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

TIMOTHY Z. JENNINGS, in his official capacity as President Pro-Tempore of the New Mexico Senate, and BEN LUJAN, SR., in his official capacity as Speaker of the New Mexico House of Representatives, *et al.*,

Intervenors.

RESPONSE BRIEF OF TIMOTHY Z. JENNINGS AND BEN LUJAN, SR. ON THE ISSUES OF JURISDICTION AND ABSTENTION

COME NOW Intervenors Timothy Z. Jennings, in his official capacity as President Pro-Tempore of the New Mexico Senate, and Ben Lujan, Sr., in his official capacity as Speaker of the New Mexico House of Representatives (the "Legislative Intervenors"), by and through their attorneys, Stelzner, Winter, Warburton, Flores, Sanchez & Dawes, P.A., and Hinkle, Hensley, Shanor & Martin, LLP, and for their Response Brief on Jurisdiction and Abstention state:

I. INTRODUCTION

Plaintiffs ask the Court in this action not only to interfere with ongoing proceedings in New Mexico court, but also to redraw districts while that effort is occurring in state court. Plaintiffs' request for such relief from this Court is, however, in direct conflict with *Growe v. Emison*, 507 U.S. 25 (1993). As directed by the United States Supreme Court in *Growe*, this Court must decline to take any action in this proceeding while the state is engaged in a timely redistricting process. Because redistricting will soon be completed in state court—before there is any conflict with upcoming election deadlines—this Court must defer to New Mexico's primary responsibility for redistricting.

Plaintiffs' request for relief from this Court is also barred by the *Rooker-Feldman* doctrine. Although Plaintiffs have made some attempt to disguise their effort to appeal from the decision of the New Mexico Supreme Court by, for example, not naming parties to the state-court proceedings and asserting an equal-protection claim based on existing districts, Plaintiffs' complaint is replete with allegations concerning alleged failings of the New Mexico Supreme Court. Plaintiffs even expressly ask this Court to declare the New Mexico Supreme Court's decision unconstitutional. This action is plainly a continuation of the efforts of disappointed parties to the state proceedings to appeal the New Mexico Supreme Court's decision. The Court should therefore recognize this action as an unauthorized appeal of the New Mexico Supreme Court's decision, and dismiss for lack of subject matter jurisdiction.

This Court further lacks jurisdiction because Plaintiffs' Complaint does not present a case or controversy within the meaning of Article III. As a practical and factual matter, there is no controversy between Plaintiffs and Defendants in this friendly lawsuit. Moreover, because Plaintiffs' claims are entirely dependent upon an unknown redistricting plan to be adopted in

state court, this matter is not ripe for adjudication, and Plaintiffs cannot demonstrate the requisite injury necessary to establish standing.

Accordingly, this Court should immediately stay this matter under *Growe* in deference to the ongoing state redistricting proceedings, or in the alternative, dismiss this action for lack of subject matter jurisdiction.

II. THIS MATTER MUST BE STAYED UNDER *GROWE*.

As detailed in the Legislative Intervenors' Motion to Stay or Dismiss, this Court must decline to consider Plaintiffs' claims while redistricting is occurring in New Mexico's courts. In *Growe v. Emison*, 507 U.S. 25, 34 (1993), the United States Supreme Court observed that "the Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts." "Absent evidence that these state branches will fail timely to perform that duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it." *Id.* The Supreme Court has reaffirmed these principles since *Growe*. *See Branch v. Smith*, 538 U.S. 254, 261-62 (2003).

Not only is there no evidence that the state will fail to timely perform its redistricting duties, as discussed below, all the evidence is to the contrary and reflects that the state will timely perform its redistricting responsibilities. Both Plaintiffs and the Executive Defendants nonetheless argue that this matter should not be stayed under *Growe*. But contrary to Defendants' contention the consent of the friendly parties on opposite sides of the "versus" in the caption of this case does not somehow render *Growe*—or other matters that would generally be pleaded as affirmative defenses—inapplicable. *See* Opening Brief of Governor Martinez and Secretary of State Duran, Doc. No. 28, at 9 ("In this case, the Governor and the Secretary of State . . . are voluntarily submitting to this suit in federal court."). Plaintiffs cannot avoid *Growe*

by choosing to name only parties sharing their position as defendants. Given the obvious alignment of Plaintiffs and the Executive parties they named as defendants, the Executive Defendants' purported waiver of affirmative defenses is of no consequence.

Furthermore, neither Plaintiffs nor Defendants have articulated any valid reason why this Court should interfere with the ongoing state redistricting proceedings. Governor Martinez and Secretary of State Duran acknowledge that "there is a clear line of precedent applying *Pullman* abstention in the context of election and redistricting disputes when adequate and timely state proceedings are ongoing." *See* Opening Brief of Governor Martinez and Secretary of State Duran, Doc. No. 28, at 19. Yet, they are unable to distinguish *Growe*.

Defendants assert, for example, that "in the present case, unlike in *Growe*, there is no suggestion that the [United States] District Court failed to allow the state court adequate opportunity to develop a redistricting plan." *See id.* at 20. Of course, such interference in *Growe* is what prompted the Supreme Court to articulate a clear standard of federal-court deference. *Growe* applies to ensure this Court does not obstruct the ongoing state redistricting efforts. The fact that this Court has not interfered with that process to date is of no consequence. The interference will occur if this Court acts during the pendency of state proceedings. Indeed, Plaintiffs ask the Court to take action in direct conflict with what is occurring in a timely fashion in state court—find the New Mexico Supreme Court's decision erroneous, and draw districts inconsistent with those currently being drawn in state court.

Defendants further argue that "a bare, though unlikely, possibility" that the state proceedings make consideration of a federal question unnecessary is not sufficient to require the Court to abstain under *Growe*. *See id.* (quoting *Cano v. Davis*, 191 F.Supp.2d 1140, 1142 (C.D. Cal. 2002). Tellingly, however, in support of this argument, Defendants rely on a case in which

it was unlikely that the state would resume its redistricting efforts, and the pending state litigation concerned different areas of the state than the federal action. *See Cano*, 191 F.Supp.2d at 1144-45. Here, in contrast, Plaintiffs ask this Court to undertake the exact same redistricting task that is well underway in state court.

Moreover, there is nothing unlikely about the possibility that the state proceedings will make consideration of a federal question by this court unnecessary. Proceedings in the state court are on track to result in an appropriate redistricting plan consistent with federal law, which in all likelihood will leave no federal questions left to be resolved by this Court. Indeed, there is a substantial probability that Plaintiffs will be precluded from attempting to relitigate issues decided in state court in this Court following the conclusion of the state-court proceedings. *See Taylor v. Sturgell*, 553 U.S. 880, 894-95 (2008) (discussing the circumstances in which preclusion doctrines apply to non-parties, including where the non-party's interests were represented in prior litigation, and where parties to an earlier action seek to relitigate in a separate action by way of a proxy); *Truong v. Truong*, 2007 WL 415152, 8 (S.D.N.Y. 2007) ("The Second Circuit has . . .permit[ted] a finding of privity when two actions are controlled by a single party and where the interests involved in the two proceedings are identical. In assessing whether the two actions are controlled by the same parties, the fact that the two actions are prosecuted by the same attorneys is of 'singular significance,' although it is not itself conclusive."); *Larsen v. Farmington Municipal Schools*, 2010-NMCA-094, ¶9, 148 N.M. 926, 929, 242 P.3d 493, 496 (elements of collateral estoppel).

As for Defendants' contention that the Court should not abstain under *Growe* because "that abstention would foreclose any possibility that the fundamental rights violation that plaintiffs allege could not be remedied prior to the next statewide election," the Legislative

Intervenors note the exceedingly swift schedule recently set by the New Mexico Supreme Court. The district court has indicated that a plan will be adopted no later than February 27, 2012. *See* Exhibit A to Legislative Intervenors' Motion to Dismiss or Stay. And the Supreme Court's schedule requires any appeal from the district court's judgment to be made by petition for writ of superintending control on or before February 29, 2012, with simultaneous briefing on such petitions to be completed by March 2, 2012, and any oral argument to be held on March 5, 2012. Supplemental Scheduling Order, attached hereto as Exhibit I, at 5, ¶¶ 2-3. This schedule plainly reflects the Court's understanding of the time-sensitive nature of the redistricting efforts, and indeed, specifically notes the March 6, 2012 deadline mentioned by Plaintiffs. *See* Supplemental Scheduling Order at 4 ("WHEREAS, the Governor may file an amended proclamation regarding the upcoming primary election on March 6, 2012 . . . ."); Plaintiff's Memorandum Brief Regarding the Court's Authority to Address the Merits of the Plaintiffs' Claims, Doc. No. 30 at 4 ("for New Mexico's primary election to proceed as scheduled a constitutional plan must be in place no later than March 6, 2012.").

While Plaintiffs (and the Executive Defendants) might prefer to have this Court evaluate Plaintiff's claims, in light of the clear appreciation of New Mexico's courts to redistrict in advance of important election deadlines, *Growe* precludes this Court from intervening. *See Growe*, 507 U.S. at 34; *compare id.* at 36 ("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"). Moreover, the alleged concern regarding the ability of the state courts to redistrict in advance of upcoming election deadline rings hollow given that Plaintiffs and the Executive Defendants ask this Court to start anew to adopt a redistricting plan. Neither Plaintiffs nor the Executive Defendants provide any explanation as to how this Court to

redistrict faster than the state courts, which have already dedicated substantial time to the process. In fact, Plaintiffs and the Executive Defendants seek to delay the consideration of issues in this case,[1] making it clear that their concern is not speed, but rather, forum selection.

Finally, Plaintiffs cannot circumvent *Growe* through their anticipation that the redistricting plan adopted in state court will not be appropriate. *See* Plaintiffs' Memorandum Brief Regarding the Court's Authority to Address the Merits of the Plaintiffs' Claims, Doc. No. 30, at 3 ("deferral is no longer proper if it becomes apparent 'that these state branches will fail to timely perform' their duty to apportion state legislative or congressional districts . . . . [I]n this context, 'timely' means 'adopt[ion] of a *constitutional plan* . . . ."). Plaintiffs are obviously unsatisfied with the New Mexico Supreme Court's recent decision, but can hardly argue that the Supreme Court's thoughtful consideration of the issues and reasoned decision will necessarily result in an unconstitutional plan.[2] Because redistricting is primarily the responsibility of the state, *Growe* requires this Court to defer to the state's timely redistricting efforts despite Plaintiffs' suggestion that there will be a problem with the plan ultimately adopted at the end of state-court litigation. *See Growe*, 507 U.S. at 34. The Court should therefore decline to take any action until the final conclusion of the state courts' redistricting efforts.

III. THIS MATTER SHOULD BE DISMISSED UNDER THE *ROOKER-FELDMAN* DOCTRINE.

Plaintiffs' Complaint also improperly seeks to invoke appellate jurisdiction, which this Court does not have. As detailed in the Legislative Intervenor's Motion, the *Rooker-Feldman* doctrine precludes disappointed parties to a state proceeding from effectively seeking to appeal to federal district court. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923) ("Under the legislation

[1] *See, e.g.* Opening Brief of Governor Martinez and Secretary of State Duran, Doc. No. 28, at 8 (arguing that preclusion doctrines and other affirmative defenses must be proved at later stages of the litigation).

[2] The Legislative Intervenors will address any issues raised concerning the constitutionality of the New Mexico Supreme Court's instructions through a separate response, in accordance with the schedule set by this Court.

of Congress, no court of the United States other than this Court could entertain a proceeding to reverse or modify the judgment for errors of that character. To do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by the District Courts is strictly original.") (internal citation omitted); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 483, 485 (1983) ("We concur in the district court's finding that it is without subject matter jurisdiction to review a final order of the State Supreme Court denying a particular application for admission to the state bar. This rule applies even though, as here, the challenge is anchored to alleged deprivations of federally protected due process and equal protection rights.").

Governor Martinez and Secretary of State Duran seek to avoid application of the *Rooker-Feldman* doctrine by claiming that Plaintiffs are invoking this Court's original jurisdiction, rather than seeking to appeal the New Mexico Supreme Court's decision. *See* Opening Brief of Governor Martinez and Secretary of State Duran on Jurisdiction, Abstention, Preclusion, and Deferral Issues, Doc. No. 28, at 6. This contention is belied by Plaintiffs' clear effort to have this Court review—and overturn—the New Mexico Supreme Court's decision. *See, e.g.* Complaint, ¶ 41 ("The Supreme Court Order simply got it wrong factually, and as a matter of law and proper procedure."); *id.* ¶ 52 ("The Supreme Court's Order mandating a decrease in Republican districts, which relies upon the erroneous performance figures, is another error that itself creates a significant and improper partisan bias."); *id.* ¶ 55 ("Not only did the New Mexico Supreme Court order Judge Hall to minimize municipality splits at the expense of what should be the paramount goal of population equality, it also unconstitutionally instructed him to relegate to secondary importance the one person, one vote mandate in favor of the majority's view of 'partisan neutrality.'"); *id.* ¶ 66 ("The Supreme Court has given the District Court instructions, erroneous as a matter of law, which cannot fail to achieve a desired partisan result, and violate

the one person, one vote principle."). Plaintiffs go so far as to ask this Court to "[d]eclare that the New Mexico Supreme Court's February 1[0], 2012 Order violates the Constitutional requirements for redistricting of state legislative bodies by a court, as would any redistricting plan adopted in accordance with the Order," *id.* at 20, ¶ E.

It would be a rare case indeed if Plaintiffs actually expressly sought to appeal a state court's decision to federal district court. The *Rooker-Feldman* doctrine consequently contemplates analysis of the claims asserted in federal district court to evaluate whether the plaintiffs in effect seek appellate review. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 n.16 (1983) ("If the constitutional claims presented to a United States district court are inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's application for admission to the state bar, then the district court is in essence being called upon to review the state-court decision. This the district court may not do."); *PJ ex rel. Jensen v. Wagner*, 603 F.3d 1182 (10th Cir. 2010) ("[T]he Rooker-Feldman doctrine precludes lower federal courts from effectively exercising appellate jurisdiction over claims actually decided by a state court and claims inextricably intertwined with a prior state-court judgment.") (internal quotation marks omitted).

By expressly complaining about the New Mexico Supreme Court's decision, and explicitly requesting this Court to find the New Mexico Supreme Court's decision unconstitutional, Plaintiffs are quite clearly, in effect, seeking appellate review of the New Mexico Supreme Court's decision. Furthermore, although there is not yet a final judgment in state court from which Plaintiffs are appealing, that judgment is forthcoming, and Plaintiffs anticipate it in this action by complaining that the plan adopted in state court will be unconstitutional. Should this Court conclude that the state court proceedings are not yet sufficiently final for application of

Rooker-Feldman, that potential barrier will be removed in the event the Court properly stays this matter under *Growe* during the pendency of the state redistricting proceedings. *See* Opening Brief of Governor Martinez and Secretary of State Duran on Jurisdiction, Abstention, Preclusion, and Deferral Issues, Doc. No. 28, at 7 (arguing that Plaintiffs cannot be seeking appellate review because there is no final state-court judgment).

As for the argument that *Rooker-Feldman* does not apply because the named plaintiffs in this case are not named parties to the state-court proceedings, the Legislative Intervenors do not dispute that *Rooker-Feldman* generally operates to preclude parties to a state court proceeding from impermissibly appealing to federal district court. The United States Supreme Court has, however, declined to hold that there are no circumstances in which the *Rooker-Feldman* doctrine may apply to preclude parties not named in the state court proceedings to pursue what in effect would be an appeal to federal district court. *See Lance v. Dennis*, 546 U.S. 459, 466 n.2 (2006).

Although, the Supreme Court did, as Governor Martinez and Secretary of State Duran observe, hold in *Lance* that the *Rooker-Feldman* doctrine does not apply against non-parties to a state proceeding simply because they could be considered in privity for purposes of preclusion doctrines, the Supreme Court did not go so far as to reject wholesale any application of the principles underlying the concept of privity in the *Rooker-Feldman* context. Instead, the Court expressly noted that certain relationships could allow *Rooker-Feldman* to apply even when new parties are named as plaintiffs in the effective federal-district-court appeal. *See Lance*, 546 U.S. at 466 n.2.

The Legislative Intervenors do not ask this Court to expansively apply *Rooker-Feldman* in violation of *Lance* based solely on the notion that the named plaintiffs in this case are in privity

with the "losing" Republican parties to the state court proceedings. Rather, the Legislative Intervenors merely ask this Court to recognize the realities of the relationship between this litigation and the state-court proceedings. Publicly disappointed with the New Mexico Supreme Court's decision, Republican parties to the state-court proceedings professed a desire to "appeal" to this Court. *See* Governor Martinez's Facebook Post (February 11, 2012), Exhibit G to Legislative Intervenors' Motion to Stay or Dismiss; *EXCLUSIVE: GOP will appeal state Supreme Court redistricting to federal court on Monday,* Capitol Report, attached hereto as Exhibit J.

Then, within days of the New Mexico Supreme Court's decision, this action was filed by the same attorneys representing parties to the state-court proceedings, effectively asking this Court to review the New Mexico Supreme Court's decision. *See Truong v. Truong*, 2007 WL 415152, 8 (S.D.N.Y. 2007) (noting the significance common attorneys have to the question of whether two actions are controlled by the same parties). And consistent with the position taken by these attorneys on behalf of their state-court parties, the attorneys take the same positions on behalf of their new clients in this action that they took in state court. *See, e.g.* Complaint, ¶ 1; Exhibits D-F to Legislative Intervenors' Motion to Dismiss or Stay. Just as parties cannot relitigate issues they lost through a proxy, the parties to the state-court proceedings cannot appeal to this Court through new plaintiffs sharing their interests and concerns. *Cf. Taylor v. Sturgell*, 553 U.S. 880, 894-95 (2008).

This Court should therefore dismiss this matter for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine.

IV. THIS ACTION MUST BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION BECAUSE PLAINTIFFS LACK STANDING, AND THEIR CLAIMS ARE NOT RIPE FOR ADJUDICATION.

This Court also lacks subject matter jurisdiction because Plaintiffs' claims are based on conjectural potential injuries and uncertain future events. Since this case rests entirely on speculative possibilities such as the inability of New Mexico's state courts to timely redistrict, and Plaintiffs' allegation that the yet-to-be-adopted plan will not be constitutional; and moreover, was artificially brought against defendants sharing Plaintiffs' interests, this case does not present an Article III Case or Controversy. *See Texas v. United States*, 523 U.S. 296, 300 (1998) ("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."); *San Juan County, Utah v. United States*, 503 F.3d 1163, 1171 (10th Cir. 2007) (for standing to exist, Plaintiff must demonstrate "an injury in fact that is both concrete and particularized as well as actual and imminent"); *Prasco, LLC Medicis Pharm. Corp.*, 537 F.3d 1329, 1335-36 (Fed. Cir. 2008) ("For there to be a case or controversy under Article III, the dispute must be definite and concrete, touching the legal relations of parties having **adverse** legal interests" (internal quotation marks omitted, emphasis added).

Thus, for the reasons detailed in the Egolf Intervenors' Motion to Dismiss for Lack of Subject Matter Jurisdiction, Doc. No. 37, at pages 12-17, which the Legislative Intervenors incorporate herein by reference, Plaintiffs lack standing and this case is not ripe for adjudication. This Court must therefore dismiss this matter for lack of subject matter jurisdiction.

V. CONCLUSION

For the foregoing reasons, and those discussed in the Legislative Intervenors' Motion to Stay or Dismiss, this Court should stay this action immediately under *Growe*, or in the alternative, dismiss this matter for lack of jurisdiction.

Respectfully Submitted,

STELZNER, WINTER, WARBURTON,
FLORES, SANCHEZ & DAWES, P.A.

/s/ Luis G. Stelzner
Luis G. Stelzner
Sara N. Sanchez
Post Office Box 528
Albuquerque, New Mexico 87103
(505) 938-7770

And

HINKLE, HENSLEY, SHANOR & MARTIN, LLP
Richard E. Olson
Post Office Box 10
Roswell, New Mexico 88202-0010
(575) 623-9332

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of February, 2012, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

Henry M. Bohnhoff	hbohnhoff@rodey.com
John W. Boyd	jwb@fdblaw.com
Robert M. Doughty, III	rob@doughtywest.com
Jennifer Dumas	jdumas@wwwlaw.com
David A. Garcia	david@theblf.com
Joseph Goldberg	jg@fbdlaw.com
Jessica M. Hernandez	Jessica.hernandez@state.nm.us
Paul J. Kennedy	pkennedy@kennedyhan.com
Paul M. Kienzle, III	paul@kienzlelaw.com

Patrick J. Rogers	patrogers@modrall.com
David H. Urias	dhu@fdblaw.com
Jerry T. Wertheim	todd@thejonesfirm.com
John V. Wertheim	jvwertheim@gmail.com
Judd C. West	judd@doughtywest.com
Patricia Williams	pwilliams@wwwlaw.us

/s/ Luis G. Stelzner
LUIS G. STELZNER