

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
THE COURT'S AUTHORITY TO POSTPONE
NEW MEXICO'S PRIMARY ELECTION DEADLINES

Egolf Intervenors, by their undersigned counsel, and pursuant to this Court's direction, provide the following legal memorandum setting forth the Court's authority to postpone New Mexico's Primary Election Deadlines, if deemed necessary:

Introduction

Should this Court determine that this matter should proceed and it should substitute its judgment regarding the redistricting of the New Mexico House of Representatives for that of the New Mexico State Courts, it will then be faced with impending deadlines for New Mexico's 2012 Primary Election, inter alia. Examples from other Circuit cases, as well as from other, current pending Federal Court redistricting lawsuits in Texas, demonstrate that this Court has the

power to postpone or enjoin the upcoming Primary Election, if need be. However, there exists a well-developed body of Federal Law that instructs against enjoining or delaying elections, favoring instead to allow elections to proceed, even if it would result in elections from malapportioned districts. Accordingly, while this Court has the power to postpone or enjoin the upcoming 2012 New Mexico Primary Election, prudential considerations should weigh in favor of allowing the election to go forward with whatever districts are set in place by the pending New Mexico State Court action.

Argument

I. COURTS ELSEWHERE HAVE POSTPONED PRIMARY ELECTIONS AND A FEDERAL COURT IN TEXAS HAS RECENTLY POSTPONED TEXAS' PRIMARY ELECTIONS PENDING REDISTRICTING LITIGATION.

At the outset, it deserves mention that the New Mexico Supreme Court currently has in place a stay of the very first primary deadline for the New Mexico House of Representatives primary election. Just yesterday, on February 22, 2012, the New Mexico Supreme Court issued a Supplemental Scheduling Order (attached hereto as Exhibit A), referencing its "Standing Order which provides that 'the Governor's public proclamation calling a primary election for the State House of Representatives is hereby stayed until further order of the Court.'" Ex. A at 3. Thus, there is already a stay of the impending election deadlines.

While exceedingly rare, the enjoining or postponing of state or local elections by a Federal Court is not without precedent. For example, in *Watson v. Commissioners Ct. of Harrison Cty.*, 616 F.2d 105 (5th Cir. 1980), the Fifth Circuit Court of Appeals enjoined a County Commission primary election and ordered the formulation of a redistricting plan. Further, the Fifth Circuit Court ordered the district court to "fix an appropriate date for the election following approval of the reapportionment with such modifications as the court may

make in the interest of providing Harrison County, Texas, with an equitable and constitutional plan of apportionment.” *Id.* at 107.

Similarly, there is currently an order in place in a Federal Court in Texas, postponing Texas’ primary elections, pending the outcome of judicial redistricting efforts. *See* Exhibit B, hereto, Order in *Perez v. Texas*, Civ. Ac. No. 11-CV-360-OLG-JES-XR (consolidated) (W.D. Tex. (San Antonio)) (setting out postponed election deadlines for Texas’ State House of Representatives and Senate elections). Moreover, there is every indication that the Three-Judge Panel in the *Perez* case is likely to further extend Texas’ 2012 primary election deadlines, until May 29, 2012. *See* “New Delay is Possible for Primary In Texas,” *The New York Times*, February 16, 2012, (<http://www.nytimes.com/2012/02/16/us/texas-primary-could-face-new-delay-over-redistricting-lawsuit.html>). Thus, while rare, it is not without precedent for a Federal Court to delay or enjoin state elections that are found to violate federal constitutional principles.

II. COURTS THAT HAVE CONSIDERED DELAYING OR ENJOINING ELECTIONS HAVE REGULARLY DECLINED TO DO SO BASED ON PRUDENTIAL CONSIDERATIONS AND HAVE ALLOWED ELECTIONS TO PROCEED USING MALAPPORTIONED DISTRICTS.

While Federal Courts have been asked, on several occasions, to delay or enjoin elections, they regularly decline to do so for a multitude of reasons, including the timing of the election and proximity to impending deadlines. Moreover, based upon well-settled law from the United States Supreme Court, Federal Courts have allowed elections to proceed in out-dated, malapportioned districting schemes to avoid disruption and voter disenfranchisement.

“Interference with impending elections is extraordinary.” *Southwest Voter Registration Ed. Project v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003) (en banc). Accordingly, Federal Courts repeatedly have refused to enjoin state election laws and deadlines brought too close to the scheduled election. *See Purcell v. Gonzalez*, 549 U.S. 1, 7 (2006); *Reynolds v. Sims*, 377 U.S.

533, 585-86 (1964). In *Purcell*, the Supreme Court reasoned that “[c]ourt orders affecting elections ... can themselves result in voter confusion and consequent incentive to stay away from the polls. As an election draws closer, that risk will increase.” *Purcell*, 549 U.S. at 7. The Supreme Court has acknowledged that these principles can justify proceeding with an election, even though the existing district apportionment scheme may be found to be invalid. *Reynolds*, 377 U.S. at 585.

In *Pileggi v. Aichele*, ___ F.Supp.3d ___, 2012 WL 398784 (E.D. Pa. 2012), a federal district court recently (on February 8, 2012) denied a request to enjoin upcoming election deadlines for Pennsylvania’s General Assembly. In doing so, the court noted that “[f]ederal courts must act cautiously when asked to interfere with state election matters.” *Id.* at *6.

Further, the court noted:

In awarding or withholding immediate relief, 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. With respect to the timing of relief, 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. at *7 (citing *Reynolds v. Sims*, 377 U.S. at 585). Moreover, the *Pileggi* court noted that “[s]ince the *Reynolds* decision, a number of federal courts have withheld the granting of relief, and even dismissed actions, where an election was imminent and the election process had already begun.” *Id.* (listing various federal court cases across the country where immediate relief was denied because of impending election deadlines).

Relying upon the U.S. Supreme Court’s instructions in *Reynolds*, and considering that there are numerous election deadlines that had passed, and many more that would continue to pass, and the fact that the primary election was eleven weeks away, the court

in *Pileggi* ruled that Pennsylvania could proceed with its State General Assembly elections using the malapportioned, 2001 districting scheme. *Id.* at *8.

As an additional consideration related to potential voter disenfranchisement and undermining the public interest, the *Pileggi* court noted that 2012 is a Presidential election year, and that a delayed election could “deprive Pennsylvania voters of their right to choose delegates to the National Conventions and their candidate for the Presidency of the United States.” *Id.* at *10. Thus, whether an election occurs during a Presidential election year is an important consideration when deciding whether to enjoin or delay an election.

III. IF THIS COURT DETERMINES TO PROCEED, IT SHOULD ALLOW THE ELECTION TO OCCUR WITH THE STATE COURT PLAN AND RULE PRIOR TO THE 2014 ELECTION, THEREBY MINIMIZING THE IMPACT OF ANY MALAPPORTIONMENT.

Should this court decide that it can and should second-guess the redistricting plan ultimately adopted by the New Mexico State Courts, the prudential considerations outlined by the U.S. Supreme Court in *Reynolds*, coupled with the fact that this is a Presidential election year, weigh in favor of not delaying the election and allowing it to proceed under the State Court plan or the 2001 districting scheme.

First, as set forth in the New Mexico Supreme Court’s Supplemental Scheduling Order, *see* Ex. A, hereto, the deadline to issue a proclamation for the upcoming primary has been stayed, but the Governor may issue an amended proclamation on March 6, 2012. Thus, the electoral machinery is already in motion for New Mexico’s primary election.

Second, as the New Mexico Supreme Court’s Supplemental Scheduling Order indicates, that Court is requiring parties to move very expeditiously in appealing, if at all,

the House of Representatives judgment that is scheduled to be issued by the State District Court on February 27, 2012. Therefore, at a minimum, there will be a State Court House of Representatives plan in time for the remaining 2012 primary election deadlines.

Third, since this is a Presidential Election year, it is important that voters not be alienated by any potential delays in primary voting.

Following *Reynolds*, and its progeny, this Court should avoid voter disenfranchisement and confusion by allowing the primary election to proceed under the State Court Plan that will be issued by the New Mexico First Judicial District Court, the Honorable James A. Hall, on February 27, 2012, with any appeals from that Judgment to be argued before the New Mexico Supreme Court on March 5, 2012. *See* Ex. A at 5. Moreover, since this litigation involves only the New Mexico State House of Representatives, there is little justification for upending an entire election ballot over this one office.

Finally, because members of the New Mexico House of Representatives run on a two year election cycle, *see* N.M. Const. art. IV, sec. 4, anyone elected to represent an allegedly malapportioned district would presumably only hold that office for two years. Acting expeditiously, this Court could ostensibly correct any alleged malapportionment in time for the next election cycle, in 2014, thereby minimizing any ill effects. This approach would best fit with the prudential considerations set forth in *Reynolds*, and most recently considered in Pennsylvania by the *Pileggi* court.

Conclusion

In rare instances, Federal Courts have exercised their authority to delay or enjoin State primary elections. However, given the proximity to the New Mexico Primary

election, the fact that this is a Presidential Election year, and considering the relatively short term of members of the New Mexico House of Representatives, this Court can and should follow the U.S. Supreme Court's instructions in *Reynolds v. Sims* and stay its hand, allowing the elections to proceed under the reapportionment plan that will be finalized by New Mexico State Courts in time for the primary election deadlines to be met.

Respectfully submitted,

Garcia & Vargas, LLC

/s/ Ray M. Vargas, II
Ray M. Vargas, II
David P. Garcia
Erin B. O'Connell
303 Paseo del Peralta
Santa Fe, NM 87501
Phone: (505) 982-1873
ray@garcia-vargas.com
david@garcia-vargas.com
erin@garcia-vargas.com

And

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

I hereby certify that on February 23, 2012, the foregoing document was electronically filed with this Court's CM/ECF system, which caused all counsel of record to be served by electronic means.

/s/ Ray M. Vargas, II
Ray M. Vargas, II