

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.

**OPENING BRIEF REGARDING THE AUTHORITY OF THE COURT TO DELAY
ELECTION DEADLINES FOR STATE HOUSE OF REPRESENTATIVES**

Defendants 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, III), hereby submit this Opening Brief Regarding the Authority of the Court to Delay Election Deadlines for the State House of Representatives. As stated below, the Governor and Secretary of State acknowledge that federal courts have the authority to enjoin state elections, but urge the Court to use restraint in deciding whether and when to exercise that authority. The Governor and the Secretary of State further urge this Court to take all possible steps to avoid a situation where it becomes necessary to delay or enjoin the New Mexico primary election for the State House of Representatives. Specifically, the Governor and Secretary of State are confident that this Court can act to decide the merits of Plaintiffs'

claims and issue a redistricting plan in time to preserve the remaining election deadlines. As a result, any immediate action taken by the Court to delay or alter the deadlines would be premature and unnecessary. Furthermore, even the most minor delays to the election deadlines would jeopardize the entire primary election and the Court should refrain from exercising its authority to delay the election deadlines unless and until it is determined that the Court will be unable to put a constitutional plan in place in time to realistically allow the primary election to go forward.

ARGUMENTS AND AUTHORITIES

I. FEDERAL COURTS HAVE THE AUTHORITY TO ENJOIN STATE ELECTIONS, BUT ONLY DO SO UNDER LIMITED CIRCUMSTANCES.

Federal courts have the authority to enjoin state elections and have done so to prevent imminent constitutional harm. *See Reynolds v. Sims*, 377 U.S. 533, 585 (1964); *Chisom v. Roemer*, 853 F.2d 1186, 1189 (5th Cir. 1988). After all, “[i]t is enough to say now that, once a State’s legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan.” *Reynolds*, 377 U.S. at 585. However, “under certain circumstances, such as where an impending election is imminent and a State’s election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative reapportionment case, even though the existing apportionment scheme was found invalid.” *Id.*

Therefore, in determining whether to enjoin a pending election, “a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of

state election laws, and should act and rely upon general equitable principles.” *Reynolds*, 377 U.S. at 585. Based on these principles, a court “can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court’s decree.” *Id.*

Nevertheless, federal courts acknowledge the constitutional imperative to have a constitutional plan in place by the candidate qualifying deadlines, “in order to avoid candidate and voter confusion that results from the flux of delays, date changes, and continuances.” *Smith v. Clark*, 189 F. Supp. 2d 502 (2001). Accordingly, unless it is clear that a federal court cannot ensure that a constitutional redistricting plan is in place, the court should refrain from adding to the delay, date changes, and continuances that would necessarily accompany a stay to the pending election deadlines. *See id.*

II. AT THIS TIME, THIS COURT SHOULD NOT STAY OR OTHERWISE ENJOIN THE PENDING ELECTIONS DEADLINES FOR THE STATE HOUSE OF REPRESENTATIVES.

The Governor and Secretary of State respectfully request that this Court refrain from enjoining and delaying the pending deadlines for the election of the State House of Representatives. First, at this time, there is no clear threat that this Court will be unable to act expeditiously to rule on the merits or that it would be required to delay ruling on the merits of this action in time for the pending election deadlines. *See* Gov. and Sec’y of State Opening Brief on Jurisdiction, Abstention, Preclusion, and Deferral Issues (filed Feb. 22, 2012). Second, there is no clear threat at this time that after ruling on the merits of this case, this Court would be unable to put a constitutional plan in place in time to meet the pending election deadlines.

Therefore, at present, it cannot be said that this Court must immediately exercise its authority to enjoin the election to ensure that the election does not proceed under an unconstitutional apportionment scheme. *See Reynolds*, 377 U.S. at 585. Any decision to enjoin the election, therefore, should not occur until after March 6, 2012, the first relevant deadline for the State House of Representatives election. As outlined below, the Court must use substantial restraint to determine when and if a delay in the election deadlines, even one as minor as a few days, will jeopardize the ability of the State to meet the primary election deadline and whether said delay will cause substantial confusion and cost.

New Mexico law sets forth specific deadlines for the electoral process to “provide for efficient administration and conduct of elections.” NMSA 1978, §1-1-1.1. At present, there are just over 100 days left until the date of the primary elections for the State House of Representatives. Pursuant to two separate orders, the New Mexico Supreme Court has stayed the Governor’s public proclamation calling a primary election for the State House of Representatives, “until further order of the Court.” *Jennings, et al. v. New Mexico Court of Appeals*, No. 33,387, Order at 2 (Jan 26, 2012); *Maestas, et al. v. Hall*, No. 33,386 (Jan. 26, 2012). That stay addresses the first deadline in New Mexico’s statutory election process for the State House of Representatives, in which the Governor files a public proclamation with the Secretary of State calling a primary election to be held in each county and precinct of the state. NMSA 1978 § 1-8-12. That deadline was to occur on January 30, 2012. The New Mexico Supreme Court’s stay will not be lifted until the final plan has been adopted by Judge Hall on February 27, 2012, at the earliest.

New Mexico statutory law provides that the last possible date for the Governor to issue a public proclamation is March 6, 2012. NMSA 1978, §1-8-16 (establishing the deadline for issuing an amended public proclamation). Regardless of when the public proclamation is issued, the Secretary of State is statutorily required to publish the proclamation for five consecutive days and send authenticated copies of the proclamation to each county clerk, who must publish the proclamation once a week for two weeks. NMSA 1978 §§ 1-8-14 & -15. Therefore, assuming the Governor is able to issue a public proclamation on March 6, 2012, the publication of the proclamation could not be completed until March 20, 2012 at the earliest.

On March 20, 2012, candidates for the State House of Representatives must file declarations of candidacy and nominating petitions with the Secretary of State. NMSA 1978 § 1-8-26(B). If the Court were to enjoin and delay the date on which candidates must file their declarations of candidacy and nominating petitions, even by one week, it would affect the Secretary of State and County Clerks' ability to certify candidates for each ballot position. For example, if the Court were to extend the candidacy filing date from March 20 to March 27, 2012, voters could file challenges to the nominating petitions through April 6, 2012. *See* NMSA 1978, § 1-8-18(B). Challenges to nominating petitions must be heard and adjudicated by the district within ten days after the challenge is filed. The district court's decision can then be appealed to the Court within five days after the decision of the district court. *Id.*

April 10, 2012 is the last day to certify candidates for each ballot position to the printer. *See* NMSA 1978, § 1-10-4(A). A delay in the nominating petition filing date by a single week would mean that a challenge and appeal as set forth in New Mexico statute, NMSA 1978, § 1-8-18(B), would prevent the certification of candidates by the statutory deadline. Next, if the ballot

certification deadline under NMSA 1978 § 1-10-4(A) were extended by a single week, to April 17, 2012, ballots could not be completed and printed in time to comply with federal law for the mailing of military and overseas ballots, which must occur by April 20, 2012. NMSA 1978, §1-10-5.¹

Furthermore, county clerks are required to have ballots available to them on or before April 26, 2012. NMSA 1978, § 1-10-5. If the ballot certification deadline is moved as outlined above, it would allow only nine days to have the ballots finalized, proofed, and printed statewide or programmed electronically in compliance with the above. This would not be sufficient time to allow Automated Election Services, the vendor of the state's ballots, to correctly print and deliver final ballots to all 33 counties in the State of New Mexico.

Again, if the Court extended the ballot printing deadline by as little as one week, to May 2, 2012, it could result in delays for early voting, which begins on May 8, 2012. Specifically, if the county clerks do not receive final ballots until May 2, there is only six days to mail the absentee ballots for early voting on May 8. In addition, a one week delay in the mailing of absentee ballots would shorten the time period available to voters who vote by mail and, thus, disenfranchise the absentee voters. Any additional delay beyond one week would threaten the primary election date of June 5, 2012, and require that date to be reset.

¹ The State of New Mexico is currently subject to a Consent Decree with the United States Department of Justice for its failure to timely mail military and overseas ballots in the 2010 election. While the Consent Decree may permit an exception to this deadline if there is pending litigation, any delay in this deadline will nevertheless disenfranchise the state's military and overseas voters.

In light of these effects, the Court should refrain from exercising its authority to delay the election deadlines unless and until it is determined that the Court will be unable to put a constitutional plan in place in time to realistically allow the primary election to go forward.

CONCLUSION

For the foregoing reasons, the Governor and Secretary of State respectfully request that this Court refrain from enjoining and delaying the pending deadlines for the election of the State House of Representatives at this time.

Respectfully submitted,

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I HEREBY CERTIFY that on February 23, 2012, I filed and served a true and correct copy of the foregoing on all counsel of record via filing with the CM/ECF filing system.

A handwritten signature in blue ink, consisting of several overlapping loops and a vertical stroke, positioned above a horizontal line.

Robert M. Doughty, III