

STATE OF NEW MEXICO  
COUNTY OF SANTA FE  
FIRST JUDICIAL DISTRICT COURT

**CAUSE NO. D-101-CV-2011-02942**

BRAIN F. EGOLF, JR., HAKIM BELLAMY, MEL HOLGUIN, MAURILIO CASTRO and  
ROXANE SPRUCE BLY, Plaintiffs,

-vs-

DIANNA J. DURAN, in her official capacity as New Mexico Secretary of State, SUSANA MARTINEZ, in her official capacity as New Mexico Governor, JOHN A. SANCHEZ, in his official capacity as New Mexico Lieutenant Governor and presiding officer of the New Mexico Senate, 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, Defendants.

**CONSOLIDATED WITH CAUSE NO. D-101-CV-2011-02944**  
**CONSOLIDATED WITH CAUSE NO. D-101-CV-2011-03016**  
**CONSOLIDATED WITH CAUSE NO. D-101-CV-2011-03099**  
**CONSOLIDATED WITH CAUSE NO. D-101-CV-2011-03107**  
**CONSOLIDATED WITH CAUSE NO. D-101-CV-2011-02945**  
**CONSOLIDATED WITH CAUSE NO. D-506-CV-2011-00913**  
**CONSOLIDATED WITH CAUSE NO. D-202-CV-2011-09600**  
**CONSOLIDATED WITH CAUSE NO. D-101-CV-2011-03135**

**THE EXECUTIVE DEFENDANTS' RESPONSE IN OPPOSITION TO**  
**THE NEW MEXICO LEAGUE OF UNITED LATIN AMERICAN CITIZENS (NM**  
**LULAC), ET AL.'S MOTION FOR INTERVENTION**

Susana Martinez, in her official capacity as New Mexico Governor (hereinafter referred to as "Governor"), by and through her attorneys, Paul J. Kennedy, Jessica M. Hernandez, and Matthew J. Stackpole; Dianna J. Duran, in her official capacity as New Mexico Secretary of State (hereinafter referred to as "Secretary of State"), by and through her attorneys, Doughty & West, P.A. (Robert M. Doughty III, Judd C. West, and Susan R. Johnson); and John A. Sanchez, in his official capacity as New Mexico Lieutenant Governor (hereinafter referred to as "Lieutenant Governor"), by and through his attorneys, Peifer, Hanson & Mullins, P.A. (Charles R. Peifer, Robert E. Hanson, and Matthew R. Hoyt), hereby respond in opposition to the New

Mexico League of United Latin American Citizens (NM LULAC), et al.'s Motion for Intervention as Co-Plaintiffs and state the following in support.

### **Introduction**

The Governor, Lieutenant Governor, and the Secretary of State (collectively, the "Executive Defendants") oppose The New Mexico League of United Latin American Citizens' ("NM LULAC's") motion for two reasons. First, NM LULAC's counsel did not seek the Executive Defendants' position on the motion prior to filing it, as is required by the New Mexico Rules of Civil Procedure. Second, NM LULAC's motion is untimely. NM LULAC waited until over a week after this Court's intervention deadline to file the instant motion, and then made no effort to ensure that the parties had received service and were aware of NM LULAC's attempt to intervene in this case. Permitting NM LULAC to intervene a week before trial, well after the deadline for the parties to submit redistricting plans and disclose witnesses and exhibits, unfairly prejudices the existing litigants and threatens to create disarray in the pre-trial and trial schedules. NM LULAC's motion should be denied.

### **ARGUMENT**

On or about November 7, 2011, ten (10) days after the Court's deadline for filing motions to intervene, *see* Scheduling Order (entered 10/18/11), NM LULAC filed the instant motion, seeking to intervene in the congressional portion of this redistricting at issue in the above captioned cause number. NM LULAC's motion should be denied for the following reasons:

***A. NM LULAC's Motion Does Not Comply With the Rules of Civil Procedure Or The Local Rules***

NM LULAC's motion suffers from two fatal procedural defects. First, NM LULAC's counsel failed to confer and seek the position of the current parties to this case prior to filing the instant motion. Both Rule 1-007.1(B) NMRA and Local Rule 1-306(A) NMRA require that a

movant “shall determine whether a motion will be opposed[,]” and must “state, with particularity, the efforts” made to determine whether a motion is opposed or not. NM LULAC ignored these requirements in filing the present motion. At no point prior to filing its motion did NM LULAC attempt to confer with any of the Executive Defendants to determine whether its motion would be opposed as required by the rules of civil procedure and the local rules. The motion to intervene should be either stricken from the record or denied on this basis alone.

Second, NM LULAC did not properly serve the motion. Rule 1-005 NMRA and Local Rule 1-306(B) NMRA required NM LULAC to serve a copy of the motion upon each of the parties, but LULAC failed to do so.

NM LULAC may contend that the current TylerTech system affords automatic service on the parties, thus relieving of the obligation to separately serve the existing parties. However, reliance on the TylerTech system necessarily requires a proposed intervenor to file its motion in the correct case, which LULAC did not do here. The lawsuit in which NM LULAC moved to intervene, cause number 2011-2944, is a different cause number than the consolidated matter, cause number 2011-2942. Although the motion does not contain a list of parties the motion was served on, the request for hearing filed concurrently with the motion only lists counsel for the Egolf Plaintiffs and Gary King, Office of Attorney General, as “parties entitled to notice.” Thus, NM LULAC’s reliance on the TylerTech system, and its misfiled motion, for proper service on the parties is inappropriate.

Further, NM LULAC also did not provide notice of the motion via e-mail per the Court’s instruction at the scheduling conference. Even if it was appropriate for NM LULAC to have relied on the TylerTech system for service, its failure to separately email the parties a copy of its

motion violates the Court's instructions. Thus, NM LULAC's motion should be denied for failure to comply with the rules of civil procedure and the local rules.

***B. NM LULAC's Motion Is Untimely***

In addition to its procedural defects, NM LULAC's motion is untimely. Intervention is permitted in New Mexico state courts pursuant to Rule 1-024 NMRA. The rule provides for an intervention of right as well as a permissive intervention into ongoing cases. *See id.* Regardless of whether the motion is one of right or permissive, timeliness is a threshold requirement for intervention. *See Apodaca v. Town of Tome Land Grant*, 86 N.M. 132, 133, 520 P.2d 552, 533 (1974). "The determination of timeliness is a matter peculiarly within the discretion of the trial court." *Id.*

"A key consideration in determining timeliness is whether the effort to intervene occurred shortly after the would-be intervenor discovered such action[] was necessary to protect its interests." *Thriftway Mkg. Corp. v. State*, 111 N.M. 763, 765, 810 P.2d 349, 351 (Ct.App. 1990). "Failure to proceed in a timely manner will result in loss of the right to intervene. Courts have been said to be unanimous in requiring prompt action on the part of an intervenor who seeks to assert rights in an action to which he is not a party." *Tom Fields, Ltd. v. Tigner*, 61 N.M. 382, 386, 301 P.2d 322, 325 (1956).

It cannot be said that NM LULAC took "prompt action" to intervene relating to the redistricting litigation. As acknowledged by NM LULAC in its *ex parte* e-mail to the Court, this case has received substantial media attention. The initial complaints in this matter were served shortly after the New Mexico special session ended without enactment of redistricting plans for the Congressional, New Mexico House, New Mexico Senate, and Public Regulation Commission districts for the upcoming elections. This Court entered an Order on October 18, 2011 setting

very quick deadlines to complete the redistricting including a deadline of October 28, 2011 to file motions to intervene. On November 7, NM LULAC filed its motion to intervene, ten (10) days after the deadline and then did nothing for the next two (2) weeks to ensure its ability to participate in the litigation. NM LULAC's motion fails to demonstrate that it is timely, and, under the circumstances of this case, cannot demonstrate that the motion is timely. It should be denied.

*C. NM LULAC's Attempt To Intervene One Week Before Trial Will Prejudice Executive Defendants*


Rule 1-024 also provides that “[i]n exercising its discretion” to allow or deny intervention, “the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.” In this case, allowing NM LULAC to intervene will prejudice Executive Defendants. Specifically, NM LULAC is attempting to intervene to advocate for the plan presented as House Bill 46, which has not been advocated by any other party to this litigation. The very late filing of the motion to intervene prejudices Executive Defendants by depriving them of a full opportunity to address the Congressional plan advocated by NM LULAC. Certainly, to the extent NM LULAC seeks a delay in the Court's decision on the Congressional redistricting, such a delay would prejudice the current parties to this litigation as well as all New Mexico citizens. The unfairness resulting from such a late filing provides an appropriate and independent basis to deny the Motion.

**CONCLUSION**

WHEREFORE, Executive Defendants request this Court enter an Order denying NM LULAC's motion to intervene and for any other relief deemed necessary and proper.

Respectfully submitted,

DOUGHTY & WEST, P.A.



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**CERTIFICATE OF SERVICE**

I hereby certify that on November 28, 2011, I filed the foregoing pleading electronically through the tyler tech system, which caused all parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

I hereby certify that on November 28, 2011, I e-mailed a copy of the foregoing pleading to the following people.

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Robert M. Doughty, III / Susan R. Johnson