IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO, *ex rel.*,
M. KEITH RIDDLE, *et al.*,
in their official capacities as County Clerks,

Petitioners,

v. No. S-1-SC-38228

MAGGIE TOULOUSE OLIVER,
in her official capacity as Secretary of State,

Respondent.

BRIEF IN SUPPORT OF THE MOTION TO INTERVENE

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CERTIFICATE OF COMPLIANCE WITH RULE 12-318(F) NMRA

I certify that, according to Rule 12-318(F), NMRA, that this brief complies with the type-volume, size, and word limitations of the New Mexico Rules of Appellate Procedure because it contains less than 35 pages of substantive text, excluding all text excluded by that rule, and was prepare in size 14 Times New Roman font, which a proportionally-spaced type face, using Microsoft Word as part of Microsoft Office 365.

/s/ Carter B. Harrison, IV
Carter B. Harrison, IV

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INTRODUCTION

On March 30, 2020, twenty-seven of New Mexico's thirty-three County Clerks filed a Stipulated Verified Emergency Petition Seeking Extraordinary Writ Relief for the 2020 Primary Election and Presidential Primary Election. Through that motion, Petitioners seek an order from this Court directing the New Mexico Secretary of State to conduct a mail ballot election in lieu of an election that includes in-person voting locations. Petitioners recognize in that motion that such a request conflicts with the New Mexico Constitution and New Mexico's election laws but nevertheless requests such relief as an equitable remedy to the COVID-19 health crisis. The New Mexico Secretary of State, who is the chosen Respondent to the petition, has stipulated to granting this requested relief. The result is that a petition asking this Court to override, and rewrite, New Mexico's laws related to the conducting of an upcoming election has been submitted without opposition and without any party defending our current election regime or adherence to sound constitutional principles. Proposed intervenors, the Republican Party of New Mexico, 29 Senators and House Members, and certain other County Clerks, therefore respectfully request that the Court grant their Motion to Intervene, allowing them protect their interests — namely the adherence to established law, the respect of the separation of powers, and the assurance that the 2020 primary election will be conducted in a lawful and appropriate manner — can be defended.

ARGUMENT

Proposed intervenors are a major political party, 29 elected state legislators, and several county clerks, all of whom band together to step into the shoes of Respondent to protect their interest in assuring that the upcoming primary election is conducted lawfully. To do so, proposed intervenors file this motion to intervene so that they may directly advocate to the Court their interests and the legal justifications to reject the Petition in this matter.

I. Absent any applicable Rule of Appellate Procedure regarding intervention, the New Mexico courts apply Rule 1-024 of the New Mexico Rules of Civil Procedure.

Intervention is a procedural device "whereby a person is permitted to be a party in an action between other persons, after which the litigation proceeds with the original and intervening parties." *State ex rel. Attorney General v. Reese,* 1967-NMSC-172, ¶ 2, 78 N.M. 241, 430 P.2d 399. While there is no rule of appellate procedure or case law directly granting a right of intervention for extraordinary writs filed in the Supreme Court in the first instance, the New Mexico courts have recognized a right to intervene on appeal under "unusual circumstances." *Thriftway Marketing Corp. v. State*, 1990-NMCA-115, ¶ 13, 810 P.2d 349, 111 N.M. 763. In *Thriftway*, the State of New Mexico appealed the grant of a writ of mandamus by the district court ordering the transfer of a liquor license. *Id.*, at ¶ 1. After docketing the appeal, the Court of Appeals distributed a calendar notice recommending

summary affirmance. *Id.* The Nageezi Chapter of the Navajo Tribe filed an amicus brief opposing the proposed affirmance, which was accepted by the court. *Id.* The State later chose to no longer pursue the appeal and sought a dismissal. *Id.* The Chapter immediately moved to intervene on behalf of the State and challenge the judgment below because the order would transfer the liquor license into the geographic territory of the Chapter. *Id.*

In reviewing the Chapter's motion to intervene, the Court of Appeals first recognized that "intervention may be allowed even at the appellate level . . . in appropriate circumstances." *Id.*, at ¶ 3. Determining whether "appropriate" or "unusual" circumstances meriting intervention on appeal are present is achieved by applying the standards for intervention found in the Rule 1-024 of the New Mexico Rules of Civil Procedure. *Id.*, at ¶ 2. That rule outlines the standard applied to determine whether intervention will be allowed by right, or whether it is may be permissively allowed by the Court through an exercise of its inherent discretion. Proposed intervenors motion meets both standards of intervention.

A. Proposed intervenors possess the right to intervene because the Petition may impair or impede their ability to protect their interest in conducting a lawful primary election.

In relevant part, intervention must be allowed by right "when the applicant claims an interest . . . which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the

applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Rule 1-024(A)(2), NMRA. This standard has been afforded liberal application by the New Mexico Courts, and has been interpreted as being met whenever an appellate decision may have a potential stare decisis impact that "may provide the necessary proof of the practical impairment of the applicant's claim." M.E. Occhialino, *Walden's Civil Procedure in New Mexico*, 89 (2d ed. 1996). Thus, if a judgment would, "in a practical sense . . . prejudicially affects the absent party," then the absent party has a right to intervene to protect their interests. *C.E. Alexander & Sons, Inc. v. DEC Int'l, Corp.*, 1991-NMSC-049, ¶ 13, 112 N.M. 89, 811 P.2d 899.

Here, Petitioners and Respondent have agreed, upon the filing of the Petition, that existing election laws governing the conduct of the upcoming primary election should be disregarded and that the Supreme Court should exercise its equitable powers to adopt new rules for those elections proposed by the parties. That request, however, follow a concession by the parties that the Constitution and state law requires such changes to be made by the legislature, rather than the executive or the judiciary. Through this motion, proposed intervenors seek to protect their interests, as a major political party, legislators, and county clerks, in ensuring the lawful conducting of an election. Neither Petitioners nor Respondent are protecting that interest. In fact, by asking the Court to engage in an unconstitutional and unlawful

rewrite of the election laws, the parties are expressly disavowing that interest. Granting the relief requested by the parties, therefore, will prejudice the proposed intervenors' interest in conducting a lawful election. Proposed intervenors should be allowed to intervene by right.

B. The Court should, in its discretion, grant this motion because proposed intervenors meet all the requirement for permissive intervention.

Permissive intervention will be allowed, "upon timely application . . . when an applicant's claim or defense and the main action have a question of law or fact in common." Rule 1-024(B). To meet this rule, the applicant must show: 1) that they timely filed the motion to intervene; 2) that the applicant has a sufficient interest in the outcome of the proceeding; and 3) that those interests would be jeopardized without intervention because they are not adequately represented by parties to the litigation. *Thriftway*, 1990-NMCA-115, ¶ 2. Proposed intervenors' motion meets all three requirements.

First, there is "[n]o mechanical rule for timeliness." *Walden's Civil Procedure in New Mexico*, at 93. Rather, timeliness depends on the circumstances. *Tom Fields, Ltd. v. Tigner*, 1956-NMSC-083, ¶ 15, 61 N.M. 382, 301 P.2d 322. ("As disclosed by some of the cases, just when an application to intervene is timely must depend on the circumstances of each case."). For example, intervention will be timely when it is triggered by the failure of a party to defend a position "triggers the

need for the application to step into the gap." *Walden's Civil Procedure in New Mexico*, at 95 (citing *Cooper v. Albuquerque City Comm'n*, 1974-NMSC-006, 85 N.M. 786, 518 P.2d 275). *See also Thriftway*, 1990-NMSC-115, ¶ 3 ("A key consideration in considering timeliness is whether the effort to intervene occurred shortly after the would-be intervenor discovered the such action was necessary to protect its interest."); *NAACP v. New York*, 413 U.S. 345, 366 (1973) ("Timeliness is to be determined from all the circumstances.").

Whether an application to intervene meets this standard is determined through a four-prong test examining: 1) the length of time an intervenor knew or should have known that their interests were not being protected; 2) any prejudice which may be caused to the existing parties by any delay in filing an application; 3) any prejudice to the intervenors which may be caused by denying the motion to intervene; and 4) whether there are any unusual mitigating circumstances. *Banco Popular de Puerto Rico v. Greenblatt*, 964 F.2d 1227, 1231 (1st Cir. 1992); *Edwards v. City of Houston*, 37 F.3d 1097, 1105 (5th Cir. 1994) (en banc). Proposed intervenor's motion meets this timeliness test.

The Petition was filed on March 30, 2020 at 3 PM. Proposed intervenors now file their motion to intervene, brief in support of that motion, and brief in intervention the morning of March 31, 2020, less than twenty-four hours after the Petition was filed. This filing was almost immediately after proposed intervenors were able to

obtain a copy of the Petition and determine that neither Petitioners nor Respondent would protect their interest in the conducting of a lawful and appropriate primary election. Moreover, no prejudice has been caused to the parties because of the filing of this motion. At the time of filing this motion, this Court has yet to even decide whether it will accept the Petition and proceed to considering the merit of the Petition. Therefore, there can be no prejudice to the parties. And there would be great prejudice to the proposed intervenors if their motion was denied because there would be no party to the proceeding defending their interest, defending the current election laws, and opposing an unconstitutional request for the judiciary to rewrite statutes duly enacted by the legislature. Proposed intervenors' motion is undoubtably timely.

Second, the Court examines whether the applicants have a sufficient interest in the outcome. As stated, the proposed intervenors in this matter are a major political party, 29 elected legislators, and several county clerks, all of which have an interest in ensuring that the 2020 primary election is conducted lawfully. That interest is obviously affected by the outcome of this Petition, which seeks to use the judiciary rather than the legislature to amend the election laws. Whether or not the public has faith in the results of the upcoming primary election will be directly affected by decisions made because of this Petition. Proposed intervenors, therefore, possess a sufficient interest in the outcome in protecting the integrity of elections in

the State, in their districts, and in their counties. *See Thriftway*, 1990-NMSC-115, ¶¶ 8-9 (explaining that the Chapter had a sufficient interest in the outcome because, like here, the decision of the Court would affect individuals within the boundaries of the Chapter).

Third, the proposed intervenors' interests would be jeopardized without intervention because no party to the Petition will protect their interests absent intervention. *See id.*, at ¶ 11. Most courts make such a determination by considering whether the applicant's interest is adequately represented by the parties to the action. *See* 6 Moore et al., Moore's Federal Practice, § 24.10, p. 24-59 (3d ed. 2009). While there is a presumption that all interests are adequately represented when the government is a party to the proceeding, *see Menominee Indian Tribe v. Thompson*, 164 F.R.D. 672, 678 (W.D. Wis. 1996), that presumption is rebutted in this case by the Secretary of State's express rejection of enforcing and following the laws governing the conducting of the 2020 primary election.

Finally, many courts, when considering permissive intervention, look to whether the applicant's participation is likely to make a significant or useful contribution to the litigation. 6 Moore's Federal Practice, § 24.10(2)(b). For example, in *Johnson v. Northam*, 915 F. Supp. 1529, 1538-39 (N.D. Fla. 1995), the NAACP was allowed to intervene in a voting rights action because it would bring a "unique perspective" to the case based upon its experience with voting rights

lawsuits. And in *National Resources Defense Council, Inc. v. Tennessee Valley Authority*, 340 F. Supp. 400, 408-09 (S.D.N.Y. 1971), an environmental organization with an expertise in strip mining was permitted to intervene in a strip mining case because its "longstanding interest and familiarity with the issues before the court and expertise may be helpful in clarifying the facts and issues" in that case. The same is true for allowing the proposed intervenors to participate in this matter. Those intervenors — a major political party, 29 elected legislators, and several county clerks — possess great experience and expertise in the election process, in amending our election laws, and in conducting elections as both in-person and mail ballot elections. Allowing them to intervene in this matter would bring the same "unique perspective" as inviting the NAACP to participate in a voting rights case and the National Resources Defense Council to participate in an environmental action. Proposed intervenors' motion should be granted, and they should be permitted to intervene as Respondents in this action.

II. The Petition is a writ-of-mandamus proceeding, which is accompanied by the right to intervene.

Despite being titled as a generic writ for extraordinary relief, this Petition is undoubtedly a writ of mandamus. NMSA 1978, § 44-2-4 (defining a writ of mandamus as an order "to any inferior tribunal, corporation, board or person, to compel performance of an act which the law specially enjoins as a duty resulting

from an office, trust or station"). *See also* Michael B. Browde, *Mandamus in New Mexico*, 4 N.M. L. REV. 155, 155 (1974) (explaining that the common law writ of mandamus is an order from a court to an inferior public officer requiring that officer to do something). Alongside New Mexico's recognition of the writ of mandamus is the right of an affected party to file a complaint in intervention. Browde, *supra*, at 163 n.8; *see also Schmitz v. New Mexico State Tax Comm'n*, 1951-NMSC-048, ¶¶ 3-4, 55 N.M. 320, 232 P.2d 986. No case, statute, or rule limits this right to intervene to writs of mandamus filed in the district court rather than in the Supreme Court. Therefore, regardless of whether Rule 1-024 applies to this proceeding, the proposed intervenors possess the common law right to intervene in this petition for a writ of mandamus.

III. Proposed Intervenors must be allowed to defend their interests in order to preserve our adversary system of litigation and to ensure public confidence in this court's decision regarding the Petition.

It is a fundamental tenant of our legal system that the courts "rely on parties to frame the issues for decision," and that the courts are assigned "the role of neutral arbiter of matters the parties present." *Greenlaw v. United States,* 554 U.S. 237, 243 (2008). Allowing the proposed intervenors to participate in this Petition as Respondents therefore makes sense as a matter of policy because it is consistent with the goals of that adversary system.

A "one-sided appeal," like the one filed by Petitioners and Respondent in this case, "does not further the underlying adversary nature of the judicial system." *See* Goldman, *Should the Supreme Court Stop Inviting Amicus Curiae to Defend Abandoned Lower Court Decisions*, 63 STAN. L. REV. 907, 939 (2011). It is this tenant that led Justice Felix Frankfurter to highlight "the duty of a court to have the benefit of an informed argument" from all sides. And it is this tenant that counsels appellate courts to "not sit as self-directed boards of legal inquiry and research, but [rather] as arbiters of legal questions presented and argued by the parties before them."). *Carducci v. Reagan*, 714 F.3d 171, 177 (D.C. Cir. 1983). The Petition, as currently presented, includes a stipulated request for relief and no opportunity for a party appearing before the Court to defend the current election statutes or oppose the extraordinary request for the Court to rewrite the election laws. Allowing the proposed intervenors to join this matter as Respondent to take those positions is not only permissible under the rules of civil procedure but will also fulfill the well-established policy goal of maintaining the adversary system. *See* Landsman, *The Decline of the Adversary System*, 29 BUFF. L. REV. 487, 490 (1980) ("The actual precept of an adversary process is that out of the sharp clash of proofs presented by adversaries in a forensic setting is most likely to come the information upon which a neutral and passive decision maker can base the resolution of a litigated dispute acceptable to both the parties and society.").

Moreover, allowing the proposed intervenors to step into the shoes of the absent Respondent in this case will help ensure accuracy in the Court's decision-making process. *See* Fuller & Randall, *Professional Responsibility: Report of the Joint Conference*, 44 ABA J. 1159, 1161 (1958) (explaining that "[o]nly when [a judge] has the benefit of intelligent and vigorous advocacy on both sides could he feel fully confident of his decision"). And having all sides properly represented before the court is likely to preserve neutrality. *Id.* (stating that when "the deciding tribunal is compelled to take into its own hands the preparations that must precede the public hearing . . . [it] cannot truly be said to come to the hearing uncommitted, for it has itself appointed the channels along which the public inquiry is to run").

Allowing the proposed intervenors to participate in this litigation will ensure that arguments against granting the petition receive the same scrutiny and consideration as the arguments of the parties stipulating to the requested relief. "Society . . . is more likely to accept the justice system as the proper venue for resolving legal disputes [when] such resolution will come only after each side has had a fair shot to present its case." Goldman, 63 STAN. L. REV. at 943. Proposed intervenors standing in the shoes of Respondent results in that "fair shot." The motion to intervene should be granted.

CONCLUSION

The Motion to Intervene should be granted, and proposed intervenors should be allowed to enter this case as Respondents to the Petition.[1]

Respectfully submitted,

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[1] If the Court denies this Motion to Intervene, then proposed intervenors respectfully request leave of the Court to file as amicus curiae. It is well-established that "[a] court may allow an applicant to participate as amicus curiae as an alternative to intervention." *United States v. Books*, 164 F.R.D. 501, 507 (D. Or. 1995). *See also Moore's Federal Practice*, § 24.23(2) at 24-88.

CERTIFICATE OF SERVICE

I certify that on March 31, 2020, I electronically filed this Brief in Support of Motion to Intervene with the State of New Mexico's Tyler/Odyssey E-File & Serve system, which caused service upon all parties through counsel of record.

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