

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

CIVIL NO. 1:14-cv-1025 RB/SMV

CITY OF ALBUQUERQUE,

Defendant.

**MOTION TO INTERVENE
ON BEHALF OF PEOPLE WHO HAVE MENTAL DISABILITIES, WHO
EXPERIENCE HOMELESSNESS AND WHO ARE NATIVE AMERICAN,
WHO HAVE ENCOUNTERS WITH THE ALBUQUERQUE POLICE DEPARTMENT**

Disability Rights New Mexico, the American Civil Liberties Union of New Mexico, and the Native American Voters Alliance Education Project, groups that represent the interests of people with mental disabilities, who experience homelessness and who are Native American who have encounters with City of Albuquerque (“City”) police officers move the Court for an order permitting them to intervene as Plaintiff-Intervenors in the instant matter, pursuant to Federal Rule of Civil Procedure 24. Proposed Plaintiff-Intervenors are New Mexico organizations which serve: 1) people with mental illness, developmental disabilities; 2) people experiencing homelessness; 3) people who are Native American; and 4) those dedicated to protecting citizens in Albuquerque from deprivation of their constitutional rights and police abuse.

Proposed Plaintiff-Intervenors contacted the other parties to this litigation to determine if they opposed this motion to intervene. Counsel for United States said that they could neither oppose nor approve of this motion to intervene at this time. Counsel for the City opposes this

motion. We contacted counsel for the Police Officers Association seeking their position, but have not received an answer as of the time of this filing.

Proposed Plaintiff-Intervenors have attached their proposed Complaint in Intervention as Exhibit A to this motion.

As grounds for this motion, proposed Intervenors state as follows:

BACKGROUND

In its complaint, the United States has sued the City of Albuquerque, pursuant to 42 U.S.C. § 14141, alleging that the City engages in a pattern or practice of its police officers depriving people of their constitutional rights by: 1) using force when force is unnecessary; and 2) using excessive force. Proposed Intervenors represent the interests of those very people whose constitutional rights are being violated by the City's police officers and therefore, Plaintiff-Intervenors' causes of action against the City present common questions of law and of fact with the action currently before this Court. This intervention is necessary and appropriate because: 1) the Plaintiff is not representing the interests of the proposed Intervenors with respect to a number of the City's violations of their members' and constituents' constitutional rights; 2) a number of violations of the proposed Intervenors' members' and constituents' constitutional rights by the City's police officers officials will not be addressed much less remedied by the remedies proposed by the Plaintiff; and 3) certain remedies that the Plaintiff has urged this Court to adopt would, if adopted, actually harm the interests of the proposed Intervenors members and constituents.

Proposed Intervenors urge the Court to grant them permissive intervention pursuant to Fed. R. Civ. P. 24(b), which states, in pertinent part, that “[o]n timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a

common question of law or fact.” Fed. R. Civ. P. 24(b)(1)(B). For the reasons set forth below, Intervenor request that the Court exercise its discretion and permit Intervenor to join this action as Plaintiff Intervenor.

1. Proposed Plaintiff Intervenor Organizations Have Important Interests In The Outcome Of This Litigation

Disability Rights New Mexico (“DRNM”) is a private, non-profit organization whose mission is to protect, promote and expand the rights of persons with disabilities. DRNM is the designated Protection and Advocacy System for New Mexico, and has authority under federal law to pursue legal, administrative and other remedies on behalf of persons with disabilities. Additionally, Congress has specifically given DRNM both the responsibility and the authorization to initiate legal action designed to protect the rights of persons with mental illness, developmental disabilities and other disabilities as the designated Protection and Advocacy System for the state of New Mexico 42 U.S.C. §§10801, 42 U.S.C. §§ 15001, 29 U.S.C. § 794e, DRNM has been accepted by a number of courts as a proper organizational plaintiff on behalf of people with disabilities. In its work, DRNM at times provides services to people who are homeless. It has also taken a leading role in advocating for police reform in Albuquerque.

The mission of the ACLU New Mexico is to maintain and advance the cause of civil liberties, civil rights and constitutional freedom in the state. The ACLU has also been a leader in advocating for police reform in Albuquerque. Additionally, the ACLU has members who are homeless and has been a proponent of the rights of the homeless community by filing a successful lawsuit challenging an ordinance restricting panhandling in Albuquerque in 2004 and advocating against similar panhandling ordinances in Santa Fe (2012) and Taos (2014).

The Native American Voters Alliance Education Project organizes Native American people to take action to improve the quality of life for our communities and to protect the

continuity of Native American cultures. This organization promotes social and economic justice strategies that advance healthy and sustainable communities for Native families living in New Mexico.

Each of the proposed Intervenors has been working with its members, its constituents and with other community organizations in recent years to reduce the incidence of unnecessary uses of force and excessive force used by Albuquerque police officials against their members and the constituency groups the proposed Intervenors represent.

The proposed Intervenors need not establish standing to be granted permissive intervention. In *San Juan County v. United States*, 420 F.3d 1197, 1206 (10th Cir. Utah 2005), the Tenth Circuit held “a party seeking to permissive intervene need not first establish its standing.”¹

Following the *San Juan County* court, this Court explained on February 19, 2015, when granting intervention to the Albuquerque Police Officers’ Association:

Some courts have ruled that, in addition to satisfying the requirements of Rule 24(a), an intervenor must have standing. *See, e.g., In re Endangered Species Act Section 4 Deadline Litigation*, 704 F.3d 972 (D.C. Cir. 2013). However, the Tenth Circuit has no such requirement. *San Juan Cnty.*, 503 F.3d at 1171. —[S]o long as there was Article III standing for the original party on the same side of the litigation as the intervenor, the intervenor need not itself establish standing. *Id.*

Doc. 102 at 10.²

¹ The Tenth Circuit vacated this opinion on rehearing en banc and affirmed that standing is not required for intervention in *San Juan County v. U.S.*, 503 F.3d 1163, 1172 (10th Cir. 2007),

² While a showing of standing is not required for intervention in this case, the organizations seeking to intervene nonetheless meet the requirements for establishing standing. An organization can assert standing on behalf of its members by demonstrating 1) that the organizations’ members have standing to sue in their own right; 2) that the interests at stake are germane to the organization’s purpose; and 3) that neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *See Hunt v.*

2. The Prospective Plaintiff-Intervenors Meet the Standard for Permissive Intervention

“Rule 24(b) allows permissive intervention under the following conditions: (i) the application to intervene is timely; (ii) the applicant's claim or defense and the main action have a question of law or fact in common; and (iii) intervention will not unduly delay or prejudice the adjudication of the original parties' rights.” *Forest Guardians v. U.S. Dep't of Interior*, No. CIV-02-1003 JB/WDS, 2004 WL 3426413, at *10 (D.N.M. Jan. 12, 2004). In this case, these standards have been met.

a. This Motion Is Timely and Will Not Delay or Prejudice the Adjudication of the Original Parties' Rights

“In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.” Fed. R. Civ. P. 24(b)(3); *Donnelly v. Glickman*, 159 F.3d 405, 412 (9th Cir. 1998) (the question is whether intervention will unduly delay the main action or will unfairly prejudice the parties).

To determine timeliness, the court examines: (1) stage of litigation; (2) the prejudice to other parties; and (3) the reason for and length of any delay. *San Jose Mercury News, Inc. v. u.s. Disl. Court-N Disl. (San Jose)*, 187 F.3d 1096, 1101 (9th Cir. 1999). A motion to intervene may

Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977). In this case, proposed Plaintiff-Intervenor DRNM represents people living with disabilities including mental illness. Some of these people have been or are homeless. DRNM has authority under federal law to pursue legal, administrative and other remedies on behalf of persons with these disabilities. The Native American Voters Alliance Education Project works to promote and protect the rights of Native Americans and has constituents who have suffered excessive force at the hands of APD. The ACLU of NM is a civil rights organization dedicated to protecting and promoting civil liberties in New Mexico as well as the rights of its homeless members.

be filed at either the merits phase or the remedial phase of the litigation. Since there has been no discovery conducted and no dispositive motions filed or decided neither the United States nor the City has any basis to assert prejudice. There has been no delay by the proposed Intervenors, who submitted their concerns to the Court by submitting *amicus* briefs on January 14, 2015, and presented their concerns at the fairness hearing on January 21, 2015, Intervenors conveyed a written proposal to the United States on February 12 met with the United States on February 19, and subsequently conveyed a written proposal to both the United States and the City on March 2, 2015, all of which were ultimately an unsuccessful attempt to resolve their concerns with the original parties. *See e.g. City of Los Angeles*, 288 F.3d at 398, (finding union timely filed its motion to intervene one-and-a-half months after the suit was filed); *San Jose Mercury News, Inc.*, 187 F.3d at 1101 (finding motion to intervene timely when filed twelve weeks after basis for intervention occurred); *Nikon Corp. v. ASM Lithograph B. v.*, 222 F.R.D. 647, 649-50 (N.D. Cal. 2004) (finding motion timely when no dispositive motions have been decided).

The Fifth Circuit has held a motion to intervene was timely where the United States' application to intervene to assert a tax lien was filed over one year after the United States learned of the suit, and after discovery and pretrial proceedings had occurred. *Diaz v Southern Drilling Corp.* 427 F.2d 1118 (5th Cir. 1970), cert. den. 400 US 878 (1970).

b. Plaintiff Intervenors' Claims Share Common Questions Of Law And Of Fact With The Claims Brought By The United States

Proposed Intervenors unquestionably share a common claim with the Plaintiff. Proposed Plaintiff-Intervenors allege that people with mental or developmental disabilities, people experiencing homelessness, and people in Albuquerque who are Native American are being unconstitutionally stopped, searched, detained and subjected to unnecessary and excessive force by City police officers personnel. In its complaint, the United States alleges, *inter alia*:

The Defendant has failed to ensure that the Albuquerque Police Department provides adequate policies, training, and accountability systems to de-escalate situations and minimize the need to use force when encountering individuals in crisis. . . .

The Defendant, its agents, and persons acting on its behalf, including Albuquerque police officers, use excessive force against individuals who pose little or no threat of harm to the officers or others, and that is otherwise unreasonable under the totality of the circumstances.

Complaint, Doc. 1, p. 5 and pp. 6-7.

The Plaintiff's April 10, 2014 Findings Letter ("Letter"), attached to the Complaint, sets forth several violations of federal law with respect to people with mental disabilities and people in a mental health crisis. For example, the DOJ's letter said:

There is a pattern of APD [Albuquerque Police Department] officers using force that is unnecessary and unreasonable against individuals who pose little, if any, threat, or who offer minimal resistance. Officers too precipitously resort to the use of Tasers, prone restraints (referred to as "face-down stabilization techniques" by APD), leg sweeps, front kicks, face-down arm-bar takedowns, and strikes to legs and thighs. *We reviewed incidents where officers applied force against individuals who were unable to understand or yield to commands but posed a minimal threat to the officers. Many subjects of excessive force had indications of mental illness, physical disabilities, intoxication, and other incapacity.* In most instances, these individuals were engaging in lawful activities or committing minor infractions.

Doc. 1-1, p. 15 (emphasis added).

The Letter contains three pages of findings (pages 20-22) regarding the City's pattern of using excessive force against people with mental disabilities, including:

Officers also used excessive force against individuals who suffered from mental illness or who were unable to comply with officers' commands for reasons beyond their control. . . . We reviewed many incidents in which we concluded that officers failed to consider an individual's physical, mental, or emotional state in making force determinations. Consequently, we found instances where individuals did not pose an immediate threat to the safety of the officer or the public, and officers deployed a level of force that was unreasonable under the circumstances.

Doc. 1-1, p. 20 (emphasis added)

The Letter also found that the City has a practice of sending uniformed police to intercede when a person is in behavioral crisis but not presenting any danger to anyone other than him/herself, and that the City fails to use properly trained personnel in those situations.

Under-Use of the Crisis Intervention Team Contributes to the Pattern or Practice of Unconstitutional Force.

In far too many of those [use-of-force] reports, officers encountered a person who was clearly in mental health crisis, but they made no attempt to contact the [Crisis Intervention] Team or patrol officers in their area who had been trained and certified by the Team. Partially as a result of the officers' failure to use the resources available to them, far too many of these encounters had a violent outcome.

One area where we believe the department can immediately begin leveraging the skills and training of the Team is in what officers call "welfare checks"—where someone has called 911 to ask officers to check on a person who may be at risk of harming himself or who seems to be in crisis. In the use-of-force reports we reviewed, far too many encounters that began as welfare checks ended in violence, and far too often the officers' use of force was unreasonable. The inclusion of the Team or patrol officers trained and certified by the Team on welfare checks could make a substantial impact on the department's use of force and could lead to better overall outcomes for residents in mental health crisis.

Doc. 1-1, pp. 34-35 (emphasis added).

3. The United States Will Not Adequately Protect the Interests of the Prospective Plaintiff-Intervenors

While there are common questions of law and fact, there are also meaningful differences between the interests the prospective Plaintiff-Intervenors seek to advance and those of the United States that warrant granting this motion for intervention. First, the United States did not examine the issue of whether excessive use of force was used disproportionately against Native Americans and homeless people. There are approximately 6,000 homeless individuals living in Albuquerque, and one third of these people live with mental illness. *See* <http://www.smhc-nm.org/how-you-can-help/understanding-homelessness> (last visited February 25, 2015). Additionally, Native Americans are over-represented in the homeless community.

While only 4.6% of the Albuquerque's population is Native American, Native Americans comprise 13% of the homeless population. See Nick Estes, *You Try to Live Like Me— Looking to Understand ABQ's Homeless Natives*, Indian Country (Sept. 12, 2014) available at <http://indiancountrytodaymedianetwork.com/2014/09/12/you-try-live-me-looking-understand-abqs-homeless-natives-156853>.

Native Americans and homeless people who have been victimized have shared their experiences, but are too frightened of the police to publically come forward. Homeless Native Americans report being the targets of police use of force including being beaten without provocation, beaten while in handcuffs, and receiving serious injuries such as broken bones. They also report that APD officers confiscate their IDs without cause, leaving them without the means to seek housing, obtain medical care, or obtain social services. Often these people are hundreds of miles from reservations and pueblos, leaving them unable to obtain new IDs. There are also reports of discrimination by APD officers including telling Native Americans that they did not belong in the City and should return to the reservation.

Homeless people who are not Native American also report excessive use of force by APD. Homeless people generally are at greater risk of being the victims of police violence because they have frequent contact with police. This is due, in part, to the criminalization of homelessness. Crimes such as public urination, loitering, trespassing, and illegal camping are difficult for homeless people to avoid that often bring them into contact with the City police officers.

While the United States seeks to reduce Albuquerque police officers' excessive use of force, it has not addressed how this problem disproportionately affects the homeless and Native

Americans. Prospective Plaintiff-Intervenors would represent these populations to ensure that their interests are protected.

Second, those living with mental illness and mental disabilities need protection their interest protected beyond what the United States can offer has offered. While the United States recognized in the DOJ's Findings Letter that APD engaged in a pattern of excessive force against those with mental health issues, the United States is not the best entity to protect those interests. DRNM is the government-recognized expert in advocating for the rights of these individuals. The United States Department of Justice is not a mental health expert organization. DRNM has the skill and expertise needed to ensure that the reform measures implemented by APD will protect those living with mental illness and mental disabilities.

The United States' lack of expertise regarding those living with mental illness and other disabilities is reflected in the remedial measures in the settlement agreement it proposed. These measures are not reasonably likely to correct the City's ongoing violations of the federal rights of proposed Intervenors with respect to unnecessary and excessive force by City police. For example, the United States is urging this Court to adopt Section VI of the consent decree. If implemented, this section would *increase* the number of encounters between the City's police officers personnel and people with mental or developmental disabilities, likely increasing uses-of-force incidents against them by City police officers and likely increasing the arrests and incarceration of such people. Additionally, the solutions the United States endorses in the settlement agreement do not reasonably address the root cause of many incidents of unnecessary uses of force against them: the City's *de facto* policy of "sweeping the streets" of people who are homeless and/or have a mental disability by 1) unlawfully initiating interactions with people who appear to have a mentally disability who are not suspected of a crime who appear to be

homeless, and/or Native American, and 2) taking people who do not have a permanent address to jail for petty offenses, instead of issuing a citation. The City's *de facto* policy "profiling" poor people with mental disabilities directly causes many use-of-force incidents; but the agreement does not address the issue.

4. The Court Should Exercise Its Discretion And Grant Intervention

The United States, the City, and the Albuquerque's Police Officers' Association (the Union) are parties to this litigation. While the federal government, the City government, and police officers all have a role in this litigation, the Albuquerque community—particularly those with mental disabilities, the homeless, and Native Americans—currently does not. It is this community that has borne the brunt of APD's excessive use of force. These potential Plaintiff-Intervenors would bring a meaningful, local voice to this lawsuit.

In a similar case in which the United States sued the City of Los Angeles under 42 U.S.C. § 14141 due to the actions of its police department, the Ninth Circuit reversed the district court's denial of permissive intervention by "Community Intervenors" similar to the proposed Intervenors herein. The Ninth Circuit held that "[b]y allowing parties with a *practical* interest in the outcome of a particular case to intervene, [courts] often prevent or simplify future litigation involving related issues; at the same time [courts] allow an additional interested party to express its views before the court." *U.S. v. City of Los Angeles*, 288 F.3d 391 (9th Cir. 2002)(emphasis added). The Ninth Circuit held that, when ruling on a motion to intervene, "[c]ourts are to take well-pleaded, nonconclusory allegations in the motion to intervene, the proposed complaint or answer in intervention, and declarations supporting the motion as true." *Id.* at 820. Here, proposed Intervenors allege that the Defendant is violating their rights under the Fourth, Fifth and Fourteenth Amendments by its pattern and practice of using unnecessary and excessive

force upon persons with mental disabilities and/or who are experiencing homelessness and/or who are Native American

In deciding whether to grant permissive intervention, a court may also consider whether the party seeking intervention will significantly contribute to the just and equitable adjudication of the legal issues presented. See *Spangler v. Pasadena City Bd. of Education*, 552 F.2d 1326, 1329 (9th Cir. Cal. 1977) 1329 (citing *Hines v. Rapides Parish School Bd.*, 479 F.2d 762, 765 (5th Cir. 1973)). “Finally, judicial economy is a relevant consideration in deciding a motion for permissive intervention.” *Id.* at 531. In determining whether intervention is appropriate, courts are guided by practical and equitable considerations. *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998).

The proposed Intervenors face circumstances with respect to intervention that are in some ways similar to those faced by the Union, to which the Court has now granted intervention. Both have interests that could be harmed by the settlement agreement proposed by the United States and the City. In its February 19, 2015 Memorandum Opinion and Order that permitted the Union to intervene with respect to the remedial phase of the instant litigation, the Court described the proposed consent decree reached between the United States and the City as follows, “[t]he parties negotiated provisions pertaining to the use of force, crisis intervention, training, investigations, community engagement, and more. (Agmt., Doc. 9-1.)” (Doc. 102 at 2).

Proposed Intervenors contend that: 1) a number of violations of the proposed Intervenors’ constitutional rights by the City’s police officers officials will not be effectively addressed much less remedied by the solutions proposed by the Plaintiff and 2) certain provisions of the proposed consent decree, unless modified, will likely cause harm to people with mental disabilities or developmental disabilities, people experiencing homelessness and

people who are Native American. Accordingly, proposed Intervenor respectfully request that this Court grant them Plaintiff-Intervenor status, to avoid harm to their constituents and to their members.

CONCLUSION

For the reasons set forth above, proposed Plaintiff Intervenor request that the Court grant them the same status that the Court granted the Albuquerque Police Officers Association on February 19, 2015 and give the parties a brief opportunity to modify the settlement agreement in order to address the concerns set forth herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on I filed the foregoing document electronically through the CM/ECF system, which caused all counsel of record to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

/s/