IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

**STATE OF NEW MEXICO ex rel.
VILLAGE OF LOS LUNAS and
VILLAGE OF LOS LUNAS COUNCIL,**

Plaintiffs-Appellants,

v.

No. 33,903

**COUNTY OF VALENCIA; BOARD OF
VALENCIA COUNTY COMMISSIONERS;
CITY OF BELEN; and CITY OF BELEN
COUNCIL,**

Defendants-Appellees.

ANSWER BRIEF

APPEAL FROM THE DISTIRCT COURT OF VALENCIA COUNTY
VALERIE A. HULING, District Judge

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Statement of Compliance: I hereby certify that this brief complies With the provisions of NMRA 12-213.

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COME NOW Defendants-Appellees, County of Valencia and Board of Valencia County Commissioners ("County") and City of Belen and City of Belen Council ("City"), and jointly file this Answer Brief.

SUMMARY OF FACTS AND COURSE OF PROCEEDINGS

Plaintiffs Village of Los Lunas and Village of Los Lunas Council ("village") sued Valencia County and the City of Belen and their respective governing bodies for declaratory judgment, injunctive relief, and *quo warranto*. (RP 1-7). The complaint seeks to invalidate an agreement between the county and the city for the transfer of mill levy funds for operation of a hospital pursuant to the provisions of the Hospital Funding Act, NMSA 1978, §§ 4-48B-1 *et seq*. (RP 6). The agreement provides for the city to issue a request for proposals for a private hospital operator to build and operate a general hospital on city-owned land, and for the operator and the county to enter into a separate Health Care Facilities Contract pursuant to the act and under which the county would transfer mill levy funds to the operator. (RP 2). The agreement between the county and the operator is not at issue.

The village's complaint alleged that the agreement between the county and the city exceeded the county's authority under the act (RP 3), and that it was invalid due to the questioned residency of one county commissioner who voted in favor of the agreement (RP 3-4). The district court dismissed the complaint on the basis of the village's lack of standing, failure to state a claim upon which relief

could be granted, and failure to join an indispensable party, i.e., the county commissioner. (RP 183-84). The court found that the village had failed to allege an injury-in-fact and that the complaint did not involve a matter of great public importance that involved a clear threat to the essential nature of government. (RP 184). The village appeals the dismissal on the first two grounds, but has not appealed the dismissal of the complaint in *quo warranto*.

ARGUMENT AND AUTHORITIES

I. THE DISTRICT COURT DID NOT ERR IN FINDING THAT THE VILLAGE LACKS STANDING.

A question of standing presents a question of law which is reviewed de novo. *Protection and Advocacy System v. City of Albuquerque*, 2008-NMCA-149, ¶ 17, 145 N.M. 156.

The village's first point of error challenges the district court's finding that it lacked standing. The basis for the point of error, however, is not entirely clear. In the court below, the village argued that it had standing on two grounds: traditional standing based on direct injury to itself, and important-public interest. (RP 85-86). It based its argument for traditional standing on the allegation of the loss of a direct economic benefit to the village due to the mill levy funds being allocated elsewhere. (RP 86). It based its important-public interest argument on the alleged lack of qualifications of Commissioner Holliday. (RP 86-87).

On appeal, the village does not clearly differentiate these arguments. Instead, the village argues that it has standing in a representational capacity to vindicate the rights of village residents. In terms of traditional standing, the village appears to have abandoned its argument of direct economic benefit, and instead claims that village taxpayers have sustained direct injury due to the alleged misappropriation of tax dollars by the county commission. (BIC 7-11). In terms of important-public interest, the village argues for the interest of village residents regarding the qualifications of Commissioner Holliday. (BIC 12-13). In both cases, the village claims to have authority to represent the taxpayers and the residents based on the provisions of NMSA 1978, § 3-38-1. (BIC 7-10).

The village's argument thus essentially consists of three points: 1) representational authority; 2) direct injury by misappropriation of tax dollars; and 3) important-public interest based on the commissioner's qualifications. The city and the county will respond to each of these three arguments in order.

A. **Representational standing.** The village claims that it has the authority, in its capacity of a municipality, to represent the interests of the village's residents in pursuit of their individual interests. The argument is based entirely on the provisions of NMSA 1978, § 3-38-1(F), which the village cites repeatedly throughout its brief. (BIC at 7, 8, 9, 10).

The referenced statute is a part of the state municipal code, and is found specifically in the article defining the powers of a municipality. Section 3-18-1 contains the general grant of power to municipalities, providing in relevant part that : "A municipality is a body politic and corporate under the name and form of government selected by its qualified electors. A municipality may: A) sue or be sued; F) protect generally the property of its municipality and its inhabitants." *Id.* § 3-38-1(A) & (F). After noting the provisions of subsection (A) allowing the right to sue, the village claims that it can sue the county in order to protect the property of the village residents, that is, their tax dollars, pursuant to subsection (F). The village cites no authority for this claim other than the statute itself, and the city and the county are aware of no such authority. The city and the county submit that the village's interpretation of subsection (F) is in error, and that such an interpretation would be far beyond the scope of municipal authority.

The village makes a bare-bones assertion of representational authority under subsection (F). The city and the county have searched for cases that would suggest such authority, but have found none. On the contrary, governmental entities are generally found not to have such authority. *See State ex rel. Overton v. New Mexico State Tax Commission*, 1969-NMSC-140, ¶ 10, 81 N.M. 28, 31, 462 P.2d 613, 616 (1969) (county tax assessor lacks standing to represent interests of taxpayers); *Board of Commissioners v. Hubbell*, 1923-NMSC-060, ¶ 5, 28 N.M.

634, 216 P. 496, 497; (statutory authority of county commission to represent county in management of its affairs does not extend to representation of taxpayers); *Tadlock v. Smith*, 1934-NMSC-027, ¶¶ 8-9, 38 N.M. 288, 31 P.2d 708, 709 (1934) (plaintiff member of town board of trustees, taxpayer and elector, lacks standing to challenge appointment of election judges on behalf of those not appointed).

Likewise, cases interpreting the police power of municipalities and cases applying the doctrine of *parens patriae* similarly fail to provide support for the village's position. Section 3-18-1(F) expresses what is commonly known as the police power of a municipality. The statute "confer[s] a 'police power' upon municipalities to protect their inhabitants and preserve peace and order within the municipal limits." *City of Hobbs v. Biswell,* ¶ 7, 81 N.M. 778, 780, 473 P.2d 917, 919 (Ct. App. 1970) (authority of municipality to adopt ordinance regulating pawn brokers); *New Mexicans for Free Enterprise v. City of Santa Fe,* 2006-NMCA-007, ¶ 29, 138 N.M. 785, 126 P.3d 1149 (general police power delegated by legislature to municipalities). The village's attempt to expand this power into private property rights misconstrues the plain wording of the statute, which provides for protection of the inhabitants themselves. *Biswell* at ¶ 7 (police power to protect inhabitants and preserve peace); *see State v. Clark*, 80 N.M. 340, 343, 455 P.2d 844, 847 (1969) (doctrine of *reddendo singular singulis* applies words "to the subjects to

which they appear by context most properly to relate and to which they are most applicable").

The police power is exercised by way of regulation, generally through the municipality's authority to adopt ordinances addressing the general welfare. Biswell, 81 N.M. at 780, 473 P.2d at 919 (city has authority to adopt ordinances under general welfare power and police power); *see generally, e.g., ACLU of New Mexico v. City of Albuquerque*, 2006-NMCA-078, ¶ 12, 139 N.M. 761, 137 P.3d 1215 (municipal authority to adopt ordinances providing for safety, preserving health, promoting prosperity of municipality and its inhabitants); *Titus v. City of Albuquerque*, 2011-NMCA-038, ¶ 32, 149 N.M. 556, 252 P.3d 780 (city's authority to enact nuisance ordinance). The city and the county have found no examples of a municipality's police power being exercised by means of a lawsuit on behalf of resident taxpayers.

Similarly, the doctrine of *parens patriae* is unavailing. In *City of Albuquerque v. New Mexico Public Service Commission*, 1993-NMSC-021, 115 N.M. 521, 854 P.2d 348 (1993), the New Mexico Supreme Court defined the doctrine as follows:

> *Parens partiae* traditionally refers to the state's role as sovereign and guardian of persons under legal disability, such as juveniles or the insane. Black's Law Dictionary 1114 (6th ed. 1990). In modern times, it has become "a concept of standing utilized to protect those quasi-sovereign interests such as health, comfort and welfare of the people, interstate water rights, general economy of the state, etc."

Id. ¶ 19, fn. 8. The case involved the authority of the city to contract with utilities for rates and service on behalf of the city's inhabitants. The court found that the city could act in *parens patriae* based specifically on a provision of the Public Utility Act providing that authority. *Id.* ¶ 19 (section 62-6-15 providing authority to establish rates and service regulations by contract with utility); *Accord, City of Las Cruces v. New Mexico Public Regulation Commission*, 2014 WL 4494432, ¶ 9 (N.M. 2014) (section 62-10-1 provides specifically for municipal standing before commission).

The city and the county have found no cases which would extend the doctrine of *parens patriae* into a general authority by which a municipality could file lawsuits on behalf of its citizens' property rights. The cases limit that authority either to situations involving specific statutory representational provisions, such as is found in the Public Utility Act, or to the historical basis of guardianship of persons under disability. There simply are no cases that would extend the general police power of a municipality under section 3-18-1(F) into a broad representational authority for purposes of litigation. Indeed, such an extension might well be in direct opposition to the wishes of the property owners. The village states that the power found in section 3-18-1(F) "would amount to very little if Los Lunas could not bring suit to enjoin the misappropriation of tax money paid by its residents for the benefit of themselves and their municipality." (BIC at 8). By this

reasoning, the municipality would always have standing to challenge any appropriation of tax money by any taxing authority, for any purpose, regardless of whether the taxpayers were in favor or opposed to it. The village has cited absolutely no authority for such a proposition, and the city and the county have found none. Accordingly, the statute does not provide a basis for the village's argument of representational standing.

B. **Traditional Standing.** Traditional standing to challenge the legality of governmental action is based on an allegation of injury-in-fact to the plaintiff. *DeVargas Savings and Loan Ass'n. v. Campbell*, 87 N.M. 469, 473, 535 P.2d 1320, 1324 (1975). The plaintiff must satisfy three elements: 1) an injury in fact; 2) a causal relationship between the injury and the alleged conduct; and 3) a likelihood that the injury will be redressed by a favorable decision. *American Civil Liberties Union v. City of Albuquerque*, 2007-NMCA-092, ¶ 7, 142 N.M. 259, 164 P.3d 958, *affirmed*, 2008-NMSC-045, ¶ 10, 144 N.M. 471, 188 P.3d 122. Moreover, the injury-in-fact must be "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* ¶ 7. The Village's complaint fails on all of these elements.

In the district court, the village argued that it had suffered an injury-in-fact by loss of "the direct economic benefit that would flow to the Village if a hospital

in the Village received the mill levy funds." (RP 86). The city and the county provided a detailed response to this argument based on the speculative and hypothetical nature of the claim, and comparing the claim to the similar claim found insufficient in *ACLU.* (RP 95-96). The village has not brought this claim forward on appeal; the city and the county, accordingly, will simply reference the argument in the court below.

On appeal, the village does not identify any type of injury-in-fact. It claims only that it could sustain economic injury in its corporate capacity, but provides no explanation of what that injury is. Instead, the village simply cites to two cases: *Morningstar Water Users Ass'n., Inc. v. Farmington Mun. School Dist. No. 5*, 1995-NMSC-058, 120 N.M. 307, 901 P.2d 725, and *Town of Mesilla v. City of Las Cruces*, 1995-NMCA-058, 120 N.M. 69, 898 P.2d 121.

Morningstar is not a standing case. It involved exemptions for governmental entities from the requirements of the state procurement code, with the court holding that the municipality was considered a governmental entity in its operation of a water utility. *Morningstar* at ¶ 37 (court reviews history and rejects governmental-proprietary distinctions). The case neither discusses nor implies any aspect of standing based on injury-in-fact.

The village cites *Mesilla* as recognizing standing based on the prospect of economic injury, but the village still fails to identify any such injury. The case is

not on point. *Mesilla* was a zoning case that involved an administrative appeal by way of writ of certiorari by one town from a decision by the zoning authority of an adjacent municipality. At issue was the zoning statute's express provision for appellate review for "aggrieved persons." The court simply determined that the town could be an aggrieved person within the meaning of the statute. *Mesilla*, 120 N.M. at 71-72, 898 P.2d at 123-24. The case is limited to the specific statutory zoning provisions at issue, and does not stand for the proposition that any allegation of economic damage by a municipality will establish standing to challenge any action of another governmental entity.

The only other allegation by the village of injury-in-fact is that the mill levy tax money paid by the taxpayers was "for the benefit of themselves and their municipality." (BIC at 7, 11). The village does not explain how the tax money is for the benefit of the municipality, and it cites no authority. The mill levy money, in fact, has nothing to do with the village. The tax is authorized by the Hospital Funding Act, which specifies that the mill levy is imposed by the county, not the municipality, and is voted on by the voters of the county. NMSA 1978, §§4-48B-12 and 4-48B-15. The distribution of the mill levy money by the county is restricted to county and contracting hospitals. § 4-48B-12(E). The act contains no provision for a municipality either to impose or receive the mill levy money. The

village does not have a claim to the mill levy money "for the benefit of the municipality" as it alleges.

The village has thus failed to allege any injury-in-fact to itself, and has only attempted to bootstrap itself to the alleged injury to taxpayers. The village never even reaches the elements of causation and redressability. The claim of economic injury made in the court below has been abandoned, and would be fail in any event, as found by the district court, as being conjectural or hypothetical, and not concrete, particularized, actual or imminent.

C. Great Public Importance Standing.

The village claims standing as a matter of great public importance, citing to *ACLU*. The court there identified such standing, stating that "It is clear that this Court can confer standing and reach the merits of a case regardless of whether a plaintiff meets the traditional requirements, based on a conclusion that the questions raised involve matters of great public importance." *ACLU v. City of Albuquerque*, ¶ 33, 2008-NM-045, 144 N.M. 471, 188 P.3d 1222. The village claims that the allegation regarding the qualifications of Commissioner Holliday is a matter of great public importance. Respectfully, the city and county will show that the doctrine is not to be applied in this type of situation.

The court's opinion in *ACLU* specifically identified the great-public-importance doctrine as involving "clear threats to the essential nature of state

government guaranteed to New Mexico citizens under their Constitution—a government in which the three distinct departments, . . . legislative, executive and judicial remain within the bounds of their constitutional powers." *Id.* ¶ 33, *quoting*, *State ex rel. Coll v. Johnson*, 1999-NMSC-036, ¶ 21, 128 N.M. 154, 990 P.2d 1277. The issue in *ACLU* was a due process issue in which the ACLU and its president challenged the constitutionality of Albuquerque's vehicle-forfeiture ordinance. The court denied standing, finding that not even this type of constitutional challenge rose to the level of a clear threat to the essential nature of government. *ACLU* at ¶ 34. Moreover, in *Coll*, reviewing the application of the doctrine, the court emphasized the separation-of-powers aspect of the matter, with most cases involving usurpation by one branch of government of the powers of another. *Coll* at ¶ 21. In addition, the court noted in *ACLU* that generally, although not always, the great-public-importance cases arise in the context of the court's original mandamus jurisdiction. *ACLU* at ¶ 33.

The current case involves none of these principles or procedures. It involves, instead, the qualifications of a given county commissioner in the context of a single action by the commission. The village cites to various authorities, mostly involving voting, to support its claim that the qualifications of the commissioner rise to the level of great public importance. Upon examination, it is seen that the cases either do not involve standing, or that the principles are not applicable.

The village initially cites *Baca v. N.M. Dep't. of Pub. Safety*, 2002-NMSC-017, 132 N.M. 282, 47 P.3d 441 and *Piedra, Inc. v. New Mexico Transportation Comm'n.*, 2008-NMCA-089, 188 P.3d 106. Neither case is on point. The *Baca* case invoked the supreme court's original mandamus jurisdiction to challenge the constitutionality of the recently enacted Concealed Handgun Carry Act. Noting the statewide application of the act, the constitutional issues involved and its own original mandamus jurisdiction to address fundamental constitutional questions, the court granted standing as a matter of great public importance. *Baca* at ¶¶ 3-4. The current case is not a mandamus case, is not a constitutional case, and does not have statewide application.

The *Piedra* case was a mandamus case in district court challenging the authority of the state transportation commission to vacate and abandon roads under a particular statutory provision. The court specifically declined to reach the standing issue and simply assumed that standing existed so as to decide the case on the merits. *Piedra* at ¶ 44. While taking note of the great-public-importance doctrine, the court expressed doubt as to its applicability, stating that the plaintiff would have a "rough row to hoe" in establishing standing under that doctrine. *Piedra* at ¶ 45.

The village cites two voting-rights cases in support of its claim of great-public-importance standing: *State ex rel. League of Women Voters v.*

Herrera, 2009-NMSC-003, 145 N.M. 563, and *Gunaji v. Macias*, 2001-NMSC-028, 130 N.M. 734. Each of these cases involved the right of suffrage found in the state constitution, Article II, Section 8, which provides for free and open elections and the free exercise of the right of suffrage. The *League of Women Voters* case was a pre-election mandamus action against the secretary of state involving the manner to be used for counting votes in the election. Noting the "paramount importance" of the right to vote, the supreme court granted standing to the League, finding that "[d]etermining the validity of individual votes . . . [and] establishing clear rules, prior to election day, for establishing how such validity is to be established" were matters of great public importance. *League* at ¶ 11; *see also Wilson v. Denver*, 125 N.M. 308, 317-18, 961 P.2d 153, 162-63 (1998) (right of suffrage is fundamental matter in a free and democratic society).

Gunaji involved errors on the ballots that resulted in a miscounting of votes. The nature of the suit was an election challenge by the unsuccessful candidates. *Gunaji* at ¶¶ 18-20. While the court did accord standing to the candidates on behalf of the voters, that standing was based specifically on the infringement of the underlying constitutional rights of the voters. *Gunaji* at ¶ 20. Moreover, the court also found injury-in-fact—the emoluments of office—to the contestants. *Gunaji* at ¶ 20;

Both *League* and *Gunaji* directly involved the right of suffrage guaranteed by Article II, Section 8 and the great public importance concerned the infringement of those rights. The current case does not involve the right to vote. There has been no allegation that anybody has been denied that right or that the action of the county commission impacts the provisions of Article II, Section 8. Instead, the village has attempted to transfer the constitutional provision into a right to challenge the post-election qualifications of a county official who, in fact, was duly elected with no allegations of any voter being denied the right of suffrage and without the election itself being involved in any way. The village conflates the two issues, stating that the county commissioner's qualifications following election are just as fundamental to the right to vote as installation of an officer not elected by the people in the first place. (BIC at 12). Neither of the cited cases states this or implies it in any way. The only authority that the village cites is *League*, which did not involve the qualifications of any elected official but rather involved the manner of counting votes. There is no authority cited and the city and the county are aware of no authority that would convert the current complaint of the village into a constitutional denial of suffrage. This case involves the village's requests for declaratory judgment and injunctive relief against the performance of a contract. The requested relief has nothing whatever to do with the right to vote, and no voter's rights would be affected one way or the other upon the granting or denial of

such relief. The voting-rights cases, by contrast, deal specifically with the infringement of those rights and the resulting impact on the election.

The current case involves the validity of a single contract, based on the vote of a single county commissioner at a single point in time. It is a matter solely of local interest; it does not impact the constitutional right of suffrage in any way; and it does not threaten the essential nature of government or the separation of powers. It is hard to imagine a situation farther removed from the principles of the great-public-importance doctrine. This court, accordingly, should affirm the district court's denial of standing based on that doctrine.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT THIS CASE PRESENTS NO ACTUAL CONTROVERSY.

The district court's dismissal of a declaratory judgment action is reviewable for an abuse of discretion. Allstate Ins. Co. v. Fireman's Ins. Co., 1966-NMSC-120, ¶ 9, 76 N.M. 430, 433-34, 415 P.2d 553, 555 (1966).

Under this point, the village is largely extending the argument made under issue number one above, regarding the qualifications of county commissioner Holliday and the claimed public importance thereof. An actual controversy between the village itself and the county or city has not, however, been shown.

The declaratory judgment statute provides that the district court "shall have power to declare rights, status and other legal relations" in cases of "actual

controversy." NMSA 1978, § 44-6-2. The controversy must be real and adverse, involving the rights or other legal relations of the parties. *Sanchez v. City of Santa Fe*, 82 N.M. 322, 324, 481 P.2d 401, 403 (1971). There is no such showing involving the village in this case.

The village first claims that an actual controversy exists "in cases implicating the right of democratic self-government although such cases might otherwise be moot." (BIC at 15). It cites *Cobb v. State Canvassing Bd.*, 2006-NMSC-034, 140 N.M. 77, 140 P.3d 498, and *Gunaji v. Macias*, 2001-NMSC-028, 130 N.M. 734, 31 P.3d 1008. Neither of these cases, however, addressed an issue of actual controversy, but instead concerned mootness principles. *Cobb* at ¶¶ 22-28; *Gunaji* at ¶¶ 9-11. The issue in the current case is the question of actual controversy, not mootness.

The village next states that the actual controversy is a matter of challenging the contract between the county and the city, and that the village has authority to do so under section 3-18-1(F) of the municipal code. (BIC at 16). This claim of "representational authority" is discussed and refuted in point I(A) above, and the city and county would respectfully refer the Court to that discussion. As a matter of contract law itself, the courts have long held that privity-of-contract is an essential element of standing in a contract action. *Staley v. New*, 56 N.M. 756, 758, 250 P.2d 893, 894 (1952). The village is not a party to the subject contract. In the absence of

a valid cause of action under substantive law, "there can be no recourse to declaratory judgment procedure to reach the desired end." *American Linen Supply v. City of Las Cruces*, 73 N.M. 30, 32, 385 P.2d 359, 360 (1963).

Third, citing *Johnson v. Lally*, 1994-NMCA-135, 118 N.M. 795, the village states that "the controversy between the parties is ongoing" in that the taxpayers will continue to be subject to the allegedly impermissible uses of the tax money. (BIC at 16). *Johnson*, however, was a 1983 action based on prosecutorial misconduct that was barred by immunity. The court only held that the past conduct would have to have continuing consequences in order to support a declaratory judgment action. *Id.* ¶¶ 11, 16-17. The present case does not involve any such past conduct, and the village is merely attempting to bootstrap itself into an actual controversy by alleging continuing consequences. *Johnson* does not support this attempt.

Fourth, citing again to *Cobb* and *Gunaji*, the village claims that the matter is one of substantial public interest in the right of representative government for the citizens. (BIC at 17). The city and the county would, again, refer the Court to the discussion of the important-public-interest doctrine under point I(C) above, and would add that the doctrine addresses standing, not justiciability. *See State ex rel. Coll v. Johnson*, 1999-NMSC-036, ¶ 24, 128 N.M. 154, 990 P.2d 1277 (traditional standards of justiciability not present in political decisions); *Forest Guardians v.*

Powell, 2001-NMCA-028, ¶ 23, 130 N.M. 368, 24 P.3d 803 (unsupported invocation of public interest doctrine cannot overcome traditional standards of justiciability).

Finally, the village states that a declaratory judgment action is an apt means of resolving disputes between governmental subdivisions. (BIC at 17). The problem is that the village has not identified such a dispute. The county and the village are separate political subdivisions of the state that exercise separate powers. *Compare* NMSA 1978, § 3-18-1 (municipal powers) *with Id.* § 4-37-1 (county powers); *see City of Albuquerque v. New Mexico Public Regulation Commission*, 2003-NMSC-028, ¶ 3, 134 N.M. 472, 79 P.3d 297 (municipality and county are political subdivisions of state, deriving powers from legislature). The county's taxing authority under the Hospital Funding Act is an authority reserved exclusively to the county in which a municipality has neither any authority nor any interest. NMSA 1978, § 4-48B-12. Each of the village's cited cases under this argument concerns the actual authority of the governmental entities involved, and are therefore not on point.

Declaratory judgment is committed to the sound discretion of the trial court and is reviewed for abuse of discretion. The court in this case found no injury-in-fact to the village, no actual controversy, and no basis under the important-public-

interest doctrine. The court was correct in each of these determinations, and certainly did not abuse its discretion in the determinations.

CONCLUSION

For the foregoing reasons, Defendant-Appellees City of Belen and County of Valencia request that this Court affirm the dismissal by the district court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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