STATE OF NEW MEXICO
LEA COUNTY
FIFTH JUDICIAL DISTRICT COURT

REPUBLICAN PARTY OF NEW MEXICO
DAVID GALLEGOS, TIMOTHY JENNINGS,
DINAH VARGAS, MANUAL GONZALES JR,
BOBBY AND DEE ANN KIMBRO,
And PEARL GONZALES

Plaintiffs,

D-506-CV-2022-00041

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 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,

and

THE BOARD OF COUNTY COMMISSIONERS
OF LEA COUNTY,

Plaintiff Intervenor

CONSOLIDATED REPLY IN SUPPORT OF MOTION TO INTERVENE BY THE BOARD OF COUNTY COMMISSIONERS OF LEA COUNTY

The Board of County Commissioners of Lea County ("Lea County") files this Consolidated Reply in Support of its Motion to Intervene and as to the Responses of all Defendants to Lea County's Motion to Intervene and would show the Court as follows:

INTRODUCTION

1. Lea County's justiciable interest in challenging the Senate Bill 1 Redistricting Plan ("SB1 Plan" or "Plan") for United States Congressional races is as obvious as the division lines on the SB 1 map[1] that sever and isolate the county and municipal voting units in and around Lea County. That map, and the history of Lea County and southeastern New Mexico (ignored by the Defendants) clearly show the Defendants have intentionally cracked and fractured longstanding and economically vital communities of interest in and around Lea County.[2] Thus, have the Defendants diluted the voting power of Lea County and its citizens by foreclosing any reasonable opportunity to have a meaningful voice in the selection of a local member for the United States House of Representatives. If they are allowed to prevail, Defendants will have effectively denied Lea County and its related communities of interest any influence with the legislative body that controls regulation of and access to the 422,000 acres[3] of federal lands in the county, including all federally controlled oil and gas lease rights[4] and other economically important and distinctive regional projects subject to federal control. Given the obvious effects of SB 1, this case is the only chance for Lea County and its voters to assert their legal and equitable right to preserve their collective voice in electing a United States representative.

[1] *See* three-page abstract of SB 1 plan maps at Exhibits 1 (state map), 2 (southeast detail), and 3 (Hobbs detail) within the Appendix of Exhibits filed with Lea County Reply ("Appendix"). Contents of the Appendix are incorporated by reference herein for all intended purposes.
[2] *Id*. at Exhibits 2 and 3.
[3] Source: U.S Geological Survey, Gap Analysis Program. 2018 (PADUS) version 2.0.
[4] *See*, Article: "The Consequences of a Leasing and Development Ban on Federal Lands and Waters", posted at https://www.api.org/~/media/Files/News/2020/09/Consequences_of_a_Leasing_and_Development_Ban_on_Federal_Lands_and_Waters.pdf (Copy at Ex. 4 to Appendix).

Denying Lea County's intervention would cause substantial prejudice to Lea County and all of its voters on a merely procedural basis.

2. By contrast, Defendants are not prejudiced by allowing Lea County's intervention at this stage in the litigation and they fail to demonstrate that intervention is improper under either Rule 1-024(A) or based on this Court's discretion per Rule 1-024(B). The Board's power and obligation to protect the interests of the community supports intervention in this matter, particularly as no other party is tasked with the legislatively created authority vested in the Board of County Commissioners. *See* Section 4-37-1 NMSA; and see authorities cited in Lea County Motion to Intervene at pages 2, & 6-7. Based on the requirements of Rule 1-024(A) and this Court's discretion under Rule 1-024(B), intervention is proper and Lea County's Motion to Intervene should be granted.

DEFENDANTS' RESPONSES

3. While the Defendants feign confusion regarding Lea County's interest in this matter, they are clear in claiming sole power for one party to determine how representatives are selected in New Mexico. Indeed, the Defendants even contend the legislatively created Citizens Redistricting Committee has no say in determining political districts, as the maps created from the committee were soundly rejected by the Legislative and Executive Defendants, opting instead for maps drawn for purely partisan purposes. *See* Pls.' Compl., ¶ 72. Defendants' responses wholly disregard the consensus factors governing the Committee's process for redistricting. Consistent with their disregard for even minimal legal and equitable standards, Defendants now contend a duly elected board of county commissioners has no interest seeking redress for a partisan gerrymander that fractures all of the historical and obvious communities of interest within southeastern New Mexico, and thus preventing Lea County, its key municipalities, and neighboring counties from protecting their vital shared interests in the

Congress that controls access to the region's key economic drivers: oil & gas development on federal lands, agricultural access to and use of federal lands, and other key local industries including storage or use of nuclear materials or waste handling— all subject to federal regulation. The Defendants' responses show a careless contempt for such matters that constitute the cultural and economic lifeblood of the region, which Defendants count for naught against their opportunity to obtain one party's political gain and 10-years' worth of partisan advantage.

4. The Response of the Legislative Defendants compares the citizen-commission to beggars in the cold, a tactless reference that has the merit of candidly revealing Defendant's disregard for the fundamental rights of New Mexico voters. Tellingly, counsel for the Legislative Defendants is not ashamed to unsheathe such scorn even while representing the Legislative Defendants in their official capacity. Such blunt disregard for essential rights requires this Court to apply its discretion and allow Lea County to intervene and ensure its vital interests are not simply cast aside. Without this intervention, Lea County and the interests of its citizens have no voice in the ongoing political process, making a shambles of rule of law and the principles of equity.

5. As discussed below, this Court has discretion to ensure communities of interest are not merely the victims of political gamesmanship and to review the conduct of these consummately partisan actors as necessary to assure the injured community's interests are properly considered in the fundamental matter of electing representatives at the national level. Without this Court's intervention and oversight, New Mexico is at risk of failing in its constitutional responsibilities of assuring equal protection, due process, and otherwise seeing that New Mexico meets all of its federal constitutional obligations.

ARGUMENT & ADDITIONAL AUTHORITES

I. There is no Prejudice to Existing Parties at this Early Stage of Proceedings.

Lea County's Motion to Intervene is timely. *See* Rule 1-024(A)-(B) NMRA. The Court has discretion to assess timeliness "in light of all the circumstances of the case." *In re Norwest Bank of New Mexico, N.A.*, 2003-NMCA-128, ¶ 17, 134 N.M. 516, 80 P.3d 98. The timeliness requirement is not meant to sanction proposed intervenors for delays but rather protects against prejudice to the original parties. *Utah Ass'n of Ctys. v. Clinton*, 255 F.3d 1246, 1250 (10th Cir. 2001).

Defendants misapply the timeliness standard of Rule 1-024. For example, Defendants point to the time lapse between the date of the enactment of Senate Bill 1 and filing of the Lea County's Motion to argue that the request is untimely. Exec. Defs.' Resp., p. 8. However, the relevant date in accounting for timeliness and any resulting prejudice has barely accrued, given that no judge willing to hear the case or set a hearing was on the bench until the March 30, 2022 order by Chief Justice Michael Vigil, following a cascade of judge recusals from January through March, while in the meantime Lea County filed its Motion on March 10th. Therefore, any purported delay by Lea County has not caused prejudice to the Defendants.

Defendants fret about a litany of concerns --protracted litigation, complicated scheduling, and increased costs they associate with the addition of new parties, but these considerations are baked into any intervention and support a finding that an application to intervene is timely. *See Am. Ass'n of People With Disabilities v. Herrera*, 257 F.R.D. 236, 250 (D.N.M. 2008) ("Prejudice resulting from the intervention itself, as opposed to the intervenors' tardiness, cannot be considered in determining the timeliness of a motion."). Indeed, without prejudice to the existing parties, Lea County's Motion is properly granted. *See Sanguine, Ltd. v. U.S. Dep't of Interior*, 736 F.2d 1416,

1418 (10th Cir. 1984) (recognizing that analysis of timeliness under Rule 1-024 is based on prejudice to existing parties).

Defendants fail to identify any prejudice to themselves or other actual parties accruing from the timing of the Lea County motion and instead direct this Court to various candidate filing dates and deadlines. *See* Exec. Defs.' Resp., p. 8; Legis. Defs.' Resp., p. 10. However, it is clear that any purported prejudice related to these deadlines is not prejudice to these Defendants, who are not congressional candidates. At this stage of the case Lea County's Motion is timely and does not prejudice any party. Therefore, this intervention is proper. *Herrera*, 257 F.R.D. at 245 ("intervention is proper where, despite the passage of time, there has been limited activity in the case and the intervention will not prejudice the existing parties.").

In sum, Lea County's Motion to Intervene is timely in view of these circumstances, and the lack of any judicial rulings in the case to date means that Lea County's action is timely. *See* Rule 1-024(A) NMRA. Further, as Lea County has a claim in common with original Plaintiffs the Defendants' timeliness complaint does not deprive the Court of discretion to grant the intervention. *See* Rule 1-024(B) ("Upon timely application anyone may be permitted to intervene in an action… when an applicant's claim or defense and the main action have a question of law or fact in common.").

II. Intervention Under Rule 1-024 Does Not Require Standing and Lea County's Motion to Intervene is Properly Granted.

The Supreme Court of New Mexico has previously rejected any requirement for particularized standing on the part of a prospective intervenor, and instead prescribes that "[t]he bounds of Rule 1-024 are to be observed." *New Mexico Right to Choose/NARAL v. Johnson*, 1999-NMSC-005, ¶ 17, 126 N.M. 788, 975 P.2d 841 (internal citations omitted). Also, federal courts have recognized that any standing requirement under federal rule 1-024 applies to litigants in

general, rather than a particularized requirement of each individual proposed intervenor. *Sec. & Exch. Comm'n v. U.S. Realty & Imp. Co.*, 310 U.S. 434, 459, (1940) (Rule 1-024(B) "plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation."). *See Town of Chester, N.Y. v. Laroe Ests., Inc.*, 137 S. Ct. 1645, 1651 (2017) ("For all relief sought, there must be a litigant with standing, whether that litigant joins the lawsuit as a plaintiff, a co-plaintiff, or an intervenor of right."); *Herrera*, 257 F.R.D. at 249 (holding that intervenors are not required to establish standing "so long as another party with constitutional standing on the same side as the intervenor remains in the case."). This lack of a particularized standing requirement has been properly acknowledged by the Defendant Secretary of State. *See* Secretary of State's Resp., pp. 1-2. Accordingly, Lea County's motion to intervene should not be denied based on any considerations of standing under Rule 1-024.

Intervention by various types of litigants in redistricting cases is not uncommon and occurs almost as a matter of course. *See, e.g., Maestas v. Hall*, 2012-NMSC-006, 274 P.3d 66 (identifying dozens of intervenors, including Indian tribes, nations and pueblos and their governmental representatives). This is because "courts should allow intervention where no one would be hurt and greater justice could be obtained." *Utah Assoc. of Counties v. Clinton*, 255 F.3d 1246, 1250 (10th Cir. 2001) (internal citations omitted). Consistent with the arguments supporting intervention and the absence of a requirement for standing under Rule 1-024, Lea County's Motion to Intervene is properly granted.

III. The Fracturing of Communities of Interest Provides Lea County a Direct Interest in Plaintiffs' Case and Intervention Is Proper.

A determination of the sufficiency of a party's interest in a matter is "highly fact-specific" but courts have "tended to follow a somewhat liberal line in allowing intervention." *Coal. of Arizona/New Mexico Ctys. for Stable Econ. Growth v. Dep't of Interior*, 100 F.3d 837, 841 (10th

Cir. 1996) (internal citations omitted). The policy supporting intervention under Rule 1-024 is the practical need to involve "as many apparently concerned persons as is compatible with efficiency and due process." *Fed. Deposit Ins. Corp. v. Jennings*, 816 F.2d 1488, 1491 (10th Cir. 1987) (internal citations). Lea County's interest in this matter is clear and it should be allowed to provide Lea County the opportunity to protect and promote the interests of its community.

The Board of County Commissioners of Lea County is charged with the responsibility of promoting the interests of the community and to ensure representation at the local level. *See* Section 4-37-1 NMSA 1978. The allegations in Plaintiffs' Complaint show that SB 1 is certain to dilute the vote of Lea County residents and of the members of the larger community of interest that share vital economic interests in the area's oil and gas industry, regional agriculture dependent on federal land use policies, and other common public and private endeavors of economic significance to Lea County residents.

The SB 1 Plan, which bisects not only Lea County but also divides the City of Hobbs into two different congressional districts[5], will inevitably impede the relevant community from electing a representative likely to be responsive to county and regional interests on critical issues involving federal bureaucratic or legislative initiatives[6] that would directly affect the regional economy. These areas of common interest affected by federal regulation or legislation cut across key economic sector affecting employment[7], including

1) oil and gas development generally and particularly on federal lands;

2) historical ranching and other agricultural access to or uses of local federal lands and conflicts with Bureau of Land Management and other federal agencies; and

[5] See Exhibits 2 and 3, at the Appendix.
[6] See, e.g., footnote 4, at page 1 above.
[7] See tables on Oil & Gas Sector Employment across counties at Exhibit 5 to the Appendix.

3) local nuclear material disposition and storage industry, e.g., at the federally regulated Waste Isolation Pilot Plant (WIPP)[8] facility, and at the more recently developed Consolidated Interim Storage Facility (CISF) initiated through the Eddy-Lea County Alliance and Holtec Inc. for storage of spent nuclear fuel materials. [9]

These distinctive economic factors, all intersecting with federal oversight issues, are peculiar to the regional community of interest, and are not shared with dissimilar communities located hundreds of miles away but now placed in the same district. *See generally* Pls.' Compl. The Board's obligation to govern and interact with these sectors and federal regulators dictates that Lea County be allowed to join this litigation so that it can properly fulfill its duties in promoting and protecting the local economy, as well as the safety and welfare of the community. These factors establish a proper role for Lea County to litigate the issues affecting its citizens' right to choose a representative for the community. *See W. Energy All. v. Zinke*, 877 F.3d 1157, 1165 (10th Cir. 2017) (recognizing that a conservation group's "record of advocacy" relating to public land was sufficient interest to support intervention in a case involving public land management).

In *Maestas, the New Mexico Supreme Court* recognized that communities that share economic, social, and cultural interests "should be included within a single district for purposes of effective and fair representation." *Maestas*, 2012-NMSC-006, ¶ 37. Communities of interest are created from common values and political similarities but also share common reliance upon industries providing jobs and spending or other critical factors for the community. Lea County, as most counties in southeastern New Mexico, which sit atop the northwestern quadrant of the

[8] The WIPP site in nearby Eddy County has been in use for decades for disposal of defense-generated waste from U.S. Dept. of Energy sites around the country. See, WIPP website at https://wipp.energy.gov and copy provided at Ex. 6 to the Appendix.
[9] See Nuclear Regulatory Commission announcement at https://www.nrc.gov/docs/ML2012/ML20122A147.pdf (copy provided at Ex. 7 of Appendix).

Permian Basin[10] relies on the oil and gas industry to provide for its community with more than 25% of its population in "oil and gas supported" jobs as defined by the New Mexico Oil & Gas Association. *See Oil & Gas Sector Employment at* Exhibit 5 within Appendix filed in support of this Reply. Within the region, Eddy County – immediately to the west of Lea-- also relies heavily on oil and gas related employment for its economy. *Id.* And the other adjacent counties (Lincoln and Chaves) show oil & gas employment at significant levels in contrast to other counties outside the region. *Id.* The need for representation from this community is obvious when contrasted with other dissimilar locales now joined with portions of southeastern New Mexico in the SB 1 Plan. For example, in Rio Arriba County, existing in the same district as the northern portion of Lea (and part of Hobbs) but located hundreds of miles away, the oil and gas industry represents only 3.5% of the jobs in that county. *See id.* Providing voters in Lea County with an opportunity to elect representatives from their community who maintain their common interests is paramount to the county's way of life and provides the interest in intervention by Lea County. *See e.g. Davis v. Bandemer,* 478 U.S. 109, 167, (1986), *abrogated by Rucho v. Common Cause,* 139 S. Ct. 2484, (2019) (Stevens J., concurring) (recognizing that maintaining communities of interest allows "communities to have a voice in the legislature that directly controls their local interests.").

To the extent Senate Bill 1 prevents these communities of interest from electing a congressional representative attuned to the community and its key interests, the Lea County Board of Commissioners is the proper party to represent these county interests and ensure these voices are heard. *See* Section 4-38-18 NMSA 1978 (charging boards of commissioners with "management of the interest of the county in all cases, where no other provision is made by law."). It is undisputed that the Board is legislatively empowered to promote the prosperity, order, and

[10] See regional map depicting Permian Basin structures and features, including the Delaware Basin extending into multiple counties in southeastern New Mexico, found at Ex. 8 of the Appendix.

convenience of Lea County. *See* Section 4-37-1 NMSA 1978. Any attempt to split a county or its key municipality for political purposes directly affects the Board's ability to promote these interests, as fragmentation in Lea County impacts its prosperity and potential. *See Maestas*, 2012-NMSC-006, ¶ 36 ("Minimizing fragmentation of political subdivisions, counties, towns, villages, wards, precincts, and neighborhoods allows constituencies to organize effectively and decreases the likelihood of voter confusion regarding other elections based on political subdivision geographics.").

It is axiomatic that congressional districts should be drawn in a way to maintain communities of interests and traditional boundaries. *See Maestas*, ¶ 17; *Davis v. Mann*, 377 U.S. 678, 686, (1964) (recognizing a "tradition of respecting the integrity of the boundaries of cities and counties in drawing district lines…."). Senate Bill 1, which prevents Lea County from electing a single representative for this community by splitting the county in two, is an affront to traditional redistricting principles and representative government. *See Maestas*, 2012-NMSC-006, ¶ 1 ("The right to vote is the essence of our country's democracy, and therefore the dilution of that right strikes at the heart of representative government.").

Communities of interests typically vote similarly, are similarly educated, and naturally gravitate towards common areas.[11] This is the case in Lea County, as the community relies on industries such as oil and gas which are not similarly prevalent in other parts of the state. Any redistricting plan that lumps Lea County into other counties without similar industries, socio-economic status, or values, prevents the ability for Lea County to be represented on a national level, an impermissible outcome. *See Reynolds v. Sims*, 377 U.S. 533, 559 (1964) ("It would defeat

[11] *See* Megan Creek Frient, *Similar Harm Means Similar Claims: Doing Away with Davis v. Bandemer's Discriminatory Effect Requirement in Political Gerrymandering Cases*, 48 Case W. Res. L. Rev. 617, 644 (1998)

the principle solemnly embodied in the Great Compromise… for us to hold that, within the States, legislatures may draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a Congressman than others.")

Plaintiffs' Complaint makes clear that Senate Bill 1 represents a discriminatory gerrymander, diluting Republican votes in southeastern New Mexico and reducing the ability of voters in Lea County from electing a candidate representing the interests of the county. *See* Pls.' Compl., ¶¶ 1-7. Lea County and the Board's ability and standing to represent the distinctive interests of its community, coupled with the legislative power to manage those interests within the county supports intervention under Rule 1-024 and the Board's Motion is properly granted. *See Utahns for Better Transp. v. U.S. Dep't of Transp.*, 295 F.3d 1111, 1115 (10th Cir. 2002) ("The threat of economic injury from the outcome of litigation undoubtedly gives a petitioner the requisite interest.").

IV. Lea County's Interests Are Not Adequately Represented By the Existing Parties and Intervention is Supported.

A requirement for intervention is a showing that Lea County's interests are not adequately represented by the existing parties. Rule 1-024(A)(2) (intervention shall be permitted "unless the applicant's interest is adequately represented by existing parties."). The burden to satisfy this requirement is "minimal" and "an intervenor need only show the *possibility* of inadequate representation." *See WildEarth Guardians v. U.S. Forest Serv.*, 573 F.3d 992, 996 (10th Cir. 2009); *Utah Ass'n of Ctys. v. Clinton*, 255 F.3d at 1254 ("The possibility that the interests of the applicant and the parties may diverge 'need not be great' in order to satisfy this minimal burden.") (internal citations omitted).

As previously stated and unrefuted by Defendants, Lea County is the only party with legislatively created power to promote the prosperity of the community and manage the interests

of the citizens of Lea County. *See* Section 4-38-18 NMSA 1978. This is critical, as the Plaintiffs to this action are composed of a political party and individual voters, devoid of authority to specifically address the needs of this community. Further the Lea County Board is, unlike the GOP Plaintiff, not a partisan entity. Even as the individual voters seek the same outcome as the Board, preservation of communities of interests, the Board has statutory authority for the interests of the community, a responsibility not held by any plaintiff. *See Matter of Marcia L.*, 1989-NMCA-110, ¶ 7, 109 N.M. 420, 785 P.2d 1039 ("[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… based on a right belonging to the proposed intervenor rather than an existing party to the suit.").

The existence of a statutory authority to promote and protect the interests of Lea County, a power not held by any plaintiff to this suit, demonstrates that this intervention is proper and the Board's motion to intervene should be granted. *Id.* Intervention as a matter of right is, therefore, established under Rule 1-024. *See* Rule 1-024 NMRA.

CONCLUSION

Lea County's Motion to Intervene is properly granted where, as in these circumstances, the motion is timely, and intervention creates no prejudice to existing parties. The interests in maintaining and promoting the interests of Lea County demonstrates a direct interest in a suit challenging the fracturing of the community for political purposes. Defendants offer no prejudice based on the timing of the motion and fail to dispute the statutory authority held by the Board, demonstrating the appropriateness in intervention. Providing Lea County the ability to meaningfully advocate and advance the interests of its community is appropriate under Rule 1-024(A) and Rule 1-024(B) and this Court should appropriately grant the Lea County's Motion and allow Lea County to intervene in this matter.

Respectfully submitted,

RAY | PEÑA | MCCHRISTIAN, P.C.

By: */s/ Jeffrey Thomas Lucky*

Jeff Ray
Jeffrey Thomas Lucky
Moses B. Winston
Brian Brack
6501 Americas Parkway NE, Ste. 820
Albuquerque, NM 87110
Tel: 505-855-6000
Fax: 505-212-0140
jray@raylaw.com
jlucky@raylaw.com
mwinston@raylaw.com
bbrack@raylaw.com
Attorneys for Board of Commissioners of Lea County

CERTIFICATE OF SERVICE

I hereby certify that on, a true and correct copy of the foregoing pleading was submitted to the Court's electronic filing system for electronic filing and service upon all counsel of record.

/s/ Jeffrey Thomas Lucky