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5th JUDICIAL DISTRICT COURT
Lea County
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STATE OF NEW MEXICO
COUNTY OF LEA
FIFTH JUDICIAL DISTRICT

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

Plaintiffs,

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

MAGGIE TOLOUSE 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 MARTÍNEZ, in his official capacity as Speaker of the New Mexico House of Representatives,

Defendants.

NON-PARTY SCOTT C. FORRESTER'S REPLY IN SUPPORT OF MOTION TO QUASH SUBPOENA DUCES TECUM

Pursuant to Rules 1-026(C) and 1-045(C)(2)(b)(i) NMRA, Scott C. Forrester, by and through counsel, Kate Ferlic and Ben Osborn of Egolf + Ferlic + Martinez + Harwood, LLC, submits this Reply In Support of Motion to Quash Subpoena Duces Tecum. Plaintiffs have not rebutted Mr. Forrester's showing that the subpoena seeks privileged communications, is not reasonably calculated to yield probative evidence, and imposes substantial burdens on the Office of Congresswoman Melanie Stansbury. Mr. Forrester therefore respectfully requests that the Court quash the subpoena and issue an order protecting Mr. Forrester from compelled discovery in this matter.

FACTUAL BACKGROUND

Plaintiffs have served extensive discovery on virtually every Democratic official and staff in an attempt to add unnecessary drama to the case in order to compensate their lack of relevant evidence to support their political gerrymandering claims. To wit, on August 2, 2023, Plaintiffs served a subpoena duces tecum to Scott C. Forrester, Chief of Staff to Representative Melanie Stansbury. See Exhibit 1 to Non-Party Scott Forrester's Motion to Quash Subpoena Duces Tecum (the "subpoena").

Far from being limited to the case before the Court, the subpoena broadly demands from the Chief of Staff to one of New Mexico's Members of Congress: (i) *all* communications between certain individuals regardless of subject matter; (ii) *any* communications with *any* person that "relate to the subject of congressional redistricting in New Mexico"; *and* (iii) any communications that contain six search terms. Plaintiffs' subpoena demands, from the office of a sitting Member of Congress, *all* of its communications with dozens of individuals and *all* communications with anyone that in any way relate to or contain broad terms referencing redistricting. Charitably construed, Plaintiffs fashioned the subpoena to Mr. Forrester seeking evidence of state lawmakers' motivations in voting on SB-1 and its map. However, the subpoena presents an unlawful incursion into matters absolutely shielded from discovery, imposes significant burdens, and seeks imprecisely-defined and irrelevant materials. The subpoena therefore must be quashed.

ARGUMENT

Plaintiffs devote little of their Combined Opposition to Motions to Quash ("Response"), to rebutting Mr. Forrester's assertions. Plaintiffs do not specifically refute Mr. Forrester's showing that the subpoena seeks materials absolutely privileged by the Speech and Debate

Clause.[1] Because Plaintiffs' Response to Mr. Forrester's Motion does not rehabilitate the subpoena's propriety and for the reasons stated below, Plaintiffs' subpoena to Mr. Forrester should be quashed.

I. Plaintiffs Have Not Mitigated the Subpoena's Undisputed Intrusion Into an Absolute Legislative Privilege.

Plaintiffs do not materially dispute that their subpoena to Mr. Forrester invades Speech and Debate privilege, or that Mr. Forrester's legislative privilege is absolute. *See* Response at 5 n.2. Instead, they offer—post hoc—to permit Mr. Forrester to sift through the voluminous unbounded responsive communications in search of any that may not pertain to Representative Stansbury's legislative acts. Plaintiffs' purported compromise does not correct the subpoena's impropriety and, moreover, rings hollow given that they have since subpoenaed Mr. Forrester to provide compelled testimony in this case *after* he had moved for a protective order.[2]

Plaintiffs' arguments with respect to Mr. Forrester amount to vague offers of "willing[ness]" to limit discovery demands in a way that might obviate their subpoena's facial intrusion into the Speech and Debate Clause's sphere of protection. Response at 5 n.2. But Plaintiffs' purported, yet unspecified, compromise does little to rectify the problems inherent to their subpoena to Mr. Forrester, as they still seek to distract a Congresswoman's Office from her official duties, require her office to sift through at least a year's worth of written communications in any conceivable medium for anything that: (i) includes a state democratic official; or (ii) concerns redistricting; or (iii) includes any of several listed terms, and then sift through those

[1] Plaintiffs' arguments regarding a qualified legislative privilege are directed at the State Legislators and the New Mexico Constitution, not Members of Congress and their top aides. *E.g.*, Response at 5-6.

[2] On behalf of Mr. Forrester, counsel will submit a Notice of Non-Appearance, Motion to Quash and for Protective Order at the appropriate time.

emails to evaluate which concern federal legislation and which do not.[3] Such burdens are precisely what the Framers intended the Speech and Debate Clause to prevent.

As Mr. Forrester thoroughly documented in his Motion to Quash, the Speech and Debate Clause is absolute; litigants may not compel disclosure of a Congresswoman's legislative communications regardless of how probative, or even crucial, those communications may be to the litigant's case. *See, e.g.*, *United States v. Rayburn House Office Bldg.*, 497 F.3d 654, 662 (D.C. Cir. 2007) ("If the testimonial privilege under the Clause is absolute and there is no distinction between oral and written materials within the legislative sphere, then the non-disclosure privilege for written materials . . . is also absolute, and thus admits of no balancing." (citations omitted)). The Clause exists to protect more than the Congresswoman's convenience. It exists to protect the collective interest in effective representation by protecting Members of Congress from the burden and distraction of compelled production of evidence and testimony. *See Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503 (1975) ("[L]egislators acting within the sphere of legitimate legislative activity should be protected not only from the consequences of litigation's results but also from the burden of defending themselves. . . . [A private civil action] creates a distraction and forces Members to divert their time, energy, and attention from

[3] Plaintiffs' disagreement with this description of the subpoena's scope is unavailing. Plaintiffs depict this as an "unnaturally broad reading of their requests." Response at 15. Yet Plaintiffs' counsel drafted the subpoena to support no other reading. Plaintiffs demanded from Mr. Forrester "All" written communications " that were sent by or to you in the year 2021 and that *either*" included any of ten individuals "*and/or*[] relate to the subject of congressional districting in New Mexico *and/or* contain" a list of search terms." Subpoena at 4 (emphases added). The meaning and effect of disjunctive terms is well-established in the law. If Plaintiffs were truly interested in narrowly targeted discovery, they would not have phrased their requests in the disjunctive and would not have included the broad demand for "all" communications that "relate" to such indeterminant subjects as "congressional redistricting in New Mexico." Further belying any claim of oversight on Plaintiffs' part, the subpoena to Mr. Forrester is worded nearly identically to the subpoenas sent to dozens of other Democratic representatives and officials. Finally, Plaintiffs did not offer any alternative reading of the subpoena's scope. Plaintiffs deliberately fashioned their discovery as a dragnet where a scalpel may have sufficed and cannot now complain that the dozens of discovery targets have balked at their scattershot requests.

their legislative tasks[.]" (internal quotation marks omitted)). In short, private litigants may not "impede congressional action" by compelling discovery from a Congresswoman related to her legislative acts.[4] *Eastland*, 421 U.S. at 509-10 n.16.

Further, Plaintiffs did not address Mr. Forrester's showing that he has no authority to waive the asserted privileges that other parties to the target communications have asserted in this litigation. As the privilege is held by the individual legislators, Mr. Forrester has no authority to waive it for Representative Stansbury or for the state legislators who have asserted their privilege for the communications the subpoena seeks. *See, e.g.*, *Favors v. Cuomo*, 285 F.R.D. 187, 211 (E.D.N.Y. 2012) ("[A] legislator cannot assert or waive the privilege on behalf of another legislator."). As Plaintiffs' unspecified and indirectly-made offer to narrow the subpoena's scope does not negate their unlawful encroachment into absolute Speech and Debate privilege, the subpoena must be quashed.

II. Plaintiffs' Discovery Practices Do Not Comport with Rule 1-026(B), the Supreme Court's Superintending Order, or the Court's Scheduling Order.

Even aside from the insurmountable issue of Mr. Forrester's constitutional privilege against compelled discovery, Plaintiffs cannot show that their discovery requests—to Mr. Forrester and to countless others—comport with Rule 1-026(B)(2) or the Court's mandate. Plaintiffs have listed over 120 witnesses they intend to call. They have threatened this Court's

[4] For the same reasons, an assertion of absolute legislative privilege does not necessarily require production of a privilege log where doing so requires burdensome personal review of extensive privileged communications. *See, e.g.*, *In re Hubbard*, 803 F.3d 1298, 1309 (11th Cir. 2015) (noting that where lawmakers asserted an absolute privilege through counsel in written motions to quash, "[n]o affidavits or confirmations that the lawmakers had personally reviewed the documents were required"). Similarly, Rule 1-045(D)(2)(e) requires only enough description and precision to "enable the demanding party to assess the claim." "Given the purpose of the legislative privilege," Plaintiffs' concession that the subpoena invades Mr. Forrester's absolute legislative privilege, the significant burden that production of a privilege log would impose, and the limited utility of the requested materials, "there was more than enough under Rule 45 to assess the claim of privilege and to compel the granting of the motions to quash." *Hubbard*, 803 F.3d at 1309 & n.10.

contempt to a Congresswoman's Chief of Staff and to dozens of other non-parties, subpoenaing thousands of communications and documents from a grab-bag of disparate individuals and entities whose only connection to this case appears to be that Plaintiffs suspect them of having communicated with some state Democratic official at some point in 2021. Plaintiffs' discovery practices amount to paradigmatic example of a fishing expedition. These tactics find no support in the procedural rules, which require discovery requests to be thoughtful and calculated in any litigation. The tactics further find no support in New Mexico Supreme Court's Superintending Order which, at the time Plaintiffs issued the subpoena, mandated that the Court resolve this matter no later than October 1. Superintending Order, *Grisham v. Van Soelen*, No. S-1-SC-39481 (N.M. July 4, 2023). And lastly, Plaintiffs cite no support in the law governing their claim, for which the most reliable and probative evidence is *not* the subjective state of mind each voting member but rather scientific and statistical comparisons of actual, representative, and counterfactual maps. Rather than seeking the materials most salient to their claims in a manner reasonably calculated to inform the Court's expeditious decision, Plaintiffs have used this case as license to demand discovery from virtually every Democratic official, representative, or advocacy group without regard to proximity or even involvement in the issue at hand, which is whether the SB-1 map substantially and purposefully diluted the individual Plaintiffs' votes by their party affiliation. *See* Amended Order ¶ 5, *Grisham v. Van Soelen*, No. S-1-SC-39481 (N.M. August 25, 2023).

A. Plaintiffs have not shown their discovery requests to Mr. Forrester are necessary, much less that their utility outweighs their significant intrusion.

On relevancy, Plaintiffs merely parrot language from the procedural and evidentiary rules, stating only that their "discovery requests are obviously 'relevant' to their claim here, Rule 1-026(B)(1), since the information sought has a 'tendency' to make it 'more or less probable,' N.M. R.

Evid. 11-401(A), that the Legislature and/or Governor acted with impermissible partisan intent, which is Justice Kagan's first element[.]" Response at 7. Aside from its paucity, there are at least two problems with Plaintiffs' assertion here. First, as noted in Mr. Forrester's Motion and unrebutted in Plaintiffs' Response, courts have never held that Speech and Debate privilege yields to relevancy, and instead have expressly fashioned equal protection tests around the unavailability of individual legislators' statements of subjective motivations. *See* Motion at 14-15. Second, Justice Kagan derived her test in *Rucho v. Common Cause* from decades of gerrymander jurisprudence which has long eschewed excessive reliance on individual legislators' statements as being minimally probative of the legislative body's intent while enabling courts too easily to second-guess an inherently political process. *E.g.*, *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (Kennedy, J., concurring in the judgment) (warning against legal theories that "would commit federal and state courts to unprecedented intervention in the American political process"). Indeed, reliance on random statements of individual legislators' subjective intent is "likely to lead to unpredictable and arbitrary results." Richard L. Hasen, *Bad Legislative Intent*, 2006 WIS. L. REV. 843, 877 (2006) ("Allowing judges to strike down election laws on the basis of a judgment about what constitutes bad enough intent will, at best, give judges the opportunity to make contested value judgments or, at worst, allow them to use the bad intent as a pretext for making naked policy or partisan decisions. At the very least it will open up judges to such charges."). Plaintiffs' subpoena to Mr. Forrester promises little in return for its significant burdens and impermissible incursion into the constitutionally guaranteed privilege.

First, Plaintiffs' misconstrue the standard for partisan intent. It is well-recognized that gleaning the intent of a deliberative body is ill-served by probing the minds of its constituent members. *E.g.*, *Washington v. Davis*, 96 S. Ct. 2040, 2054 (1976) (Stevens, J., concurring) ("It is unrealistic . . . to invalidate otherwise legitimate action simply because an improper motive

affected the deliberation of a participant in the decisional process. A law conscripting clerics should not be invalidated because an atheist voted for it."). "Legislative intent," has thus long been distinguished from the subjective purposes of individual legislators. *See Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 130-31 (1810); *accord TBCH, Inc. v. City of Albuquerque*, 1994-NMCA-048, ¶ 20, 117 N.M. 569 874 P.2d 30 ("Testimony 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." (internal quotation marks and citation omitted)); *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"); *Rucho v. Common Cause*, 139 S. Ct. 2484, 2516 (2019) (Kagan, J., dissenting) (accepting "overwhelming direct evidence" of intent based on statistical analysis and public statements of the officials that drew the map). Courts recognize this problem even for racial discrimination cases, in which such statements would be far more probative because invidious racial intent need not be the "dominant motive" to invalidate a decision, but rather need only be "among the factors that motivated" it. *Keyes v. School Dist. No. 1*, 413 U.S. 189, 210-11 (1973); *see Hart v. Cmty. Sch. Bd. of Educ*, 512 F.2d 37, 50 (2d Cir. 1975) ("When we consider the motivation of people constituting a school board . . . we are dealing with a collective will. It is difficult enough to find the collective mind of a group of legislators. . . . It is even harder to find the motivation of local citizens, many of whom would be as reluctant to admit that they have racial prejudice as to admit that they have no sense of humor.").

Second and relatedly, an individual legislator's subjective intent is especially unrevealing in partisan gerrymandering cases. The process of districting encompasses multiple normative and empirical goals, including "contiguity of districts, compactness of districts, observance of the

lines of political subdivision, protection of incumbents of all parties, cohesion of natural racial and ethnic neighborhoods, compliance with requirements of the Voting Rights Act of 1965 regarding racial distribution, etc." *Vieth*, 541 U.S. at 284. Beyond these public interests, legislators also are expressly permitted to consider partisan advantage, but to an extent whose limits are not yet defined. *See* Superintending Order ¶¶ 3-7; *Davis v. Bandemer*, 478 U.S. 109, 143 (1986). And the Supreme Court has specifically recognized protecting incumbents as a permissible *defense* to charges that a state legislature has engaged in an unconstitutional racial gerrymander. *Easley v. Cromartie*, 532 U.S. 234 (2001). It is thus unsurprising that a unanimous Supreme Court recently indicated that gerrymander claims, unlike retaliation claims, do not "require[] discovery into the motives of the officials who produced the [map]." *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018).

For these reasons, statistical analysis is generally accepted as the most reliable evidence of partisan gerrymandering, as it objectively demonstrates the presence or absence of both partisan intent *and* partisan effect. *E.g.*, *Rucho*, 139 S. Ct. at 2517 (Kagan, J., dissenting) (stating that statistical analysis of North Carolina's redistricting "show[ed] how the same technologies and data that today facilitate extreme partisan gerrymanders also enable courts to discover them, by exposing just how much they dilute votes"). As Plaintiffs and their expert have acknowledged, courts *must* rely on expert statistical analysis to determine the necessary question of partisan effect, and such analyses are objectively, and directly, probative of partisan intent. *See* Response at 7 n.3; Plaintiffs' Motion to Compel at 6 n.2 (admitting that expert statistical analysis can be "powerful" and "*independently* satisfy the first part of Justice Kagan's test" (emphasis added)); Expert Report of Sean P. Trende at 7-8, filed herein August 11, 2023; *cf.* Exhibit A to Motion for Leave to file Amici Curiae Brief in Support of Neither Party, at 4-6, filed herein August 14, 2023 (describing the various quantitative data and analyses probative of intent). For

example, in *Benisek*, on which the Plaintiffs hinge much of their argument, the three-judge district court noted that while evidence of intent may be direct or circumstantial, partisan gerrymander plaintiffs "must rely on *objective* evidence," *Benisek v. Lamone*, 241 F. Supp. 3d 566, 570 (D. Md. 2017) (quoting *Shapiro v. McManus*, 203 F. Supp. 3d 579, 597-98 (D. Md. 2016) (emphasis added). The *Benisek* court indeed permitted deposition questioning "into the [state legislators'] unexpressed thoughts." *Id.* at 575. But the court expressly distinguished such "unexpressed thoughts" as inadmissible because, unlike testimony regarding motivations, "only *objective* evidence is sufficiently reliable to prove intent." *Id* (emphasis added). Because Plaintiffs' subpoena impermissibly intrudes into Speech and Debate privilege and imposes a significant burden that greatly outweighs its minimal utility, and because more reliable evidence is readily available from other sources, the subpoena must be quashed. *See* Rule 1-026(B)(2) NMRA.

B. In light of the subpoena's minimal utility, it must be quashed as unduly burdensome and incompatible with the Court's mandate and scheduling order.

Rule 1-026(B)(2) independently supports quashing the subpoena. But the Supreme Court's Superintending Order also provides no support for dragnet discovery on dozens of Democratic officials, representatives, and advocacy groups demanding thousands of communications that only theoretically might suggest the subjective motivations of lawmakers. Against the multiple protective motions' uniform observation that the Plaintiffs' discovery requests are incompatible with the Supreme Court's instructions and deadlines, Plaintiffs again merely recite the Supreme Court's direction that the Court "consider any [] evidence relevant to"

the application of the three-part test described in Justice Kagan's *Rucho* dissent.[5] Response at 8. This statement cannot support Plaintiffs' scattershot discovery practices. As discussed above, the subpoenas issued to Mr. Forrester and dozens of others threaten to drown the parties and the Court in unhelpful and even distracting material while misunderstanding the jurisprudence of legislative intent. It is not plausible that the Supreme Court envisioned such voluminous and piecemeal discovery, much less that it was eviscerating constitutionally enshrined legislative privilege, when it remanded this case for resolution on "an extraordinarily truncated timeline," Scheduling Order at 3, ¶ 4, filed July 24, 2023, to resolve a claim that expressly permits some degree of partisan considerations, Superintending Order, ¶¶ 3-7. Because Plaintiffs do not need the material that the subpoena demands, and because that material is only minimally relevant to their claim, the Court should not permit Plaintiffs' unusual, disfavored, and distracting fishing expedition into the Office of a sitting Member of Congress.

CONCLUSION

For these reasons, non-party Scott C. Forrester respectfully requests that the Court quash the subpoena seeking privileged and irrelevant information. Mr. Forrester also requests all such further relief that is just and proper under the circumstances, including an award of the attorney fees and costs he incurred in bringing this motion.

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[5] Mr. Forrester notes that the Supreme Court has since refined the scope of evidence relevant to the Plaintiffs' claim when it issued an amended Superintending Order on August 25, 2023. *Compare* July 5 Order ¶ 7 *with* Amended Order ¶ 5. Among other revisions to its original Superintending Order, the Supreme Court reduced the scope of expressly relevant evidence, instructing the Court to "assess whether the individual plaintiffs' party-affiliated votes were in fact substantially diluted by the challenged map by comparing objective district-specific data under that map against analogous evidence under the prior congressional map," and to "consider any other evidence relevant to the district court's application of the test [outlined in Justice Kagan's *Rucho* dissent]." Amended Order ¶ 5.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2023, I filed the foregoing Reply in Support of Motion to Quash through the Court's electronic filing system, which caused all parties entitled to notice to be served.

/s/ *Kate Ferlic*
Kate Ferlic