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NELDA CUELLAR
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STATE OF NEW MEXICO
COUNTY OF LEA,
FIFTH JUDICIAL DISTRICT COURT

REPUBLICAN PARTY OF NEW MEXICO, DAVID GALLEGOS, TIMOTHY JENNINGS, DINAH VARGAS, MANUEL GONZALES, JR., BOBBY AND DEE ANN KIMBRO, and PEARL GARCIA,

Plaintiffs,

v. **No. D-506-CV-2022-00041**

MAGGIE TOULOUSE OLIVER in her official capacity as New Mexico Secretary of State, MICHELLE LUJAN GRISHAM in her official capacity as Governor of New Mexico, HOWIE MORALES in his official capacity as New Mexico Lieutenant Governor and President of the New Mexico Senate, MIMI STEWART in her official capacity as President Pro Tempore of the New Mexico Senate, and JAVIER MARTINEZ in his official capacity as Speaker of the New Mexico House of Representatives,

Defendants.

EXECUTIVE DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO COMPEL DISCOVERY

Defendants Governor Michelle Lujan Grisham and Lieutenant Governor Howie Morales (collectively, "Executive Defendants"), by and through their counsel of record in this matter, hereby respond to Plaintiffs' Motion to Compel Discovery (filed Aug. 15, 2023) ("Motion to Compel").

INTRODUCTION

In an attempt to collect largely irrelevant evidence, Plaintiffs seek to pry into internal and external communications between the Governor or her staff and various individuals that broadly relate to the 2021 New Mexico congressional redistricting process and consideration of the

proposed congressional maps (including consideration of the preferences of other politicians, the effects of the proposed maps, and the likely partisan composition of the State's congressional delegation), as well as to the Governor's subjective opinion of the proposed congressional maps. The Court should reject this unnecessary and egregious attack on the privileges belonging to its coordinate branches. To hold otherwise would violate separation of powers and significantly impair informed and sound gubernatorial deliberations, policymaking, and decisionmaking.

BACKGROUND

On August 4, Plaintiffs' counsel served a notice of Rule 1-030(B)(6) NMRA deposition, directing a representative of the Office of the Governor to testify about the following topics:

> 1. All communications (including emails, text messages, phone calls, and in-person conversations) that took place in the year 2021 between any official or employee of the Governor's Office (including the Governor herself) and [various officials, employees of the Office of the Governor, and political organizations, law firms, and demography/mapping consultants] . . . that relate to the 2021 New Mexico congressional-redistricting process; consideration of various proposed congressional maps (including specifically Congressional Concept H, S.B. 1 as originally introduced, and the S.B. 1 Senate Judiciary Committee substitute ultimately signed into law); the preferences of [various officials], regarding the drawing of congressional districts; and/or effect of various proposed congressional maps on electoral outcomes and/or the likely partisan composition of the state's congressional delegation.
>
> 2. The Governor's position and/or opinions on various proposed congressional maps — including specifically Concept H, S.B. 1 as originally introduced, and the S.B. 1 Senate Judiciary Committee substitute that was eventually signed into law — and how those positions/opinions evolved over the course of 2021.
>
> 3. The Governor's communications (including both written and spoken) in 2021 and the first three months of 2022 with any person with whom the Governor does not have a claim of any privilege — including, at a minimum, members of the press, personal and political contacts, etc. — evincing the position and/or opinions referenced in ¶ 2, above.

Motion to Compel, Exhibit 7.[1] On August 9, 2023, Plaintiffs served interrogatories and requests for admission on the Executive Defendants, generally inquiring into the congressional redistricting process. *See* Motion to Compel, Exhibit 9-10. Two days later, the Governor filed a motion for protective order seeking the Court to quash or substantially limit Plaintiffs' notice of Rule 1-030(B)(6) deposition. *See* Motion for Protective Order (filed Aug. 11, 2023). Shortly thereafter, Plaintiffs served requests for production and additional interrogatories on the Governor. *See* Exhibit A. Among other things, Plaintiffs request documents that correspond to the three topics listed in the deposition notice. *Compare* Motion to Compel, Exhibit 7 at 2-3, *with* Exhibit A at 2-3. Plaintiffs now seek to compel Executive Defendants with this discovery.

DISCUSSION

I. The Court should not permit any party discovery of Executive Defendants until it addresses their pending motion to dismiss

As an initial matter, Executive Defendants should not have to respond to any party discovery until the Court addresses their pending motion to dismiss based on legislative immunity. Courts have routinely recognized that discovery is improper while issues of immunity or jurisdiction are being resolved. *See, e.g.*, *Doe v. Leach*, 1999-NMCA-117, ¶ 17, 128 N.M. 28, 988 P.2d 1252 ("If Defendants were entitled to summary judgment because of qualified immunity, then requiring them to submit to discovery would violate that immunity."); *HIRA Educ. Services N. Am. v. Augustine*, 991 F.3d 180, 188 (3d Cir. 2021) (holding that a district court erred when it permitted the plaintiffs to take discovery when a motion to dismiss based on legislative and qualified immunity was pending). Therefore, the Court should first determine whether to dismiss Executive

[1] Plaintiffs also seek to question the representative to testify as to nonprivileged communications about this litigation, invocations of privileges asserted by the Governor's Office, and steps taken to prepare for the deposition. *See id.*

Defendants—which would moot Plaintiffs' arguments the extent they apply to party discovery under Rules 1-033(A), 1-034(A), and 1-036(A) NMRA—especially given that the Executive Defendants filed their motion to dismiss based on legislative immunity *before* Plaintiffs served any discovery requests on them.

II. The vast majority of the records and information Plaintiffs seek is protected by legislative and executive privilege

As explained in the Governor's Motion for Protective Order, most of Plaintiffs' Rule 1-030(B)(6) deposition notice topics seek information protected by both legislative and executive privilege. *See* Motion for Protective Order at 11-14. The same goes for Plaintiffs' requests for production and many of their interrogatories and requests for admission: these seek documents and information concerning quintessential legislative acts and "the Governor's decisionmaking in the realm of . . . her core duties." *Republican Party of New Mexico v. New Mexico Tax'n & Revenue Dep't*, 2012-NMSC-026, ¶ 38, 283 P.3d 853; *see, e.g.*, *Florida v. Byrd*, 2023 WL 3676796, at *3 (N.D. Fla. May 25, 2023); *League of Women Voters of Florida, Inc. v. Lee*, 340 F.R.D. 446, 453-458 (N.D. Fla. 2021); *League of Women Voters v. Commonwealth*, 177 A.3d 1010, 1019 (Pa. Commw. Ct. 2017). Plaintiffs do not dispute the foregoing. *See generally* Motion to Compel. Rather, they argue: (1) legislative and executive privilege do not apply to communications with those outside of the legislative and executive branches; (2) legislative privilege is not absolute; and (3) Plaintiffs can overcome Executive Defendants' claims of legislative and executive privilege. Plaintiffs are wrong on all fronts.

A. Legislative and executive privilege can shield communications with those outside of the legislative and executive branches

To support their argument that legislative and executive privilege never apply to communications with those outside of the legislative and executive branches, Plaintiffs primarily

rely on the plain language of the Speech or Debate clause of the New Mexico constitution, the Supreme Court's discussion of executive privilege in *Republican Party*, 2012-NMSC-026—which Plaintiffs claim also applies to legislative privilege—and various opinions from other jurisdictions. *See* Motion to Compel at 10-11. The Court should find none of this persuasive.

For starters, any plain language argument regarding the Speech or Debate clause is irrelevant to common law legislative privilege that applies to the Executive Defendants. *See Lee v. City of Los Angeles*, 908 F.3d 1175, 1186-88 (9th Cir. 2018) (explaining history of common law legislative privilege).[2] Plaintiffs' reliance on *Republican Party* is equally misplaced. Plaintiffs cite the *Republican Party* Court's discussion of a previous case in which a splintered Supreme Court held, *without any analysis*, that the Attorney General could not invoke executive privilege over communications with those not employed in the executive branch. *See Republican Party*, 2012-NMSC-026, ¶ 37 (discussing *State ex rel. Atty. Gen. v. First Judicial Dist. Court of New Mexico*, 1981-NMSC-053, 96 N.M. 254, 629 P.2d 330)); *see First Judicial*, 1981-NMSC-053, ¶ 24. However, the *Republican Party* Court ***abrogated*** this prior decision, observing:

> At the time we decided *First Judicial*, executive privilege jurisprudence was in its early stages of development; although we cited generally to [*United States v. Nixon*, 418 U.S. 683 (1974)], we did not discuss the different categories of the executive privilege that courts were beginning to recognize, nor the rationales for how to define the contours of that privilege.

Republican Party, 2012-NMSC-026, ¶ 42. The Court went on to clarify that our executive privilege is "similar in origin, purpose, and scope to the presidential communications privilege recognized by the federal courts," *id.* ¶ 43, and therefore applies to documents and information that are: (1)

[2] Even if it was applicable, the Court should be cautious relying on such a simplistic argument. *Cf. Taylor v. Waste Mgmt. of New Mexico, Inc.*, 2021-NMCA-026, ¶ 8, 489 P.3d 994 (cautioning against relying only on the plain language of a statute). Rather, the Court should find persuasive the caselaw below explaining the reasoning for extending legislative privilege to those who assist with the performance of legislative activities.

"communicative in nature"; (2) "concern the Governor's decisionmaking in the realm of his or her core duties"; and (3) are "authored, or solicited and received, by either the Governor or an 'immediate adviser,' with 'broad and significant responsibility' for assisting the Governor with his or her decisionmaking." *Id.* ¶¶ 44-47 (quoting *Judicial Watch, Inc. v. Dept. of Justice*, 365 F.3d 1108, 1115 (D.C. Cir. 2004)). As this new rubric does not make a distinction between internal and external communications, the Court should reject Plaintiffs' assertion to the contrary. *Cf., e.g.*, *Leopold v. United States Dep't of Justice*, 487 F. Supp. 3d 1, 19 (D.D.C. 2020) (holding that the presidential communications privilege applied to communications with private individuals because they were "authored or received in response to a solicitation by members of a presidential adviser's staff" (quoting *In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir. 1997)).

Even if Plaintiffs' analysis of *Republican Party* was correct with regard to the scope of *executive* privilege, it does not follow that *legislative* privilege has the same limitations simply because that Court previously mentioned ***in dicta*** that the two were "similar." *See* Motion to Compel at 10-11. Indeed, many courts have held that legislative privilege extends to communications with various persons outside government who provide input as to legislation. *See, e.g.*, *Almonte v. City of Long Beach*, 478 F.3d 100, 107 (2d Cir. 2007); *In re Georgia Senate Bill 202*, 2023 WL 3137982, at *3 (N.D. Ga. Apr. 27, 2023); *Thompson v. Merrill*, 2020 WL 2545317, at *3 (M.D. Ala. May 19, 2020); *LWV of Florida*, 340 F.R.D. at 454; *Puente Arizona v. Arpaio*, 314 F.R.D. 664, 670 (D. Ariz. 2016); *ACORN v. Cnty. of Nassau*, 2009 WL 2923435, at *6 (E.D.N.Y. Sept. 10, 2009). As the Fifth Circuit Court of Appeals recently explained:

> [C]ommunications with third parties outside the legislature might still be within the sphere of legitimate legislative activity if the communication bears on potential legislation. Consequently, some communications with third parties, such as private communications with advocacy groups, are protected by legislative privilege when they are a part and parcel of the modern legislative procedures through which

> legislators receive information possibly bearing on the legislation they are to consider.

Jackson Mun. Airport Auth. v. Harkins, 67 F.4th 678, 687 (5th Cir. 2023) (cleaned up).

To artificially limit this privilege to those formally employed by the executive and legislative branches would severely impair the legislative function by preventing legislators and the Governor from seeking candid input and advice from knowledgeable outsiders, which would in turn harm every New Mexican. *See ACORN*, 2009 WL 2923435, at *6; *see generally In re Hubbard*, 803 F.3d 1298, 1308 (11th Cir. 2015) ("The privilege protects the legislative process itself, and therefore covers both governors' and legislators' actions in the proposal, formulation, and passage of legislation."); *cf. Republican Party*, 2012-NMSC-026, ¶ 35 (explaining that the purpose of executive privilege is to foster informed and sound deliberations, policymaking, and decisionmaking).

Plaintiffs' cited caselaw to the contrary is unavailing. The summary Ohio decision does not even mention legislative privilege or its scope. *See League of Women Voters of Ohio v. Ohio Redistricting Comm.*, 2021-Ohio-3607, 164 Ohio St. 3d 1457. And the remainder of the federal district court opinions base their holdings (whether directly or indirectly) on *Rodriguez v. Pataki*, 280 F. Supp. 2d 89 (S.D.N.Y. 2003), and *Almonte v. City of Long Beach*, 2005 WL 1796118, at *4 (E.D.N.Y. July 27, 2005)—cases which have since been abrogated or overturned. *See Puente Arizona*, 314 F.R.D. at 670 (declining to rely on *Rodriguez* and *Almonte* for these reasons). To top it off, *Edwards v. Vesilind*, 790 S.E.2d 469, 482 (Va. 2016), actually cuts *against* Plaintiffs. There, the Virginia Supreme Court held:

> The circuit court further erred by holding that, as a matter of law, communications between legislators and constituents or other third parties cannot be protected by legislative privilege. Such individuals are equally capable of performing acts as alter egos, subject to the same requirements that the acts that they perform both fall within the sphere of legitimate legislative activity and are delegated by the

> legislator to be performed on his or her behalf. Any basis on which to differentiate a constituent or other third party from a legislator's personal legislative staffer, including unpaid interns, or consultants would be artificial.

Id. at 483 (citations omitted). Thus, the Court should hold that both legislative and executive privilege can apply to communications with members outside of the legislative and executive branches.

B. Legislative privilege, when applicable, is absolute

Plaintiffs next argue the Court should apply a five-factor balancing test for intra-branch communications protected by legislative privilege. *See* Motion to Compel at 13. However, the logic of the U.S. Supreme Court's common law legislative immunity cases makes clear that the legislative privilege should be absolute in all civil cases. Specifically, it is clear that "a state legislator's common law . . . immunity from civil suit" is "absolute." *United States v. Gillock*, 445 U.S. 360, 372 (1980). It is also clear that the immunity from suit and the legislative privilege share an origin and further the same purposes (i.e., minimizing the distraction of diverting legislators' time, energy, and attention from their legislative tasks to defend litigation). *See, e.g.*, *Lee*, 908 F.3d at 1186-88; *EEOC v. Washington Suburban Sanitary Comm'n*, 631 F.3d 174, 181 (4th Cir. 2011). It follows that if one is absolute, then the other should be too. *See Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 416 (D.C. Cir. 1995) ("[T]he legislative privilege is 'absolute' where it applies at all.").

Plaintiffs implore the Court to ignore this logic and instead rely on the New Mexico Supreme Court's ***dicta*** that legislative privilege is "similar" to the qualified executive privilege in this state, as well as various federal district court opinions. *See* Motion to Compel at 13. But, as discussed earlier, the Court should not blindly transpose the Supreme Court's discussion of *executive* privilege to *legislative* privilege—which has a much longer history at common law and

serves different purposes. *Compare Nixon*, 418 U.S. 683 (analyzing presidential communications privilege), *with Bogan v. Scott-Harris*, 523 U.S. 44, 48 (1998) (analyzing legislative privilege).

Nor should the Court find Plaintiffs' cited federal district court cases persuasive, because their holdings are premised on the principle that state legislative privilege must sometimes give way to the vindication of *federal* rights under the Supremacy Clause of the United States Constitution. *See, e.g.*, *Benisek v. Lamone*, 241 F. Supp. 3d 566, 574 (D. Md. 2017) (citing *Gillock*, 445 U.S. 360, for the proposition that legislative privilege is not absolute); *see generally Gillock*, 445 U.S. at 370 (explaining that "federal interference in the state legislative process is not on the same constitutional footing with the interference of one branch of the Federal Government in the affairs of a coequal branch" in light of the Supremacy Clause). It is also worth noting that no federal appellate court has yet to adopt this balancing approach. *See Byrd*, 2023 WL 3676796, at *2.

Given the foregoing, the Court should give its sister branches the deference it accords itself and hold that legislative privilege is akin to the *absolute* judicial deliberations privilege recognized in *Pacheco v. Hudson*, 2018-NMSC-022, 415 P.3d 505. *See Florida v. United States*, 886 F. Supp. 2d 1301, 1303 (N.D. Fla. 2012) ("Legislators ought not call unwilling judges to testify at legislative hearings about the reasons for specific judicial decisions, and courts ought not compel unwilling legislators to testify about the reasons for specific legislative votes."). Anything less would be an affront to separation of powers.

C. Plaintiffs' discovery requests fail any balancing test

Even assuming, *arguendo*, legislative immunity is qualified, Plaintiffs cannot demonstrate they are entitled to overcome it under the balancing test articulated in *Benisek*, 241 F. Supp. 3d 566, that considers: (1) the relevance of the evidence sought, (2) the availability of other evidence,

(3) the seriousness of the litigation, (4) the role of the State, as opposed to individual legislators, in the litigation, and (5) the extent to which the discovery would impede legislative action.

i. Relevance

As suggested by the New Mexico Supreme Court's order, Plaintiffs' claims depend on public record and the challenged map itself—not the preferences and thought processes of individual legislators or the Governor. *See* Order at 3, *Lujan Grisham v. Republican Party of N.M.*, S-1-SC-93481 (July 5, 2023) (directing this Court to consider demographics and characteristics of challenged map in considering the degree of partisan gerrymandering); *accord Rucho v. Common Cause*, 139 S. Ct. 2484, 2516 (2019) (Kagan, J., dissenting) (looking at the "overwhelming direct evidence" of purpose in the form of the extreme nature of the challenged maps themselves and lawmakers' open and public statements of express intent to maximize political power for their own party). And this makes sense, because "[t]estimony of individual legislators or others as to happenings in the Legislature is *incompetent*, since that body speaks solely through its concerted action as shown by its vote." *TBCH, Inc. v. City of Albuquerque*, 1994-NMCA-048, ¶ 20, 874 P.2d 30 (cleaned up) (emphasis added); *see Greater Birmingham Ministries v. Sec'y of State for Ala.*, 992 F.3d 1299, 1324-25 (11th Cir. 2021) ("It is . . . questionable whether the [bill] sponsor speaks for all legislators").

Contrary to Plaintiffs' assertions, inquiry into individual legislators and government officials' intent behind enacting a certain map are not "frequently allowed" or "standard fare" in redistricting litigation.[3] Indeed, a ***unanimous*** United States Supreme Court recently indicated that

[3] Each of the cases Plaintiffs cite for this proposition is unhelpful. *Benisek*, 241 F. Supp. 3d 566, is inapt because the United States Supreme Court vacated that decision. *See Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) (per curiam). The same goes for *Common Cause v. Rucho*, 279 F. Supp. 3d 587 (M.D.N.C. 2018), *vacated and remanded*, 138 S. Ct. 2679 (2018)—*which did not even address the issue of legislative privilege*. *See Piedra, Inc. v. N.M. Transp. Comm'n*, 2008-

gerrymandering claims do ***not*** "require[] discovery into the motives of the officials who produced the [map]." *Benisek*, 138 S. Ct. at 1944 (stating that "[p]laintiffs' newly presented [first amendment retaliation] claims—*unlike the [partisan] gerrymandering claim presented in the 2013 complaint*—required discovery into the motives of the officials who produced the 2011 congressional map"); *see Matter of 2022 Legislative Districting of State*, 282 A.3d 147, 199 (Md. 2022) (pointing this out and holding that "[i]t thus appears that a gerrymandering claim, by itself, does not defeat the legislative privilege under the federal common law and entitle a plaintiff to discovery into the motives of those who produced the map"). Accordingly, this factor weighs against Plaintiffs. *Cf. Comm. for a Fair & Balanced Map v. Illinois State Bd. of Elections*, 2011 WL 4837508, at *8 (N.D. Ill. Oct. 12, 2011) (finding that this factor weighed against disclosure because evidence of intentional discrimination by the map drawers is "not central" to the outcome of the case); *Michigan State A. Philip Randolph Inst. v. Johnson*, 2018 WL 1465767, at *5 (E.D. Mich. Jan. 4, 2018) (same).

And, finally, even if the Court finds that this evidence is relevant vis-à-vis the legislators, it does not follow that the same is true for the Executive Defendants because there is simply no allegations nor evidence that they had any role in drawing the challenged map. *See, e.g.*, *Benisek*,

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NMCA-089, ¶ 32, 144 N.M. 382, 188 P.3d 106 ("Cases are not authority for propositions not considered." (cleaned up)). The Florida and Ohio state caselaw cited by Plaintiffs fare no better. Florida is unique in that its constitution (unlike ours) has a specific provision requiring all prearranged meetings between members of the legislature and/or the governor to agree upon formal legislative action "shall be reasonably open to the public" and lacks a Speech or Debate clause evincing a dedication to protecting the legislative process. *See League of Women Voters of Florida v. Florida House of Representatives*, 132 So. 3d 135, 144 (Fla. 2013). And even then, Florida courts do not permit discovery of subjective "thoughts or impression" of legislators and their staff—something Plaintiffs seek here. *Id.* at 154. Plaintiffs' unpublished Ohio decision is even less helpful, as it merely determined that the plaintiffs could depose legislators and the governor without *any* mention of the topics of discussion or legislative privilege. *LWV of Ohio*, 2021-Ohio-3607; *see Piedra, Inc.*, 2008-NMCA-089, ¶ 32. The Court should, therefore, have no trouble distinguishing these cases.

241 F. Supp. 3d at 575 (finding this factor weighing in favor of disclosure because the plaintiffs were "seeking to depose the witnesses *who were involved in drawing the map*" (emphasis added); *Page v. Virginia State Bd. of Elections*, 15 F. Supp. 3d 657, 666 (E.D. Va. 2014) (finding this factor weighing in favor of disclosure "[g]iven the centrality of *the legislature's* motives" (emphasis added)).

ii. Availability of other evidence

For the same reasons discussed in the previous section, Plaintiffs can obtain relevant evidence without trampling on legislative privilege. For example, Plaintiffs can retain an expert demographer to analyze the demographics and characteristics of challenged map. They can also depose the Legislative Defendants' retained experts. Even Plaintiffs admit analysis of the map itself can be "powerful" and "*independently* satisfy the first part of Justice Kagan's test." Motion to Compel at 6 n.2; Plaintiffs' Response to Motion for Protective Order at 7 n.3 (filed Aug. 17, 2023). In terms of getting insight into the Legislature's motive for enacting SB 1, Plaintiffs can review the recordings of the public debates regarding the maps and gather other public comments from officials about SB 1. All of this should be sufficient for Plaintiffs' purposes. *See Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *8 (finding that this factor weighed against disclosure because the plaintiffs "already have considerable information at their fingertips," including "public hearing minutes, special interest group position papers, statements made by lawmakers during debate, committee reports, press releases, newspaper articles, census reports, registered voter data and election returns"); *Michigan State*, 2018 WL 1465767, at *6 (same).

iii. Seriousness of the claims

There can be no dispute that voting rights litigation is serious as a general matter. However, this factor—like the others—must be based on the seriousness of the claims against the individuals

asserting the legislative privilege. Plaintiffs claims here against the Executive Defendants are virtually non-existent. Therefore, this factor weighs against piercing their legislative privilege.

iv. Role of the state, as opposed to the Executive Defendants

While Plaintiffs argue the fourth factor weighs in their favor simply because they are not suing officials in their individual capacities, *see* Motion to Compel at 15, this argument misses the mark. "[T]his factor considers the role played by the legislature and its members in the allegedly unlawful conduct. When the role of the legislators in the unlawful conduct is direct, the fourth factor weighs in favor of disclosure." *Citizens Union of City of New York v. Attorney Gen. of New York*, 269 F. Supp. 3d 124, 169 (S.D.N.Y. 2017) (cleaned up). Here, there are no allegations whatsoever that the Executive Defendants had any role in the purported gerrymandering other than simply fulfilling their constitutional duties. And—unlike the legislators in most, if not all, of the cases Plaintiffs cite—Executive Defendants *have* asserted legislative immunity. Accordingly, this factor weighs against disclosure. *Cf. Favors*, 285 F.R.D. at 220 (finding this factor weighing in favor of disclosure due to, *inter alia*, the legislators' refusal to assert legislative immunity); *Citizens Union*, 269 F. Supp. 3d at 169 (concluding that simply voting for a law that may infringe on constitutional rights does not support piercing legislative privilege).

v. Future timidity

"The legislative privilege is important." *Hubbard*, 803 F.3d at 1307. It "protects the legislative process itself, and therefore covers both governors' and legislators' actions in the proposal, formulation, and passage of legislation." *Id.* at 1308 (citations omitted); *see also Baraka v. McGreevey*, 481 F.3d 187, 196-97 (3d Cir. 2007) (same). "The privilege applies whether or not the legislators [or Governor] themselves have been sued." *Hubbard*, 803. F.3d at 1308 (cleaned up). And "[t]he reason . . . is clear": "[i]n order to enable and encourage a representative of the

public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence." *Tenney v. Brandhove*, 341 U.S. 367, 373 (1951) (cleaned up).

It follows that "courts have long recognized that the disclosure of confidential documents [and testimony] concerning intimate legislative activities should be avoided." *Harding v. Cnty. of Dallas, Texas*, 2016 WL 7426127, at *6 (N.D. Tex. Dec. 23, 2016). The same holds true in this case. To paraphrase one court:

> If Plaintiffs are permitted to delve into the state legislators' [or Governor's] private communications with other legislators or with their staff regarding the introduction, consideration, or passage of [SB 1], it is likely that these legislators [and Governor], as well as other current and future legislators [and governors], will refrain from engaging in the frank and candid deliberation about, and analysis of, proposed legislation that is necessary to sustain our republican form of government.

Michigan State, 2018 WL 1465767, at *7. Plaintiffs' "characterization of the harm as 'speculative' does not undermine the importance of preserving confidentiality of communication among legislators, their aides, and their staff members." *Veasey v. Perry*, 2014 WL 1340077, at *3 (S.D. Tex. Apr. 3, 2014). "Thus, this factor weighs ***heavily*** in favor of non-disclosure, as to both the Legislators and the Governor's office." *LWV of Florida*, 340 F.R.D. at 458 (emphasis added).

vi. The factors weigh in favor of non-disclosure

Considering the foregoing, the Court should hold that legislative privilege protects the vast majority of, if not all, the documents and information sought by Plaintiffs. *See LWV of Florida*, 340 F.R.D. at 457-59 (applying balancing test and quashing subpoena seeking to inquire about the role the governor's office played in drafting, discussing, negotiating, and enacting the challenged map and the office's opinions and statements concerning the challenged map and its purpose and effects on the basis of legislative privilege); *Byrd*, 2023 WL 3676796, at **2-3 & n.3 (quashing or

limiting subpoenas seeking deposition of governor's staff regarding efforts to pass the governor's proposed redistricting map, the map drafting process, recommendations to sign or veto legislation, and thoughts and internal discussions regarding the challenged map on the basis of legislative privilege and observing that it would reach the same result under the multi-factor balancing test that some courts have used); *cf. Rodriguez*, 280 F. Supp. 2d at 102 (weighing factors and concluding that the plaintiffs cannot "seek information concerning the actual deliberations of the Legislature—or individual legislators—which took place outside [an advisory group with "legislative outsiders"], or after the proposed redistricting plan reached the floor of the Legislature"); *LWV of Michigan*, 2018 WL 2335805, at *6 (weighing factors and concluding that the plaintiffs cannot discover documents or information that contains or reveals opinions, motives, recommendations or advice about legislative decisions between legislators or between legislators).

For the same reasons, the Court should hold that executive privilege protects these documents and communications as well. *See Republican Party*, 2012-NMSC-026, ¶ 49 (observing that a party seeking records subject to executive privilege must first show "good cause" and then the court must conduct determine whether the need for confidentiality outweighs the special needs of the movant); *LWV*, 177 A.3d at 1019 (quashing subpoena directed to governor in redistricting case on basis of executive privilege).

CONCLUSION

For the foregoing reasons, the Court should deny the Motion to Compel.

Respectfully submitted,

/s/ Holly Agajanian
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Counsel for Governor Michelle Lujan Grisham and Lieutenant Governor Howie Morales

CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2023, I filed the foregoing through the New Mexico Electronic Filing System, which caused all counsel of record to be served by electronic means. I have additionally emailed a copy of the foregoing to all counsel of record per this Court's scheduling order.

Respectfully submitted,

/s/ Holly Agajanian
Holly Agajanian

STATE OF NEW MEXICO
COUNTY OF LEA
FIFTH JUDICIAL DISTRICT COURT

REPUBLICAN PARTY OF NEW MEXICO, DAVID GALLEGOS, TIMOTHY JENNINGS, DINAH VARGAS, MANUEL GONZALES, JR., BOBBY and DEANN KIMBRO, and PEARL GARCIA,

Plaintiffs,

vs. No. D-506-CV-2022-00041

MAGGIE TOULOUSE OLIVER in her official capacity as New Mexico Secretary of State, MICHELLE LUJAN GRISHAM in her official capacity as Governor of New Mexico, HOWIE MORALES in his official capacity as New Mexico Lieutenant Governor and President of the New Mexico Senate, MIMI STEWART in her official capacity as President Pro Tempore of the New Mexico Senate, and JAVIER MARTINEZ in his official capacity as Speaker of the New Mexico House of Representatives,

Defendants.

PLAINTIFFS' FIRST SET OF REQUESTS FOR PRODUCTION AND SECOND SET OF INTERROGATORIES TO GOVERNOR LUJAN GRISHAM

The Plaintiffs, by and through their counsel, Harrison & Hart, LLC (Carter B. Harrison IV), and pursuant to the New Mexico Rules of Civil Procedure, propounds the following interrogatories and requests for production ("RFPs") on Defendant Michelle Lujan Grisham:

INTERROGATORIES

INTERROGATORY NO. 35: Please list and give a brief description (including its Bates number and the basis of its relevance) of each document (including affidavits/declarations)

EXHIBIT A

or other item "that [you] may use [as an exhibit either at trial or to a motion for summary judgment] to support [your] claims or defenses." Rule 1-026(B)(3) NMRA.

ANSWER:

INTERROGATORY NO. 36: Please list "the name, address and telephone number of each individual likely to have discoverable information" relevant to this case, and, for each person listed, state "the subjects of such information." Rule 1-026(B)(3) NMRA.

ANSWER:

INTERROGATORY NO. 37: Please describe, in as much detail as you are aware, the subject matter likely to be testified about, and the discoverable information in the possession, custody, or control of, each of the following individuals: Clara Padilla Andrews, Kathy Duffy, Matthew Gonzales, Ted Jojola, Luz Maldonado, Mary-Parr Sanchez, Christina Serna, and Steve Sianez.

ANSWER:

REQUESTS FOR PRODUCTION

RFP NO. 1: Please produce any documents referred to in any of your answers to these or past Interrogatories, including specifically Interrogatory No. 35, *supra*.

RESPONSE:

RFP NO. 2: Please produce all written communications (including emails, text messages, letters, and memoranda) that were made or sent in the year 2021 between any official

or employee of the Governor's Office (including the Governor herself) and any of the following persons —

> a. Brian Egolf, Mimi Stewart, Peter Wirth, Joseph Cervantes, Georgene Louis, Teresa Leger Fernandez, Melanie Stansbury, or any employee or agent of any of the foregoing;
>
> b. any other official or employee of the Governor's Office (*i.e.*, this asks for internal communications within the Governor's Office); and/or
>
> c. any official, employee, or agent of any non-New Mexico-based political organization, 501(c)(4) organization, law firm, or consultant or expert in the field of demography or mapping

— that relate to the 2021 New Mexico congressional-redistricting process; consideration of various proposed congressional maps (including specifically Congressional Concept H, S.B. 1 as originally introduced, and the S.B. 1 Senate Judiciary Committee substitute ultimately signed into law); the preferences of the individuals listed in subdivision (a) of this RFP, regarding the drawing of congressional districts; and/or effect of various proposed congressional maps on electoral outcomes and/or the likely partisan composition of the state's congressional delegation.

RESPONSE:

RFP NO. 3: Please produce all documents evidencing the Governor's position and/or opinions on various proposed congressional maps — including specifically Concept H, S.B. 1 as originally introduced, and the S.B. 1 Senate Judiciary Committee substitute that was eventually signed into law — and/or demonstrating or describing how those positions/opinions evolved over the course of 2021.

RESPONSE:

EXHIBIT A

RFP NO. 4: Please produce all non-privileged communications from January 21, 2022 to the present day either within the Governor's Office, or between an official or employee of the Office and one of the individuals listed in subdivision (a) of RFP No. 2, *supra*, relating to this litigation.

RESPONSE:

RFP NO. 5: Please produce all emails relating to the 2021 redistricting and/or this litigation between counsel for the Governor (either Holly Agajanian and/or Kyle Duffy) and any one or more of the following: **(a)** counsel for the Legislative Defendants (including Lucas Williams, Rich Olson, Mark Baker, and/or Sara Sanchez); **(b)** any employee, agent, or attorney of Research & Polling, Inc., the Center for Civic Policy, or the Democratic Party of New Mexico; and/or **(c)** any legislator other than the ones listed in subdivision (a) of RFP No. 2, *supra*.

RESPONSE:

Respectfully submitted,

HARRISON & HART, LLC

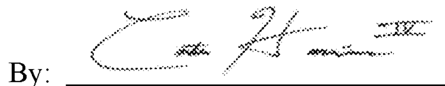
By: 

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EXHIBIT A