

**STATE OF NEW MEXICO
COUNTY OF LEA,
FIFTH JUDICIAL DISTRICT COURT**

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

Plaintiffs,

v.

No. D-506-CV-2022-00041

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

Defendants.

EXECUTIVE DEFENDANTS' RESPONSE TO MOTION TO INTERVENE

Comes now Defendants Governor Michelle Lujan Grisham and Lieutenant Governor Howie Morales (collectively, "Executive Defendants"), by and through their counsel of record in this matter, and hereby provides their response to Proposed Intervenor Larry Marker's ("Intervenor's") Motion to Intervene (the "Motion"). As grounds for their response, the Executive Defendants state as follows.

INTRODUCTION

In late 2021, the Legislature approved, and the Governor signed into law, a new Congressional district map which would ensure that each district contained both rural and urban

constituencies. The Republican Party of New Mexico and several individuals residing in different parts of the State then brought the instant action challenging that map. Intervenor, a pro-se litigant living in the same area as many of the plaintiffs, now seeks to intervene as a matter of right. Yet he fails to show how his interests are not already adequately represented by the existing plaintiffs. His Motion should, therefore, be denied.

BACKGROUND

I. The redistricting process

New Mexico, like all states, must regularly reapportion its Congressional districts to ensure compliance with the constitutional mandate of “equal representation for equal numbers of people.” *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964). To aid in the redistricting process, the Legislature enacted the Redistricting Act of 2021, NMSA 1978, §§ 1-3A-1 to -10 (2021). That Act created the Citizen Redistricting Committee, composed of seven members appointed by legislative leadership and the State Ethics Commission and chaired by a retired Justice of the New Mexico Supreme Court. Section 1-3A-3. In 2021, the Committee was required to adopt, and deliver to the Legislature, three district plans for New Mexico’s congressional districts “no later than October 30, 2021, or as soon thereafter as practicable.” Section 1-3A-5(A). Each plan was to be developed in accordance with an enumerated list of requirements and adopted following public input. Section 1-3A-7. However, the Committee’s proposals are not binding on the Legislature, which chose to retain the ultimate authority to redistrict Congressional and state legislative districts. *See* § 1-3A-9.

Consistent with the Redistricting Act, the Committee submitted three proposed Congressional maps to the Legislature in early November 2021: (1) Congressional Concept A, which largely maintained the boundaries of the then-current Congressional districts, (2)

Congressional Concept E, a map proposed by former Justice Edward Chavez, and (3) Congressional Concept H, a map based on feedback from a coalition of community-based organizations throughout the State.¹ Shortly thereafter, the Governor called the Legislature into a special session to adopt new Congressional and legislative maps.² The Legislature introduced several bills proposing different Congressional district maps—some of which were those recommended by the Committee. One such map was introduced by Senators Joseph Cervantes and Georgene Louis as Senate Bill 1 (“SB 1”).³ SB 1—based largely on Congressional Concept H—proposed three Congressional districts which combined both rural and urban voters in each district.⁴ Senator Cervantes described his motivation for the map as follows:

This congressional map is unique in that it includes both significant urban and rural populations within each of our three congressional districts. Having our entire congressional delegation represent both urban and rural constituencies and communities will assure advocacy on behalf of every New Mexican from our entire delegation. This is a great opportunity for us to focus on creating unified priorities rather than exacerbating our divisions and differences.⁵

¹ *CRC District Plans and Evaluations for New Mexico Congress, State Senate, State House of Representatives, & Public Education Commission: 2020 Redistricting Cycle*, 29-42, Citizen Redistricting Comm. (Nov. 2, 2021), <https://www.nmredistricting.org/wp-content/uploads/2021/11/2021-11-2-CRC-Map-Evaluations-Report-Reissued-1.pdf> [hereinafter “Committee Report”]; *Adopted Maps*, N.M. Citizen Redistricting Comm., <https://www.nmredistricting.org/adopted-maps/> (last visited Feb. 8, 2022).

² *Gov. Lujan Grisham to formally call Legislature into special session on redistricting*, Office of Gov. Michelle Lujan Grisham (Dec. 2, 2021), <https://www.governor.state.nm.us/2021/12/02/gov-lujan-grisham-to-formally-call-legislature-into-special-session-on-redistricting/>.

³ *2021 2nd Special Session – SB 1*, N.M. Legislature, <https://www.nmlegis.gov/Legislation/Legislation?chamber=S&legType=B&legNo=1&year=21s2> (last visited Feb. 9, 2022).

⁴ *Senate Meeting*, N.M. Legislature (Dec. 10, 2021), <https://sg001-harmony.sliq.net/00293/Harmony/en/PowerBrowser/PowerBrowserV2/20220208/-1/68211> at 3:38:00-42:00 (describing proposed map).

⁵ Carol A. Clark, *New Mexico Senate Passes CD Map Proposal*, Los Alamos Daily Post (Dec. 11, 2021), <https://ladailypost.com/new-mexico-senate-passes-cd-map-proposal/>.

SB 1 achieved this primarily by: (1) extending the northern 3rd Congressional district down into the southeastern part of the State, including parts of the cities of Hobbs, Artesia, and Roswell; extending the southern 2nd Congressional district into the northwestern part of the state, including parts of southwest/west Albuquerque, Los Lunas, and Belen; and (3) expanding the central Congressional district 1 to the southeast, including Santa Rosa and Ruidoso.⁶ A majority of both chambers of the Legislature voted in favor of SB 1—sending it to the Governor’s desk for signature or veto.⁷

While SB 1 deviated from the Committee’s maps, it was the Legislature’s prerogative to go its own way. The Governor still found it to be a good faith effort to comply with federal and New Mexico law. Additionally, vetoing SB 1 would have left the State with an indisputably unconstitutional map mere weeks before important election deadlines—assuredly subjecting the State to a whirlwind of expensive litigation. *See, e.g.*, NMSA 1978, § 1-8-26(A) (requiring declarations of candidacy by preprimary convention designation for United States representative to be filed on February 1, 2022); NMSA 1978, § 1-8-30 (2011) (requiring filing of nominating petitions); NMSA 1978, § 1-8-33(B) (requiring candidates to file petitions at the time of filing declarations of candidacy); *see generally* *Maestas v. Hall*, 2012-NMSC-006, 274 P.3d 66

⁶ *See* Districttr, <https://districtr.org/plan/66395> (select “Data Layers”; then select “US House”) (showing current Congressional map shaded in different colors with previous Congressional districts indicated with black outlines) (last visited Feb 9, 2022).

⁷ Technically, the Legislature passed Senate Judiciary Substitute for Senate Bill 1. *See Official Roll Call*, N.M. Legislature (Dec. 11, 2021), <https://www.nmlegis.gov/Sessions/21%20Special2/votes/SB0001HVOTE.pdf> (House of Representatives); *Official Roll Call*, N.M. Legislature (Dec. 10, 2021), <https://www.nmlegis.gov/Sessions/21%20Special2/votes/SB0001SVOTE.pdf> (Senate). The Governor refers to this bill interchangeably with Senate Bill 1 for ease of reference.

(addressing litigation following the Legislature’s failure to enact new maps over the Governor’s veto). Thus, the Governor declined to exercise her discretionary veto power and signed the Legislature’s chosen map into law on December 17, 2021.⁸

II. The instant action

Despite being well aware of the impending election deadlines, Plaintiffs—the Republican Party of New Mexico and several individuals residing in different parts of the State—waited over a month to challenge SB 1. *Compare id.*, with Verified Complaint for Violation of New Mexico Constitution Article II, Section 18 (“Complaint”), filed Jan 21, 2022. In addition to the Executive Defendants, the Complaint names President Pro Tempore Mimi Stewart and Speaker Brian Egolf (collectively, the “Legislative Defendants”) and Secretary of State Maggie Toulouse Oliver. *Id.* at 1. Plaintiffs challenge SB 1 solely on the basis that it allegedly constitutes improper partisan gerrymandering, in violation of the State equal protection clause in Article II, Section 18 of the New Mexico Constitution. Complaint at ¶¶ 15-16, 24, 78, 96, 98. Specifically, Plaintiffs allege that SB 1 intentionally “cracked” Republican voters in southeastern New Mexico—including parts of Chaves, Eddy, Lea, and Otero counties—and “cracked” parts of Albuquerque to weaken that party’s political strength in the 2nd Congressional district. *Id.* at ¶¶ 2-7. In so doing, the drafters of SB 1 allegedly relied on “illegitimate reasons” rather than traditional redistricting principles of preserving communities of interest, considering political and geographic boundaries, and preserving the core of existing districts. *Id.* at ¶ 77-98. Plaintiffs ultimately seek to have SB 1 declared unconstitutional and replaced with another map. *Id.* at 27.

⁸ Gov. Michelle Lujan Grisham, *Senate Executive Message No. 3* (Dec. 17, 2021), <https://www.governor.state.nm.us/wp-content/uploads/2021/12/Senate-Executive-Message-No.-3-1.pdf>.

III. The Motion

Shortly after Plaintiffs filed the instant action, Intervenor filed the Motion seeking to intervene as a matter of right under Rule 1-024(A)(2). *See* Motion at 1. Intervenor lives just north of Roswell in Chavez County, which is now part of the First Congressional District. *See* Intervening Plaintiffs [sic] Complaint and Statement of Concurrence in Support of Plaintiffs [sic] Allegations (“Complaint in Intervention”), filed January 31, 2022). Like Plaintiffs, Intervenor claims SB 1 is the product of unlawful political gerrymandering prohibited by Article II, Section 18 of the New Mexico Constitution. *See* Complaint in Intervention at 5-6. Intervenor also claims SB 1 violates Article II, Section 8 of the New Mexico Constitution, which provides for free and open elections. *See* Complaint in Intervention at 3-5. Like Plaintiffs, Intervenor seeks to have the Court overturn SB 1’s map and replace it with the Congressional Concept E map. *Id.* at 6-7.

DISCUSSION

The Court should deny Intervenor’s Motion because his interests are already adequately represented. Rule 1-024 NMRA provides for intervention of right and permissive intervention. Rule 1 024(A)-(B). Intervenor seeks only to intervene as a matter of right pursuant to Rule 1-024(A)(2), *see* Motion at 1, which provides for intervention

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.*

(Emphasis added). Therefore, a proposed intervenor is not entitled to intervention if his interests are already adequately represented. “The most common situation in which courts find representation adequate arise when the objective of the [prosed intervenor] is identical to that of

one of the parties.” *Bottoms v. Dresser Indus., Inc.*, 797 F.2d 869, 872-73 (10th Cir. 1986).⁹ “[A] presumption of adequate representation arises when an applicant for intervention and an existing party have the same ultimate objective in the litigation[.]” *Utah Ass’n of Ctys. v. Clinton*, 255 F.3d 1246, 1255 (10th Cir. 2001). “[M]otivations for pursuing that common objective are immaterial.” *Statewide Masonry v. Anderson*, 511 F. App’x 801, 806-07 (10th Cir. 2013) (internal quotation marks and citation omitted).

Plaintiffs are composed of the Republican Party of New Mexico, as well as individuals from around the State—including individuals in the same former and current Congressional district as Intervenor. *Compare* Complaint in Intervention at 2, *with* Complaint at ¶ 3. Both Intervenor and Plaintiffs seek identical outcomes: overturning the current Congressional map and replacing it with a map similar to the Congressional Concept E map. *Compare* Complaint in Intervention at 6-7, *with* Complaint at 27. That Intervenor asserts another basis for achieving the same ultimate result is of no moment. *Cf. Hershey v. ExxonMobil Oil Corp.*, 278 F.R.D. 617, 621 (D. Kan. 2011) (“Differences in underlying trial strategies — such as different theories to obtain the most recovery for a plaintiff class in the face of potential statute of limitations defenses — are not a sufficient difference of interest to justify revocation of the presumption of adequate representation.”). Given the existing Plaintiffs’ adequate representation of Intervenor’s interests, Intervenor is not entitled to intervention of right under Rule 1-024(A). *Cf. Am. Ass’n of People with Disabilities v. Herrera*, 257 F.R.D. 236, 254 (D.N.M. 2008) (denying intervention of right when the proposed intervenor’s “interest in fair elections and curtailing registration fraud are also part of the general public interest

⁹ New Mexico courts find federal case law construing Rule 1-024 persuasive, as our rule is modelled after Fed. R. Civ. P. 24. *See Tom Fields, Ltd. v. Tigner*, 1956-NMSC-083, ¶ 13, 61 N.M. 382, 301 P.2d 322.

that is shared by all voters, and by the government, and that the Defendant is actively asserting and adequately representing”).

CONCLUSION

For the foregoing reasons, this Court should deny the Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2022, I filed the foregoing through the New Mexico Electronic Filing System, which caused all counsel of record to be served by electronic means.

Respectfully submitted,

/s/ Holly Agajanian

Holly Agajanian