

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

CLAUDETTE CHAVEZ-HANKINS, *et al.*

Plaintiffs,

v.

No. 1:12-cv-00140

DIANNA DURAN, in her official capacity as
New Mexico Secretary of State, *et al.*,

Defendants.

**INTERVENOR STATE OF NEW MEXICO'S RESPONSE TO PLAINTIFFS'
MEMORANDUM BRIEF AND THE EXECUTIVE DEFENDANTS' OPENING
BRIEF CONCERNING THE PANEL'S AUTHORITY TO REVIEW
THE DECISION OF THE NEW MEXICO SUPREME COURT**

Neither Plaintiffs nor the Executive Defendants succeed in overcoming the two primary obstacles to this Panel's determination of the issues presented by the Complaint. Because the constitutional issues are not yet ripe, the Panel lacks jurisdiction. And because New Mexico is currently engaged in efforts to timely draw its legislative districts, even if the Panel had jurisdiction it should decline to exercise it.

ARGUMENT AND AUTHORITY

Plaintiffs do not address the question of whether their Complaint presents a controversy ripe for decision. The Executive Defendants briefly touch on the issue, but their argument is insufficient to establish the existence of a justiciable controversy here. Similarly, neither party effectively argues against the application of *Younger v. Harris*, 401 U.S. 37 (1971), and *Grove v. Emison*, 507 U.S. 25 (1993).

I. THE COMPLAINT DOES NOT PRESENT A CONTROVERSY RIPE FOR DECISION.

The Executive Defendants, in an effort to establish ripeness, make an argument that ultimately relies on their own assertion that Election Code deadlines are looming in such a way

that the New Mexico State courts are incapable of resolving the pending controversy concerning the State's redistricting efforts. The argument fails because it flatly ignores the procedural facts surrounding those efforts.

At present, the State district court has not yet adopted a final redistricting plan in accordance with the direction of the New Mexico Supreme Court. Plaintiffs (and the Executive Defendants) thus challenge a plan that does not exist. The Executive Defendants try to use this fact to their advantage, arguing that a redistricting case becomes ripe for federal adjudication “when citizens need to start preparing for the primary elections.” (Executive Defendants' Brief, pg. 5) (quoting *Arrington v. Elections Bd.*, 173 F. Supp. 2D 856, 865 (E.D. Wis. 2001)). The Executive Defendants then proclaim “[t]hat time is now upon us.” (*Id.*).

This argument fundamentally depends on the unwarranted conclusion that the State courts are incapable of drawing legislative districts in time for the 2012 primary elections. The situation is not so dire as the Executive Defendants contend. Three days from now the State district court will issue its final map. Even assuming that the final map will be subject to appeal, the New Mexico Supreme Court – keenly aware of the upcoming Election Code deadlines – has made clear it will make a final ruling on a map in time for the March 6 proclamation deadline. The circumstances the Executive Defendants contend make this controversy ripe for decision are thus absent.

This issue, in some ways, bleeds into the abstention and deferral issues discussed below. Because there is no plan to challenge, and because the State courts are fully capable of finalizing a plan in time to ensure the smooth functioning of the primary elections, the Panel need not interfere in the ongoing State court proceedings. The Panel lacks jurisdiction and should accordingly dismiss this action.

II. *YOUNGER AND GROWE* COUNSEL ABSTENTION OR DEFERRAL.

The Executive Defendants begin their discussion of various abstention doctrines by arguing that they are affirmative defenses that must be adequately pled before their application by a federal court. The authority cited for that proposition does not support it. First, the Executive Defendants cite to *Guillemard-Ginorio v. Contreras-Gomez*, 585 F.3d 508 (1st Cir. 2009) as “holding that ‘abstention is a waivable defense.’” (Executive Defendants’ Brief, pg. 8.) There are two problems with this citation. First, the court in *Guillemard-Ginorio* was dealing with whether the issue had been properly preserved for appeal, and mused that it might not be if the party asserting it failed to raise it in a Rule 50 motion to reconsider. *Guillemard-Ginorio*, 585 F.3d at 517. Second, the court then went on to consider the parties’ abstention arguments anyway “in recognition of the important interests underlying the abstention doctrines.” *Id.* at 518.

The Executive Defendants then cite to *Bonas v. Town of North Smithfield*, 265 F.3d 69 (1st Cir. 2001) for the proposition that “courts have generally declined to consider abstention doctrines *sua sponte*.” (Executive Defendants’ Brief, pg. 8.) In *Bonas* the court noted that the parties did not “offer any developed argumentation in support of abstention” and did not “appear to have pursued that course with much vigor below.” *Id.* at 76, n. 5. There is no contention here that the parties have not raised developed abstention arguments or that the parties opposing the exercise of federal jurisdiction here have not done so with vigor.

An examination of these authorities thus puts the lie to the Executive Defendants’ puzzling contention that a party cannot urge abstention on a federal court unless it is pled as an affirmative defense. Instead, the authority cited in the Executive Defendants’ brief suggests that abstention is waivable (which it is) and that they are “voluntarily submitting to this suit in federal court.” (Executive Defendants’ Brief, pg. 9.) The State of New Mexico, through the Attorney

General, does not, however, consent to such an exercise of jurisdiction. The State emphatically does not waive its abstention argument.¹

A. *Younger* Abstention Applies To This Case.

The Executive Defendants cite to *Colorado River Water Cons. Dist. v. United States*, 424 U.S. 800, 816 (1976), to suggest that *Younger* abstention applies only to criminal proceedings, nuisance proceedings related to a criminal prosecution, and the collection of state taxes. But subsequent (and even one prior) Supreme Court decisions indicate that the reach of *Younger* is not so limited.

In *Moore v. Sims*, 442 U.S. 415 (1979), the Supreme Court considered *Younger* abstention in the context of a challenge to a Texas statute touching on the parent-child relationship. In determining that the three judge federal district court panel had improperly considered the merits of the dispute, the Court noted that although the *Younger* doctrine “was first articulated with reference to state criminal proceedings . . . the basic concern – that threat to our federal system posed by displacement of state courts by those of the National Government – is also fully applicable to civil proceedings in which important state interests are involved.” *Moore*, 442 U.S. at 423. Indeed, the *Moore* Court indicated that the Supreme Court had recognized *Younger*'s application to civil cases as early as 1975 in *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975).

In *Huffman*, the Court applied *Younger* to a civil nuisance action taken against an adult theater. The Court specifically held that “the principles of *Younger* are applicable even though the state proceeding is civil in nature.” *Huffman*, 420 U.S. at 486. Likewise, in *Trainor v. Hernandez*, 431 U.S. 434 (1977), the Court applied *Younger* and *Huffman* to preclude federal jurisdiction over a case involving alleged wrongful public assistance payments made to the

¹ This highlights the importance of the Attorney General's intervention in this case, and may explain, at least in part, the Executive Defendants' opposition to such intervention.

defendants. The action was a civil one, and the Court noted that *Younger* abstention was appropriate in light of the State of Illinois' interest in “safeguarding the fiscal integrity” of its public assistance programs. *Trainor*, 431 U.S. at 444.

Where the Executive Defendants try to downplay the importance and reach of *Younger*, the Supreme Court has actually articulated the narrow circumstances in which *Younger* does not apply:

Younger, and its civil counterpart which we apply today, do of course allow intervention in those cases where the District Court properly finds that the state proceeding is motivated by a desire to harass or is conducted in bad faith, or where the challenged statute is flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it.

Huffman, 420 U.S. at 611 (internal quotation marks omitted).

These circumstances are absent here. There is no allegation – much less a good faith allegation – that the pending State court action is conducted in bad faith. And while Plaintiffs do allege that the New Mexico Supreme Court's directive is unconstitutional, Plaintiffs cannot make a case that it is “flagrantly and patently violative of express constitutional prohibitions.” Thus, while the Executive Defendants may be correct in arguing that no principle of comity requires federal courts to defer to state court determinations of federal law, that fact is beside the point. What is at issue here is federal abstention in the face of an ongoing state court proceeding conducted in good faith. Under those circumstances, abstention is not just appropriate, but required.

B. *Growe* Deferral Applies In This Case.

The Executive Defendants attempt to avoid the application of *Growe* by arguing that the parties urging it have not proven either a substantive or temporal component of the doctrine. Absent from the briefing is any discussion of either the quality or quantum of proof allegedly

necessary for application of *Growe* deferral. This is likely because the courts do not really require “proof” as such. To the extent the doctrine only applies in those cases where a state court ruling would terminate the controversy, there can be little doubt of that here. Indeed, to the extent a ruling of the New Mexico courts would not terminate the controversy, it would only be because Plaintiffs and Executive Defendants did not allow it to do so by seeking redress from the federal courts. The parties cannot avoid application of *Growe* by their own unilateral action.

Ultimately, *Growe* counsels deferral in this case, where the State of New Mexico is taking timely action to draw its own legislative districts. Federal interference with that ongoing process is unwarranted.

CONCLUSION

For the foregoing reasons, the State of New Mexico respectfully requests that the Panel decline to exercise jurisdiction over this matter and instead defer to the ongoing State court proceeding.

Respectfully submitted,

GARY K. KING
NEW MEXICO ATTORNEY GENERAL

/s/ Scott Fuqua
Scott Fuqua
Mark Reynolds
Assistant Attorneys General
408 Galisteo Street
Santa Fe, NM 87501
(505)827-6920 – Telephone
(505)827-6036 – Facsimile

*Attorneys for Intervenor
State of New Mexico*

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing on all counsel of record via filing with the CM/ECF system on February 24, 2012.

/s/ Scott Fuqua
Scott Fuqua