

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,

v.

Cause 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 MARTINEZ, in his official capacity as Speaker of the New Mexico House of Representatives,

Defendants.

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**PLAINTIFFS' COMBINED OPPOSITION TO: (1) LEGISLATIVE DEFENDANTS & NON-PARTY LEGISLATORS' MOTION TO QUASH TRIAL SUBPOENAS ISSUED TO LEGISLATORS AND STAFF AND FOR PROTECTIVE ORDER; (2) EMERGENCY MOTION TO QUASH TRIAL SUBPOENA ISSUED TO NON-PARTY KYRA ELLIS-MOORE; (3) LEGISLATIVE DEFENDANTS' MOTION TO QUASH DOCUMENT SUBPOENAS TO NON-PARTIES LISA CURTIS AND MICHAEL SANCHEZ; AND (4) NON-PARTY SCOTT C. FORRESTER'S MOTION FOR PROTECTIVE ORDER**

Plaintiffs the Republican Party of New Mexico and a bipartisan group of New Mexico voters (collectively, "Plaintiffs") hereby file this Combined Opposition to: (1) Legislative Defendants And Non-Party Legislators' Emergency Motion To Quash Trial Subpoenas Issued To Legislators And Staff And For Protective Order (Sept. 21, 2023) ("Leg.Mot."); (2) Emergency Motion To Quash Trial Subpoena Issued To Non-Party Kyra Ellis-Moore (Sept. 22, 2023) ("Ellis-Moore Mot."), who is the campaign

manager of Congresswoman Teresa Leger Fernández, *id.* at 1; (3) Legislative Defendants’ Motion To Quash Document Subpoenas To Non-Parties Lisa Curtis And Michael Sanchez (Sept. 11, 2023) (“Curtis & Sanchez Mot.”); and (4) Non-Party Scott C. Forrester’s Motion For Protective Order (Sept. 11, 2023) (“Forrester Mot.”), who is the Chief of Staff to Representative Melanie Stansbury, *id.* at 2. These Motions oppose Plaintiffs’ trial subpoenas, document requests, or deposition notice largely on the same three bases that Legislative Defendants and various nonparty recipients of Plaintiffs’ discovery requests have raised in other discovery-related motions and oppositions previously filed with this Court—namely, legislative privilege, undue burden/overbreadth grounds, and relevancy.\* Accordingly, this Court should deny these Motions for the same reasons that Plaintiffs provided in their Motion To Compel Discovery (Aug. 14, 2023) (“Pls. Mot. To Compel”), and their Combined Opposition To The Motions To Quash (Aug. 17, 2023) (“Pls. Combined Opp.”).

Two recent developments make Plaintiffs’ position on these issues even stronger. First, yesterday, the New Mexico Supreme Court issued a more fulsome decision in this case, articulating—as relevant here—the types of evidence that plaintiffs asserting a partisan-gerrymandering claim may rely upon. As relevant to

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\* These motions and oppositions include: Motion To Quash Subpoenas To 74 Non-Party Legislators And For Protective Order (Aug. 8, 2023); Legislative Defendants’ Motion To Quash Subpoenas Served On Legislative Staff And Consultants (Aug. 14, 2023); Legislative Defendants’ Motion To Quash Subpoenas For Deposition And For Protective Order (Aug. 16, 2023); Legislative Defendants’ Response To Plaintiffs’ Motion To Compel (Aug. 21, 2023); Non-Party Senator Daniel Ivey-Soto’s Joinder In Legislative Defendants’ Motion To Quash Subpoenas For Deposition And For Protective Order (Aug. 28, 2023); Legislative Defendants’ Motion To Quash Deposition Subpoena To Legislative Staffer Leanne Leith And For Protective Order (Sept. 5, 2023); Non-Party Dominic P. Gabello’s Motion To Quash Subpoena Duces Tecum And For Protective Order (Sept. 6, 2023); and Non-Party Gabello’s Motion To Quash Deposition Subpoena (Sept. 6, 2023).

the testimony and evidence that Plaintiffs seek, the Court pointed specifically to the “extensive evidence of intent and effect indicat[ing] that the districting plans in North Carolina and Maryland” at issue in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), were “highly partisan,” while noting that those two cases “support[ ]” the conclusion “that many forms of evidence may be relevant to prove predominant intent.” Opinion at 48, *Grisham v. Van Soelen*, No.S-1-SC-39481 (N.M. Sept. 22, 2023) (hereinafter “Opinion”). As Plaintiffs have repeatedly pointed out, Pls. Mot. To Compel 5–6; Pls. Combined Opp.5–6, 7–8, the discovery they seek is just the type of discovery into evidence of partisan intent that courts considering partisan-gerrymandering cases routinely allow, including the district court in *Benisek v. Lamone*, 241 F. Supp. 3d 566, 575 (D. Md. 2017), the companion case to *Rucho* challenging Maryland’s map. Second, the one entity or individual that meaningfully cooperated with Plaintiffs’ discovery requests—the Center for Civic Policy—produced remarkably candid evidence of Legislative Defendants’ partisan intent, through text messages sent by Defendant Senator and President of the Senate Mimi Stewart, Pls.Ex.2 at 4, of precisely the type that Justice Kagan relied upon in *Rucho*. That the one entity or individual that meaningfully cooperated with Plaintiffs’ discovery requests turned over such powerful evidence strongly suggests that if the other parties and nonparties similarly cooperated with their discovery obligations, that would uncover still more powerful evidence of the Legislature’s egregious partisan intent.

## ARGUMENT

### I. Plaintiffs' Trial Subpoenas, Document Requests, And Deposition Notice Seek Evidence Highly Relevant To The Issue Of Legislative Defendants' Partisan Intent Under Justice Kagan's First Element

As a threshold matter, Plaintiffs' trial subpoenas, document requests, and deposition notice seek highly relevant information related to Legislative Defendants' partisan intent, under the first element of Justice Kagan's controlling test here from her dissenting opinion in *Rucho*, see Opinion at 37–39, notwithstanding the rehashed, contrary arguments of Legislative Defendants, Non-Party Legislators, Ms. Ellis-Moore, and Mr. Forrester. As Plaintiffs explained, Pls. Mot. To Compel 5–8, Justice Kagan's controlling test for Plaintiffs' partisan-gerrymandering claim requires Plaintiffs to establish that the Legislature acted with partisan intent in enacting Senate Bill 1, *Rucho*, 139 S. Ct. at 2516 (Kagan, J., dissenting). Documentary and testimonial evidence from the politicians who drafted, enacted, and signed Senate Bill 1 is highly relevant, direct evidence of partisan purpose, *id.* at 2517, and thus is discoverable under New Mexico law, Rule 1-026(B)(1); N.M. R. Evid. 11-401(A)–(B). Plaintiffs' discovery requests seek only this highly relevant evidence, thus all of these requests are within the bounds of permissible discovery. Pls. Mot. To Compel 6–7; Pls. Combined Opp.7. That is why courts considering partisan-gerrymandering claims frequently allow discovery like Plaintiffs' requests here. Pls. Mot. To Compel 5–6, 7–8 (collecting numerous cases, including *Benisek*). Further, the New Mexico Supreme Court's recent decision also confirms that Plaintiffs' discovery requests are permissible here, given its conclusion that *Rucho* is “a useful evidentiary template” for Plaintiffs' claim, with the “record in *Rucho* support[ing] that many forms of

evidence may be relevant to prove predominant intent and substantial effect for an egregious partisan gerrymander.” Opinion at 48.

Legislative Defendants and Non-Party Legislators argue that Plaintiffs’ trial subpoenas and discovery requests are not relevant here because, as Legislative Defendants argued in their recently filed Proposed and Annotated Findings of Fact and Conclusions of Law, “the thoughts, opinions and personal motivations of individual legislators are not relevant to determining the legislative intent behind a statute or other piece of legislation.” Leg.Mot.8–11; *see also* Ellis-Moore Mot.2–3 (incorporating the same relevancy arguments as Legislative Defendants and Non-Party Legislators); Curtis & Sanchez Mot.5–6. Plaintiffs already fully rebutted these arguments in their Response Brief To Legislative Defendants’ Annotated Findings Of Fact And Conclusions Of Law (Sept. 20, 2023) (“Pls.Resp.Br.”). As Plaintiffs explained there, Justice Kagan did not limit the kind of evidence that may satisfy the intent element of her test to the bare text of the redistricting legislation itself; rather, she repeatedly relied on statements from the state officials overseeing the redistricting process to conclude that the partisan-intent element was met as to the two States at issue there. Pls.Resp.Br.5–7 (discussing *Rucho*, 139 S. Ct. at 2510–11, 2517 (Kagan, J., dissenting)); *contra* Leg.Mot.8–10. And the New Mexico Supreme Court’s recent decision confirms this, explicitly recognizing that the “record in *Rucho* supports that many forms of evidence may be relevant to prove predominant intent,” Opinion at 48—a record that, for example, included a statement from a North Carolina official that he “think[s] electing Republicans is better than electing

Democrats[,] [s]o [he] drew this map to help foster what [he] think[s] is better for the country,” and a statement from Maryland Governor Martin O’Malley that he decided “to create a map that was more favorable for Democrats over the next ten years” by “go[ing] for the Sixth [District],” *Rucho*, 139 S. Ct. at 2510–11 (Kagan, J., dissenting) (citations omitted).

## **II. Legislative Privilege Does Not Bar Plaintiffs’ Trial Subpoenas, Requests For Documents, Or Deposition Notice**

Legislative Defendants, Non-Party Legislators, Ms. Ellis-Moore, and Mr. Forrester argue that legislative privilege bars Plaintiffs’ trial subpoenas, document requests, and deposition notice, expressly incorporating prior legislative-privilege arguments from previous filings with this Court. Leg.Mot.7; Ellis-Moore Mot.3–4; Curtis & Sanchez Mot.5; Forrester Mot.5–6. As Plaintiffs have previously explained, any legislative-privilege claim based on New Mexico’s Speech or Debate Clause is limited in the context of this case, given that: (1) the privilege does not extend to legislators’ communications with outside third parties; and (2) when the privilege does apply, it may yield in the face of competing constitutional considerations, after appropriate balancing. Pls. Mot. To Compel 8–11, 12–14; Pls. Combined Opp.1–2 (citing *State ex rel. Att’y Gen. v. First Jud. Dist. Ct. of N.M.*, 1981-NMSC-053, ¶ 18, 96 N.M. 254, 629 P.2d 330, *abrogated by Republican Party of N.M. v. N.M. Tax’n & Rev. Dep’t*, 2012-NMSC-026, 283 P.3d 853; and *Republican Party*, 2012-NMSC-026, ¶ 49). This is the balancing approach that the district court in *Benisek* used to overrule certain Maryland officials’ legislative-privilege objections to discovery requests, 241 F. Supp. 3d at 575, leading to the record of impermissible

partisan intent and partisan effects as to Maryland’s map that Justice Kagan found so compelling, *Rucho*, 139 S. Ct. at 2510–11, 2517 (Kagan, J., dissenting). And again, the New Mexico Supreme Court’s recent decision just endorsed use of this very same “record in *Rucho*,” recognizing that it authorizes “many forms of evidence . . . relevant to prove predominant intent and substantial effect for an egregious partisan gerrymander.” Opinion at 48.

Plaintiffs’ trial subpoenas, document requests, and deposition notice seek two categories of information—communications between legislators or executive-branch officials and outside third parties, and communications among legislators and/or executive-branch officials. The former category wholly falls outside of legislative privilege, and the latter category prevails over the privilege, after appropriate balancing here. Pls. Mot. To Compel 11–12, 14–15; Pls. Combined Opp.2–4, 4–8. Thus, legislative privilege is no bar here.†

### **III. Plaintiffs’ Trial Subpoenas, Document Requests, And Deposition Notice Are Not Overbroad Or Unduly Burdensome, Although, Again, Plaintiffs Are Amenable To Appropriately Narrowing Their Requests**

Finally, Legislative Defendants, Non-Party Legislators, Ms. Ellis-Moore, and Mr. Forrester argue that Plaintiffs’ trial subpoenas, document requests, and deposition notice are overbroad and unduly burdensome in certain respects. Leg.Mot.7–8; Ellis-Moore Mot.3–4; *see* Forrester Mot.6–7. Again, as Plaintiffs explained in their prior filings, Plaintiffs’ trial subpoenas, document requests, and

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† Ms. Ellis-Moore and Mr. Forrester rest their assertions of privilege on the U.S. Constitution’s Speech or Debate Clause. Ellis-Moore Mot.3–4; Forrester Mot.5–6. As Plaintiffs explained, this Clause is inapplicable, because the drafting and enacting of Senate Bill 1 was a legislative process of New Mexico, not of Congress. Pls. Combined Opp. 5 n.2.

deposition notice seek highly relevant testimony, communications, and documents establishing the Legislature’s purpose in drawing and enacting Senate Bill 1, which is standard fare in partisan-gerrymandering cases. *See* Pls. Mot. To Compel 5–8; Pls. Combined Opp.12–15. The New Mexico Supreme Court’s recent decision confirms that Plaintiffs’ requests are targeted to uncover relevant evidence, as that opinion endorsed *Rucho*’s evidentiary “record,” while also recognizing that *Rucho*’s record considers “many forms of evidence” to be “relevant to prove predominant intent . . . for an egregious partisan gerrymander.” Opinion at 48. And the Center for Civic Policy’s response to Plaintiffs’ discovery shows that Plaintiffs’ discovery requests seek relevant evidence, as that response produced the remarkably candid text messages from Senator Stewart, revealing the Legislature’s egregious partisan purposes with Senate Bill 1. Pls.Ex.2 at 4. Thus, Plaintiffs’ trial subpoenas, documents requests, and deposition notice are not overbroad or unduly burdensome.

Legislative Defendants’ and Non-Party Legislators’ Motion largely rehashes their prior filings regarding the alleged overbreadth and burdensomeness of Plaintiffs’ document requests. Leg.Mot.7–8. Yet, as Plaintiffs explained, their document requests are similar to electronic discovery requests in ordinary commercial litigation, so Legislative Defendants’ and Non-Party Legislators’ renewed complaints of overbreadth and burdensomeness are still unpersuasive. *Compare* Leg.Mot.7–8 (expressly incorporating prior arguments), *with* Pls. Combined Opp.12–15. In any event, just as before, Plaintiffs are happy to consider appropriate requests from Legislative Defendants and Non-Party Legislators to narrow these document



requests, if Legislative Defendants and Non-Party Legislators would likewise agree to respond to these requests in good faith. *See* Pls. Combined Opp.12–15. Finally, while Legislative Defendants and Non-Party Legislators complain that they have “less than 5 calendar days” to comply with these document requests, Leg.Mot.8, whatever time pressure they face is of their own making, since Plaintiffs’ document requests renews the prior discovery requests that Plaintiffs made well over a month ago (and consistent with this Court’s Scheduling Order), *see supra* p.2 n.\* (listing Legislative Defendants’ various discovery motions).

Nonparty Ms. Ellis-Moore’s arguments are similarly unpersuasive. First, Ms. Ellis-Moore complains of the scope of her trial subpoena and document requests and the timeframe in which she must comply, Ellis-Moore Mot.3, but her arguments fail for the same reasons as Legislative Defendants’ and Non-Party Legislators’ same arguments fail, *supra* pp.8–9. Second, Ms. Ellis-Moore claims that she lives over 100 miles away from this Court, Ellis-Moore Mot.3, but Plaintiffs are amenable to having Ms. Ellis-Moore testify remotely, as they explained at the Court’s status conference on Friday, September 22, 2023. Third, Ms. Ellis-Moore raises legislative-privilege issues as an additional burden, Ellis-Moore Mot.3–4, but those complaints fail for the reasons discussed above, *supra* Part I. Fourth, Ms. Ellis-Moore notes that the trial is set for three days and claims that any information that she possesses would be of comparably limited relevancy to Plaintiffs’ case, Ellis-Moore Mot.4; *see also* Forrester Mot.6–7; however, and again, Plaintiffs are willing to have her testify remotely, which eliminates any force to those observations.

## CONCLUSION

This Court should deny: (1) Legislative Defendants And Non-Party Legislators' Emergency Motion To Quash Trial Subpoenas Issued To Legislators And Staff And For Protective Order (Sept. 21, 2023); (2) Emergency Motion To Quash Trial Subpoena Issued To Non-Party Kyra Ellis-Moore (Sept. 22, 2023); (3) Legislative Defendants' Motion To Quash Document Subpoenas To Non-Parties Lisa Curtis And Michael Sanchez (Sept. 11, 2023); and (4) Non-Party Scott C. Forrester's Motion For Protective Order (Sept. 11, 2023).

Dated: September 23, 2023

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Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and complete copy of the foregoing will be served on all counsel via the e-filing system.

Dated: September 23, 2023

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