STATE OF NEW MEXICO
COUNTY OF LEA
FIFTH JUDICIAL DISTRICT

REPUBLICAN PARTY OF NEW MEXICO, DAVID GALLEGOS, TIMOTHY JENNINGS, DINAH VARGAS, MANUEL GONZALES, JR., BOBBY AND DEANN KIMBRO, and PEARL GARCIA,

Plaintiffs,

v.

Cause No. D-506-CV-2022-00041

MAGGIE TOULOUSE OLIVER as New Mexico Secretary of State, MICHELLE LUJAN GRISHAM as Governor of New Mexico, HOWIE MORALES as New Mexico Lieutenant Governor and President of the New Mexico Senate, MIMI STEWART as President Pro Tempore of the New Mexico Senate, and BRIAN EGOLF as Speaker of the House of Representatives,

Defendants.

LEGISLATIVE DEFENDANTS' RESPONSE IN OPPOSITION TO THE MOTION TO INTERVENE BY THE BOARD OF COUNTY COMMISSIONERS OF LEA COUNTY

Much like the uninvited neighbor who shows up late to the dinner party, empty-handed but eager to come inside, the Board of County Commissioners of Lea County (the "Board") seeks to intervene in this action. The Board has nothing to offer the Court or the parties to warrant intervention—not even a cause of action or any legally protectable interest in this litigation. They do not distinguish their position from that of the Plaintiffs in any respect; instead, they whole-heartedly share and endorse the Plaintiffs' contention that SB 1 is a "partisan gerrymander" that violates New Mexico's equal protection clause. Not only that, the Board's ultimate objective here is identical to the Plaintiffs': to have the Court strike down SB 1 and replace it with the Concept

E map that was generated by the Citizen Redistricting Committee but never adopted by the Legislature. And while the Board seeks to distinguish itself as a party deserving of intervention because Lea County residents' voting rights are purportedly being trampled, the Board completely ignores the fact that three Lea County residents—David Gallegos, Bobby Kimbro and Dee Ann Kimbro—are already Plaintiffs in this action.

The Board fails to establish entitlement to intervention at every turn. It cannot intervene as of right because it has no claim, cause of action or legally protectable interest. As a political subdivision of the state, black-letter law prevents Lea County from suing the state on a substantive constitutional provision. Neither the county nor the Board is a voter or a "person" protected by Article II, Section 18 of the New Mexico Constitution. And even if the County were empowered to sue to vindicate the individual constitutional rights of its residents (it is not), that is exactly the type of *indirect* interest (already represented by existing parties) that defeats intervention.

The Board cannot satisfy any of the other requirements for intervention, either. Its motion is untimely under the unique circumstances of this case, where preliminary injunctive relief is being sought in the midst of an election process already well underway, with a primary election less than three months away. Allowing the Board to intervene will not benefit the Court or the parties in any way—but it will undoubtedly inflate the cost of this litigation and the burden on the Court by increasing the number of attorneys, pages of briefing, and the amount of time needed for hearings, among other things. Those are all costs borne by taxpayers, as Plaintiffs have sued numerous state officials, and presumably the Board's legal bill would be footed by Lea County taxpayers.

The motion to intervene should be denied.

I. New Mexico Law on Intervention

Intervention in New Mexico state courts is governed by Rule 1-024 NMRA. The rule provides for intervention as a matter of right and permissive intervention. A party may intervene as a matter of right "(1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Rule 1-024(A) NMRA. Permissive intervention may be granted "(1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common." Rule 1-024(B) NMRA.[1] In exercising its discretion in response to an application for permissive intervention, "the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *Id.*

A party seeking to intervene must attach to its motion a copy of its proposed complaint in intervention. Rule 1-024(C) NMRA. This requirement helps to "enable the court to determine whether the applicant has a right to intervene." *Matter of Marcia L. v. State ex rel. Human Services Dept.*, 1989-NMCA-110, ¶ 9, 109 N.M. 420 (internal citations omitted). "While a determination that a proposed complaint in intervention is legally sufficient – so as to withstand a motion to dismiss for failure to state a claim under Rule 12(B)(6)—is not required before the trial court may grant an application to intervene, it is certainly permissible for the court to scrutinize the proffered

[1] Rule 1-024(B) also provides, "When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action." That provision does not apply here.

complaint to see whether it states a cause of action." *Solon v. WEK Drilling Co., Inc.*, 1992-NMSC-023, ¶ 5, 113 N.M. 566. *See also* 3B James Wm. Moore & John E. Kennedy, *Moore's Federal Practice* ¶ 24.10[4], at 24–103 (2d ed. 1991) ("Leave [to intervene] should not be granted if the court could not grant intervenor any relief."); *Id.* ¶ 24.14, at 24–144 ("The proposed complaint or answer of the intervenor must state a well-pleaded claim or defense."); 7C Charles A. Wright et al., *Federal Practice & Procedure: Civil* § 1914, at 416–17 (2d ed. 1986) ("The proposed pleading must state a good claim for relief or a good defense.").

Finally, Rule 1-024 requires that any application for intervention be "timely." Rule 1-024(A), (B) NMRA. *See also In re Norwest Bank of N.M., N.A.*, 2003-NMCA-128, ¶ 17, 134 N.M. 516. The district court is to assess the timeliness requirement "in light of all the circumstances of the case." *Id.* (internal quotation marks and citation omitted). Timeliness is a threshold question. *Murken v. Solv-Ex Corp.*, 2005-NMCA-137, ¶¶ 12, 14, 138 N.M. 653.

II. The Board is Not Entitled to Intervention as of Right.

A. The Board Does Not Have a "Direct, Substantial and Legally Protectable Interest" in These Proceedings.

A party seeking to intervene as a matter of right must establish that it has an interest in the action "that is significant, direct rather than contingent, and based on a right belonging to the proposed intervenor rather than an existing party to the suit." *Matter of Marcia L.*, 1989-NMCA-110, ¶ 7. *See also Coalition of Arizona/New Mexico Counties for Stable Economic Growth v. Dept. of the Interior*, 100 F.3d 837, 840-841 (10th Cir. 1996) (party seeking to intervene as of right must show that its interest in the proceedings is "direct, substantial and legally protectable") quoting *Vermejo Park Corp. v. Kaiser Coal Corp.*, 998 F.2d 783, 791 (10th Cir. 1993). The intervenor's interest must be "a particularized interest rather than a generalized grievance."

American Ass'n of People With Disabilities v. Herrera, 257 F.R.D. 236, 246 (D.N.M. 2008), quoting *Chiles v. Thornburgh*, 865 F.2d 1197, 1212 (11th Cir. 1989).

The Board's attempt to intervene fails at the most fundamental level: the Board has no legally cognizable interest in this case. Instead, the Board offers only generalized allegations that SB 1 violates the Equal Protection Clause of the New Mexico Constitution and should be replaced by a different map more to the Board's political liking. Tellingly, the Board's proposed Complaint in Intervention does not assert or even identify a cause of action—nor could it, for several reasons. First, New Mexico's Equal Protection Clause applies to "persons," not political subdivisions of the state. N.M. Const. art. II, § 18 ("No **person** shall be deprived of life, liberty or property without due process of law; nor shall any **person** be denied equal protection of the laws. Equality of rights under law shall not be denied on account of the sex of any **person**.") (emphasis added). *See also State ex rel. New Mexico State Highway Comm'n v. Taira*, 1967-NMSC-180, 78 N.M. 276 (noting that Art. II, Section 18 of the New Mexico Constitution "protects only the rights of 'persons' and does not embrace the state").

Second, it is black-letter law that counties, as political subdivisions of the state, cannot assert constitutional claims against the state.[2] *See Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 363 (2009) ("[A] political subdivision, 'created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator'"), quoting *Williams v. Mayor of Baltimore*, 289 U.S. 36, 40 (1933); *Board of Supervisors v. McMahon*, 219 Cal.App.3d 286, 296-297 (Ct. App. Cal. 1990) ("[S]ubordinate political entities, as 'creatures' of the state, may not challenge state action as violating the entities'

[2] While the State of New Mexico itself is not named as a defendant in this action, a suit against a state official in his or her representative capacity is considered a suit against the State itself. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989).

rights under the due process or equal protection clauses of the Fourteenth Amendment or under the contract clause of the federal Constitution"), quoting *Star-Kist Foods, Inc. v. County of Los Angeles*, 42 Cal.3d 1, 6 (1986); *Branson School Dist. RE-82 v. Romer*, 161 F.3d 619 (10th Cir. 1998) ("a state generally is immune to claims by its subsidiary political subdivisions asserting that the state has violated a constitutional provision protecting individual liberty"); *Kerr v. Polis*, No. 17-1192, 2021 U.S. App. LEXIS 36682 at *21 (10th Cir. Dec. 13, 2021) (en banc) ("First, we must determine whether the political subdivision's cause of action rests on a substantive constitutional provision; if so, the claim cannot proceed."). While these cases directly addressed claims by political subdivisions under the federal constitution, the same reasoning applies to claims under New Mexico's constitution, and the Board has cited no authority to the contrary.

Nor do the state statutes cited by the Board empower the Board to sue the State to enforce the individual constitutional rights of residents of Lea County. *See* Motion at ¶ 3, citing NMSA (1978), Sections 4-38-1, 4-37-1 and 4-38-18 (1953). "A county is but a political subdivision of the State, and it possesses only such powers as are expressly granted to it by the Legislature, together with those necessarily implied to implement those express powers." *El Dorado at Santa Fe, Inc. v. Board of County Com'rs of Santa Fe County*, 1976-NMSC-029, ¶ 6, 89 N.M. 313. "When the Legislature confers an express power or imposes a duty upon a county and prescribes the method for exercising the power or discharging the duty, that method is exclusive." *Id.* Section 4-38-1 does not enumerate any county powers; it merely provides that a county's powers shall be exercised by a board of county commissioners. Section 4-37-1 grants counties general police powers and the power to make ordinances to discharge those powers—but it comes nowhere close to empowering the county to assert constitutional claims against the state on behalf of individual county residents. Nor does section 4-38-18, which provides: "To represent the county and have

the care of the county property and the management of the interest of the county in all cases where no other provision is made by law." This statute is aimed at carrying out the business of the county, such as managing county property and services. *See, e.g., Board of Comm'rs v. Hubbell*, 1923-NMSC-060, ¶ 5, 28 N.M. 634 (predecessor statute to § 4-38-18 "empowers the board of county commissioners to generally represent the county in the management of its affairs, where no other provision is made by law").

Finally, even if the Board could identify a source of authority empowering it to sue the state to vindicate the individual constitutional rights of county residents, that would not give rise to the direct, substantial interest required for intervention as of right. Intervention must be "based on a right belonging to the proposed intervenor rather than [to] an existing party to the suit." *NM Right to Choose/NARAL v. Johnson*, 1999-NMSC-005, ¶ 19, 126 N.M. 788, quoting *In re Marcia L.*, 1989-NMCA-110, ¶ 7.[3] Therefore, any attempt at intervention by the Board that is grounded in claims made on behalf of or for the benefit of county residents must fail—especially here, when several Lea County residents are already parties to the suit.

Because the Board has failed to establish that it has a direct, substantial or protectable interest (or even a cause of action) in these proceedings, its Motion to Intervene must be denied.

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[3] The Board's analogy to *Coalition of Arizona/New Mexico Counties for Stable Economic Growth*, 100 F.3d 837 (10th Cir. 1996) is misplaced, as the factual circumstances of the intervenor in that case could not be more different from those present here. In that case, the intervenor was a wildlife photographer who (among other things) (a) had a statutory right to bring his claim against the defendant, (b) previously brought a similar claim against the defendant in an earlier case, (c) and had a direct, well-documented scientific and economic interest in the subject of the action. By contrast, the Board's stated general interest in voting rights, equal protection and notions of "partisan fairness" are akin to the generalized interests in "voting rights" and "preserving the integrity of the electoral process" that Judge Browning found insufficient to justify intervention as of right in *American Ass'n of People With Disabilities*, 257 F.R.D. at 253, because those are interests shared by all voters.

B. Denial of Intervention will not Impair any Interest of the Board.

To establish intervention as of right, the intervenor must demonstrate that the disposition of the action would impair or impede its ability to protect its interest. *American Ass'n of People With Disabilities*, 257 F.R.D. at 246-47. This inquiry "is intertwined with the existence of an interest." *Id.* at 247. Here, because the Board lacks a direct, protectable interest in this action, there is no interest that would be impaired or impeded if intervention is denied.

C. The Board's Interests, if Any, are Adequately Represented by the Parties.

A party seeking to intervene bears the burden of establishing that its interests are not adequately represented by the current parties to the action. Rule 1-024(A); *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1254 (10th Cir. 2001). "An applicant may fulfill this burden by showing collusion between the representative and an opposing party, that the representative has an interest adverse to the applicant, or that the representative failed in fulfilling his duty to represent the applicant's interest." *Coalition of Arizona/New Mexico Counties for Stable Economic Growth*, 100 F.3d at 844-45. "[A] presumption of adequate representation arises when an applicant for intervention and an existing party have the same ultimate objective in the litigation." *Amer. Ass'n of People With Disabilities*, 257 F.R.D. at 247, quoting *Utah Ass'n of Counties*, 255 F.3d at 1255; *see also City of Stilwell, Okl. v. Ozarks Rural Elec. Coop.*, 79 F.3d 1038, 1042 (10th Cir. 1996) ("representation is adequate 'when the objective of the applicant for intervention is identical to that of one of the parties").

Here, not only does the Board share the exact same "ultimate objective" as all of the Plaintiffs—a declaration that SB 1 is an unconstitutional "partisan gerrymander" and court-ordered adoption of Concept Map E in its place—but the Board's legal and factual contentions are virtually identical to those asserted by Plaintiffs. *See* proposed Complaint in Intervention at 6 (discussing

and endorsing Plaintiffs' claims). And even if all that were not the case, the Board cannot show inadequate representation because three of the Lea County voters the Board purports to represent are already Plaintiffs. *See* Verified Complaint at ¶¶ 2, 6 (Plaintiff David Gallegos is a resident of Eunice, located within Lea County, and Plaintiffs Bobby and Dee Ann Kimbro are residents of Lovington, located within Lea County). Nowhere in its motion or its proposed Complaint in Intervention does the Board explain why the county's interest (if any) is not adequately represented by its own residents who are asserting the same allegations based on the same constitutional provision and seek the same relief. At best, the Board offers some general assertions that it "has a unique responsibility to its citizenry" and that the county possesses some type of unspecified "expertise" or "information" that will aid the litigation. Motion to Intervene at 7, 10. These vague claims fall far short of establishing entitlement to intervention.

D. The Board's Motion is Untimely.

An application to intervene must be timely. Rule 1-024 NMRA. Timeliness of a motion to intervene is assessed "in light of all the circumstances, including the length of time since the applicant knew of his interest in the case, prejudice to the existing parties, prejudice to the applicant, and the existence of any unusual circumstances." *Utah Ass'n of Counties*, 255 F.3d at 1250, quoting *Sanguine, Ltd. v. United States Dep't of Interior*, 736 F.2d 1416, 1418 (10th Cir. 1984).

Here, the Board moved to intervene almost three months after SB 1 was signed into law and nearly two months after Plaintiffs commenced this action. If this were a typical civil action on a conventional pre-trial schedule, that degree of delay might not be prejudicial and might satisfy the timeliness requirement. After all, most civil cases in our state courts take more than a year (or two) to proceed through the pleading stage, discovery phase and to trial. However, this case is

anything but typical. Plaintiffs seek to challenge the constitutionality of an enacted congressional redistricting plan while the election process for congressional office is already well underway. Candidate filing deadlines have passed, pre-primary conventions have been held, and the primary election will take place in less than three months. Plaintiffs have moved for preliminary injunctive relief and have requested a hearing on their motion, which is fully briefed. While Defendants have all taken the position that Plaintiffs' efforts to obtain injunctive relief are themselves already untimely and unworkable due to the election process already underway (even if Plaintiffs' complaint did not suffer from other fatal defects, not the least of which is the non-justiciability of their partisan gerrymandering claim), the Board's delay in seeking intervention only compounds the prejudice of that untimeliness.

For all these reasons, the Board has failed to establish any entitlement to intervention as a matter of right.

III. The Court Should Deny the Board's Request for Permissive Intervention.

Permissive intervention may be granted when "an applicant's claim or defense and the main action have a question of law or fact in common." Rule 1-024(B). Even if that condition is satisfied, however, permissive intervention is subject to the court's discretion, and the court "must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." *Id.* "While not a required part of the test for permissive intervention, a court's finding that existing parties adequately protect prospective intervenors' interests will support a denial of permissive intervention." *Amer. Ass'n of People With Disabilities*, 257 F.R.D. at 249, citing *City of Stilwell, Okl.*, 79 F.3d at 1043.

Here, the Board cannot even satisfy the threshold condition for permissive intervention because it has no claim. As discussed above, the only legal basis cited by the Board for its challenge to SB 1 is the equal protection clause of the New Mexico Constitution. That clause, of

course, only protects "persons," not political subdivisions. And political subdivisions such as Lea County are barred from suing the state if their cause of action "rests on a substantive constitutional provision," as it would here. *Kerr,* No. 17-1192, 2021 U.S. App. LEXIS 36682 at *20. The Board lacks authority to sue on behalf of its residents to enforce their constitutional rights, and even if it possessed that power, a suit to vindicate third parties' rights (especially when several of those third parties are already in the case) is exactly the type of indirect interest that fails to justify intervention.

Even if the Board could state a claim that would warrant consideration for permissive intervention, the undue delay and prejudice that would result from allowing the county to participate in this case warrant denial. Intervention by the Board would drive up the costs of this litigation by introducing another set of attorneys to participate in hearings, file motions and briefing, participate in discovery and trial (if the claims get that far) and generally drag out and multiply these proceedings. This increases the burden on the Court and slows down the litigation process—yet adds nothing new or meaningful to the case because the Board's position is essentially identical to that of the existing Plaintiffs. That increased cost is of particular concern here, where five (5) state officials are named as Defendants, such that the costs incurred in their defense of this matter is borne by New Mexico taxpayers.

In addition to driving up costs and duplication of effort, allowing a county to enter the fray in this case opens the door to other political subdivisions entering into redistricting litigation. The addition of counties, municipalities or other political bodies—none of whom are voters, none of whom have individual constitutional rights, and none of whom are charged with the task of statewide redistricting—as parties to redistricting litigation would add unnecessary and burdensome complications to such cases. Nowhere in its ten-page motion to intervene or in its

lengthy proposed complaint in intervention does the Board cite a single case from any jurisdiction in which a county or other political subdivision of the state was permitted to intervene in a statewide redistricting challenge based on general concerns for the rights of its residents. Indeed, there does not appear to be any precedent for doing so, and the Court should not create one now.

CONCLUSION

The Board cannot satisfy the requirements for either intervention as a matter of right or permissive intervention. The Board has no direct, legally protectable interest in these proceedings, much less a cognizable cause of action against any of the defendants. Any interests the Board might arguably have are already adequately represented by the existing parties, who share the exact same ultimate objective as the Board. And allowing the Board to intervene would unduly delay and prejudice the adjudication of the rights of the original parties. For all the foregoing reasons, the Motion to Intervene by the Board of County Commissioners for Lea County should be denied.

Respectfully submitted,

PEIFER, HANSON, MULLINS & BAKER, P.A.

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CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2022, I caused the foregoing Response, along with this Certificate of Service, to be served and filed electronically through the Tyler Technologies Odyssey File & Serve electronic filing system, which caused all parties or counsel of record to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

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