**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 BY THE BOARD OF COUNTY COMMISSIONERS OF LEA COUNTY

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 Board of County Commissioners of Lea County (the "Board") 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 a month after it was signed into law. Now—*nearly three months after the map was signed into law, almost two months after this suit was filed, over a month after declarations of candidacy and petition signatures were due*—the Board seeks to intervene permissively and as a matter of right. There are several reasons to deny the Board's Motion. First, the Motion is untimely in light of the pressing deadlines of the election. Second, the Board does not have a legally protected interest in challenging the new Congressional map. Third, the Board fails to show how its interests are not already adequately represented by the existing parties seeking identical relief. The 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 reapportion the 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—

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[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).

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]

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]

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[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/.

[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.

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 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 (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 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

[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.

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.

## III. The Motion to Intervene

Nearly two months after Plaintiffs filed the instant action, the Board filed the Motion seeking to intervene permissively and as a matter of right under Rule 1-024(A)(1), (2). *See* Motion at 3. During this period of time the candidate filing deadline passed on February 1, *see* NMSA 1978, § 1-8-21.1 (2013), the Republican and Democrat pre-primary conventions to endorse candidates were held on February 26 and March 5, respectively,[9] and the deadline for filing additional signatures for candidates who did not receive their party's endorsement passed on March 8, *see* NMSA 1978, § 1-8-33(D) (2020). Like Plaintiffs, the Board 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 by the Board of County Commissioners of Lea County New Mexico at ¶ 11 ("Complaint in Intervention"), filed Mar. 10, 2022. The Board

[9] *Chair Velasquez's Call for the Pre-Primary Convention*, Democratic Party of N.M. (Dec. 30, 2021), https://nmdemocrats.org/party-resources/2022-pre-primary-convention/call/ (calling Democratic pre-primary convention for March 3, 2022) [hereinafter Democratic Pre-Primary Call]; *State Pre-Primary Convention Call*, Republican Party of N.M., https://newmexico.gop/preprimary/ (calling Republican pre-primary convention for February 26, 2022) (last visited Mar. 17, 2022) [hereinafter Republican Pre-Primary Call].

similarly seeks to have the Court overturn SB 1's map and replace it with the Congressional Concept E map. *Id.* at 10.

## DISCUSSION

### I. The Board is not entitled to intervene as of right

Rule 1-024 NMRA provides for intervention of right and permissive intervention. Rule 1-024(A)-(B). Intervention of right is appropriate in two situations. First, it is appropriate "when a statute confers an unconditional right to intervene." Absent a statute conferring an unconditional right to intervene, the movant's application "must (1) be timely, (2) show an interest in the subject matter of the action, (3) show that the protection of the interest may be impaired by the disposition of the action, and (4) show that the interest is not adequately represented by an existing party." *Cordova v. State ex rel. Human Servs. Dep't*, 1989-NMCA-110, ¶ 6, 109 N.M. 420, 785 P.2d 1039; Rule 1-024(A)(2). The movant bears the burden of establishing its right to intervene. *See United States v. Tex. E. Transmission Corp.*, 923 F.2d 410, 414 (5th Cir. 1991).[10]

#### A. The Motion is untimely

As the Board does not argue, as it cannot, that it has a statutory right to intervene, it must meet the requirements of Rule 1-024(A)(2). *See* Motion at 5-9 (only discussing non-statutory right to intervene). The first requirement is that the motion be timely. *See Cordova*, 1989-NMCA-110, ¶ 6; Rule 1-024(A)(2). "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*, 1956-NMSC-083, ¶ 13 (internal quotation marks and citation omitted). "The timeliness requirement

[10] 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.

lacks precisely measurable dimensions, and whether the requirement is met lies within the trial court's discretion." *Nellis v. Mid-Century Ins. Co.*, 2007-NMCA-090, ¶ 5, 142 N.M. 115, 163 P.3d 502 (citation omitted). "The 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." *Am. Assoc. of People with Disabilities v. Herrera*, 257 F.R.D. 236, 245 (D.N.M. 2008) (quoting *Utah Ass'n of Cntys. v. Clinton*, 255 F.3d 1246, 1250 (10th Cir. 2001)); *see also Tom Fields*, 1956-NMSC-083, ¶ 14 ("[J]ust when an application to intervene is timely must depend on the circumstances of each case[.]").

Here, Intervenor waited nearly three months after SB 1 was signed into law and nearly two months after Plaintiffs filed this action. While this delay might be acceptable in some cases, this is no ordinary case. Plaintiffs and the Board seek to have the Court overturn the Legislature's duly enacted map redistricting New Mexico's Congressional districts mere months before the primary and general elections. This demands "extreme diligence and promptness." *McClafferty v. Portage Cty. Bd. of Elections*, 661 F. Supp.2d 826, 839 (N.D. Ohio 2009) (internal quotation marks and citation omitted). As the Texas Supreme Court recently explained,

> [I]nvoking judicial authority in the election context requires unusual dispatch—the sort of speed not reasonably demanded of parties and lawyers when interests less compelling than our society's need for smooth and uninterrupted elections are at stake. Time is particularly of the essence if a lawsuit seeks judicial action that may prevent the election from happening on time. Like the courts themselves, all parties must minimize delays in this context. Avoidable delays, in particular, may be fatal to the courts' ability to proceed at all.

*In re Khanoyan*, 637 S.W.3d 762, 764, 65 Tex. Sup. Ct. J. 207 (2022) (footnotes omitted).

*In re Khanoyan*, is particularly instructive. There, the Harris County Commissioners Court passed a map reapportioning their own districts for the 2022 election on October 28, 2021. *Id.* at

763, 65. A group of relators sued to overturn the map three weeks later, on November 16. *Id.* at 765. The district court held a hearing on November 29 to consider relators' request for a temporary restraining order, which the court denied. *Id.* On December 22, the relators asked the district judge to proceed quickly so that they could appeal; the next day, they filed an original petition for writ of mandamus with the Texas Supreme Court. *Id.* The supreme court denied the relators petition for being untimely because they failed to proceed with the special diligence necessary "due to the emergency nature of the litigation." *Id.* at 766. The court observed that "no amount of expedited briefing or judicial expediency at this point can change the fact that the primary election for 2022 is already in its early stages." *Id.* Nor was the court convinced that the relators' requested relief (i.e., "enjoin[ing] the use of the map enacted by the commissioners court") negated the practical consequences that the litigation "could prevent the election from going forward on time and, at the very least, insert a great deal of confusion into this election cycle." *Id.*

Though *In re Khanoyan* was not decided in the context of intervention, its discussion of the diligence required to challenge electoral maps on the eve of an election illustrates the untimeliness of the Board's Motion. The Board was undoubtedly aware of SB 1's enactment back in December 2021, as well as the impending 2022 election. It is also highly likely they were aware of this action given the significant media attention it received.[11] The Board's own members understood that "[t]ime is of the essence" in this matter.[12] Yet they chose to wait *months* before

[11] Robert Nott, *GOP files lawsuit over redistricting*, Santa Fe New Mexican (Jan. 21, 2022), https://www.santafenewmexican.com/news/legislature/gop-files-lawsuit-over-redistricting/article_ec423ef4-7b20-11ec-ad9f-d3d4c908c126.html. The Hobbs News-Sun even published a copy of the lawsuit on its website in January. *See Lawsuit on new Congressional map for N.M.*, Hobbs News-Sun (Jan. 23, 2022), https://www.hobbsnews.com/2022/01/23/lawsuit-on-new-congressional-map-for-n-m/.

[12] Curtis C. Wynne, *Lea joins redistricting lawsuit*, Hobbs News-Sun (Mar. 15, 2022), https://www.hobbsnews.com/2022/03/15/lea-joins-redistricting-lawsuit/.

seeking to intervene. Why? They don't say. Nor does the Board offer any mechanism by which this Court may "undo" the already completed actions. As discussed, the candidate filing deadline passed on February 1, the Republican and Democrat pre-primary conventions to endorse candidates were held on February 26 and March 5, respectively, and the deadline for filing additional signatures for Republican candidates who did not receive their party's endorsement passed on March 8. *See* Background, Section III, *supra*.

The Court should not excuse such unexplained and unjustified delay. Permitting the Board to intervene at this point will only serve to delay this case (and potentially the election) and increase litigation costs by requiring Defendants to file and brief yet another set of motions to dismiss or answers, at the very least. On the other hand, the Board will not suffer any prejudice in being denied intervention because it has no right to seek to overturn SB 1 (as explained in Discussion, Section I(B), *infra*) and its interests are already adequately represented (as explained in Discussion, Section I(C), *infra*). *Cf. Rotstain v. Mendez*, 986 F.3d 931, 939 (5th Cir. 2021) ("If the proposed intervenors' interests are adequately represented, then the prejudice from keeping them out will be slight."). Accordingly, the Court should deny the Motion as untimely.

### B. The Board does not have a sufficient interest in this litigation

Under Rule 1-024(a)(2), an intervenor must "show an interest in the subject matter of the action." "[I]n order to establish an interest in the pending action a party seeking to intervene must show that it has an interest 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*." *Cordova v. State ex rel. Human Servs. Dep't*, 1989-NMCA-110, ¶ 7, 109 N.M. 420, 785 P.2d 1039 (emphasis added). In other words, the interest must be "direct, substantial, *and legally protectable*." *Coal. of*

*Ariz./New Mexico Ctys. for Stable Econ. Growth v. DOI*, 100 F.3d 837, 840 (10th Cir. 1996) (internal quotation marks and citation omitted) (emphasis added).

The Board cannot meet this requirement because it has no right to sue Defendants for alleged political gerrymandering. Such claims (if justiciable) necessarily belong to the voters themselves—not political subdivisions, which obviously cannot vote. *See Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) ("We have long recognized that a person's right to vote is individual and personal in nature." (internal quotation marks and citations omitted)). While the Board may claim it is seeking to protect the rights of its inhabitants, these rights do not "belong[] to the proposed intervenor rather than an existing party to the suit," and therefore cannot satisfy the requirements for intervention of right. *Cordova*, 1989-NMCA-110, ¶ 7.

So, the question is: what right does *the Board itself* have in this litigation? The answer is none. The Board only asserts a claim under Article II, Section 18 of the New Mexico Constitution (i.e., the equal protection clause) against Defendants in their official capacities. *See generally* Complaint in Intervention. However, "[t]he Supreme Court has made clear that the Constitution does not contemplate the rights of political subdivisions as against their parent states[.]" *Kerr v. Polis*, No. 17-1192, 2021 U.S. App. LEXIS 36682, at *21 (10th Cir. Dec. 13, 2021) (en banc) (internal quotation marks and citation omitted).[13] This is primarily because "[a] political subdivision . . . is a subordinate unit of government . . . created by a state for the better ordering of government, [and] has no privileges or immunities under the federal constitution which it may

[13] "The County is a political subdivision of the state of New Mexico." *Romero v. Bd. of Cty. Comm'rs*, 2011-NMCA-066, ¶ 12, 150 N.M. 59, 257 P.3d 404. Additionally, the instant suit is considered to be against the State because it is against legislators and statewide elected officials in their official capacities. *See Kerr*, 2021 U.S. App. LEXIS 36682 (applying analysis to action brought against the Colorado governor in his official capacity); *see also Pacheco v. Hudson*, 2018-NMSC-022, ¶ 61, 415 P.3d 505 (explaining that a suit against a state employee in his or her official capacity is a suit against the government entity itself).

invoke in opposition to the will of its creator." *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 363 (2009) (internal quotation marks and citation omitted). Therefore, a county seeking to sue an arm of the State for a substantive constitutional violation has no "cause of action." *Kerr*, 2021 U.S. App. LEXIS 36682, at *20.[14]

The same may be said for the New Mexico constitution. Although the federal cases were animated by federalism concerns, the underlying concern remains the same: how can a political subdivision of the State maintain an action against its creator to vindicate a constitutional right that does not belong to it? *See e.g.*, *Kittitas Cty. v. Dep't of Transp.*, 13 Wn. App. 2d 79, 98, 461 P.3d 1218 (2020) ("[T]he County cannot bring a constitutional equal protection argument because it is a political subdivision of the State."); *State v. City of Birmingham*, 299 So. 3d 220, 234 (Ala. 2019) (applying this reasoning to an action brought by a city against the state of Alabama for violating its purported right to free speech and rejecting the city's argument that it had an independent right to free speech under the state constitution); *Morial v. Smith & Wesson Corp.*, 785 So. 2d 1, 11 (2001) (holding that "a political subdivision of the state[] is not entitled to assert the protections afforded by [the state due process and ex post facto clauses]").

The plain language of Article II, Section 18 of the New Mexico Constitution, like its federal counterpart, only speaks of protecting the right of individual "person"—not political subdivisions. *Cf. White v. White*, 293 Neb. 439, 443-44, 884 N.W.2d 1 (2016) ("The County has no right to due process. U.S. Const. amend. XIV and Neb. Const. art. I, § 3, prohibit the State from depriving any

[14] The Tenth Circuit has clarified that this is not an issue of standing but whether the county has a cause of action. *See id.* at *20 ("We now hold that what we formerly referred to as political subdivision standing is an inquiry going to the merits of the case, not the court's jurisdiction. Under this inquiry, we no longer ask whether a political subdivision has standing. We ask whether the political subdivision has a cause of action."). Either way, the Board also fails to demonstrate it has standing to represent the interests of its inhabitants. *See generally* Response.

'person' of life, liberty, or property without due process of law. A county, as a creature and political subdivision of the State, is neither a natural nor an artificial person."). The Board fails to cite, as it cannot cite, any statutory or constitutional provision expressly granting it the rights guaranteed in Article II.[15] *Cf. City of Birmingham*, 299 So. 3d at 234 ("Any right to have the City's 'government speech' fall within the protections of § 4 of the Alabama Constitution must be specifically conferred by the legislature, and the legislature has not done so."). Accordingly, the Board does not have a legally protectable interest justifying its intervention in this matter, *see Kittitas Cty.*, 13 Wn. App. 2d at 98; *City of Birmingham*, 299 So. 3d at 234; *Morial*, 785 So. 2d at 11, and its claim for intervention of right must fail. *See Cordova*, 1989-NMCA-110, ¶ 7.

### C. The Board is already adequately represented by the existing parties

In terms of the last requirement (i.e., adequacy of representation), "[t]he most common situation in which courts find representation adequate arise when the objective of the [movant] is identical to that of one of the parties." *Bottoms v. Dresser Indus., Inc.*, 797 F.2d 869, 872-73 (10th Cir. 1986). "[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). "To rebut this presumption, [the movant] must make a 'compelling showing' of inadequate representation." *W. Watersheds Project v. Haaland*, No. 20-35780, 2022 U.S. App. LEXIS 240, at *32 (9th Cir. Jan. 5, 2022).

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[15] The Board's reliance on NMSA 1978, Section 4-37-1 (1975), is misplaced, as the statute does not change the fact that the Board is still seeking to vindicate the rights of the county's inhabitants—not the Board's. *See Cordova*, 1989-NMCA-110, ¶ 7.

Here, Plaintiffs are composed of the Republican Party of New Mexico, as well as individuals from around the State—including individuals in Lea County. *See* Complaint at ¶ 3. Both the Board 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 10, *with* Complaint at 27. While the Board points out that it has an independent interest in protecting its county's inhabitants, it does not even attempt to explain how the existing parties *seeking the same relief* do not adequately represent these interests. *See* Motion at 7. Accordingly, the Board fails to demonstrate entitlement to intervention of right under Rule 1-024(A)(2). *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 that is shared by all voters, and by the government, and that the Defendant is actively asserting and adequately representing").

**II. The Court should deny the Board's request for permissive intervention**

Absent a statute provision, a movant seeking permissive intervention under Rule 1-024(B) when "[the movant's] claim or defense and the main action have a question of law or fact in common." Rule 1-024(B) further instructs that "[i]n exercising its discretion pursuant to this paragraph the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." The Board argues it should be able to permissively intervene because it has "insight and information" about the communities identified in the Complaint. Motion at 10. Yet the Board makes no attempt to explain what that "insight and information" is, or why the existing plaintiffs cannot provide it to the Court. *See id.* Thus, this case is distinguishable from the single federal district court case upon which the Board relies. *Compare Nat. Res. Def. Council, Inc. v. Tenn. Valley Auth.*, 340 F. Supp. 400, 409 (S.D.N.Y. 1971)

(permitting intervention of the Audubon society when it demonstrated "a long-standing interest in and familiarity with strip-mining"), *with Tri-State Generation & Transmission Ass'n v. N.M. Pub. Regulation Comm'n*, 787 F.3d 1068, 1074 (10th Cir. 2015) (denying intervention when the movant failed to demonstrate it had particular expertise beyond the of the existing parties).

For the same reasons discussed above with regard to intervention as of right (i.e., the Board's failure to timely move to intervene, lack of a claim, and failure to demonstrate that its interests are not already adequately protected), the Board cannot meet Subsection (B)(2)'s requirements. *See Nellis v. Mid-Century Ins. Co.*, 2007-NMCA-090, ¶ 5, 142 N.M. 115, 163 P.3d 502 ("Although the trial court applies different standards for the two kinds of intervention, granting more leeway when the intervention is of right, both kinds of intervention require a timely application." (citation omitted)); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 n.18 (1997) ("The words 'claims or defenses' . . . in the context of Rule 24(b)(2) governing permissive intervention—manifestly refer to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending law suit." (citation and internal quotation marks omitted)); *Am. Ass'n of People with Disabilities v. Herrera*, 257 F.R.D. 236, 249 (D.N.M. 2008) ("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."). Accordingly, the Court should not permit the Board to intervene.[16]

## CONCLUSION

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

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[16] If the Court does permit intervention, it should be prepared to allow additional counties to intervene and bog down this exigent litigation. Chavez County recently decided to intervene as well, and Eddy County may do the same. *See* Alex Ross, *Chaves County joins redistricting lawsuit*, KOB 4 (Mar. 22, 2022), https://www.kob.com/albuquerque-news/chaves-county-joins-redistricting-lawsuit/6425651/.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 25, 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