IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

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

Case No. 1:12-cv-00140-HH-BB-WJ

Plaintiffs,

vs.

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.

PLAINTIFFS' MEMORANDUM BRIEF IN RESPONSE TO THE EGOLF, MAESTAS AND JENNINGS/LUJAN PARTIES' FEBRUARY 22, 2012 MOTIONS AND BRIEFS REGARDING JURISDICTION, ABSTENTION, PRECLUSION AND DEFERRAL ISSUES

In accordance with the Court's February 22, 2012 Scheduling Order (Doc. 31), the Plaintiffs submit the following memorandum in response to the Egolf Intervenors' Motion to Dismiss and supporting briefs (Doc. 36 and 37); the Maestas Parties' Brief Regarding the Court's Authority (Doc. 27); and the Jennings/Lujan Parties' Motion to Dismiss or, in the Alternative, to Stay (Doc. 29).[1] The Plaintiffs incorporate by reference their Memorandum Brief Regarding the Court's Authority (Doc. 30) and the Governor's and Secretary of State's Opening Brief on Jurisdiction, Abstention, Preclusion and Deferral Issues (Doc. 28), which demonstrate as well that the non-merits defenses and arguments that these Democrat parties raise lack merit.

[1] The Plaintiffs oppose the New Mexico Attorney General's intervention. However, in the event he is permitted to intervene, the discussion herein also addresses the arguments he advances in his February 22, 2012 Brief Concerning the Panel's Authority to Review the Decision of the New Mexico Supreme Court (Doc. 35).

A. PLAINTIFFS HAVE STANDING TO BRING THIS ACTION, AND THEIR CLAIMS ARE RIPE.

The Egolf and Maestas Parties lodge the related objections that the Plaintiffs lack standing and their claims are not ripe, because the state court litigation has not fully ended and Judge Hall has not yet entered a final remand plan. They liken this case to Mayfield v. Texas, 206 F. Supp. 2d 820 (E.D. Tex. 2001), which was dismissed as being a mere "placeholder" suit that did not amount to a constitutional case and controversy.

In Mayfield, Texas voters brought suit on December 28, 2000, challenging Texas' Congressional districts as malapportioned. The court concluded that the plaintiffs had jumped the gun:

> This suit was filed on the day the 2000 Census figures were released. The Plaintiff filed suit, asking this court to set a deadline for State authorities to act, even before the Texas Legislature convened on January 9, 2001 to begin the redistricting process. Indeed, it appears that the Texas Legislature was unable to act until it received from the Bureau of the Census the detailed block-by-block census analysis necessary for it to begin redistricting. The Legislature received this information on March 12, 2001, and is currently [April 26, 2001] engaged in formulating a redistricting plan based on the new figures.

Id. at 824. The court concluded that "the Texas Legislature has not been given the opportunity to act." Id. For these reasons, the court dismissed the complaint. The plaintiffs lacked standing, because "[i]n this case, there is no threat that an election will be held with the current districting scheme in place, and there is no reason to believe at this time that the Texas Legislature will fail to correct any malapportionment before the next election process begins [in 2002]. Accordingly, we believe that any alleged injury is nothing more than an uncertain potentiality and, therefore, is insufficient to satisfy the injury-in-fact requirement of standing." Id. at 823 (internal quotation marks omitted). And because "resolution of this case rests upon contingent future events that

may not occur as anticipated, or indeed may not occur at all," the claims were not ripe. Id. at 824 (internal quotation marks and citations omitted).

The facts of Mayfield are a far cry from those of the case at bar. Here, the Legislature *has* acted -- this is not a placeholder suit. The state courts have acted as well. In particular, the New Mexico Supreme Court has ruled in a manner that very likely ensures that Judge Hall's map violates the United States Constitution, and Judge Hall already has complied with those instructions. Further, New Mexico's June 5, 2012 primary election has drawn sufficiently close such that any further delay in establishing a constitutional districting plan will impact the ability of New Mexico's Secretary of State and county clerks to meet the multiple, cascading deadlines for actions that precede that election. In this context, the Plaintiffs have standing and their claims are ripe.

Arrington v. Elections Board, 173 F. Supp. 2d 856 (E.D. Wis. 2001), is more appropriately analogized to this one, although our facts still show a more imminent danger. In Arrington, citizen suits filed after the 2000 census results were released alleged malapportionment of Wisconsin's Congressional districts and a resulting unconstitutional dilution of their votes. The court noted that such suits are not uncommon, "because existing apportionment schemes become instantly unconstitutional upon the release of new decennial data."[2] Id. at 860. The court also observed that "[c]ourts consistently find that plaintiffs alleging injury to their voting rights have standing to bring suit. To achieve standing, all one needs to do is allege a threat that one's voting rights may be diluted." id. at 861 (internal quotation marks and citations omitted), and found that the plaintiffs had met "the relatively modest burden of alleging a realistic threat of imminent injury to their voting rights." Id. at 862 (internal quotation

[2] If for no other reason than this, Plaintiffs would have had standing as of February 13, 2012, the day they filed this action.

marks and citation omitted). The court also concluded that the plaintiffs' claims were ripe, notwithstanding the likelihood that the Wisconsin Legislature would reapportion the state's Congressional districts on its own. Id. at 864-66. The court summarized its ruling as follows:

> Boiled down to the bare essentials, there is a case or controversy in this case because Wisconsin's current apportionment law is unconstitutional, and this court can redress the situation by declaring the apportionment plan unconstitutional and entering injunctive relief. The alleged harm is not hypothetical. While injury is by no means uncertain, the plaintiffs' fear of injury is realistic. As all the elements of a justiciable case or controversy are present, this court is obliged to exercise jurisdiction over the matter.

Id. at 866-67 (internal citations omitted). The court ordered the parties to prepare a schedule that would establish deadlines for the state legislature and, if necessary, the federal court to act to protect the plaintiffs' constitutional rights, and then stayed the case pending timely action by the state. Id. at 867-68.[3]

Based on the foregoing, it is clear that the Plaintiffs herein have standing and their claims are ripe. Further, a stay is inappropriate, because there is little or no possibility of further action by New Mexico's state courts that might eliminate the unconstitutionality of its House districting plans. The New Mexico Supreme Court has ordered Judge Hall to increase population deviations among House districts in order to (1) reduce the number of split municipalities and (2) achieve "political neutrality," neither of which considerations qualify as "historic, significant state policies" that might justify deviation from population equality under Chapman v. Meier, 420 U.S. 1 (1973). He already has done just that: the deviation ranges and average deviations of his February 20, 2012 alternative preliminary plans exceed those of the original plan that he adopted last month. Because Judge Hall has no choice but to comply with the New Mexico

[3] As the Arrington court noted, because Growe v. Emison, 508 U.S. 25 (1993), declined to address standing and ripeness, the case can be read to stand for the proposition that standing and ripeness predicates are met in redistricting cases, and the threshold question instead is only whether the federal court should defer acting until the appropriate state bodies have had an opportunity to act.

Supreme Court's instructions, there is zero chance that he will reverse this result in his final plan to be issued on Monday, February 27, 2012, and there also is no reason to expect that the New Mexico Supreme Court might reverse itself on any subsequent appeal. Further, any delay by this Court in acting will either result in the actions leading up to New Mexico's 2012 primary elections being governed by an unconstitutional districting map or necessitate the drastic step of postponing and rescheduling that election. The Court should rule that the Plaintiffs have standing to bring this action and their claims are ripe.

B. THIS COURT SHOULD NOT DEFER CONSIDERATION OF PLAINTIFFS' CLAIMS ON *GROWE v. EMISON* GROUNDS.

The Pullman-Growe arguments advanced by the Egolf parties, Jennings/Lujan and the Attorney General in their February 22, 2012 briefs and motions are, for the most part, already addressed in the briefs filed on the same day by the Executive Defendants, at 18-20, and the Plaintiffs, at 2-4. Little further discussion is necessary.

First, while federal courts are "to defer consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch, has begun to address that highly political task itself," Growe v. Emison, 507 U.S. 25, 33 (1993) (emphasis original), it also is the case that "district courts must closely scrutinize [such] a motion to defer adjudication ... because of the importance of safeguarding the right to vote." Cano v. Davis, 191 F. Supp. 2d 1140, 1142 (C.D. Cal. 2002).

Second, once it is clear that the state court's redistricting plan is not subject to any change that will eliminate its constitutional infirmities, the rationale for deference disappears. At that point, the federal court "is empowered to entertain" the federal claims. Growe v. Emison, 507 U.S. at 36. The Democrat Parties argue that the New Mexico state courts have not finalized their maps for redistricting New Mexico's House of Representatives. But the die is clearly cast,

because (1) the New Mexico Supreme Court issued binding instructions to Judge Hall on February 10, 2012 to re-draw his previous map in an unconstitutional manner that, *inter alia*, subordinates population equality to "political neutrality" and avoiding municipal splits; (2) the New Mexico Supreme Court issued a formal opinion on February 21, 2012, confirming those instructions; and (3) Judge Hall has issued new maps that comply with the New Mexico Supreme Court's directives.

Granted, Judge Hall will issue his final map on February 27, 2012, and the Supreme Court is poised to consider and rule on any appeals by March 5, 2012 or soon thereafter. But the possibility that the state courts somehow might act in a manner that diverges from the course charted in the New Mexico Supreme Court's February 10 Order "is too remote to justify deferring the adjudication of plaintiffs' federal claims." Cano v. Davis, 191 F. Supp. 2d at 1145. Cf. Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 236 (1984) ("[T]he relevant inquiry is not whether there is a bare, though unlikely, possibility that state courts might render adjudication of the federal question unnecessary.").

Further, continued deferral, i.e., delay, will either prejudice the Plaintiffs' ability to vindicate their federal equal protection rights in this Court, or risk the serious consequence of delaying New Mexico's June 5, 2012 primary election. As the Secretary of State's February 23, 2012 Opening Brief Regarding the Authority of the Court to Delay Election Deadlines for State House of Representatives (Doc. 42), at 4-7, explains, because of the tight and connected schedule of events that must occur between March 6, 2012 and the primary election, any delay in implementing a constitutional redistricting plan past that date will necessitate the drastic step of staying the primary election. This should be avoided if at all possible. Therefore, this Court

should not defer and instead should proceed immediately to hear Plaintiffs' claim and, if necessary, take action to protect their rights.

C. THIS SUIT IS NOT BARRED BY THE *ROOKER-FELDMAN* DOCTRINE, AND SPECULATION ABOUT PRIVITY DO NOT MERIT APPLICATION OF THE DOCTRINE.

In arguing that the *Rooker-Feldman* doctrine bars this action, the Maestas and Jennings/Lujan Parties ask this Court to ignore the simple fact that this case is brought by parties that did not participate in the state court litigation. See Exxon Mobil Corp. v. Saudi Basic Industries Corp., 544 U.S. 280, 284 (2005) ("The *Rooker-Feldman* doctrine ... is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state court judgments...."). These parties go so far as to allege that Plaintiffs "are in actuality, however, the state-court losers, and should be treated as such for purposes of the *Rooker-Feldman* doctrine." Jennings Opening Brief, Doc. 29 (2/22/12) at p. 12; see Maestas Opening Brief, Doc. 27 (2/22/12) at p. 4. Because the United States Supreme Court and the Tenth Circuit have rejected such invitations to expand the *Rooker-Feldman* doctrine, it has no application here.

In pursuit of their expansive interpretation of the *Rooker-Feldman* doctrine, the Democrat parties fail to acknowledge the Tenth Circuit's clarification and limitation of the *Rooker-Feldman* doctrine in Mo's Express, LLC v. Sopkin, 441 F.3d 1229 (10th Cir. 2006). In Mo's Express, LLC, the Tenth Circuit clarified that the *Rooker-Feldman* doctrine has been "substantially narrowed" by the Supreme Court and the doctrine "does not apply against nonparties to the prior judgment of the state court." Id. at 1231-34. The narrowness of the doctrine requires a federal court to reject invitations to treat *Rooker-Feldman* "as a substitute for

ordinary principles of preclusion, or as an extension of the various grounds for abstention by federal courts." Id. at 1234.

Specifically, the Tenth Circuit has rejected the use of an "in privity" standard to evaluate whether the plaintiffs in a federal action were parties in the state court litigation for purposes of the *Rooker-Feldman* doctrine. Id. at 1236 (rejecting the claim that a party's "commitment" to same claims and arguments has any bearing in applying the doctrine); see also Lance v. Dennis, 546 U.S. 459, 466 (2006) ("T]he *Rooker-Feldman* doctrine does not bar actions by nonparties to the earlier state-court judgment simply because, for purposes of preclusion law, they could be considered in privity with a party to the judgment."). As a result, the Tenth Circuit has declined to apply *Rooker-Feldman* where, as here, the proponent claims or suggests a conspiracy to avoid its application by using nonparties to bring a federal action. The court has refused to apply the doctrine as a bar, "even if the ... account is accurate." Id. at 1236; see id. at 1237 ("To the extent that strategic behavior by similarly situated parties is a concern, the proper safeguard against relitigation is res *judicata*, not *Rooker-Feldman*.").

The *Rooker-Feldman* doctrine does not alter the principle that, under concurrent jurisdiction principles, "any group of individuals faced with the same legal problem is free to pursue different avenues of relief." Id. at 1236-37 (internal quotation marks and citations omitted). Accordingly, the doctrine is inapplicable here due to the simple fact that Plaintiffs are not parties to the state court proceedings.

D. THE DEMOCRAT PARTIES' PRECLUSION ARGUMENTS ARE BASELESS.

In support of their motions to dismiss, the Egolf and Jennings/Lujan Parties invite the Court to speculate, solely on the basis of their representation by a common set of attorneys, that the Plaintiffs are "controlled by" or "proxies" for the Sena and James groups of plaintiffs in the

state court redistricting litigation, or otherwise should be deemed to be in privity with those groups. The unstated but desired inference is that the Plaintiffs Complaint should be dismissed on issue or claim preclusion grounds. Speculation is not appropriate at any stage of litigation, certainly not on motions brought pursuant to Fed. R. Civ. P. 12.

The cases on which the Egolf and Jennings/Lujan Parties rely do not support their argument, and none involve facts comparable to those of this case. In Truong v. Truong, No. 03 Civ. 3423(PKC), 2007 WL 415152 (S.D.N.Y. Feb. 5, 2007), the court found that a wife litigating over financial accounts she held jointly with her husband was bound by judgments concerning those accounts that were entered against him, particularly where he also had acted as her lawyer. In Louisiana Seafood Mgt. v. Foster, 53 F. Supp. 2d 872 (E.D. La. 1999), the court addressed the res judicata effect of the result in one class action case on a second one that involved the same claims and had the same lead plaintiff. In Taylor v. Sturgell, 553 U.S. 880, 128 S. Ct. 2161 (2008), the Supreme Court reaffirmed the narrow parameters of the "adequate representation" exception to the rule against nonparty preclusion, declined an invitation to adopt a new "virtual representation" exception, and reminded the parties on remand that claim and issue preclusions are affirmative defenses for which proponent bears the burden of proof.

E. CONCLUSION

The Court has jurisdiction over this matter, the Plaintiffs are not precluded from bringing their claims, and there are no grounds on which the Court should abstain[4] or defer from exercising that jurisdiction. The Court should address the merits at the earliest possible opportunity.

[4] The discussion in the Governor's and Secretary of State's Opening Brief (Doc. 28) fully address the Younger v. Harris argument advanced in the Attorney General's February 22, 2012 Brief (Doc. 35).

Respectfully submitted,

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

By: /s/ Henry M. Bohnhoff

Henry M. Bohnhoff
P.O. Box 1888
Albuquerque, NM 87103
Phone: (505) 765-5900
hbohnhoff@rodey.com

MODRALL SPERLING ROEHL HARRIS & SISK PA

Patrick J. Rogers
PO Box 2168
Albuquerque, NM 87103-2168
Phone: (505) 848-1800
pjr@modrall.com

DAVID A. GARCIA LLC

David A. Garcia
1905 Wyoming Blvd. NE
Albuquerque, NM 87112
Phone: (505) 275-3200
david@theblf.com

Attorneys for Plaintiffs Claudette Chavez-Hankins, Paul Pacheco and Miguel Vega

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:

David A. Garcia/david@theblf.com & lowthorpe@msn.com
Paul M. Kienzle III/*paul@kienzlelaw.com*
Patrick J. Rogers/patrogers@modrall.com
Attorneys for Plaintiffs Claudette Chavez-Hankins, Miguel Vega & Paul Pacheco

Jessica Hernandez/jessica.hernandez@state.nm.us
Paul J. Kennedy/pkennedy@kennedyhan.com
Attorneys for Defendant Susana Martinez

Joseph Goldberg /jg@fbdlaw.com
John W. Boyd /jwb@fbdlaw.com
David H. Urias /dhu@fbdlaw.com
Joseph Goldberg /jg@fbdlaw.com
John W. Boyd /jwb@fbdlaw.com
David H. Urias /dhu@fbdlaw.com
Erin B. O'Connell/erin@garcia-vargas.com
Ray M. Vargas, II/ray@garcia-vargas.com
Attorneys for Intervenors Defendants Brian Egolf, Hakim Bellamy, Maurilio Castro, Mel Holguin & Roxane Spruce Bly

Attorneys for Intervenors Defendants Brian Egolf, Hakim Bellamy, Maurilio Castro, Mel Holguin & Roxane Spruce Bly

Robert M. Doughty, III/rod@doughtywest.com
Judd West /judd@doughtywest.com
Attorneys for Defendant Dianna J. Duran

Jennifer J. Dumas/jdumas@nordhauslaw.com
Patricia Williams/pwilliams@wwwlaw.us
Attorneys for Intervenors The Navajo Nation, Angela Barney Nez, Duane H. Yazzie, Kimmeth Yazzie, Lorenzo Bates & Rodger Martinez

Richard E. Olson/rolson@hinklelawfirm.com
Luis G. Stelzner/lgs@stelznerlaw.com
Sara Nathanson Sanchez/ssanchez@stelznerlaw.com
Attorneys for Ben Lujan, Sr. and Tim Z. Jennings

Jerry Todd Wertheim/todd@thejonefirm.com
John V. Wertheim/jvwertheim@gmail.com
Attorneys for, Defendants Alvin Warren, Eloise Gift, Henry Ochoa, and Intervenors Antonio Maestas and June Lorenzo

Scott Fugua/sfuqua@nmag.gov
Mark H. Reynolds/markh.reynolds@state.nm.us
Attorneys for State of New Mexico, ex rel. Gary K. King, Attorney General

/s/ Henry M. Bohnhoff
Henry M. Bohnhoff