

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

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

Plaintiffs,

vs.

Case 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.

MAESTAS PARTIES' REPLY REGARDING THE COURT'S AUTHORITY

Antonio Maestas, June Lorenzo, Alvin Warren, Eloise Gift and Henry Ochoa (collectively the "Maestas Parties"), by and through John V. Wertheim and Jerry Todd Wertheim (JONES, SNEAD, WERTHEIM & WENTWORTH, P.A.), hereby submit the Maestas Parties' Reply Regarding the Court's Authority, pursuant to the Court's Order Setting Briefing Schedule [Doc. 31], filed on February 22, 2012.

I. NO CONTROVERSY EXISTS BETWEEN THE PARTIES UNDER ARTICLE III BECAUSE THE CASE IS A FRIENDLY SUIT, MILITATING FOR IMMEDIATE DISMISSAL.

The Court does not possess subject matter jurisdiction over this case because federal courts cannot entertain friendly suits, and none of the copious briefing filed changes this inescapable conclusion. To the contrary, Defendants Governor Martinez and Secretary of State Duran have filed several briefs now that advance substantively identical case theories to those advanced by the Plaintiffs Chavez-Hankins, Pacheco and Vega, making clear that this suit was a friendly one designed to create the mere appearance of controversy where none exists. The

United States Constitution does not extend the judicial power to “friendly suits,” however, as Article III demands an actual controversy. *E.g., Flast v. Cohen*, 392 U.S. 83, 100 (1968) (stating “**the rule that federal courts will not entertain friendly suits**”) (emphasis supplied); *United States v. Johnson*, 319 U.S. 302, 305 (1943) (per curiam) (holding district court should have dismissed suit brought by plaintiff at the behest of defendants as an impermissible “friendly suit” because an “actual antagonistic assertion of rights is indispensable to adjudication of constitutional questions”).

As scholars recently put the point: “Supreme Court decisions could not be more certain that Article III is satisfied only when the parties are truly ‘adverse’ to one another. . . .” Martin H. Redish & Andrianna D. Kastanek, *Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. Chi. L. Rev. 545 (2006)¹ Because the lack of adversity among the original parties is manifest in the filed pleadings, the Maestas Parties respectfully suggest the Court immediately dismiss the case without prejudice as an impermissible friendly suit, over which federal courts lack subject matter jurisdiction.

II. BECAUSE NO PLAINTIFF RESIDES IN HD63—THE DISTRICT THEY CLAIM IS RACIALLY GERRYMANDERED—PLAINTIFFS LACK STANDING UNDER ARTICLE III FOR THAT CLAIM.

Plaintiffs have now made clear that one of the two constitutional claims in their suit, alongside the claim alleging violation of one person-one vote, is that Judge Hall has supposedly

¹ The rule that federal courts cannot entertain non-adverse suits is indeed venerable. *See, e.g., Muskrat v. United States*, 219 US 346, 361 (1911) (holding that the judicial power does not extend to cases where there are not truly “opposing parties”); *Chicago & Grand Trunk Railway Co. v. Wellman*, 143 US 339, 345 (1892) (affirming refusal to instruct jury on constitutional claim that was brought as a “friendly suit” to test the constitutionality of a statute); *Wood-Paper Co v Heft*, 75 US (8 Wall) 333, 336 (1869) (granting a motion to dismiss because, if case went to trial, “there would be the same interest on both sides”); *Cleveland v Chamberlain*, 66 US (1 Black) 419, 425, 1861 WL 7712 (1861) (dismissing appeal because there was “no real dispute between the appellant and the appellee”).

been forced into drawing an unconstitutional racial gerrymander in HD63 in Eastern New Mexico. (Pls.' Br. [Doc. 43], Part II, at 4-14 and Ex. 1 [Doc. 43-1].) In both preliminary maps that Judge Hall drew on remand—what Plaintiffs label Hall 2 and Hall 3—Judge Hall, in the Clovis area, simply added a few precincts to the current HD63 to adjust for a population deficiency in the district and make it more compact. While it is highly doubtful that Judge Hall's maintenance of the current lines of HD63 in the Clovis area, with additions that lower deviation and improve compactness, could ever constitute an actionable racial gerrymander as enunciated in *Shaw v. Reno*, 509 U.S. 630 (1993), Plaintiffs face an even bigger hurdle than the apparent implausibility of their racial gerrymandering claim. They lack standing to bring the claim in the first place because no Plaintiff resides in HD63, neither under the current districting scheme nor under Hall 2 and Hall 3. *See United States v. Hays*, 515 U.S. 737, 744-45, 747 (1995) (vacating judgment of three-judge panel with instructions to dismiss because plaintiffs did not reside in the district they were challenging as racially gerrymandered and thus lacked standing).

While Plaintiff Miguel Vega lives in Curry County, he does not live in the portion of that county within HD63. (Voter Certificate for Miguel Angel Vega, attached as Ex. A.) Miguel Vega instead lives in Texico, Curry County Precinct 33, which is located in HD67 currently and as embodied in the Hall 2 and Hall 3 plans. Of course, Plaintiffs Chavez-Hankins and Pacheco live in the Albuquerque. (Compl. [Doc. 1] ¶¶ 5 & 6.) Therefore, no Plaintiff has standing to challenge HD63 as a supposed racial gerrymander, providing an independent reason to dismiss that claim for lack of subject matter jurisdiction under the rule enunciated in *Hays*.

III. PLAINTIFFS HAVE NOW MADE CLEAR THAT THEY SEEK DIRECT REVIEW OF THE NEW MEXICO SUPREME COURT’S ORDER AND OPINION, JURISDICTION FOR WHICH CONGRESS HAS DENIED THE LOWER FEDERAL COURTS.

In their briefs, Plaintiffs make clear that their case is exclusively an attack on the New Mexico Supreme Court, labeling their two claims: (1) “The NMSC Order and NMSC Opinion Mandate Race-Based Redistricting in Violation of the Equal Protection Clause of the Fourteenth Amendment of the United State Constitution” and (2) “The NMSC Order Fails To Comply With The One Person, One Vote Requirement of the Equal Protection Clause.” (Pls.’ Br. [Doc. 43], at 4 & 14.) One would be hard-pressed to describe claims that fall more squarely into the plain language of 28 U.S.C. § 1257, which provides exclusive jurisdiction in the United States Supreme Court for review of orders “rendered by the highest court of a State in which a decision could be had.” The Court need not delve into the nuances of *Rooker-Feldman* in order to see that Plaintiffs have pled directly into the Supreme Court’s exclusive jurisdiction as Congress provided in 28 U.S.C. § 1257.

Whether Plaintiffs were parties to the state litigation—or can be held in privity with Defendants who were—is irrelevant to this plain language argument. The *Rooker-Feldman* doctrine is an interpretive gloss on 28 U.S.C. § 1257, devised for claims not so obviously described by Congress’s words. *See, e.g., District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476 (1983) (expanding the scope of 28 U.S.C. § 1257 beyond its plain language to include claims regarding bar admissions and stating “[a]dmittedly, the proceedings in both Feldman’s and Hickey’s case did not assume the form commonly associated with judicial proceedings”). Because a statute must be strictly construed against jurisdiction, the plain language interpretation of 28 U.S.C. § 1257 provides yet another independent reason to dismiss this case for lack of subject matter jurisdiction. *See, e.g., Shamrock Oil & Gas Corp. v. Sheets*,

313 U.S. 100, 108–109 (1941) (“Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined”) (citations omitted). By this suit, Plaintiffs explicitly seek a direct review of the New Mexico Supreme Court’s order and opinion by this Court, and Congress plainly denied lower federal courts the subject matter jurisdiction to carry on such a labor.

IV. PLAINTIFFS HAVE TACITLY ADMITTED THAT JUDGE HALL’S PRELIMINARY MAPS HAVE RENDERED THEIR “ONE PERSON, ONE VOTE” CLAIM MOOT.

As various parties predicted at the status conference, Judge Hall accommodated both the New Mexico Supreme Court’s instructions and the Equal Protection Clause’s requirement for “one person, one vote,” rendering the claim moot. Plaintiffs have now tacitly admitted as much. They now say that their claim regarding “one person, one vote” boils down to a gripe that Judge Hall “subordinate[d] population equality” because “the overall average deviation of Hall Map 2 and Hall Map 3 is 0.1 percent higher (representing some 2,059 people statewide).” (Pls.’ Br. [Doc. 43], at 17.) With all due respect to Plaintiffs, to convene a three-judge panel over an increase of 1/10 of one percent average deviation in seventy districts, about 30 people per district, is an unjustifiable waste of judicial resources. Not a single court in the history of the United States has ever ruled such a minuscule change to be constitutionally significant, nor would a court ever do so.

Furthermore, the New Mexico Supreme Court, as a co-equal branch of the government of the State of New Mexico, deserves the same deference with regard to population deviation as the other branches. See *Chapman v. Meier*, 420 U.S. 1, 766 (1975) (“We say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the

State through its legislature or other body, rather than of a federal court.”) Because Governor Martinez and the Legislature failed to reach a compromise over reapportionment of the New Mexico House of Representatives, the responsibility fell to New Mexico’s judicial branch, an “other body” of the State, to use Chapman’s phrase. Any difference between how New Mexico’s judicial branch may exercise its power and duty to reapportion, as compared to the legislative and executive branches, is purely a matter of state constitutional law, a question of separation of powers under the New Mexico Constitution. Of course, the New Mexico Supreme Court has the final word on that question. At bottom, how the State of New Mexico distributes power to reapportion its House of Representatives is a matter of state constitutional law, and the United States Constitution says nothing in preference of one branch of government over another. Obviously, many state constitutions have reapportionment commissions or otherwise establish branch-hybrids for the task of reapportionment.

In sum, Judge Hall has mooted any claim under the principle of “one person, one vote” by achieving deviations in the range of plus or minus one percent, as Plaintiffs seem forced to admit tacitly, which provides a fourth reason to dismiss the Complaint for lack of subject matter jurisdiction. Reinforcing mootness, even if the judiciary were to adopt slightly higher deviations in a final plan, such would deserve the same deference federal courts afford to the other branches of state government.

V. CONCLUSION.

Plaintiffs have utterly failed to meet their burden of establishing the grounds for federal jurisdiction. No controversy exists because this case a friendly suit, over which the judicial power does not extend under Article III. Plaintiffs lack standing to pursue a claim of racial gerrymander in HD63. Plaintiffs seek direct review of an order and opinion of the New

Mexico Supreme Court, jurisdiction for which Congress has denied the lower federal courts pursuant to the plain language of 28 U.S.C. § 1257. Finally, by achieving very low average deviations, Judge Hall has mooted any claim under the principle of “one person, one vote,” and, in any event, the state judiciary deserves the same deference from the federal courts on deviations as the other branches of government would have received had they done their job. For these reasons, the Maestas Parties respectfully suggest the Court dismiss this case without prejudice for lack of subject matter jurisdiction.

Respectfully submitted,

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& WENTWORTH, P.A.

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th 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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