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 COMMISIONERS;
CITY OF BELEN; and CITY OF BELEN COUNCIL,

Defendants-Appellees.

REPLY BRIEF

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

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Statement of Compliance: I certify in accordance with Rule 12-213 NMRA and Miscellaneous Order No. 1-46 that this brief is proportionally spaced, that its body contains 2,916 words, and that it was prepared using Microsoft Word 2010.

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ARGUMENT

I. THE DISTRICT COURT ERRED IN RULING THAT LOS LUNAS LACKS STANDING

Defendants do not contest the allegations of Los Lunas's complaint for purposes of this appeal, as those allegations are to be accepted as true in reviewing the district court's dismissal of the complaint for lack of standing. *Protection & Advocacy Sys. v. City of Albuquerque*, 2008-NMCA-149, ¶ 17, 145 N.M. 156 ("Whether a part has standing to bring a claim is a question of law which we review de novo. . . . [W]e accept as true all material allegations in the complaint . . . and construe them in favor of Plaintiffs.").

Thus, it should be accepted as true for present purposes that Valencia County acted unlawfully in approving its contract with Belen in that Donald Holliday, the individual who cast the deciding vote to approve the contract, was not qualified to hold office as a county commissioner or vote on behalf of the County's residents because he did not reside in Valencia County. **[RP 2-5 (¶¶ 13, 23-26, 34-36)]**; *see* NMSA 1978, § 4-38-3 (2002). It should be accepted as true that the contract between Valencia County and Belen is unlawful for the further reasons that it is unauthorized by statute and that it impermissibly delegates the County's power to contract to Belen. **[RP 3-6 (¶¶ 14-22, 30-33, 40-43)]**; *see* NMSA 1978, § 4-38-1 (1876). And it should be accepted as true that the citizens of

Los Lunas will be subjected to having their tax monies committed to an unauthorized third party as a result of the unlawful contract. **[RP 6 (¶¶ 41-43)]**.

Defendants argue that Los Lunas does not have standing to complain of the unlawful contract, or of Valencia County's unlawful action in approving it. They argue that Los Lunas cannot bring suit to protect the property of its municipality and its inhabitants. **[AB 3-8]**. They argue that Los Lunas has failed to satisfy the elements of traditional standing. **[AB 8-11]**. And they argue that this case present no question of great public importance, but is "a matter solely of local interest" with no effect on anyone's right of suffrage. **[AB 11-16]**. Defendants' arguments should be rejected.

A. Standing Under Section 3-18-1

Los Lunas has statutory authority to bring this action under NMSA 1978, Section 3-18-1 (1972). Defendants acknowledge that Los Lunas has the authority to "'sue or be sued,'" and that it has the authority to "'protect generally the property of its municipality and its inhabitants.'" **[AB 4]** (quoting §§ 3-18-1(A), (F)). They argue, however, that Los Lunas cannot do both—that it cannot bring suit to protect the property of its municipality and its inhabitants. **[AB 4-8]**. They reason that a municipality's power to protect "the property of its municipality and its inhabitants" is a police power which provides for protection of "the inhabitants themselves" but not of their property, and, further, that such a power cannot be

exercised "by means of a lawsuit," but only "by way of regulation, generally through the municipality's authority to adopt ordinances addressing the general welfare." **[AB 5-6]**.

Defendants' argument is at odds both with the plain language of Section 3-18-1 and with common sense. *See Fowler v. Vista Care*, 2014-NMSC-019, ¶ 7, 329 P.3d 630 (recognizing that to discern legislative intent, court looks first to statute's plain language and will not read that language in a way that is absurd or unreasonable). If, as Defendants maintain, a municipality could protect the *persons* of its inhabitants but not their *property* **[AB 5]**, huge swaths of municipal regulation and activity would be invalid, including zoning and other land use regulations, building codes, business and licensing codes, traffic codes, and economic and community development regulations, all of which serve above all to protect municipal inhabitants' interests in property. *See, e.g., New Mexicans for Free Enter. v. City of Santa Fe*, 2006-NMCA-007, ¶¶ 29-30, 138 N.M. 785 (recognizing that municipality's authority to protect property of its municipality and its inhabitants under Section 3-18-1(F) includes authority to set minimum wage for its inhabitants).

Nor is there anything in the language of Section 3-18-1 which would limit a municipality to adopting ordinances as the means to exercise its powers. **[AB 6]**. A municipality plainly does have the power to legislate through ordinances, NMSA

1978, § 3-17-1 (1993), but legislating is the only permissible way to exercise its powers. Our Supreme Court has recognized, in particular, that a municipality has standing to bring suit to enforce its police power. *City of Santa Rosa v. Jaramillo*, 1973-NMSC-119, ¶¶ 5-6, 85 N.M. 747 (holding that City of Santa Rosa had standing to bring suit to challenge transfer of liquor license which affected "the municipality and all its citizens") (citation and internal quotation marks omitted); *City of Albuquerque v. Burrell*, 1958-NMSC-070, ¶¶ 6, 8-9, 64 N.M. 204 (holding that City of Albuquerque had standing to bring suit to enjoin state labor commissioner from imposing minimum wage rates in public contracts).

The cases cited by Defendants do not hold otherwise, as none of them addresses a municipality's authority under Section 3-18-1 and none even involved an action by a municipality. *See State ex rel. Overton v. N.M. State Tax Comm'n*, 1969-NMSC-140, ¶ 10, 81 N.M. 28 (holding that county assessor lacked standing to represent interests of taxpayers or veterans); *Tadlock v. Smith*, 1934-NMSC-027, ¶¶ 1, 8-9, 38 N.M. 288 (per curiam) (holding that single member of village board of trustees lacked standing to represent third parties in challenge election officials' appointments); *Bd. of Comm'rs v. Hubbell*, 1923-NMSC-060, ¶ 5, 28 N.M. 634 (holding that county commissioners lacked standing to compel county assessor to reduce tax assessments that "did not injuriously affect the rights or interests of the county, but on the contrary would result in its financial gain").

Defendants argue that Los Lunas has not met the elements of traditional standing. **[AB 8-11]**. Yet they do not take issue with, or even mention, the settled right of Los Lunas taxpayers to bring suit against local governments to challenge the misappropriation of tax monies. **[BIC 8-9]** (citing *Shipley v. Smith*, 1940-NMSC-074, ¶¶ 1-3, 9, 45 N.M. 23; *Ward v. City of Roswell*, 1929-NMSC-074, ¶¶ 1, 6, 34 N.M. 326; *Asplund v. Hannett*, 1926-NMSC-040, ¶¶ 16, 50-52, 31 N.M. 641). Los Lunas has explained that it has a direct interest in exercising its statutory authority to protect its inhabitants' property interests, that it is working against the impairment of their right to self-government through their elected representatives, and that its citizens' organization into a body of plaintiffs would not be as feasible or effective as allowing Los Lunas to represent their interests. **[BIC 10-11]** (citing *Gunaji v. Macias*, 2001-NMSC-028, ¶ 20, 130 N.M. 734).

Defendants attempt to distinguish *Gunaji* on the ground that the plaintiffs' standing in that case "was based specifically on the infringement of the underlying constitutional rights of the voters." **[AB 14]**. But they overlook the fact that Los Lunas too specifically seeks redress for an infringement of its citizens' constitutional rights. Its citizens have the constitutional right to representation by county commissioners who reside in Valencia County. N.M. Const. art. X, § 7. Los Lunas alleges on infringement of that right. **[RP 2-5 (¶¶ 13, 23-26, 34-36)]**. The requirements for standing therefore are met. *See Gunaji*, 2001-NMSC-028, ¶ 20.

B. Standing to Raise a Question of Great Public Importance

Even apart from the question of whether traditional elements of standing are satisfied, Los Lunas has argued that it has standing based on the great public importance of the question presented. **[BIC 12-13]**. Defendants acknowledge that standing in cases of great public importance is not restricted to the Supreme Court's mandamus jurisdiction. **[AB 12]**; *see ACLU v. City of Albuquerque*, 2008-NMSC-045, ¶ 33, 144 N.M. 471 (recognizing that standing has been conferred in non-mandamus cases). They appear to acknowledge as well that such standing is not limited to separation-of-powers challenges, but is properly conferred in cases implicating the right of citizens to govern themselves through their elected representatives. **[AB 12-15]**; *see ACLU*, 2008-NMSC-045, ¶¶ 33-34 (recognizing public importance of questions arising in election cases and cases implicating "the state's definition of itself as a sovereign").

Defendants argue, however, that this "is not a constitutional case." **[AB 13]**. They argue that Donald Holliday's deciding vote to approve the contract when he was unqualified to represent Valencia County's citizens was "a matter solely of local interest." **[AB 16]**. They say that a governmental failure to represent its citizens "does not impact the constitutional right of suffrage in any way" and "does not threaten the essential nature of government." **[*Id.*]**.

Defendants' argument fails at the outset because it begins with the mistaken premise that this is not a constitutional case. **[AB 13]**. As explained in the Brief in Chief **[BIC 12-13]** and as elaborated below, this case hinges on the New Mexico Constitution's express requirement that a county commissioner shall reside in the district in which he or she was elected in order to act as a proper representative of the citizens of that district. N.M. Const. art. X, § 7; *see* **[RP 2-5 (¶¶ 13, 23-26, 34-36)]**. Defendants overlook the application of that constitutional requirement in this case, as well as the principle of representative government that it implicates.

Defendants' effort to depict this case as a matter solely of local interest is equally unpersuasive. By their reasoning, *Gunaji* was a matter solely of local interest, as it involved a single malfunctioning voting machine at a single precinct affecting no more than 66 votes cast in two local elections. *Gunaji*, 2001-NMSC-028, ¶¶ 2-4. The same could be said of *Wilson v. Denver*, 1998-NMSC-016, 125 N.M. 308, another case cited by Defendants **[AB 14]**, in that it concerned the membership of a ditch association in the small community of Lama, New Mexico. *Id.* ¶¶ 2-5. These cases undoubtedly were of local interest, but they also presented questions of broader significance because they put into issue the right of New Mexico citizens to govern themselves through democratically elected representatives. *Gunaji*, 2001-NMSC-028, ¶ 20 (holding that election contestants had standing to assert rights of third parties because, *inter alia*, they were "working

against the impairment of the rights of voters"); *Wilson*, 1998-NMSC-016, ¶ 30 ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society.") (citation and internal quotation marks omitted). In short, no case implicating the right of New Mexico citizens to representative government is "a matter solely of local interest" **[AB 16]**. *See State ex rel. League of Women Voters v. Herrera*, 2009-NMSC-003, ¶ 11, 145 N.M. 563 ("Determining the validity of individual votes is of unquestionable importance.").

Defendants argue that *League of Women Voters* and *Gunaji* are distinguishable on the ground that they "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." **[AB 14-15]**. Defendants are mistaken in both a literal sense and a more fundamental sense. Literally speaking, *League of Women Voters* did not involve Article II, Section 8. The Supreme Court did not apply or even mention Article II, Section 8, but more broadly addressed the right to choose one's representatives as "the fundamental transaction which sustains our representative democracy." *League of Women Voters*, 2009-NMSC-003, ¶ 9.

More fundamentally, Defendants fail to recognize that the principle of representative democracy is implicated as much here as it was in *League of Women Voters* and *Gunaji*. Whether a county commissioner properly represents the voters

of a district is the "flip side" of whether the district's voters properly choose their representative. *Klumker v. Van Allred*, 1991-NMSC-045, ¶ 9, 112 N.M. 42. On both sides of the coin, our Constitution imposes a residency requirement. Voting in a county and precinct is limited to residents of the county and precinct. N.M. Const. art. VII, § 1; *see Kiehne v. Atwood*, 1979-NMSC-098, ¶¶ 18-23, 93 N.M. 657. Service as a county commissioner in a county and district is limited to residents of the county and district. N.M. Const. art. VII, § 2(A), art. V, § 13, art. X, § 7; *see Apodaca v. Chavez*, 1990-NMSC-028, ¶ 8, 109 N.M. 610. The reason for the residency requirement is precisely to ensure that a county commissioner is representative of the voters in his or her district: "Requiring candidates to be residents of the district from which they seek election 'insure[s] that each elected commissioner has knowledge of the problems and the needs of the district from which he is elected.'" *Velasquez v. Chavez*, 1984-NMSC-109, ¶ 8, 102 N.M. 54 (quoting *State ex rel. Rudolph v. Lujan*, 1973-NMSC-077, ¶ 6, 85 N.M. 378).

Defendants are therefore mistaken that the infringement of representative government alleged in this case "does not impact the constitutional right of suffrage in any way." **[AB 16]**. The right of the people to govern themselves does not end when the polls close. To the contrary, as the Constitution expressly provides, the residency requirement for a county commissioner continues throughout his or term of office: A change of residency at any time to a place

outside the county commissioner's district "shall *automatically terminate* the service of that commissioner and the office shall be declared vacant." N.M. Const. art. X, § 7 (emphasis added).

If "the right to vote is of paramount importance," *League of Women Voters*, 2009-NMSC-003, ¶ 8, then it must amount to more than marking ovals on a ballot. It must amount to a meaningful choice of the public officers who are to act on the voters' behalf throughout their term of office. When a government body ceases to act through the voters' qualified representatives, it reneges on "the fundamental transaction which sustains our representative democracy." *Id.* ¶ 9. A government that reneges on that fundamental transaction puts into question "the state's definition of itself as a sovereign" and poses a threat to "the essential nature of state government guaranteed to New Mexico citizens under their Constitution." *ACLU*, 2008-NMSC-045, ¶¶ 33-34. Los Lunas has standing to seek redress for the breakdown of representative government alleged in this case.

II. THE DISTRICT COURT ERRED IN RULING THAT THIS CASE PRESENTS NO ACTUAL CONTROVERSY

Los Lunas has argued that, for the same basic reasons that it has standing to bring this action, it has alleged a case of "actual controversy" for purposes of the Declaratory Judgment Act. **[BIC 14-18]**. The inquiry is essentially the same because a court should consider prudential rules of judicial self-governance "like standing, ripeness, and mootness" in determining whether a case presents an actual

controversy. *New Energy Econ., Inc. v. Shoobridge*, 2010-NMSC-049, ¶¶ 16-17, 149 N.M. 42 (per curiam). Indeed, the district court in this case, in its order dismissing Los Lunas's complaint, made no separate determination that Los Lunas had not alleged a case of actual controversy, but simply ruled that it lacks standing. **[RP 183-84]**. For the reasons stated in Point I above, the ruling that Los Lunas lacks standing was error.

Defendants evidently agree that whether an actual controversy exists in this case is determined by whether Los Lunas has standing: In arguing that there is no actual controversy, Defendants largely refer back to their arguments on standing. **[AB 16-20]**. In particular, they refer to point I(A) of the Answer Brief in regard to whether Los Lunas has standing under Section 3-18-1, and point I(C) in regard to whether it has standing based on a question of great public importance. **[AB 17-18]**. Defendants' arguments should be rejected for the reasons stated in Point I of this brief.

Defendants argue that the decisions in *Cobb v. State Canvassing Bd.*, 2006-NMSC-034, 140 N.M. 77, and *Gunaji*, 2001-NMSC-028, address mootness principles rather than an issue of actual controversy, and that "[t]he issue in the current case is the question of actual controversy, not mootness." **[AB 17]**. It is true that there is no claim of mootness in this case. The only prudential consideration at issue is standing. *See New Energy Econ.*, 2010-NMSC-049, ¶¶ 16-17. The

significance of *Cobb* and *Gunaji*, however, is that they demonstrate that a court may properly decide issues of substantial public interest independent of whether traditional prudential considerations are satisfied. *Cobb*, 2006-NMSC-034, ¶¶ 23, 28; *Gunaji*, 2001-NMSC-028, ¶ 10; *accord ACLU*, 2008-NMSC-045, ¶ 9 ("[T]his Court has exercised its discretion to confer standing and reach the merits in cases where the traditional standing requirements were not met due to the public importance of the issues involved.").

Defendants also say that the public importance of a citizen's right to representative government "addresses standing, not justiciability." **[AB 18]**. Defendants fail to develop the contention, so it is unclear whether they are implying that some other issue of "justiciability" prevents Los Lunas from alleging an actual controversy. *See* **[AB 18-19]**. At any rate, because Defendant's argument, if any, is wholly undeveloped, the short answer is that this Court "will not review unclear arguments, or guess at what [Defendants'] arguments might be." *Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339.

The complaint poses the important question of whether Los Lunas's citizens will have their tax monies appropriated by a government body that does not represent them. That question presents an actual controversy between the parties and Los Lunas has standing to raise it.

CONCLUSION

The district court's order of dismissal should be reversed, and the case should be remanded to the district court for further proceedings on Los Lunas's claims for declaratory and injunctive relief.

Respectfully submitted,

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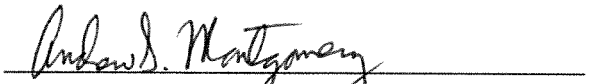

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I certify that on February 19, 2015, I caused true and correct copies of this *Reply Brief* to be served by first-class United States mail, postage prepaid, on the following:

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