IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

DONALD J. TRUMP FOR PRESIDENT, INC., Plaintiff, v. MAGGIE TOULOUSE OLIVER, in her official capacity as Secretary of State of New Mexico, the ELECTORS of NEW MEXICO and the STATE CANVASSING BOARD OF NEW MEXICO, Defendants.	Case No. 1:20-cv-01289-MV

THE DNC'S MOTION TO INTERVENE AS DEFENDANTS AND MEMORANDUM OF LAW IN SUPPORT

Pursuant to Federal Rule of Civil Procedure 24, the DNC Services Corporation/Democratic National Committee (the "DNC") files this Motion to Intervene in this action as a matter of right or, alternatively, to permissively intervene. The DNC has conferred with counsel for Defendants, who have no objection to this Motion. The DNC has also conferred with counsel for Plaintiff, and Plaintiff has not yet taken a position on this Motion. In support of its Motion to Intervene, the DNC respectfully submits the following:

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

On December 14, 2020, the Electoral College met in accordance with federal law to cast ballots for President and Vice President and carry out the will of the American people as expressed in the November election. Along with three hundred and one other Electors, all of New Mexico's Electors cast their ballots for and formally elected Joe Biden and Kamala Harris as the next President and Vice President of the United States. On that same day, the losing presidential campaign, Donald J. Trump for President, Inc. (the "Campaign"), filed this action seeking—somehow, someway—to defy the expressed will of New Mexico's voters and undo and overturn the votes cast by New Mexico's Electors. This timing on behalf of the Campaign was no mistake—indeed, it is part and parcel of the increasingly desperate, and apparently bottomless, efforts by the Campaign and its allies to overturn the results of the 2020 presidential election. In its oddly-styled Amended "Complaint" slash "Motion for Preliminary Injunction and Temporary Restraining Order or, Alternatively, for Stay and Administrative Stay," the Campaign boldly asserts that it is entitled to "disregard" federal statutes and disenfranchise almost a million New Mexicans who voted in the Presidential Election. *See* Compl. ¶ 32, B-E. For myriad reasons, Proposed Intervenor DNC Services Corporation/Democratic National Committee (the "DNC") has a significant and protectable interest in the outcome of this litigation.

The DNC is a national committee, as that term is defined by and used in 52 U.S.C. § 30101, dedicated to electing local, state, and national candidates of the Democratic Party, including President-Elect Biden and Vice-President-Elect Harris, to public office throughout the United States. Among the DNC's members and constituents are eligible absentee voters in New Mexico who voted in the November general election. Any relief entered by this Court that disenfranchises these voters would harm the DNC's core mission and its candidates' electoral success in the state.

The DNC's interests are not adequately represented in this litigation because the Defendants are state officials and individual Electors whose interests are largely defined by law and therefore more limited and distinct from the DNC's interests in protecting the franchise for its candidates and voters. Democratic Party committees have routinely been granted intervention this election cycle to protect these and similar interests. *See infra* Section III-A. Therefore, and for the reasons that follow, this Court should find that the DNC is entitled to intervene as a matter of right under Rule 24(a)(2). In the alternative, the DNC should be granted permissive intervention pursuant to Rule 24(b).[1]

II. BACKGROUND

In May, the New Mexico Legislature passed N.M. Stat. 1978 § 1-12-72 to regulate the conduct of the 2020 general election amidst a global pandemic. The new law directs: "the secretary of state *shall*, in consultation with each county clerk in an area identified in the public health order, *implement changes in the conduct of the 2020 general election* only to the extent necessary for the preservation of [] health and safety." N.M. Stat. § 1-12-72(O) (emphasis added). In early September, and in accordance with Section 1-12-72(O), the New Mexico Department of Health issued a Public Health Order ("PHO") permitting "election-related facilities to operate subject to certain requirements designed to mitigate the risk of spreading COVID-19 through in-person voting," and directing, the Secretary to implement social distancing protocols and "provide additional guidance to facilitate and ensure compliance with such protocols to limit the amount of voters in a polling location at one time." *See* PHO of N.M. Dept. of Health Cabinet Sec'y, *Public Health Emergency Order Clarifying that Polling Places Shall be Open as Required in the Election*

[1] The DNC has attached a Proposed Motion to Dismiss as Exhibit A, which satisfies its obligation under FRCP 24(c) to file a pleading that "sets out the claim or defense for which intervention is sought."

Code and Imposing Certain Social Distancing Restrictions on Polling Places (Sept. 3, 2020). In keeping with her duties and in response to her authority granted by 1-12-71 and the PHO, the Secretary issued "Standards and Guidance" encouraging the use of drop boxes by New Mexico's County Clerks as a means of reducing congestion at in-person polling locations and, "to support the health and safety of those communities impacted by the global pandemic." N.M. Sec'y of State, General Election 2020 Drop Box Standards and Guidance 1 (Sept. 9, 2020) ("Guidance"), ECF No. 1-6.

The November 3 general election proceeded as planned, and in accordance with New Mexico law, each county canvassing board approved their vote tallies and issued certificates of canvass to the Secretary. *See* N.M. Stat. §§ 1-13-13–15. Joe Biden and Kamala Harris received 501,614 votes (54.3%) of the votes for President and Vice President, compared to only 401,894 votes for Donald Trump and Mike Pence. Despite the many procedural opportunities that followed (including the opportunity for any candidate to request a recount, *see* N.M. Stat. § 1-14-14), the Campaign waited until December 14 to seek relief—the very same day New Mexico's slate of Presidential Electors met, as prescribed by federal and state law, to formally confirm Joe Biden and Kamala Harris's victory.

In this lawsuit, the Campaign seeks sweeping, unprecedented, and remarkable relief that could disenfranchise hundreds of thousands of New Mexico voters. The Campaign petitions the Court to enjoin the "disposition of certificates of votes for President and Vice President . . . until the conclusion of this case on the merits," or alternatively, to "vacate the Defendant Electors' certifications . . . and remand to the state of New Mexico legislature pursuant to 3 U.S.C. § 2 to appoint electors." Compl. B (Prayer for Relief). The Campaign also seeks a "decree mandating" a "statewide canvass of absentee votes and investigation of drop boxes" involving public submission

of evidence and various other extra-statutory procedures, and ultimately the "invalidation of all results from whatever the smallest block of absentee ballots is that can be precisely matched to its election *results*." Compl. B-E (emphasis in original).

III. ARGUMENT

Since it became clear Donald Trump lost the 2020 election, the Campaign and its allies have filed dozens of lawsuits around the country seeking to disenfranchise, collectively, many millions of voters and undo the will of the people. Given the drastic relief sought by the Campaign and its allies in the various lawsuits, the DNC and other Democratic party committees have routinely sought and been granted intervention to protect their interests and the interests of their members. This lawsuit is more of the same, and because the DNC likewise has a clear protectable interest in the outcome of this litigation, it should be permitted to intervene here.

A. The DNC is entitled to intervene as of right.

"Under Rule 24(a)(2) of the Federal Rules of Civil Procedure, a nonparty seeking to intervene as of right must establish (1) timeliness, (2) an interest relating to the property or transaction that is the subject of the action, (3) the potential impairment of that interest, and (4) inadequate representation by existing parties." *Kane Cty. v. United States*, 928 F.3d 877, 889 (10th Cir. 2019) (citing *W. Energy All. v. Zinke*, 877 F.3d 1157, 1164 (10th Cir. 2017)). The DNC satisfies these factors.[2]

Applying this standard, federal courts have routinely granted intervention to the DNC and other Democratic Party committees in post-election litigation brought by the Campaign and its allies seeking to overturn the 2020 general election. *See, e.g.*, *Wood v. Raffensperger*, No. 1:20-

[2] Because the DNC does not seek relief different from the defendants, it need not establish Article III standing to intervene as of right. *Kane Cty.*, 928 F.3d at 886 (citing *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1648 (2017)).

CV-04651-SDG, 2020 WL 6817513, at *7 (N.D. Ga. Nov. 20, 2020) (recognizing grant of intervention to Georgia Democratic Party, DCCC and DSCC, and stating that the Party would be "significantly injured" if post-election relief enjoining certification of 2020 election results were granted), *aff'd*, No. 20-14418, 2020 WL 7094866 (11th Cir. Dec. 5, 2020); *Pearson v. Kemp*, 1:20-cv-04809-TCB, ECF No. 42 (N.D. Ga. Dec. 2, 2020) (granting Democratic Party of Georgia, DCCC, and DSCC's motion to intervene); *Donald J. Trump for President, Inc. v. Benson*, No. 1:20-cv-01083-JTN-PJG, ECF No. 20 (W.D. Mich. Nov. 17, 2020); *King v. Whitmer*, No. 2:20-cv-13134-LVP-RSW, ECF No. 28 (E.D. Mich. Dec. 7, 2020) (granting DNC's motion to intervene); *Donald J. Trump for President, Inc. v. Boockvar*, No. 4:20-cv-02078-MWB, ECF No. 72 (M.D. Pa. Nov. 12, 2020) (granting DNC's motion to intervene).

Federal courts also routinely grant political party committees intervention even in similar *pre*-election litigation, such as cases in which a plaintiff seeks to make it harder to vote or harder to have particular votes counted. *E.g.*, *Parnell v. Allegheny Bd. of Elections*, No. 20-cv-01570 (W.D. Pa. Oct. 22, 2020), ECF No. 34 (granting intervention to the DCCC in lawsuit regarding processing of ballots); *Paher v. Cegavske*, No. 20-cv-00243-MMD-WGC, 2020 WL 2042365, at *4 (D. Nev. Apr. 28, 2020) (granting DNC intervention in election case brought by conservative interest group); *see Donald J. Trump for President, Inc.*, No. 20-cv10753 (MAS) (ZNQ), 2020 WL 5229209, at *1 (D. N.J. Sept. 01, 2020) (granting DCCC intervention in lawsuit by Republican candidate and party entities); *Cook Cnty. Republican Party v. Pritzker*, No. 20-cv-4676 (N.D. Ill. Aug. 28, 2020), ECF No. 37 (granting DCCC intervention in lawsuit by Republican party entity); *Issa v. Newsom*, No. 20-cv-01044-MCE-CKD, 2020 WL 3074351, at *3 (E.D. Cal. June 10, 2020) (granting DCCC and California Democratic Party intervention in lawsuit by Republican congressional candidate); *Donald J. Trump for President v. Bullock*, No. 20-cv-66 (D. Mont. Sept.

08, 2020), ECF No. 35 (granting DCCC, DSCC, and Montana Democratic Party intervention in lawsuit by four Republican party entities); *cf. DCCC v. Ziriax*, No. 20-CV-211-JED-JFJ, 2020 WL 5569576, at *2 (N.D. Okla. Sept. 17, 2020), ECF No. 56 ("DCCC and the Democratic candidates it supports . . . have an interest in ensuring that Democratic voters in Oklahoma have an opportunity to express their will regarding Democratic Party candidates running for elections.").

1. The DNC's motion to intervene is timely.

First, the motion to intervene is timely. "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." *Kane Cty.*, 877 F.3d at 890 (quoting *Utah Ass'n of Ctys. v. Clinton*, 255 F.3d 1246, 1250 (10th Cir. 2001)). Here, the DNC seeks intervention at the earliest possible stage of this action, and its intervention will neither delay the resolution of this matter nor prejudice any party. The Campaign filed its "Complaint" and Motion on December 14, ECF No. 1, and amended the pleadings today. This motion to intervene follows within hours of the Campaign's amended pleadings. No motions have been fully briefed—and thus no party can legitimately claim that intervention by the DNC would cause any prejudicial delay. The DNC is prepared to comply with the Court's existing expedited briefing schedule, which requests written responses to Plaintiff's Motion by December 24. ECF No. 3. In these circumstances, the motion to intervene is timely.

2. The DNC has a significant protectible interest in the outcome of the litigation.

Second, the DNC has significant and cognizable interests in intervening in this case to ensure that the ballots submitted by the voters of New Mexico, including by the DNC's members, constituents, and those who support its candidates, are not disregarded. To meet this requirement, an applicant "must have an interest that could be adversely affected by the litigation," and that

interest must simply be "relat[ed] to" the existing litigation. *Kane Cty.*, 928 F.3d at 892 (holding that an organization with a "decades-long history of advocating for the protection of these federal public lands" had an adequate interest that would be impaired if not allowed to intervene in highway dispute).

The DNC's interests here easily satisfy this "minimal" standard. *Id.* at 891. In fact, the DNC's interest in opposing the relief sought is more concrete and acute than Plaintiff's purported interest in bringing the litigation in the first instance: the DNC's members have the right to ensure that their ballots remain valid—as they've already been determined to be—and to preserve the electoral victory that their votes delivered. The Campaign asks this Court to enjoin the disposition of certificates of the votes for President-Elect Biden and Vice-President-Elect Harris or vacate the Electors' certifications and remand to the state legislature. Compl. B (Prayer for Relief). Putting aside that the Campaign provides no basis for setting aside the Certificates of Votes for President and Vice President, which have already been endorsed and sealed by the Presidential Electors in accordance with federal law, *see* 3 U.S.C. §§ 7-11, if the relief the Campaign seeks were to be granted, it would result in the loss of lawfully-executed and now-certified votes for DNC-supported candidates and the effective disenfranchisement of DNC members and constituents. The Campaign also seeks an order mandating a statewide canvass of absentee votes and investigation of drop boxes and the "invalidation of all results from whatever the smallest block of absentee ballots is that can be precisely matched to its election *results*." Compl. B-E. Again, putting aside the lack of statutory or other legal or factual basis for this extraordinary request, implementing the Campaign's proposed procedures to further scrutinize already-certified ballots would require a massive undertaking that the DNC would be forced to expend significant resources to defend

against, and the "invalidation" sought would likewise result in disenfranchisement of DNC members and constituents. *See id.*

These interests easily clear the threshold established by Rule 24(a)(2), which requires only an interest "relat[ed] to" the litigation. *Kane Cty.*, 928 F.3d at 892. Moreover, in related circumstances, courts have consistently recognized that, where proposed relief carries with it the prospect of disenfranchising the Democratic Party's members, the Democratic Party has a legally cognizable interest at stake. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 189 n.7 (2008) (agreeing with the unanimous view of the Seventh Circuit that the Indiana Democratic Party had standing to challenge voter identification law that risked disenfranchising its members); *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 586 (5th Cir. 2006) (holding that Texas Democratic Party had direct standing based on "harm to its election prospects").

In short, because the "potential risk of injury" to the votes for the DNC's candidates and by its members is great if Plaintiff is successful, the DNC has met its burden of demonstrating a protectible interest in the litigation for purposes of intervention as of right. *Kane Cty.*, 928 F.3d at 891; *WildEarth Guardians v. Nat'l Park Serv.*, 604 F.3d 1192 at 1199; *see also, e.g.*, *NEOCH v. Husted*, 696 F.3d 580 (6th Cir. 2012) (Ohio Democratic Party allowed to intervene in case where challenged practice would lead to disenfranchisement of its voters).

3. Denial of the motion to intervene will impair the DNC's ability to protect its interests.

Third, a denial of the DNC's motion to intervene will, as a practical matter, impair and impede its ability to protect these interests. The "burden" of establishing potential impairment of a protectible interest is "minimal." *Kane Cty.*, 928 F.3d at 891 (quoting *WildEarth Guardians*, 604 F.3d at 1199 (10th Cir. 2010)). "Courts must apply 'practical judgment' when 'determining whether the strength of the interest and the potential risk of injury to that interest justify

intervention.'" *Kane Cty.*, 928 F.3d at 891. Federal Courts of Appeals have had "little difficulty concluding" that, where an intervenor has a protectible interest in the outcome of litigation, such interest would be impaired by a denial of intervention. *E.g.*, *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 898 (9th Cir. 2011); *see also* Advisory Comm. to Fed. R. Civ. P. 24 1966 Amendment ("If an absentee [party] would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene . . . .").

Here, there can be no doubt that disposition of this matter has the potential to impair the DNC's ability to protect its interests. The requested remedy is extreme—Plaintiffs seek relief that would not just burden DNC's voters, but would completely disenfranchise them. The Campaign effectively seeks to halt the results of the presidential election in New Mexico until the Secretary discards absentee votes it alone believes were not adequately monitored, or alternatively, to "vacate" the 11-percentage point electoral victory of Joe Biden's presidential electors and remand the vote to the New Mexico Legislature. *See* Compl. B-D. Each of these proposed remedies will significantly harm the DNC's candidates, its members, and the voters who supported its candidates. Practically speaking, because the DNC and its members would otherwise lack an opportunity to prevent these "adverse" effects, this prong of the standard for intervention is satisfied. *Kane Cty.*, 928 F.3d at 891; *WildEarth Guardians*, 604 F.3d at 1199.

4. The DNC's interests are not adequately represented by Defendants.

Fourth, the named Defendants do not adequately represent the DNC's interests in this case. The Tenth Circuit has recently emphasized that the burden of meeting this factor is also "'minimal,' and 'it is enough to show that the representation "may be" inadequate.'" *Kane Cty.*, 928 F.3d at 892 (quoting *Nat. Res. Def. Council v. U.S. Nuclear Regulatory Comm'n*, 578 F.2d 1341, 1345 (10th Cir. 1978)); *see Trbovich v. United Mine Wkers.*, 404 U.S. 528, 538 n.10 (1972).

In fact, even if the interests of the proposed intervenor are "identical" to an existing party, it may nevertheless demonstrate a right to intervene—especially where the existing defendants are carrying out government duties. *WildEarth Guardians v. U.S. Forest Serv.*, 573 F.3d 992, 994–97 (allowing coal company to intervene over an environmental group's opposition, noting that even though intervenors and the Defendant United States "shared [an] objective," the United States may have "multiple objectives" that differ from ultimate "goals" of the intervening company); *Utah Association of Counties*, 255 F.3d at 1255–56 (granting environmental group intervention as of right in a suit challenging the legality of the creation of a national monument); *Kane Cty.*, 928 F.3d at 891 (affirming the reasoning of *WildEarth Guardians*, 573 F.3d 992, and *Utah Association of Counties*).

Here, the Secretary and the State Canvassing Board's stakes in this lawsuit are defined solely by their statutory duties to conduct elections. And the Electors' duties, as they relate to this lawsuit, are mandatory and likewise defined by federal and state law. *See* 3 U.S.C. §§ 1-11 (establishing procedures for the Electoral College); *see* N.M. Stat. § 1-15-5 ("Presidential electors for [New Mexico] shall perform the duties of the presidential electors required by law and the constitution of the United States."); *see id.* § 1-15-9 ("Any presidential elector who casts his ballot in violation of the provisions [requiring vote for party candidate] is guilty of a fourth degree felony."); *see generally id.* §§ 1-15-1–10 (establishing procedures and duties of New Mexico Presidential electors).

The DNC's interests, on the other hand, are to ensure that the votes for its candidates for President and Vice President remain effective and to protect its members from disenfranchisement. Even if all of these interests ultimately align and result in arguments supporting the preservation of Joe Biden and Kamala Harris's victory, the inquiry as to intervention focuses on the precise

goals and priorities of the existing parties and the proposed intervenor. *Kane Cty.*, 928 F.3d at 891. In this context, the DNC has met the "minimal" standard required for intervention. *Id.*, *see, e.g.*, *Issa*, 2020 WL 3074351, at *3 ("While Defendants' arguments turn on their inherent authority as state executives and their responsibility to properly administer election laws, the Proposed Intervenors are concerned with ensuring their party members and the voters they represent have the opportunity to vote in the upcoming federal election, advancing their overall electoral prospects, and allocating their limited resources to inform voters about the election procedures."). Accordingly, the DNC also satisfies the fourth and final prong of the standard for intervention as of right, and intervention should therefore be granted in this case.

B. The DNC is also entitled to permissive intervention.

If the Court does not grant intervention as a matter of right, the DNC respectfully requests that the Court exercise its discretion to allow it to intervene under Rule 24(b). The Court has broad discretion to grant a motion for permissive intervention when the Court determines that: (1) the proposed intervenor's claim or defense and the main action have a question of law or fact in common, and (2) the intervention will not unduly delay or prejudice the adjudication of the original parties' rights. *See* Fed. R. Civ. P. 24(b)(1)(B) and (b)(3); *City of Stilwell v. Ozarks Rural Elec. Coop.*, 79 F.3d 1038, 1043 (10th Cir.1996) ("[T]his standard is, aptly, 'permissive.'").

The DNC easily meets the requirements of permissive intervention. First, the DNC will inevitably raise common questions of law and fact, including whether the Campaign has standing, whether ballots cast in accordance with the Secretary's Guidance must be discarded, and whether, for instance, it is too late to enter the relief Plaintiff seeks. Second, for the reasons set forth in Section III-A, *supra*, the motion to intervene is timely and—given the early stage of this litigation—intervention will not unduly delay or prejudice the adjudication of the rights of the original parties. The DNC is prepared to proceed in accordance with the briefing schedule this

Court has ordered, and its intervention will only serve to contribute to the complete development of the factual and legal issues before the Court.

IV. CONCLUSION

For the reasons stated, the DNC is entitled to intervention as of right. In the alternative, it requests that the Court grant it permissive intervention.

Dated: December 22, 2020.

Respectfully submitted,

/s/ Paul Melendres
Paul Melendres #12399
Melissa Calderon #141511
MELENDRES & MELENDRES PC
1017 5th Street NW
Albuquerque, NM 87102
Telephone: (505) 243-8310
paul@melendreslaw.com
melissa@melendreslaw.com

Marc E. Elias*
Emily Brailey*
Jacob Shelly*
PERKINS COIE LLP
700 Thirteenth Street NW, Suite 800
Washington, DC 20005
Telephone: (202) 654-6200
MElias@perkinscoie.com
UNkwanta@perkinscoie.com
EBrailey@perkinscoie.com
JShelly@perkinscoie.com

Matthew P. Gordon*
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: (206) 359-8000
MGordon@perkinscoie.com

Torryn Taylor Rodgers*
PERKINS COIE LLP

505 Howard Street, Suite 1000
San Francisco, CA 94105
Telephone: (415) 344-7000
TRodgers@perkinscoie.com

Counsel for Proposed Intervenor-Defendants

**Pro Hac Vice Application Forthcoming*

CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

Dated: December 22, 2020.

Respectfully submitted,

/s/ Melissa Calderon
Melissa Calderon