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 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,

and

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

Intervenors.

CORRECTED EGOLF INTERVENORS' RESPONSE TO PLAINTIFFS' MEMORANDUM BRIEF REGARDING THIS COURT'S AUTHORITY TO ADDRESS THE MERITS OF PLAINTIFFS' CLAIMS AND TO THE EXECUTIVE DEFENDANTS' OPENING BRIEF ON JURISDICTION, ABSTENTION, PRECLUSION AND DEFERRAL ISSUES

Egolf Intervenors, by their undersigned counsel, respond to: 1) Plaintiffs' Memorandum Brief Regarding This Court's Authority to Address the Merits of the Plaintiffs' Claims; and 2) Governor Susana Martinez and Secretary of State Dianna J. Duran's Opening Brief on Jurisdiction, Abstention, Preclusion, and Deferral Issues.

As shown below, despite their efforts to transform their speculation concerning the outcome of the state redistricting proceedings into an actual injury, both Plaintiffs and Executive Defendants fail to provide any legal basis on which this Court can exercise jurisdiction over Plaintiffs' claims in this matter. Plaintiffs lack standing to challenge the anticipated

malapportionment in the districts for the New Mexico House of Representatives because there is no redistricting plan in place in the state court proceedings and the issue of what the redistricting plan will be is currently and timely being addressed by the New Mexico courts. Through those proceedings, the New Mexico courts are working expeditiously to address the current malapportionment of the state house districts and there is no rational reason to doubt that the state court's efforts will result in a plan that meets the constitutional requirement of one-person, one-vote. As explained by the Egolf Intervenors in their opening brief to this Court, Plaintiffs cannot create an actual injury, and thus standing, simply by mischaracterizing the Supreme Court of New Mexico's Order to the state district court; nor can Plaintiffs make the issues they raise ripe for adjudication by simply declaring them to be so. In addition, even if it were the case that Plaintiffs had standing and the problem with ripeness were satisfied, neither Plaintiffs or the Executive Defendants provide a cogent legal basis for this Court to ignore the United States Supreme Court's direction that federal district courts defer to ongoing state redistricting proceedings.

A. Plaintiffs Do Not Even Attempt to Explain How They Have Article III Standing in This Case When Their Claim of Malapportionment is Not Based on Actual Injury, But is Grounded Only on Plaintiffs' Unfounded Conjecture.

In their opening brief, Plaintiffs focus on trying to convince this Court not to abstain or defer from addressing the merits of Plaintiffs' claims, even though the New Mexico Supreme Court and a state district court are addressing the very same issue of malapportionment complained of by Plaintiffs. *See* Plaintiffs' Memorandum Brief Regarding This Court's Authority to Address the Merits of the Plaintiffs' Claims (Plaintiffs' Opening Brief"), Dkt. Entry No. 30 at 2-4. Plaintiffs also argue that the *Rooker-Feldman* doctrine is not applicable and that, despite the fact that the very same legal team that represents two of the plaintiff parties in the

state court proceeding represent the plaintiffs here, there is no privity between any of the parties in the state and federal proceedings. *See id.* at 4-8.

What Plaintiffs do not address is the obvious – Plaintiffs have not yet suffered an actual injury that would provide them with the standing required by Article III. As explained in the Egolf Intervenors' opening brief, the Tenth Circuit has been unequivocal in holding that injury in fact required to establish standing, no matter what type of case a federal court entertains, "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). For much the same reason, the issues raised by Plaintiffs in this matter – the malapportionment of the state house districts – is not yet ripe for federal adjudication. "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).

In this case, no matter how Plaintiffs articulate their fear that there is a *possibility* that the state courts will not address the one-person, one-vote issue in the current house districts the way Plaintiffs would like it to be addressed, or their fear that the state courts may not adopt a redistricting plan to their liking or one that is the result of impermissible gerrymandering, none of these hypothetical situations have yet come to fruition. Therefore, under any "actual injury" analysis, Plaintiffs clearly lack standing to bring the claims they assert now.[1]

[1] It is true that in cases like *Scott v. Germano,* 381 U.S. 407 (1965) *and Growe v. Emison,* 507 U.S. 25 (1993), the federal courts did not dismiss the actions before them, but instead deferred consideration until after state court

The Governor and the Secretary of State, both defendants in this federal action, not surprisingly make common cause with Plaintiffs by informing the court that "they do not contest that Plaintiffs have standing to pursue this action under Article III of the United States Constitution or that the federal question presented in this controversy is ripe for adjudication." Governor Susana Martinez and Secretary of State Dianna J. Duran's Opening Brief on Jurisdiction, Abstention, Preclusion, and Deferral Issues ("Executive Defendants' Opening Brief"), Dkt. Entry No. 28 at 2. The Executive Defendants then go on to cite law that stands for the propositions that: factual allegations of injury resulting from the defendant's conduct may suffice to establish standing; standing allegations need not be crafted with precise detail; and as long as the pleadings realistically allege actual, imminent harm, standing has been established. *See id.* at 3 (citing, e.g., *Baur v. Veneman*, 352 F.3d 625, 631 (2d Cir. 2003); *Arrington v. Elections Bd.*, 173 F. supp. 2d 856 (E.D. Wis. 2001)).

There are two problems with the Executive Defendants' argument on standing. First, despite the fact that they are the "defendants" in this case, they cannot confer jurisdiction on this Court where it otherwise does not lie by attempting to concede that Plaintiffs have standing. *See, e.g., Thomas v. Basham*, 931 F.2d 521, 523 (8th Cir. 1991) ("jurisdiction issues will be raised sua sponte by a federal court when there is an indication that jurisdiction is lacking, even if the parties concede the issue.") (citing *Hughes v. Patrolmen's Benevolent Ass'n*, 850 F.2d 876, 881 (2d Cir.), cert. denied, 488 U.S. 967, 109 S.Ct. 495, 102 L.Ed.2d 532 (1988)); *see also United States v. Tittjung*, 235 F.3d 330, 335 (7th Cir.2000) ("No court may decide a case without subject matter jurisdiction, and neither the parties nor their lawyers may stipulate to jurisdiction

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proceedings were completed. But, as explained by the three-judge panel in *Mayfield v. Texas*, 206 F.Supp.2d 820, 825-26 (2001), in those cases the issue of standing or ripeness were never raised. Had they been, it would have fallen on the plaintiffs in federal court to demonstrate their actual injury. *See Nova Health Sys.*, 416 F.3d at 1154 ("As the party seeking to invoke federal jurisdiction, the plaintiff (here Nova) has the burden of establishing each of these three elements of Article III standing.").

or waive arguments that the court lacks jurisdiction."). Second, the cases relied upon by the Executive Defendants, all of which pertain to the pleading standard in various cases, do nothing to help the Plaintiffs here because Plaintiffs have not even *alleged* actual injury. Plaintiffs have instead made it clear that their only claim of injury is hypothetical: "[s]hould 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. There is simply nothing "actual" or "imminent" about the possible future injury Plaintiffs are concerned with.

The Executive Defendants also cite cases such as *Shaw v. Hunt*, 517 U.S. 899 (1996), *Miller v. Johnson*, 515 U.S. 900 (1995), and *Northeastern Fla. Chapter, Associated Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656 (1993), in support of their standing argument for Plaintiffs. *See* Executive Defendants' Opening Brief at 3-4 (citing *Shaw*, 517 U.S. at 904; *Miller*, 515 U.S. at 909; *Northeastern*, 508 U.S. at 666). According to the Executive Defendants, these cases stand for the proposition that a plaintiff has standing to challenge a redistricting plan when he is either a candidate or a voter who resides in a district that was changed by a new plan. While it is certainly true that a voter who resides in a district may have standing to challenge an unconstitutional or otherwise unlawful plan that changes the district he lives in, that rule has no bearing here because Plaintiffs are not challenging an unconstitutional or unlawful plan – instead, Plaintiffs are motivated only by an unfounded concern that such a plan *might* be adopted in the future. That type of "allegation of possible future injury" is exactly what the Tenth Circuit has determined to be insufficient to establish Article III standing. *Nova Health Sys.*, 416 F.3d at 1155.

The Executive Defendants also make a half-hearted attempt to assert that the issues raised by Plaintiffs are ripe for adjudication. *See* Executive Defendants' Opening Brief at 5-6. The

Executive Defendants recognize the ripeness problem raised by the three-judge panel in *Mayfield v. Texas*, which is discussed in the Egolf Intervenor's Memorandum of Law in Support of Motion to Dismiss (*see* Dkt. Entry No. 37 at 15-16), but then state that "this case is now distinct from [Mayfield] in which a complaint was filed when elections are so far in the future that the redistricting procedures mandated by state law have not begun." *Id.* at 5. The three-judge panel in *Mayfield*, however, did not find lack of ripeness because election deadlines were far in the future. Instead, the court determined that the claims brought by plaintiffs were not ripe because, "at this time there is no indication that the [State] will fail to enact a valid redistricting plan. .. [therefore] Plaintiffs' claims are not fit for judicial decision." *Mayfield*, 206 F.Supp.2d at 826 (citing *Texas v. United States*, 523 U.S. 296, 301 (1998)).

In sum, Plaintiffs have failed to establish that they have standing to assert the claims in their Complaint and the Executive Defendants provide no persuasive legal authority for their positions that Plaintiffs have standing or that the issue raised by Plaintiffs is ripe for federal adjudication. This Court should thus immediately dismiss Plaintiffs' Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1).

B. Plaintiffs Misread *Growe v. Emison* and Are Wrong in Asserting that this Court is Not Required to Defer to the State Court Redistricting Proceedings Currently Underway.

The Supreme Court's holdings in *Germano* and *Growe* are not ambiguous. In both cases, the United States Supreme Court held that federal district courts committed reversible error by not deferring challenges to state redistricting plans until after the state legislature or the state courts had completed the redistricting process. *See Germano*, 381 U.S. at 409 (holding that the federal district court "should have stayed its hand," and in failing to do so overlooked the Supreme Court's teaching that state courts have a significant role in redistricting); *Growe*, 507

U.S. at 34 (determining that the federal court's failure to defer until the ongoing state court redistricting proceedings were completed was "clear error").

Plaintiffs nevertheless grapple with the language of *Growe* and attempt to make an argument that somehow the case does not apply to the matter before this Court. First, Plaintiffs contend that "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." Plaintiffs' Opening Brief at 3. Second, Plaintiffs assert that "deferral considerations end when the state court adopts a redistricting plan." *Id.* Even if Plaintiffs were right on both counts (which they are not), it is difficult to understand Plaintiffs' position that deferral is not appropriate under the circumstances of this case where there is no reason to believe that the New Mexico state courts will fail timely to perform their duty to apportion the state house districts. The New Mexico Supreme Court has required that the state district court adopt a redistricting plan by February 27, 2012. *See* N.M. Supreme Court Order of February 10, 2012. The Supreme Court has further set forth an expedited briefing schedule in a February 22, 2012, Supplemental Scheduling Order, in the event any party intends to appeal from the judgment of the district court. *See* Ex. A. The state courts will thus undoubtedly complete the redistricting process in a timely manner. Moreover, even if it were true that deferral considerations must end once a redistricting plan is adopted, it cannot be seriously contended that the district court has now adopted a redistricting plan. Plaintiffs' arguments are without merit.

C. 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. Moving forward in this federal proceeding will necessarily require a full evidentiary trial on Plaintiffs' assertions regarding the malapportionment in the current state house districts and Plaintiffs' claims that the Supreme Court of New Mexico has ordered an unconstitutional gerrymander. The Court need not address either of these claims given the fact that the state courts are addressing the malapportionment and there is no evidence, other than plaintiffs' speculation, that the plan to be adopted by the district court will contain any constitutional infirmities.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 24nd, 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/David Urias
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