

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

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

Case No. 1:12-cv-00140-HH-BB-WJ

Plaintiffs,

vs.

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.

**PLAINTIFFS' MEMORANDUM BRIEF
REGARDING THIS COURT'S AUTHORITY
TO ADDRESS THE MERITS OF THE PLAINTIFFS' CLAIMS**

At the February 17, 2012 scheduling conference, this Court directed the parties to file briefs on or before February 22, 2012 regarding the Court's authority to address the merits of Plaintiffs' claims asserted in their February 13, 2012 Complaint. The Court specifically requested the parties to address the issues of abstention, deferral and jurisdiction.

I. INTRODUCTION

Since the February 17 scheduling conference, the following has occurred in the Egolf v. Duran state court litigation. First, on Monday, February 20, 2012, and in accordance with the New Mexico Supreme Court's February 10, 2012 Order, District Judge Hall filed with the First Judicial District Court two alternative preliminary redistricting maps for the New Mexico House of Representatives. Electronic copies of these maps are being submitted with the Notice of Lodging that the Plaintiffs are concurrently filing herein. See also Exhibit A attached hereto

(court's transmittal e-mails to counsel). Second, on Tuesday, February 21, 2012, the New Mexico Supreme Court issued its formal Opinion explaining in more detail the reasoning underlying its February 10 Order. An electronic copy of the Opinion is being submitted also with the Notice of Lodging.

These documents do not change the circumstances that gave rise to this litigation. On the contrary, they simply confirm what was apparent on February 13, when the Plaintiffs filed their Complaint. The New Mexico Supreme Court has given Judge Hall unconstitutional instructions that, inter alia, he create a new House redistricting map that increases deviations from the ideal district population in order to avoid splitting municipalities and achieve a politically "neutral" map. Judge Hall now has complied with those instructions.

II. THIS COURT NEED NOT AND SHOULD NOT ABSTAIN OR EVEN DEFER FROM ADDRESSING THE MERITS OF THE PLAINTIFFS' COMPLAINT.

This case involves a challenge, on federal constitutional and statutory grounds, to the results of state legislative redistricting conducted first by New Mexico's Legislature and then, following failure in that body, New Mexico's courts. This Court has jurisdiction over these claims under 28 U.S.C. §§ 1331. Further, in Grove v. Emison, 507 U.S. 25, 32-33 (1993), the Supreme Court determined that, while a federal court may in certain circumstances "defer proceeding to hear redistricting disputes where the State, through its legislative *or* judicial branch, has begun to address that highly political task itself, the federal court will not abstain from doing so." (Emphasis original.) Accord, id. at 37 ("Germano requires deferral, not abstention."); Vigil v. Lujan, 191 F. Supp. 2d 1273, 1274 (D.N.M. 2001) ("A federal district court is justified in adopting its own redistricting plan if it becomes apparent that the state legislature or judiciary, through no fault of the federal court, would not develop a redistricting plan in a timely manner. Thus, while we have and will *retain* jurisdiction over this matter, we

choose *at this time* to defer consideration of the merits of any proposed redistricting plan for the State of New Mexico.” (emphasis original)).

Under Emison, federal court deferral is no longer proper if it becomes apparent “that these state branches will fail timely to perform” their duty to apportion state legislative or congressional districts. Id. at 34. And in this context, “timely” means “adopt[ion] of a *constitutional* plan ‘within ample time ... to be utilized in the [upcoming] election.’” Id. at 35 (quoting Scott v. Germano, 381 U.S. 407, 409 (1965) (emphasis added)). In Emison, the Supreme Court reversed the district court for adopting its own plan to reapportion Minnesota’s Congressional districts where a Minnesota state court concurrently was drawing its own plan: “the state court was fully prepared to adopt a congressional plan in as timely a manner as the District Court.” Id. at 37. However, the Supreme Court emphasized that, “the District Court would have been justified in adopting its own plan if it had been apparent that the state court ... would not develop a redistricting plan in time for the primaries.” Id. at 36.

Further, deferral considerations end when the state court adopts a redistricting plan -- at that point, the question is no longer one of affording the state body the opportunity to draw a plan, but whether that plan complies with federal constitutional and statutory mandates. “[A]fter January 30 [the date the Minnesota state court issued its final order adopting a legislative plan for use in the 1992 primary election], the federal court was empowered to entertain the *Emison* plaintiffs’ claims relating to legislative redistricting ... to the extent those claims challenged *the state court’s* plan.” Id. at 30, 36 (emphasis original). Accord, Benavidez v. Eu, 34 F.3d 825, 834 (9th Cir. 1994) (while the district court “properly exercised .. restraint” in deferring to ongoing state redistricting proceedings, “[i]t simply went too far”; once the state plan was adopted, the district court “should have entertained” federal plaintiffs’ claims).

In contrast to the plaintiffs in Emison v. Growe, the Plaintiffs herein are not asking this Court to draw and adopt a redistricting plan for the New Mexico House of Representatives in advance of one being drawn by New Mexico's state court. On the contrary, here the state courts already have acted: the New Mexico Supreme Court ordered the state district court on February 10, 2012 to draw a map in an unconstitutional manner, see Compl. Ex. 1; the district court complied and issued alternative maps on February 20, 2012 that contains such infirmities, see February 22, 2012 Notice of Lodging, Exhibits 1 and 2; and the New Mexico Supreme Court has now reaffirmed its unconstitutional mandate with its February 21, 2012 opinion, see Notice of Lodging, Exhibit 3. There is no purpose or justification for this Court to defer any further. This Court reasonably cannot assume that the state district court ultimately will not adopt a plan that is not in accordance with the state Supreme Court's instructions. Further, this Court must act now, because for New Mexico's primary election to proceed as scheduled a constitutional plan must be in place by no later March 6, 2012. See Secretary of State's January 24, 2012, Emergency Motion to Lift Stay, at 8-13, filed in Supreme Court proceeding No. 33,387 (describing cascading preliminary election deadlines that will be affected by any failure to adopt a redistricting plan by March 6, 2012).

III. THE ROOKER-FELDMAN DOCTRINE DOES NOT BAR THIS COURT FROM HEARING THE PLAINTIFFS' CLAIMS.

The Plaintiffs herein are not parties to the state court proceedings. As a result, the *Rooker-Feldman* doctrine is inapplicable and does not bar this Court from proceeding in this case.

Because the United States Supreme Court has exclusive jurisdiction pursuant to 28 U.S.C. § 1257 over appeals from final state court judgments, "under what has come to be known as the *Rooker-Feldman* doctrine, lower federal courts are precluded from exercising appellate

jurisdiction over final state-court judgments.” Lance v. Dennis, 546 U.S. 459, 463 (2006). However, “our cases since *Feldman* have tended to emphasize the narrowness of the *Rooker-Feldman* rule.” Id. at 464. Thus, “[t]he *Rooker-Feldman* doctrine ... is confined to cases of the kind from which the doctrine acquired its name: case *brought by state-court losers* complaining of injuries caused by state court judgments.” Exxon Mobil Corp. v. Saudi Basic Industries Corp., 544 U.S. 280, 284 (2005) (emphasis added). Accord, Johnson v. DeGrandy, 512 U.S. 997, 1005-06 (under *Rooker-Feldman* doctrine, “a party losing in state court is barred from seeking what in substance would be appellate review of the state judgment in a United States district court, based on the losing party’s claim that the state judgment itself violated the loser’s federal rights” (emphasis added)).

The obvious corollary to this description of the parameters of the *Rooker-Feldman* doctrine is that it does not apply to federal cases brought by persons who are not parties to the state court proceedings. Lance v. Dennis confirms this. In that case, after the Colorado legislature failed to pass a redistricting plan, a state court drew a plan. The next year, the legislature enacted a plan, but Colorado’s attorney general then successfully sued in state court to require the Colorado Secretary of State to use the court plan. Voters thereupon sued in federal court, challenging the second state court decision. The three-judge panel dismissed the federal action on *Rooker-Feldman* grounds, but the Supreme Court reversed. Citing Johnson v. DeGrandy, 512 U.S. at 1005-06, the Court noted that, “we have held *Rooker-Feldman* inapplicable where the party against whom the doctrine is invoked was not a party to the underlying state-court proceeding.” 546 U.S. at 464. The Court went further, holding that the *Rooker-Feldman* doctrine would be inapplicable even assuming the federal court plaintiff was in privity with one of the state court parties. Id. at 462-63. “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.” Id. at 466.¹

This Court can note that, in fact, it was the rule in the Tenth Circuit even before Lance v. Dennis that the *Rooker-Feldman* doctrine does not apply to non-parties to the underlying state court proceeding. In Johnson v. Rodriguez, 226 F.3d 1103 (10th Cir. 2000), a biological father who was not a party to his child’s state court adoption proceeding brought suit in federal court, asking that the adoption decree be voided. The Tenth Circuit reversed the district court’s dismissal of the federal action on *Rooker-Feldman* grounds because, among other reasons, it is not applicable to non-parties. Citing Johnson v. DeGrandy and precedent from other circuits, the Tenth Circuit held that:

We are convinced that the *Rooker-Feldman* doctrine does not bar a federal action when the plaintiff, as here, lacked a reasonable opportunity to litigate claims in the state court.... A person ordinarily would lack a reasonable opportunity to litigate claims in an action in which the person was not a party.

226 F.3d at 1110.²

IV. THE PLAINTIFFS HEREIN ARE NOT IN PRIVACY WITH ANY OF THE PARTIES IN THE NEW MEXICO STATE COURT REDISTRICTING PROCEEDINGS. THEREFORE, 28 U.S.C. § 1738 DOES NOT BAR THIS COURT FROM HEARING PLAINTIFFS’ CLAIMS.

The preclusive effect that, under the full faith and credit clause of 28 U.S.C. § 1738, this Court is to give the decisions of Judge Hall and the New Mexico Supreme Court are governed by New Mexico’s rules of preclusion. Lance v. Dennis, 546 U.S. at 466.

¹ The defendant Colorado Secretary of State had argued that the plaintiff voters were bound by the result of the attorney general’s state court challenge to the legislative plan, on the theory that the citizens are in privity when the government litigates a matter of public concern. See infra at 7-8.

² It is immaterial that the Plaintiffs’ counsel herein have represented other parties in the Egolf v. Duran litigation. Cf. Benavidez v. Eu, 34 F.3d at 832 (“Wilson cites no cases, and we can find none, in which any court has ever granted *Younger* abstention because a party’s *attorney* was also participating in a state proceeding.”).

In New Mexico, claim and issue preclusion may be invoked only against someone who was, or was in privity with, a party to the earlier proceeding. Shovelin v. Central N.M. Elec. Coop., Inc., 115 N.M. 293, 297, 850 P.2d 996, 1000 (1993); City of Sunland Park, 2003-NMCA-098, ¶ 18, 134 N.M. 216, 75 P.3d 816. It is undisputed that the Plaintiffs herein have not been parties to the Egolf v. Duran proceedings. Nor are they in privity with any of those parties. “The concept of privity with respect to issue preclusion has been defined as that relationship between two parties which is sufficiently close so as to bind them both to an initial determination, at which only one of them was present.” Rex, Inc. v. Manufactured Housing Commte., 119 N.M. 500, 507, 892 P.2d 947, 954 (1995) (internal quotation marks and citations omitted). Stated less circularly, “certain pre-existing substantive legal relationships between the person to be bound and a party to the judgment may render collateral estoppel appropriate to bar subsequent litigation.” Phillips v. Franco, 612 F. Supp. 2d 1190, 1195 (D.N.M. 2009). The Plaintiffs herein have no substantive legal relationships with any of the parties to the underlying state action at issue.

In Lance v. Dennis, the Colorado Attorney General argued that, because he brought the state court action over a matter of public concern, under Colorado state law the result in that action was binding on its citizens, including the voters in the subsequent federal action. The Attorney General’s position ultimately prevailed. See Lance v. Dennis, 444 F. Supp. 2d 1149 (D. Colo. 2006). However, that analysis cannot be applied in this case. First, in Egolf v. Duran no public official brought suit on behalf of all New Mexico citizens to determine a public right. Second, in the case at bar the Plaintiffs are suing to vindicate their individual Fifth Amendment rights to have their votes count the same as those of other New Mexico voters.³ Complaint ¶¶ 5-

³ The Lance v. Dennis three-judge panel observed that, under Colorado law, “the extent to which individuals are privies of the state depends on whether the issue asserted by the private citizen and previously asserted by the public

7. Third, New Mexico law differs from Colorado's. In Floersheim v. Board of Comm'rs, 28 N.M. 330, 212 P. 451 (1922), one Manuel Martinez, a resident and taxpayer of Harding County, brought suit expressly "on behalf of himself and all other residents and taxpayers similarly situated" to enjoin a county bond issue. The trial court upheld the bond issue, which decision was affirmed on appeal to the New Mexico Supreme Court. Thereafter, Floersheim brought a similar suit, also on behalf of himself and all others similarly situated, to enjoin the bond issue. This time the court upheld the challenge and enjoined the bond issuance. On appeal, the New Mexico Supreme Court found the second proceeding was barred by res judicata. However, the court did so only because the first suit was brought on behalf of the public at large: "Where a suit is brought to determine a public right, involving a matter of general interest, *as, for example, the suit of Martinez as a resident and taxpayer in behalf of himself and all others similarly situated*, to enjoin the issuance of courthouse and jailhouse bonds by Harding county, all citizens and taxpayers are parties to the proceeding by representation, and are bound by the judgment...." Id. at 336, 212 P.2d at 453 (emphasis added). Because none of the Egolf v. Duran plaintiffs brought suit on behalf of anyone other than themselves, the outcome of that decision does not have preclusive effect on the claims of the Plaintiffs herein.

V. CONCLUSION

This Court clearly has jurisdiction over the Plaintiffs' claims: they seek a determination that New Mexico state officials are and will be acting in violation of the United States

entity is a matter of general interest to all the people and whether the interests of the sovereign are different from those of the private individuals." 444 F. Supp. 2d at 1158-59 (internal quotation marks and citations omitted). The voter plaintiffs in Lance v. Dennis asserted a claim that the Colorado state court redistricting plan was being enforced in violation of the Elections Clause, U.S. Const., art. I, § 4. The federal court found that voter plaintiffs' Elections Clause interests merged with and in fact were derivative of the state's interest. Id. at 1160. However, the court noted that, in contrast, an individual's interest in the dilution of the worth of her vote is not barred by a governmental entity's prior suit that raises common issues. Id. at 1159 n.12 (citing Town of Lockport v. Citizens for Community Action at the Local Level, Inc., 430 U.S. 259, 263 n.7 (1977)). Plaintiffs herein complain of the dilution of the worth of their individual votes. Their interests are different than those of the sovereign. See, e.g., Compl. ¶ 5.

Constitution. Because the New Mexico state courts have made their rulings, Emison v. Growe no longer requires this Court to defer from considering these claims. And because the Plaintiffs herein have not been parties to the state court proceedings, neither *Rooker-Feldman* nor 28 U.S.C. § 1738 bar this Court from proceeding to the merits.

Respectfully submitted,

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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:

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