading intended to avoid the settled law of standing and ripeness.

> than an "uncertain potentiality" and, therefore, is insufficient to satisfy the injury-in-fact requirement of standing.

Id.[3]

Here, Plaintiffs only claim of injury is that, "Should new voting districts not be timely drawn in the State of New Mexico, the Plaintiffs and many New Mexico citizens will suffer dilution of their votes in elections held in 2012." Complaint at ¶ 67. The next elections for the New Mexico House of Representatives, however, are not scheduled to occur until November 6, 2012. In its February 10, 2012, Order, the New Mexico Supreme Court directed that the state district court adopt a redistricting plan by February 27, 2012. The district court has set a briefing schedule in that case and appointed a Rule 707 expert to assist the court in order to ensure that a constitutional plan is adopted within the time frame contemplated by the Supreme Court. More recently, the New Mexico Supreme Court has imposed a drastically expedited briefing schedule for any appeals from the district court's redistricting decision. *See* Order of February 22, 2012. Plaintiff's alleged "injury" is thus wholly speculative, based only on conjecture, and constitutes what the Tenth Circuit has called an "allegation of possible future injury" that cannot and does not satisfy the requirements of Art. III. *Nova Health Sys.*, 416 F.3d at 1155. There is simply no threat that an election will be held with the current redistricting scheme in place or that the redistricting process currently underway in the state courts of New Mexico will not be completed in time for those elections.

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[3] The Egolf Intervenors argue at Point B of Argument, *infra*, that this Court must, at a minimum, stay this proceeding under the Supreme Court's holding in *Growe*. The three-judge court in *Mayfield*, however, did not stay that proceeding but, instead, dismissed it because, like this suit, it was merely "placeholder" litigation that anticipated a future controversy regarding redistricting. The court correctly noted that the Supreme Court in *Growe* had not addressed the issue of standing and ripeness because the parties had not disputed it. "Candidly, *Growe* instructs little about the justiciability of placeholder suits. The Supreme Court did not address either standing or ripeness, acknowledging that '[t]he parties do not dispute that both [federal and state] courts had jurisdiction to consider the complaints before them.' The Plaintiffs argue that the Court would have been compelled to, and we should presume did, determine whether the lower court in *Growe* had jurisdiction to entertain the suit and that we should therefore read from the Court's silence an implicit conclusion that jurisdiction exists in a case such as this. We disagree." *Mayfield v. Texas,* 206 F.Supp.2d at 825 -826 (internal citations omitted).

Plaintiffs not only lack standing to bring their claims of malapportionment, but their claims are also not justiciable because they are not ripe. "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300, 118 S.Ct. 1257, 140 L.Ed.2d 406 (1998) (internal quotations and citations omitted).

B. This Court Must Defer Taking any Action Related to Redistricting Until After the New Mexico State Court Action is Completed.

Even if this Court were to determine that Plaintiffs had standing to assert the claims in their Complaint, that their claims are ripe and that plaintiffs' complaint can somehow survive the Supreme Court's and this Circuit's rulings that standing must exist when a plaintiff files his or her complaint, this Court still must defer to the state court redistricting proceeding currently under way. Deference is required under the principles articulated by the Supreme Court in *Scott v. Germano*, 381 U.S. 407 (1965) and *Growe v. Emison*, 507 U.S. 25 (1993), and consistently honored and followed by this federal district in the cases of *Vigil v. Lujan*, 191 F. Supp. 2d 1273, 1274-75 (D.N.M. 2001) (three-judge panel) and *Archuleta v. City of Albuquerque*, No. 11-CV-510 JCH/ACT (Memorandum Opinion and Order of Remand, entered June 6, 2011) (Herrera, J.). Under those precedents, this Court must "defer consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch, has begun to address that highly political task itself." *Growe*, 597 U.S. at 33 (emphasis in original). As the Supreme Court held, "[a]bsent evidence that these state branches will fail timely to perform that duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it." *Id.* at 34. Plaintiffs' prayer for relief asks this Court to do precisely that: obstruct or impede the state court redistricting proceeding.

In *Growe*, separate Minnesota plaintiffs initiated state and federal suits seeking congressional and legislative redistricting following the 1990 decennial census. While the suits were pending, the governor of Minnesota vetoed redistricting legislation. The state court then issued its final legislative plan, based on the redistricting bill that the governor had vetoed, and prepared to issue a congressional plan. A three-judge federal district court then issued its own, different plans and permanently enjoined interference with state implementation of those plans. *See id.* at 27-31.

The Supreme Court reversed. The Court reaffirmed that "the Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts." *Id.* at 34 (citing U.S. Const. Art. I, § 2); *see Chapman v. Meier*, 420 U.S. 1, 27 (1975) (same). The Court declared that the state court's issuance of its legislative redistricting plan, "far from being a federally enjoinable 'interference,' was precisely the sort of state judicial supervision of redistricting that we have encouraged." *Id.* Thus, because the state had begun the task of addressing the issues involving redistricting, the Supreme Court held that the federal court should have deferred to the state's efforts and not intervened in the absence of evidence that the state would fail timely to perform its redistricting duties. *See id.* at 34, 41. The Court emphasized that the state judicial branch's redistricting efforts are entitled to the same deference as those of the legislative branch, and that where the record does not demonstrate that the state court was either unwilling or unable to adopt a timely redistricting plan, the federal court must stay its hand. *Id.* at 36-37.

In its ruling, the Court relied heavily on its prior decision in *Germano*, which the *Growe* court described as "requir[ing] federal judges to defer consideration of disputes involving redistricting where the State, through its legislative or judicial branch, has begun to address that

highly political task itself." *Id.* at 33. In *Germano*, the federal district court invalidated Illinois state senate districts and entered an order requiring the state to submit to it any revised districting scheme it might adopt. The federal court did so despite the pendency of a state court lawsuit and a ruling by the state supreme court holding that the current redistricting scheme was invalid but retaining jurisdiction to ensure that the upcoming election would be conducted under a constitutionally valid plan. The United States Supreme Court held that the federal district court should have "stayed its hand," as "[t]he power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged." *Germano*, 381 U.S. at 409. More recently, the Supreme Court summarized its holding in *Growe* as follows:

> In *Growe*, the Federal District Court had refused to abstain or defer to state-court redistricting proceedings. In reversing, we reminded the federal courts of "'what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court.' " We held that "[a]bsent evidence that these state branches will fail timely to perform that duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it." 507 U.S., at 34, 113 S.Ct. 1075.

Branch v. Smith, 538 U.S. 254, 261-262 (2003).

In this case, the State of New Mexico is actively and timely addressing the task of redistricting the 70 districts of the New Mexico House of Representatives. Although the Governor vetoed the redistricting plan that had been approved by the state legislature, the Supreme Court of New Mexico promptly consolidated all of the ensuing redistricting suits and appointed Judge James Hall to preside over the matter. After the hearing on House redistricting, Judge Hall adopted a redistricting plan that had been introduced on the last day of the hearing.

Upon review of Judge Hall's findings and conclusions, the Supreme Court of New Mexico found that Judge Hall erred in determining that the court was bound to adopt the plan that had the closest to perfect population equality and remanded the case to the district court with instructions to adopt a new redistricting plan by February 27, 2012. *See* Ex. C at 21. There is no evidence that the state court does not intend to address the malapportionment in the current redistricting scheme within the time frame prescribed by the state supreme court. Nor is there any reason to believe that Judge Hall will adopt a redistricting plan that is in any way unconstitutional or impermissible under the ambits of the Voting Rights Act.[4] Nor is there any reason to believe that if there is disagreement with the district court's new plan, the New Mexico Supreme Court will not handle that appeal expeditiously, as it handled the previous appeal. Indeed, its order of February 22 establishes that the New Mexico Supreme Court intends to act at breakneck speed to complete redistricting. New Mexico's courts are acting expeditiously to address the current malapportionment in the state house districts and a redistricting plan that comports both with federal and state mandates will be in place well before any elections will take place. In accordance with *Growe* and *Germano*, this Court must defer any further proceedings in this matter until the state courts have completed their attempts to adopt a valid redistricting plan.

C. There is a Strong Suggestion that the Plaintiffs in this Litigation are in Privity with the Republican Party Plaintiffs in the State Court Litigation. As a Prudential Matter, this Court Should Address Whether these Parties are Precluded from Opening a New Front in this Forum.

No discovery has yet occurred in this litigation. The Intervenors will shortly serve deposition notices on the plaintiffs to determine their relationship to the lawyers in this case and

[4] This court has directed the parties to address in later briefing the plaintiffs' allegations of constitutional defects in the New Mexico Supreme Court's directions to the state district court. Accordingly, the Egolf Intervenors will not now address the one-person, one-vote and partisan bias issues raised by the plaintiffs other than to say that the New Mexico Supreme Court's opinion relies on settled United States Supreme Court decisional law. In their later brief, the Egolf Intervenors will demonstrate that the plaintiffs' allegations of constitutional defects in the New Mexico court's redistricting efforts are contrived and entirely without merit.

to the Republican Party litigants in the state court proceeding. The Egolf Intervenors believe that the evidence is likely to demonstrate that the plaintiffs in this case and the James, Sena and Executive parties in the state court litigation are in privity and that these plaintiffs will accordingly be bound by the proceedings in state court. If the evidence establishes as much, the Egolf Intervenors will move to dismiss on the ground that the plaintiffs' claims are barred by their participation, through privies, in the state court proceeding and on the ground that the plaintiffs' complaint in this case represents improper forum shopping.

This is not mere speculation. Other courts have commented on the "singular significance" of the fact that parties to two proceedings in circumstances such as these are represented by the same counsel. While not determinative of privity, the fact that the same counsel appeared in two cases that involve the same issues is significant:

> As the prerequisites to collateral estoppel under New York law are met, the only potential obstacle to its application in these cases is that plaintiff Maryse MacTruong was not a party to the state action. However, under New York law, "[c]ollateral estoppel binds not only the actual parties to a lawsuit, but also their privies. While "privity does not have a technical and well defined meaning [,] ... [i]t includes those who are successors to a property interest, those who control an action although not formal parties to it, those whose interests are represented by a party to that action, and possibly coparties to a prior action." The Second Circuit has interpreted this language from Watts to permit a finding of privity when two actions are controlled by a single party and where the interests involved in the two proceedings are identical. In assessing whether the two actions are controlled by the same parties, the fact that the two actions are prosecuted by the same attorneys is of "singular significance," although it is not itself conclusive. The emphasis on control is intended "to prevent one controlling person or entity from bringing multiple suits in the names of different plaintiffs, and controlling the litigation from the shadows.

Truong v. Truong, 2007 WL 415152, 8 (S.D.N.Y.) (S.D.N.Y., 2007) (citations omitted).

Another federal court spoke directly to what appears to be occurring in this court:

> Moreover, the tactical maneuvering employed by federal plaintiffs should not allow them to evade the state court ruling on the constitutionality of this Louisiana legislation. The coordinated efforts of the commercial fisherman and their representative associations in bringing two different suits in state and federal court, hoping to dodge res judicata by merely naming different plaintiffs with the same interests, cannot escape the concept of preclusion through privity.

Louisiana Seafood Management v. Foster, 53 F.Supp.2d 872, 884 (E.D.La., 1999).

In this case, Egolf Intervenors do not contend that there is a sufficient evidentiary basis at this time to establish that these plaintiffs are in privity with the state court Republican litigants and/or the Executive defendants here and in the state court litigation. All the Egolf Plaintiffs know at this juncture is that these plaintiffs are represented by the same team of attorneys who represented Republican interests in the state court litigation and that, in the press, the plaintiffs have been referred to as "allies of the governor." If this is forum shopping by parties in privity, this Court should dismiss this case on that ground. The Supreme Court has made clear that a party that controls litigation cannot proceed to the federal forum to bring "redundant litigation," after having brought litigation in a state court where the result was not to his liking. *Montana v. U. S.* 440 U.S. 147, 162 (U.S.Mont.,1979).

III.
CONCLUSION

For the reasons set forth above, this Court should dismiss plaintiffs' complaint or, in the alternative, defer this proceeding until the New Mexico state court redistricting proceedings are concluded and the plaintiffs in this case can in good faith allege that the state redistricting plan contains constitutional flaws that this court must address. Alternatively, in the event that discovery establishes that the plaintiffs in this proceeding are in privity with parties to the state court proceeding, this court should dismiss on that ground, at that time, and leave these plaintiffs

to their remedy, which is to petition the United States Supreme Court for a writ of certiorari to the New Mexico Supreme Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 22nd, 2012, I caused the foregoing to be filed electronically through the CM/ECF system, which caused the parties or counsel to be served by electronic means as more fully reflected on the Notice of Electronic Filing.

/s/Joseph Goldberg
Joseph Goldberg