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

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

Plaintiffs,

vs. Case 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.

MAESTAS PARTIES' BRIEF REGARDING THE COURT'S AUTHORITY

Antonio Maestas, June Lorenzo, Alvin Warren, Eloise Gift and Henry Ochoa (collectively the "Maestas Parties"), by and through undersigned counsel, hereby submit the Maestas Parties' Brief Regarding the Court's Authority, as requested and permitted at the status conference held February 17, 2012.

I. INTRODUCTION—THE COMPLAINT FAILS TO ESTABLISH FEDERAL JURISDICTION.

This is a case in search of controversy under Article III of the United States Constitution. In both state and federal court, plaintiffs and defendants, which is to say dozens of parties, all agree that population growth as recorded by the 2010 census has rendered the 2001 redistricting scheme for the New Mexico House of Representatives unconstitutional under the Equal Protection Clause's mandate for "one person, one vote." No controversy exists regarding the need for reapportionment. Additionally, at the status conference on February 17, 2012, the original Plaintiffs and Defendants admitted that they plan to advance essentially identical legal

theories and evidence before this Court, an alliance made apparent in the initial pleadings. Put differently, the original parties are arrayed on both sides of "versus," an obvious marker of a case devoid of the requisite controversy. Furthermore, the Complaint explicitly asks this Court to sit in review of the New Mexico Supreme Court's order, a task for which lower federal courts lack jurisdiction.

Even if one assumes for the sake of argument that jurisdiction exists for a federal district court to sit as a court of review of an order from a state supreme court—a far-fetched hypothetical—then this Court would still lack jurisdiction to hear the Complaint because it advances a theory of future harm based on a metaphor: the notion that the New Mexico Supreme Court's instructions are faulty foundations on which to build a house. Although one must admire the house building-House of Representatives pun, Plaintiffs find themselves on the horns of dilemma with regards to federal jurisdiction. Their claims began as unripe fears about the extent to which the New Mexico Supreme Court's order might tie Judge Hall's hands, and activity in state court this week is quickly transforming their case from unripe to moot.

As more fully explained in the remainder of this Brief, this Court simply lacks jurisdiction to hear the merits of the Complaint. First, from a common sense perspective, no controversy exists under Article III because the original Plaintiffs and Defendants plan to advance the same position in litigation and all parties agree that the current 2001 redistricting scheme is unconstitutional. Second, adjudication of the Complaint necessitates that this Court sit in review of an order of the New Mexico Supreme Court, a task for which federal district courts lack jurisdiction. Third, even if the Complaint were not otherwise jurisdictionally defective, the Complaint itself advances a theory of speculative future harm, making it unripe for adjudication at the time of filing. Therefore, the Maestas Parties respectfully suggest this Court dismiss the

Complaint without prejudice for lack of subject matter jurisdiction, pursuant to Fed. R. Civ. P. 12(b)(1) or (h)(3).

II. THE COMPLAINT SEEKS REVIEW OF AN ORDER OF A STATE'S HIGH COURT, JURISDICTION FOR WHICH CONGRESS HAS DENIED THE LOWER FEDERAL COURTS.

Beyond the apparent lack of controversy between the original Plaintiffs and Defendants under Article III—a fatal jurisdictional defect in its own right—the Complaint seeks review of an order of the New Mexico Supreme Court. Jurisdiction to review the orders of a state supreme court is, however, exclusively vested with the United States Supreme Court. 28 U.S.C. § 1257; *see also District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983) (holding jurisdiction to review orders from a state's high court to be exclusive in the United States Supreme Court); *Atlantic Coast Line R. Co. v. Locomotive Engineers*, 398 U.S. 281, 286 (1970); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923). At the outset, the present case can be easily distinguished from those invocations of *Rooker-Feldman* as a mere substitute for claim preclusion (*res judicata*) or issue preclusion (collateral estoppel), which have resulted in a narrowing of the doctrine. *See, e.g., Lance v. Dennis*, 546 U.S. 459, 466 (2006) (holding that district court erred in ruling that it lacked jurisdiction over voters' action in part because district court had "erroneously conflated preclusion law with *Rooker-Feldman*").

By contrast to the counterclaims advanced in *Lance*, the instant Complaint pleads directly into the plain language of 28 U.S.C. § 1257 by explicitly seeking this Court's review of the constitutionality and compliance with federal law of an order "rendered by the highest court of a State in which a decision could be had." Plaintiffs in this case seek relief that is "tantamount to an appeal" of a state supreme court order, for which lower federal courts have no jurisdiction. *Lance* at 463 (characterizing *Rooker* as correctly viewing the underlying action in *Rooker* "as

tantamount to an appeal of the Indiana Supreme Court decision, over which only [the United States Supreme Court] had jurisdiction") (emphasis supplied); *see also Bolden v. City of Topeka*, 441 F.3d 1129, 1139 (10th Cir. 2006) (holding that *Rooker-Feldman* did not bar plaintiffs' claims because the "federal suit did not seek to overturn the state-court judgment"). Given that the Plaintiffs attach the order from the New Mexico Supreme Court as an exhibit to the Complaint, that the main thrust of the Complaint is to criticize the order and that the relief sought, if granted, would undo the order's effect, there can be no doubt that the instant action is tantamount to an appeal.

At the status conference, Plaintiffs argued that, despite appearances to the contrary, this Court had jurisdiction to review an order of the New Mexico Supreme Court because Plaintiffs were not parties to the state redistricting litigation. Without just coming out and citing *Lance*, Plaintiffs apparently hope their absence from the state case suffices to abate *Rooker-Feldman* as it did for the plaintiffs in *Lance.* Plaintiffs' hope, however, is misplaced. First, the fact that the Plaintiff were absent from the state case does nothing to change the character the Complaint as tantamount to an appeal. Second, the presence of multiple groups of intervenors and the original Defendants, all of whom were parties to the state case, effectively destroys federal jurisdiction for the Complaint as pled. Unquestionably, 28 U.S.C. § 1257 and the *Rooker-Feldman* doctrine jurisdictionally bar the intervenors—presently the Legislative Parties, the Egolf Parties, the Maestes Parties and the Navajo Nation—as well as the original Defendants from complaining about the New Mexico Supreme Court's order before this Court. Couple this truth with the axiom that parties may not consent to federal jurisdiction, and one arrives at the inescapable conclusion that the Court lacks jurisdiction over the Complaint. If complaint about the New

Mexico Supreme Court's order is jurisdictionally barred to some (and actually most) before this Court, logical consistency demands that such complaint be barred to all.

III. THE COMPLAINT ALSO FAILS TO ESTABLISH FEDERAL JURISDICTION BECAUSE IT IS UNRIPE AND BECOMING MOOT.

Because the Complaint merely anticipates future harm from the state district court's new reapportionment plan due to become final on February 27, it was not ripe for adjudication at time of filing, another fatal jurisdictional defect independent of the absence of controversy engendered by the alignment of the original parties and independent of *Rooker-Feldman*. Unless a plaintiff has "suffered, or be[en] threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision," there is no case or controversy within the meaning of Article III. *Tarrant Regional Water Dist. v. Sevenoaks*, 545 F.3d 906, 910 (10th Cir. 2008) (citation and internal quotation marks omitted). When evaluating ripeness, "the central focus is on whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all." *Initiative and Referendum Institute v. Walker*, 450 F.3d 1082, 1098 (10th Cir. 2006) (citation and internal quotation marks omitted); *see also, e.g., Prasco, LLC v. Medicis Pharm. Corp.*, 537 F.3d 1329, 1339 (Fed. Cir. 2008) (holding action was not ripe because controversy under Article III "must be based on a real and immediate injury or threat of future injury that is caused by the defendants—an objective standard that cannot be met by a purely subjective or speculative fear of future harm").

Making jurisdiction even more dubious, it appears likely that Plaintiffs' fears will never come to pass, as activity in the state courts is poised to transform the unripe into the moot. In anticipation of adoption of the final plan due February 27, the state district court, on February 20 and according to schedule, served two preliminary plans for reapportionment of the New Mexico House of Representatives on the parties to the state case for comment. (Aff. of Elizabeth

Clifford ¶ 5, attached as Ex. A.) The preliminary plans differ very little, just in their choice of district consolidation in Northern New Mexico, and they demonstrate the state district court's commitment and ability to comply with both the New Mexico Supreme Court's order and the principle of "one person, one vote," as well as the Voting Rights Act. Notably, the preliminary plans exhibit very low deviations from the ideal district population of 29,417, with the mean and median deviations falling within the range of plus or minus one percent. (Aff. of Elizabeth Clifford ¶¶ 10 & 11.)

This is the same range of mean and median deviations into which falls the Executive Alternative 3 plan, the one the state district court originally adopted and the one the Complaint extols as a paragon of virtue under "one person, one vote." Reinforcing the emerging mootness of the Complaint before this Court, the New Mexico Supreme Court filed its final opinion in the redistricting case on February 21, 2012, attached here as Ex. B (the "Opinion"), making clear that the hands of the state district court are not unconstitutionally or unlawfully tied:

> [T]he order does not specifically direct the district what to do, if anything, about those concerns [regarding partisan neutrality]. The district court continues to have the discretion necessary to carry out its equitable jurisdiction.

Opinion ¶ 44.

In any event, the emerging mootness of the Complaint before this Court only serves to underscore that it was unripe when filed, unripe now and likely to become moot.

IV. CONCLUSION.

In sum, the Complaint fails to establish federal jurisdiction. From a common sense perspective, no controversy under Article III exists because the original Plaintiffs and Defendants are aligned. Furthermore, the Complaint explicitly seeks review of an order "rendered by the highest court of a State in which a decision could be had," 28 U.S.C. § 1257, jurisdiction for which Congress has denied the lower federal courts. Finally, even giving

Plaintiffs the benefit of the doubt on the other points, the Complaint is not ripe and finds itself well on its way to becoming moot. For these reasons, the Maestas Plaintiffs respectfully suggest the Court dismiss the Complaint without prejudice, for lack of subject matter jurisdiction.

Alternatively, if the Court determines that it possesses subject matter jurisdiction, then it should defer to the state proceeding pursuant to *Growe v. Emison*, 507 U.S. 25 (1993). The New Mexico Supreme Court issued an updated scheduling order on February 22, 2012, attached here as Exhibit C. This February 22 order insures that the state efforts at reapportionment will be timely under *Growe.*

Respectfully submitted,

/s/ John V. Wertheim
John V. Wertheim
Jerry Todd Wertheim
Jones, Snead, Wertheim & Wentworth, P.A.
P.O. Box 2228
Santa Fe, NM 87505-2228
Phone: (505) 982-0011
Fax: (505) 989-6288
johnv@thejonesfirm.com
todd@thejonesfirm.com

And

David K. Thomson
Thomson Law Office LLC
303 Paseo de Peralta
Santa Fe, NM 87501-1860
Phone: (505) 982-1873
Fax: (505) 982-8012
david@thomsonlawfirm.net

And

Kate Ferlic, Esq.
Law Office of Katherine Ferlic
128 Grant Avenue, Suite 301
Santa Fe, NM 87501
kate@ferliclaw.com

Attorneys for Plaintiffs Antonio Maestas, June Lorenzo, Alvin Warren, Eloise Gift, and Henry Ochoa

CERTIFICATE OF SERVICE

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

Henry M. Bohnhoff hbohnhoff@rodey.com
Christopher T. Saucedo csaucedo@saucedochavez.com
Iris L. Marshall imarshall@saucedochavez.com
David A. Garcia david@theblf.com & lowthorpe@msn.com
Paul M. Kienzle III paul@kienzlelaw.com
Patrick J. Rogers patrogers@modrall.com
Attorneys for Plaintiffs Claudette Chavez-Hankins, Miguel Vega & Paul Pacheco

Jessica Hernandez jessica.hernandez@state.nm.us
Paul J. Kennedy pkennedy@kennedyhan.com
Attorneys for Defendant Susana Martinez

Joseph Goldberg jg@fbdlaw.com
John W. Boyd @ jwb@fbdlaw.com
David H. Urias dhu@fbdlaw.com
Attorneys for Intervenors Defendants Brian Egolf, Hakim Bellamy, Maurilio Castro, Mel Hoguin & Roxane Spruce Bly

Robert M. Doughty, III rod@doughtywest.com
Judd West judd@doughtywest.com
Attorneys for Defendant Dianna J. Duran

Jennifer J. Dumas jdumas@nordhauslaw.com
Patricia Williams pwilliams@wwwlaw.us
Attorneys for Intervenors The Navajo Nation, Angela Barney Nez, Duane H. Yazzie, Kimmeth Yazzie, Lorenzo Bates & Roger Martinez

Richard E. Olson rolson@hinklelawfirm.com
Luis G. Stelzner lgs@stelznerlaw.com
Sara Nathanson Sanchez ssanchez@stelznerlaw.com
Attorneys for Ben Lujan, Sr. and Tim Z. Jennings

/s/ John V. Wertheim
John V. Wertheim