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.

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 JAVIER MARTINEZ in his official capacity as Speaker of the New Mexico House of Representatives,

Defendants,

and

THE DEMOCRATIC PARTY OF NEW MEXICO,

[Proposed] Intervenor-Defendant.

No. D-506-CV-202200041
Judge Fred T. Van Soelen

DEMOCRATIC PARTY OF NEW MEXICO'S REPLY IN SUPPORT OF EXPEDITED MOTION TO INTERVENE AS DEFENDANT

INTRODUCTION

The Democratic Party of New Mexico ("DPNM") is entitled to intervene in this action as of right under Rule 1-024(A)(2), NMRA, because its motion is timely, it has unique private interests that are threatened by this suit, and none of the existing parties represent those interests. In the alternative, the Court should grant permissive intervention under Rule 1-024(B). Nothing in Plaintiffs' Opposition ("Opp.") provides reason to find otherwise. Plaintiffs do not dispute that DPNM has significant interests in this litigation that belong to DPNM and no other party, or that Plaintiffs' desired relief threatens those interests. Plaintiffs argue only that (1) the motion is untimely, and (2) the existing Legislative Defendants adequately represent DPNM's interests. Plaintiffs are wrong on both counts.

First, DPNM moved to intervene as soon as its interests were no longer adequately represented by the existing defendants. To argue the instant Motion is untimely, Plaintiffs disregard controlling precedent instructing that courts measure the timeliness of an intervention motion against the date the need for intervention arose, not the date that the complaint was filed. Plaintiffs' claims of prejudice, moreover, are belied by the facts. This matter was stayed early in the proceedings and that stay was only recently lifted. As a result, Plaintiffs are unable to point to any expected delay in this case's upcoming proceedings that would result from DPNM's intervention at this stage. And DPNM is committed to abiding by the schedule issued by the Court.

Second, the Legislative Defendants, who are charged with representing the *public* interest, do not share DPNM's four unique *private* interests. Indeed, already several state defendants have sought to avoid having to offer merits defenses and have sought dismissal on immunity grounds. In contrast, DPNM is uniquely well-situated—and stands ready—to vigorously defend the challenged map on the merits, consistent with the expedited time frame set by the Court. DPNM

will have to suffer the consequences, including any resulting harm to its unique interests that may follow from an under-developed record on the merits of the challenged map. For all these reasons, therefore, the Court should not presume that the Legislative Defendants adequately represent DPNM's interests. Indeed, as several courts have recognized, governmental defendants like the Legislative Defendants *cannot* adequately represent both the public interest and DPNM's more parochial private interests.

Finally, in opposition to DPNM's alternative request for permissive intervention, Plaintiffs merely repeat the same timeliness arguments that are insufficient to defeat intervention as of right. For the same reasons, those arguments fail.

ARGUMENT

I. DPNM is entitled to intervention as of right under Rule 1-024(A)(2).

Plaintiffs do not dispute that DPNM has four independent, protectable interests at stake in this litigation. Nor do they dispute that the relief they seek will impair DPNM's interests. Because (A) DPNM's motion to intervene is timely and (B) the existing Defendants cannot represent DPNM's private interests at stake here, DPNM is entitled to intervene as of right.

A. The motion is timely.

DPNM moved to intervene as of right on July 17, 2023, less than two weeks after the Supreme Court's order remanding the case and prior to any further substantive filings or the entry of a scheduling order. The Supreme Court has directed that courts evaluating the timeliness of a motion to intervene "should be more circumspect in their exercise of discretion when the intervention is of right rather than permissive. The reason is that a denial of intervention of right may be more harmful than a denial of permissive intervention." *Apodaca v. Town of Tome Land Grant*, 1974-NMSC-026, ¶ 7, 86 N.M. 132, 520 P.2d 552; *accord In re Norwest Bank of N.M., N.A.*, 2003-NMCA-128, ¶ 17, 134 N.M. 516, 80 P.3d 98 (noting that courts "grant[ ] more leeway

when the intervention is of right"); *Nellis v. Mid-Century Ins. Co.*, 2007-NMCA-090, ¶ 6, 142 N.M. 115, 163 P.3d 502 ("the timeliness requirement is applied less stringently where a right to intervene is shown").

1. DPNM sought intervention as soon as its interests were no longer adequately represented by existing parties.

The need for DPNM's intervention in this lawsuit arises from the Supreme Court's order dated July 5, 2023. A motion to intervene filed less than two weeks later is timely. Courts measure timeliness starting when a party *acquires the need to intervene*, not by simply counting days from the filing of the complaint. *See* 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1916 n.8 (3d ed.) (collecting cases for proposition that "the mere lapse of time by itself does not make an application untimely"). The same is true in New Mexico, where "[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 Mktg. Corp. v. State*, 1990-NMCA-115 ¶ 3, 111 N.M. 763, 810 P.2d 349 (emphasis added) (finding that *amicus curiae* timely applied for intervention once its interests were no longer represented by existing parties).

Plaintiffs incorrectly argue that DPNM "must have known" that its interests were at risk from "the earliest days of this litigation" because of the relief Plaintiffs sought. Opp. at 8. But for the first 17 months of this case, the proceedings concerned only a general legal question—whether partisan gerrymandering claims are justiciable under the New Mexico constitution—and not the particulars of the enacted map. *See, e.g.*, Legis. Defs.' Mot. to Dismiss (Feb. 18, 2022). DPNM took no position on that constitutional question and had no reason to question the existing defendants' ability to brief the constitutional issues. DPNM's intervention at that point in the litigation would have added no new legal arguments, and any factual evidence and arguments in

defense of the map were inappropriate for briefing at the motion to dismiss stage, during which the court accepts all well-pleaded facts as true. *See, e.g.*, *N.M. Life Ins. Guar. Ass'n v. Quinn & Co.*, 1991-NMSC-036, ¶ 5, 111 N.M. 750, 753, 809 P.2d 1278, 1281. Indeed, had the Supreme Court ruled otherwise on Defendants' Petition for Writ of Superintending Control, there would have been no need for DPNM's intervention regarding the map itself.

Now that the partisan gerrymandering claim is proceeding to the merits, however, the existing defendants no longer represent DPNM's interests. To resolve the gerrymandering claim, this Court must evaluate the legislature's intent in drawing the map; the effects of the map on both political parties' voters; and the existence of a legitimate, non-partisan justification for the map. *See* Order at *4, No. S-1-SC-39481 (N.M. July 5, 2023); *Rucho v. Common Cause*, 139 S. Ct. 2484, 2516 (2019) (Kagan, J. dissenting). None of these questions has been meaningfully broached to date by either the existing parties' briefing or this Court's rulings. And answering them will require fact development and expert testimony that DPNM is uniquely suited to offer. In doing so, DPNM seeks to protect its four undisputed interests in this case: (1) the electoral prospects of DPNM's candidates; (2) protecting against diversion of resources; (3) preserving and furthering the policy goals DPNM advocated during the redistricting process; and (4) avoiding any dilution in the voting power of DPNM's voters and constituents. Because they are state officials named in their official capacity, the existing defendants *cannot* defend these private interests "while acting in good faith." *La Union del Pueblo Entero v. Abbott*, 29 F.4th 299, 309 (5th Cir. 2022) (*LUPE*); *see also infra* Part I.B.2.

Like the *amicus* in *Thriftway*, DPNM "had no reason to seek intervention" until it learned its interests were unrepresented. *Thriftway Mktg. Corp.*, 1990-NMCA-115, ¶ 3. Once the need to intervene arose, DPNM did so promptly, so its motion is timely. *See Burge v. Mid-Continent Cas.*

Co., 1997-NMSC-009, ¶ 16, 123 N.M. 1, 933 P.2d 210 (granting intervention after entry of judgment because intervenor's "interest could have been adequately represented by [Defendant] until he defaulted. Once the default occurred, however, [the intervenor]'s ability to protect its interests was severely impeded."); *Okla. ex rel. Edmondson v. Tyson Foods, Inc.*, 619 F.3d 1223, 1232 (10th Cir. 2010) ("[A] potential party could not be said to have unduly delayed in moving to intervene if its interests had been adequately represented until shortly before the motion to intervene. After all, an earlier motion to intervene—when the movant's interests were adequately represented by a party—would have been denied."); *see also Cameron v. EMW Women's Surgical Ctr.*, 142 S. Ct. 1002, 1012 (2022) ("The attorney general's need to seek intervention did not arise until the secretary ceased defending the state law, and the timeliness of his motion should be assessed in relation to that point in time.").

Plaintiffs' crabbed view of timeliness would create a trap for litigants, forcing them to choose between (1) moving to intervene while their interests in the litigation are unripe or remain adequately represented, or (2) risking having their motions denied as untimely. Requiring parties to intervene before they can meaningfully contribute to the case runs counter to the purpose of the intervention rule: "promot[ing] the efficient and orderly use of judicial resources." *Mausolf v. Babbitt*, 85 F.3d 1295, 1300 (8th Cir. 1996).

2. The timing of DPNM's intervention will not prejudice the parties.

Plaintiffs claim that DPNM's motion is prejudicially untimely, but they do not allege any actual prejudice resulting from DPNM's supposed delay. In considering timeliness, "the trial court must . . . consider whether permitting intervention will prejudice the existing parties—particularly with respect to *additional* delay." *In re Norwest Bank*, 2003-NMCA-128, ¶ 17 (emphasis added) (affirming denial of intervention as untimely where class action had already settled and intervention threatened to re-open costly discovery).

The only source of so-called prejudice Plaintiffs identify that would result from DPNM's participation in this case is the potential that DPNM will participate in discovery, including by offering expert witness testimony. Opp. at 9. But the possibility of additional discovery does not show prejudicial *delay*. *Cf. Boles-Scott v. City of Albuquerque*, No. A-1-CA-38990, 2022 WL 2915483, at *4 (N.M. Ct. App. July 25, 2022) (unpublished) (finding prejudice where intervention would re-open dismissed claims, require "substantial motion practice addressing a different class" than the original class action, and "cause significant delay in the final resolution of this case"). Instead, it is merely part of the burden of adding parties to any litigation at any time. That has no bearing on the timeliness of DPNM's motion—those same burdens would have been incurred even if DPNM moved to intervene at the very earliest stages of this litigation. If the incidental burdens of adding a party to litigation were sufficient to defeat intervention as of right, intervention would almost never be granted.[1]

DPNM has agreed to abide by all deadlines, including those set out in this Court's recent scheduling order. Specifically, DPNM is prepared to disclose its expert witness by August 10, file its expert report by August 25, complete discovery by September 13, submit its proposed Findings of Fact and Conclusions of Law by September 15, submit rebuttal briefs and responses by September 20, and appear for trial from September 27-29. *See* Scheduling Order (July 24, 2023);

[1] In addition, Plaintiffs' conduct in this case belies their insistence that conducting additional depositions or other discovery would be insurmountably prejudicial. On August 3, Plaintiffs filed an "Emergency Motion of the Plaintiffs to Compel Depositions and/or Appoint a Special Master" (Aug. 3, 2023), the exhibits to which reveal that "Plaintiffs have issued no fewer than 65 subpoenas to virtually every member of the Democratic caucus in both houses, seeking documents . . . and directing each legislator to provide [them] with their availability for questioning." Pl.'s Ex. 1 at *2. The enormous breadth of these requests casts doubt on how much, if at all, Plaintiffs would be prejudiced by DPNM's intervention; whatever additional discovery may result from DPNM bringing its own expert witness into the case, it is at best marginal compared to what Plaintiffs are seeking (and imposing on the existing defendants) of their own accord.

Notice of Hearing (Aug. 4, 2023). Its intervention therefore will not delay proceedings at all. *See Utah Ass'n of Cntys. v. Clinton*, 255 F.3d 1246, 1250-51 (10th Cir. 2001) (finding intervention timely in the middle of discovery where motion to intervene came before any scheduling order in the case).

DPNM moved to intervene on an expedited basis as soon as it became necessary to do so—and files this reply brief ten days ahead of its deadline—precisely to *avoid* delaying the proceedings. DPNM, like the existing parties, has a strong interest in the expeditious resolution of this matter. Because the timing of DPNM's intervention will not prejudice the parties, the motion is timely.

B. DPNM's interests are not adequately represented by the existing parties.

Plaintiffs are also wrong to assert that the Legislative Defendants adequately represent DPNM's interests in this litigation.[2] *First*, Plaintiffs apply the incorrect standard. Because the Legislative Defendants do *not* share DPNM's unique private interests in this case, they are not presumed to adequately represent those interests. *Second*, the Legislative Defendants cannot adequately represent both the public interest and DPNM's private interests.

1. No presumption of adequate representation applies because DPNM and the Legislative Defendants have different interests.

Plaintiffs are incorrect that a "presumption of adequate representation" applies to DPNM's intervention. The presumption applies only where "*the interest the applicant seeks to protect* is represented by a governmental entity." *N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-005, ¶ 19, 126 N.M. 788, 975 P.2d 841 (quoting *Chino Mines Co. v. Del Curto*, 1992-NMCA-108, ¶ 11, 114 N.M. 521, 842 P.2d 738) (emphasis added). The Legislative Defendants do not represent

[2] Plaintiffs do not suggest that any of the other Defendants adequately represent DPNM's interests. Instead, they focus exclusively on the Legislative Defendants.

the interests that DPNM seeks to protect. As explained in its Motion, DPNM has "four independent protectable interests in the outcome of this litigation that are not shared by the Government Defendants." Mot. at 13. Plaintiffs ignore these independent interests and assert that "Legislative Defendants are protecting the same interest that DPNM seeks to protect here; namely, the interest in New Mexico using Senate Bill 1 for the next decade." Opp. at 12 (citations omitted).

Plaintiffs misunderstand what "interest" means in this context. To show that an existing party shares the "interests" of the proposed intervenor, "it is not enough that they seek the same outcome in the case." *Bost v. Ill. State Bd. of Elections*, No. 22-3034, --- F.4th ----, 2023 WL 4781687, at *3 (7th Cir. July 27, 2023). "After all, 'a prospective intervenor must intervene on one side of the 'v.' or the other and will have the same general goal as the party on that side. If that's all it takes to defeat intervention, then intervention as of right will almost always fail.'" *Id.* (quoting *Driftless Area Land Conservancy v. Huebsch*, 969 F.3d 742, 748 (7th Cir. 2020)). Contrary to Plaintiffs' contention, "the government's representation of the public interest generally cannot be assumed to be identical to the individual parochial interest of a particular member of the public merely because both entities occupy the same posture in the litigation." *Utah Ass'n of Cntys.*, 255 F.3d at 1255-56; *see also Nat'l Farm Lines v. I.C.C.*, 564 F.2d 381, 383 (10th Cir. 1977) (recognizing the "inadequacy of governmental representation of the interests of private parties") (citing *Trbovich v. United Mine Workers*, 404 U.S. 528 (1972)).

The cases Plaintiffs cite for a presumption of adequate representation are readily distinguishable. The proposed intervenor in *Chino Mines Co. v. Del Curto* was a public official—the Grant County Treasurer—not a private party with its own private interests. 1992-NMCA-108, ¶ 6. Because the Treasurer was "a public representative that *had no private interests to represent*," the existing government defendants presumptively represented her interests. *Id.* ¶ 13 (citing

Trbovich, 404 U.S. at 538 n.10; *Nat'l Farm Lines*, 564 F.2d 381) (emphasis added). In *New Mexico Right to Choose/NARAL v. Johnson*, two individuals sought to intervene as "representatives of the potential life of the unborn," rather than to protect their own private interests. 1999-NMSC-005, ¶ 19. The Supreme Court concluded that interest was presumptively represented by the Human Services Department. *Id.* Intervention, the Court noted, must be "based on a right belonging to the proposed intervenor rather than to an existing party to the suit." *Id.* (quoting *Marcia L.*¸109 N.M. at 421) (alteration omitted). Here, DPNM has identified four such interests. *See Bost*, 2023 WL 4781687, at *3-*4 (holding that the Democratic Party of Illinois's interests in (1) conserving its own resources and (2) protecting the voting rights of its members "belong to [the Party] in its own right," and are "importantly different" from the interests of the government defendants).[3]

Plaintiffs are therefore wrong that New Mexico courts take a "different approach" to the presumption of adequate representation than do federal courts. Opp. at 13-14. The Court of Appeals has explicitly directed that "because the pertinent portions of Rule 1-024 are similar to the federal rule, the district court may utilize federal case law in its analysis." *Rivera-Platte v. First Colony Life Ins. Co.*, 2007-NMCA-158, ¶ 89, 143 N.M. 158, 173 P.3d 765. *Chino Mines* and *NARAL* simply addressed different scenarios than the one presented here. The federal case law

[3] The prospective intervenor in *Bost* was denied intervention because it failed to make even the minimal showing required by the court to demonstrate inadequate representation. For the reasons set out below, *see infra* Part I.B.2, DPNM has demonstrated several concrete reasons why its representation by the existing parties "may be" inadequate—including the likelihood of future changes in the defendants' litigating posture, DPNM's separate partisan interests, and the importance of establishing DPNM's perspective in the factual record of this case. *See WildEarth Guardians v. Nat'l Park Serv.*, 604 F.3d 1192, 1200 (10th Cir. 2010); *LUPE*, 29 F.4th at 308.

cited above and in DPNM's Motion is thus entirely consistent with the application of Rule 1-024 by New Mexico courts.[4]

Plaintiffs do not dispute (1) that DPNM has four independent protectable interests, *see* Mot. at 10-12, (2) that those interests are threatened in this litigation, and (3) that Legislative Defendants do not share any of those interests. It would therefore be inappropriate to apply a presumption of adequate representation here. Instead, DPNM "must show only the possibility that representation may be inadequate." *WildEarth Guardians v. Nat'l Park Serv.*, 604 F.3d 1192, 1200 (10th Cir. 2010). "[E]ven *hypothetical* conflicts are enough." *Bost*, 2023 WL 4781687, at *4. Because DPNM's interests are "not identical with" those of the existing Defendants, DPNM "should be allowed to intervene unless it is clear that the [Defendants] will provide adequate representation for [DPNM]." *Nat. Res. Def. Council, Inc. v. U.S. Nuclear Regul. Comm'n*, 578 F.2d 1341, 1346 (10th Cir. 1978). DPNM easily carries that minimal burden.

2. Legislative Defendants cannot adequately represent DPNM's interests.

DPNM is entitled to intervene as of right because neither the Legislative Defendants nor any other existing party can adequately represent DPNM's private interests. That task—"protect[ing] not only the interest of the public but also the private interest of the petitioners in intervention"—is "on its face impossible." *Utah Ass'n of Cntys.*, 255 F.3d at 1255 (quoting *Nat'l Farm Lines*, 564 F.2d at 384).

Federal courts, applying a rule that is nearly identical to Rule 1-024(A), have long held that "a government's representation of many broad interests precludes it from adequately representing

[4] *Chino Mines* itself relied on federal case law for its holding that a presumption of adequacy applies where "the interest the applicant seeks to protect is represented by a governmental entity." 1992-NMCA-108, ¶ 11 (citing *Del. Valley Citizens' Council for Clean Air v. Pennsylvania*, 674 F.2d 970 (3d Cir. 1982); 7C Charles A. Wright et al., Federal Practice and Procedure: Civil 2d § 1909, at 334-37 (1986)).

an intervention applicant's more narrow and discrete interest." *San Juan Cnty., Utah v. United States*, 503 F.3d 1163, 1227 (10th Cir. 2007) (en banc) (Ebel, J., concurring, joined by Seymour, Briscoe, & Lucero, JJ.) (collecting cases). That is because the government's objectives "will involve a much broader range of interests, including competing policy, economic, political, [and] legal . . . factors." *Id.* at 1229. For that reason, the Tenth Circuit has held that "an intervention applicant can 'easily' show its interest diverges from that of an existing party to the litigation 'when the party upon which the intervenor must rely is the government, whose obligation is to represent not only the interest of the intervenor but the public interest generally, and who may not view that interest as coextensive with the intervenor's particular interest.'" *Id.* (quoting *Utah Ass'n of Cntys.*, 255 F.3d at 1254).

Recent developments in this case underscore why private plaintiffs like DPNM with private interests cannot rely on government defendants to protect those interests. Although they previously argued that partisan gerrymandering is a nonjusticiable political question, *see* Exec. Defs.' Mot. to Dismiss (Feb. 18, 2022), on July 28 the Governor and Lieutenant Governor ("Executive Defendants") asked to be dismissed from this action without defending the merits of S.B. 1, arguing in part that they are protected by absolute legislative immunity. Mot. to Dismiss Exec. Defs. (July 28, 2023). Executive Defendants' legislative immunity arguments, if successful, could equally apply to the Legislative Defendants. *See id.* at 9-10 (noting that, like executive officials performing legislative functions, "legislators are absolutely immune from liability for their legislative activities," including in actions seeking declaratory or injunctive relief (citing *Bogan v. Scott-Harris*, 523 U.S. 44, 48 (1998))). That would leave only the Secretary of State, who did *not* move to dismiss the Complaint and did not make any merits arguments in response to Plaintiffs' Preliminary Injunction Motion, to defend the case on the merits. *See* Sec'y of State's Resp. in

Opp'n to Pls.' Mot. for Prelim. Inj. (Feb. 18, 2022). It is therefore not enough, as Plaintiffs assert, that the Legislative Defendants have "vigorously defended Senate Bill 1 throughout this litigation." Opp. at 12. As the Executive Defendants have demonstrated, that can change. While DPNM and the Legislative Defendants "each want the law upheld, the stakes for each of them are different." *Bost*, 2023 WL 4781687, at *4. Those different stakes will lead to different approaches to the litigation of this case going forward.

This litigation has entered a new stage. Now that this case will proceed to a trial on the merits, "the disposition of this lawsuit will turn heavily on a record yet to be created during this litigation. As an intervenor, [DPNM] will be able to affect what evidence that record includes and ensure that the record includes all the evidence necessary to reflect [DPNM's] concerns and enable the court to make a fully informed decision." *San Juan Cnty.*, 503 F.3d at 1231 (Ebel, J., concurring). DPNM is prepared to present arguments and testimony in defense of the enacted map that reflect its four unique interests in this case, including, for instance, evidence regarding the treatment of communities of interest among DPNM's constituency in both the enacted and Plaintiffs' preferred map. Granting DPNM's intervention will allow it to "ensure that the evidentiary record before the district court is complete, as well as fully reflecting [DPNM's] interests and concerns." *Id.* This will be particularly important for purposes of appeal and, if necessary, remedial proceedings.

Even if a presumption of adequate representation did apply here, these divergences between DPNM and the existing Defendants would be sufficient to overcome it. A proposed intervenor can overcome the presumption of adequacy by showing that "the intervenor's interest is in fact different from that of the governmental party and that the interest will not be represented by the existing governmental party." *LUPE* 29 F.4th at 308 (quotation marks omitted). In *LUPE*,

a group of "committees associated with the Republican party" moved to intervene to defend a Texas election law alongside the governor and secretary of state. *Id.* at 304. The Fifth Circuit, assuming that a presumption of adequacy did apply, held that the committees had overcome it because: (1) the committees' "private interests are different in kind from the public interests of the State or its officials;" (2) "[t]he State and its officials would prefer to not resolve this case on the merits at all," instead preferring to resolve it on standing and immunity grounds; and (3) "the State and its officials have many interests that the Committees do not—maintaining not only SB1, but also its relationship with the . . . courts that routinely hear challenges to the State's election laws." *Id.* at 308-09 (quotation marks omitted). The same is true here. That is enough to establish that "the state's more extensive interests" "might" "result in inadequate representation," which is "all that [Rule 1-024(A)(2)] requires." *Id.* at 309 (quotation marks omitted).

3. Plaintiffs' remaining arguments fail.

Plaintiffs do not engage with any of the persuasive authority cited in DPNM's Motion and fail to muster any on-point authority of their own. *See, e.g.*, Mot. at 9 n.3. Their only response to the raft of cases granting intervention to political parties in similar circumstances is that New Mexico law takes a "different approach" "with respect to the presumption of adequate representation by government entities." Opp. at 13-14. As explained above, Plaintiffs are wrong. *See supra*, Part I.B.1. Moreover, Plaintiffs fail to acknowledge, let alone distinguish, any of the *New Mexico* cases in which political parties—including RPNM and DPNM—have been granted intervention in disputes over election laws. *See State ex rel. Riddle v. Oliver*, 2021-NMSC-018, ¶ 1, 487 P.3d 815; *Crum v. Duran*, 2017-NMSC-013, ¶ 3, 390 P.3d 971; *Johnson v. Vigil-Giron*, 2006-NMSC-051, 140 N.M. 667, 146 P.3d 312.

Finally, the earlier motions to intervene as plaintiffs in this case filed by an individual voter and the Lea County Commissioners are readily distinguishable because those motions did not

involve a private party seeking to intervene on the same side as a government defendant. That is not, as Plaintiffs suggest, a "distinction without a difference." Opp. at 14. For the reasons explained above, the risks of inadequate representation are fundamentally different when a *private* party must rely on a *public* entity to represent its *private* rights.[5]

II. Alternatively, the Court should grant DPNM permissive intervention under Rule 1-024(B).

Even if this Court does not grant intervention as of right, case law and common sense favor permitting DPNM to intervene. DPNM has satisfied all the requirements of Rule 1-024(B). As discussed, its application is "timely" and will not prejudice the existing parties. *See supra* Part I.A. Just as importantly, DPNM raises defenses that share a question of law or fact in common with the main action, which Plaintiffs do not dispute. *See* Rule 1-024(B)(2); Opp. at 14-15. Plaintiffs merely repeat the same arguments against timeliness addressed above, but those fail in the permissive intervention context as well. Plaintiffs do not point to any delay or prejudice caused by the timing of DPNM's motion to intervene. Instead, they focus on the inconvenience of conducting additional future discovery that may result from granting DPNM's intervention. But that is precisely the kind of discovery that the parties will be conducting anyway.

Plaintiffs also ignore the main "practical benefit" that will result from granting DPNM's intervention in this case: representative fairness. Opp. at 15. Hearing from a full spectrum of interested parties, which is the underlying purpose of Rule 1-024, takes on a special salience when adjudicating important questions about the administration of elections. Courts often grant

[5] Plaintiffs miss the point when they emphasize that the Lea County Commissioners were "a public entity seeking to intervene in support of private parties." Opp. at 13. Like the Grant County Treasurer in *Chino Mines*, the intervening Commissioners were "public representative[s] that had no private interests to represent." 1992-NMCA-108, ¶ 13. Here, by contrast, DPNM is a *private* entity seeking to intervene in support of its own *private* interests, on the same side of the litigation as a *public* entity that is charged with representing only the *public* interest.

intervention to political parties in that context so they may speak for constituents and perspectives not otherwise present in the proceedings—indeed, the *Republican* Party of New Mexico has been the beneficiary of this approach. *See Riddle*, 2021-NMSC-018, ¶ 1 (granting RPNM's intervention in election dispute on writ of superintending control and inviting responses from other major political parties); *see also Democratic Party of Va. v. Brink*, No. 3:21-cv-756-HEH, 2022 WL 330183, at *2 (E.D. Va. Feb. 3, 2022) ("Courts often allow the permissive intervention of political parties in actions challenging voting laws."). Plaintiffs do not offer any reason why the Republican Party of New Mexico should be allowed to spearhead the potential redrawing of New Mexico's congressional map while excluding its Democratic counterpart. Participation by all interested parties, particularly where it comes at minimal additional cost and no meaningful delay, will further the interests of fairness and transparency.

CONCLUSION

DPNM respectfully requests that the Court grant its motion to intervene as a matter of right under Rule 1-024(A)(2) or, in the alternative, permissively under Rule 1-024(B).

Dated: August 7, 2023

Respectfully submitted,

Abha Khanna*
ELIAS LAW GROUP LLP
1700 Seventh Ave., Suite 2100
Seattle, WA 98101
Telephone: 206.656.0177
akhanna@elias.law

Richard A. Medina*
Ian U. Baize*
ELIAS LAW GROUP LLP
250 Massachusetts Avenue NW, Suite 400
Telephone: 202.987.5010
Facsimile: 202.968.4498
rmedina@elias.law
ibaize@elias.law

**Pro Hac Vice*

DURHAM, PITTARD & SPALDING, LLP

By: /s/ *Justin R. Kaufman*
Justin R. Kaufman
Caren I. Friedman
Rosalind B. Bienvenu
Philip M. Kovnat
505 Cerrillos Road, Suite A209
Santa Fe, NM 87501
Telephone: (505) 986-0600
Facsimile: (505) 986-0632
jkaufman@dpslawgroup.com
cfriedman@dpslawgroup.com
rbienvenu@dpslawgroup.com
pkovnat@dpslawgroup.com

Counsel for Proposed Intervenor-Defendant Democratic Party of New Mexico

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing instrument will be served on all counsel via the e-filing system on this the 7th day of August, 2023 as well as emailed to all parties of record.

/s/ Justin R. Kaufman
Justin R. Kaufman