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,

No. D-506-CV-2022-00041

Plaintiffs,

v.

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, and BRIAN EGOLF in his official capacity as Speaker of the New Mexico House of Representatives,

Defendants.

SECRETARY OF STATE'S RESPONSE IN OPPOSITION TO BOARD OF COUNTY COMMISSIONERS OF LEA COUNTY'S MOTION TO INTERVENE

Defendant the New Mexico Secretary of State Maggie Toulouse Oliver, in her official capacity, ("SOS"), by and through undersigned counsel, hereby responds to Board of County Commissioners of Lea County's ("Lea County") *Motion to Intervene*, filed on March 10, 2022, as follows:

I. LEA COUNTY MAY NOT INTERVENE FOR LACK OF STNADING

a. An Intervenor Seeking Unique Relief Must Have Standing

In New Mexico, "the standing jurisprudence in our courts has long been guided by the traditional federal standing analysis." *Deutsche Bank Nat. Tr. Co. v. Johnston*, 2016-NMSC-013,

¶ 13, 369 P.3d 1046. "Thus, at least as a matter of judicial policy if not of jurisdictional necessity, our courts have generally required that a litigant demonstrate injury in fact, causation, and redressability to invoke the court's authority to decide the merits of a case." *ACLU of New Mexico v. City of Albuquerque,* 2008–NMSC–045, ¶ 10, 144 N.M. 471, 188 P.3d 1222.

In a case involving Federal Rule of Civil Procedure 24(a), which is substantively identical to Rule 1-024(A) NMRA, the United States Supreme Court recently clarified that the requirement of standing applies to *all* litigants seeking unique relief – including those asking to intervene as of right. *See Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017). Reiterating the rule that "[a]t least one plaintiff must have standing to seek each form of relief requested in the complaint[,]" *id.*, the Court expounded:

> The same principle applies to intervenors of right . . . For all relief sought, there must be a litigant with standing, whether that litigant joins the lawsuit as a plaintiff, a coplaintiff, or an intervenor of right. Thus, at the least, an intervenor of right must demonstrate . . . standing when it seeks additional relief beyond which the plaintiff requests. . . . That includes cases in which both the plaintiff and the intervenor seek separate money judgments in their own names.

Id.

While intervenor standing appears to be a question of first impression in New Mexico, our Supreme Court has recognized that "the requirements for intervention as of right seem to accord with the general requirements for standing." *New Mexico Right to Choose/NARAL v. Johnson*, 1999-NMSC-005, ¶ 17, 126 N.M. 788, 975 P.2d 841. Further, New Mexico's standing jurisprudence tracks closely federal precedent. *See ACLU of New Mexico*, 2008-NMSC-045, ¶ 10, and *Deutsche Bank*, 2016-NMSC-013, ¶ 13; *cf. Albuquerque Redi–Mix, Inc. v. Scottsdale Ins. Co.*, 2007–NMSC–051, ¶ 9, 142 N.M. 527, 168 P.3d 99 ("federal construction of the federal rules is persuasive authority for the construction of New Mexico rules"). Given the *Laroe Estates* decision,

this Court should hold that an intervenor proceeding under Rule 1-024(A) and seeking relief that is in addition to any relief sought by the named plaintiffs must have standing to sue.

b. Lea County Seeks Unique Relief

Lea County does seek such additional relief. As stated in its *Complaint in Intervention by the Board of County Commissioners of Lea County New Mexico*, Lea County asks this Court to award it "its attorney's fees and cost[s], and all further relief to which Intervenor may be entitled at law or in equity." *Motion to Intervene*, Exhibit A at 10. By contrast, the named plaintiffs do not seek any relief on behalf of, or specific to, Lea County. *See Verified Complaint for Violation of New Mexico Constitution Article II, Section 18*, filed Jan. 21, 2022, at 27. Therefore, this Court should hold that, in order to intervene as of right under Rule 1-024(A), Lea County must establish that it has standing to challenge Senate Bill 1 on equal protection grounds under Article II, Section 18. *See Motion to Intervene*, Exhibit A at 2-3.

c. Lea County Cannot Establish Personal, Associational, or Third-Party Standing

There are three potential avenues for Lea County to establish standing: (i) by showing that it has standing to sue on its own behalf, (ii) by demonstrating that it is an association with standing to sue on behalf of its members, or (iii) by satisfying the requirements for third-party standing. Lea County's constitutional challenge of Senate Bill 1 cannot proceed under any one of these alternatives.

With respect to personal standing, "as far back as the early part of the twentieth century . . . this Court has required allegations of direct injury to the complaining party for that party to properly . . . challenge the constitutionality of legislative acts." *ACLU of New Mexico*, 2008-NMSC-045, ¶ 10; *see also State ex rel. Overton v. N.M. State Tax Comm'n,* 1969-NMSC-028, ¶ 9, 81 N.M. 28, 462 P.2d 613 (1969) (noting that "there must be a real and not a theoretical question,

and the party raising it must have a real interest in the question before a declaratory judgment action will lie").

However, because Lea County *qua* county and the Lea County Commissioners *qua* commissioners do not have a right to vote in congressional elections, they cannot show a "direct injury" from the alleged unconstitutionality of Senate Bill 1. As the Pennsylvania Supreme Court has explained, "any entity not authorized by law to exercise the right to vote . . . lacks standing to challenge [a congressional] reapportionment plan." *Albert v. 2001 Legislative Reapportionment Comm'n*, 790 A.2d 989, 995 (2002). This conclusion is compelled by the fact that it is "the right to vote and the right to have one's vote counted that is the subject matter of a reapportionment challenge[.]" *Id.*; *see also Erfer v. Com.*, 794 A.2d 325, 330 (2002) (reiterating that the Pennsylvania Democratic Committee and its leaders acting in their official capacities do not have standing to bring a congressional reapportionment challenge), abrogated on other grounds by *League of Women Voters v. Commonwealth*, 178 A.3d 737 (2018), and *Reynolds v. Sims*, 377 U.S. 533, 554-55 (1964) (holding that "[t]he right to vote is personal" and that the rights sought to be vindicated in a suit challenging an apportionment scheme are "personal and individual."). For these reasons, the Court should hold that Lea County and its Commissioners do not have personal standing to challenge the constitutionality of Senate Bill 1.

With respect to associational standing, because Lea County is a political subdivision rather than a voluntary membership association, it would first need to show that, "for all practical purposes, [it] performs the functions of a traditional trade association[.]" *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 344 (1977); *see also El Dorado at Santa Fe, Inc. v. Bd. Of County Comm'rs*, 1976-NMSC-029, ¶ 6, 89 N.M. 313, 551 P.2d 1360 ("A county is but a political subdivision of the State[.]").

In *Hunt*, the United States Supreme Court held that the Washington State Apple Advertising Commission—a state agency "charged with the statutory duty of promoting and protecting the State's apple industry"—met this test when it filed a lawsuit challenging the constitutionality of a North Carolina statute that prohibited the display of Washington State apple grades on containers of apples shipped into North Carolina. *Id.* at 336.

Similarly, in *Central Delta Water Agency et al. v. U.S.*, the Ninth Circuit held that the Central Delta Water Agency and the South Delta Water Agency—two "political subdivisions of the State of California, created . . . to ensure that the lands within their respective jurisdictions have a dependable supply of water of suitable quality sufficient to meet present and future needs"—met the *Hunt* test for associational standing in a lawsuit alleging that the Bureau of Land Management's operation of a dam would raise salinity levels in irrigation water. 306 F.3d 938, 945, 948, n. 8 (9th Cir. 2002).

By contrast, in *Board of Commissioners of Union County. v. McGuiness*, the Indiana Supreme Court concluded that Union County did not meet the *Hunt* test in a negligence action it brought against the Indiana Department of Transportation for allegedly damaging several septic systems of Union County residents while repairing a highway, because "Union County serves no such specific associational purpose [*i.e.*, one similar to a traditional trade association] with respect to septic systems." 80 N.E. 3d 164, 166, 170 (Ind. 2017).

Like Union County vis-à-vis septic systems, Lea County serves no specific associational purpose with respect to its residents' right to vote in congressional elections; Lea County's challenge to Senate Bill 1 is not analogous to a state apple advertising commission's lawsuit to protect its state apple industry, nor is it similar to a state water agency's lawsuit to protect the quality of irrigation water.

While not entirely clear, Lea County appears to claim "a significant interest in protecting and promoting the rights of its citizens, including equal representation and the ability to participate in the political process fully and effectively[,]" based on its general police powers. *Motion to Intervene* at 6. Citizens' right to vote in congressional elections, however, is completely separate from any state governmental entity's police powers. *See, e.g.*, *Calkins v. Hare*, 228 F. Supp. 824, 827 (E.D. Mich. 1964) (in addressing a congressional redistricting challenge, directly contrasting redistricting/voting rights statutes with police power statutes, and holding that the presumption of constitutionality applies to the latter but not the former, because the rights implicated in each category are fundamentally different); *see also* U.S. Const., art. I, sec. 4, cl. 1 (giving states authority to regulate only the times, places and manner of congressional elections)

More importantly, if Lea County's police powers were sufficient to establish associational standing with respect to residents' apportionment to a particular congressional district, Lea County would necessarily also have standing in lawsuits involving abortion rights, transgender rights, disability rights, First Amendment rights, Second Amendment rights, and innumerable other issues that may arguably affect "the safety, preserve the health, promote the prosperity and improve the morals, order, comfort and convenience of any county or its inhabitants." *Motion to Intervene* at 6. Such vast expansion of associational standing for counties seeking to act as plaintiffs would frustrate the prudential reasons behind requiring standing in the first place and should be rejected. *See also ACLU of New Mexico*, 2008-NMSC-045, ¶ 30 (under the general associational standing analysis, an association must additionally establish that the interests it seeks to protect are germane to the association's purpose).

Lastly, Lea County cannot establish third-party standing. Under this doctrine,

> [A] litigant may assert the rights of third parties if [it] can show that: (1) the litigant [itself] has suffered an injury in fact, thus giving ... [it] a sufficiently concrete

> interest in the outcome of the issue in dispute; (2) the litigant has a close relation to the third party; and (3) there exists some hindrance to the third party's ability to protect his or her own interests.

ACLU of New Mexico, 2008-NMSC-045, ¶ 31 (internal quotations and citation omitted). Lea County fails each of these prongs—as established above, it lacks personal standing; it has an identical relation with all of its residents and, therefore, lacks a "close relation" with any of them; and there is no hindrance to any resident's ability to protect his or her own interests, as evidenced by the named individual plaintiffs in this action.

For the foregoing reasons, the Court should hold that Lea County cannot establish standing under any of the three doctrines recognized in New Mexico.

d. Discretionary Standing Is Not Warranted

Finally, "it is well settled that New Mexico courts are [ ] not bound by the limitations on standing that are constitutionally imposed on federal courts and [ ] have occasionally granted standing when it would not otherwise exist under the federal analysis, most notably in instances where a case presents a question of fundamental importance to the people of New Mexico." *Deutsche Bank*, 2016-NMSC-013, ¶ 13 (internal quotation and citation omitted). At the same time, our Supreme Court has directed that "this power to confer standing 'does not equate with rights of indiscriminate intervention. The bounds of Rule 1-024 are to be observed." *Johnson*, 1999-NMSC-005, ¶ 17. Because Lea County fails to meet the requirements of either Rule 1-024(A) or (B), *see infra*, coupled with the fact any and all "question[s] of fundamental importance" presented in this case will be addressed by the named parties, the Court should find that discretionary standing is not warranted.

Because Lea County seeks unique relief but lacks standing to challenge the constitutionality of Senate Bill 1, the Court should deny its motion to intervene in this matter.

II. LEA COUNTY IS NOT ENTITLED TO INTERVENE UNDER RULE 1-024(A)

Should this Court conclude that lack of standing does not preclude Lea County form intervening as of right, the motion should nevertheless be denied. Under Rule 1-024(A)(2),

> [A]nyone shall be permitted to intervene in an action . . . when the applicant claims 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)(2) requires a person claiming a right of intervention to demonstrate an interest in the action that is significant, direct rather than contingent, and based on a right belonging to the proposed intervenor rather than [to] an existing party to the suit." *Johnson*, 1999-NMSC-005, ¶17 (internal quotations and citation omitted). As stated above, "[i]n this respect, the requirements for intervention as of right seem to accord with the general requirements for standing." *Id.* As also stated above and in greater detail, Lea County cannot establish standing with respect to its single claim of political gerrymandering. Further, Lea County has no "right belonging to [it] rather than an existing party to the suit," as it has no right to vote and no recognized right to be part of a single congressional district. *Motion to Intervene* at 6. Therefore, intervention as of right should be denied

III. LEA COUNTY IS NOT ENTITLED TO INTERVENE UNDER RULE 1-024(B)

Alternatively, Lea County asks to be allowed to intervene under Rule 1-024(B)(2), which provides, in relevant part, that "anyone may be permitted to intervene in an action . . . when an applicant's claim . . . and the main action have a question of law or fact in common." *Motion to Intervene* at 9. In support of this request, Lea County relies on its challenge to "Senate Bill 1 and the related redistricting process as violative of the New Mexico Constitution's Equal Protection Clause." *Id.* As explained in greater detail above, however, Lea County lacks standing—whether

personal, associational, or third-party—to advance this claim. *See supra*. Therefore, Lea County's request for permissive intervention likewise should be denied.

IV. CONCLUSION

For the foregoing reasons, Secretary of State Maggie Toulouse Oliver respectfully requests that the *Motion to Intervene by the Board of County Commissioners of Lea County* be denied in its entirety.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2022, I filed the foregoing through the New Mexico Electronic Filing System, which caused all parties and counsel of record to be served by electronic means.

/s/ Olga M. Serafimova