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.

PLAINTIFFS' COMBINED OPPOSITION TO (1) MOTION TO QUASH SUBPOENAS TO 74 NON-PARTY LEGISLATORS AND FOR PROTECTIVE ORDER, (2) MOTION FOR PROTECTIVE ORDER OF GOVERNOR MICHELLE LUJAN GRISHAM, (3) LEGISLATIVE DEFENDANTS' MOTION TO QUASH SUBPOENAS SERVED ON LEGISLATIVE STAFF AND CONSULTANTS, (4) MOTION TO QUASH SUBPOENA OF KYRA ELLIS-MOORE, (5) LEGISLATIVE DEFENDANTS' MOTION TO QUASH SUBPOENAS FOR DEPOSITION AND FOR PROTECTIVE ORDER, AND (6) NON-PARTY SCOTT C. FORRESTER'S MOTION TO QUASH SUBPOENA DUCES TECUM

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INTRODUCTION

After Plaintiffs served discovery consistent with the New Mexico Supreme Court's order that this Court should consider "any [ ] evidence relevant to" Justice Kagan's test from *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), Order 4, *Grisham v. Van Soelen*, No. S-1SC-39481 (N.M. July 5, 2023) ("Superintending Order"), numerous parties moved to quash that discovery, seeking to gut Plaintiffs' opportunity to present evidence that is clearly relevant to the partisan-intent element of Justice Kagan's test, *see, e.g.*, Pls. Mot. To Compel Discovery, Exs.1–11 (Aug. 14, 2023) ("Mot. To Compel"); Mot. To Quash Of Non-Party Legislators, Exs.A, C–G (Aug. 8, 2023) ("Non-Party Leg.Mot."); Mot. To Quash Of Gov. Grisham, Ex.B (Aug. 11, 2023) ("Gov.Mot."); Legislative Defs. Mot. To Quash Subpoenas Served On Leg. Staff & Consultants, Ex.A–D (Aug.14, 2023) ("Leg.S&C.Mot."); Mot. To Quash Of Ellis-Moore 2–4 ("Ellis-Moore Mot.") (Aug. 15, 2023); Leg. Defs. Mot. To Quash Subpoenas For Dep., Exs.1–2 (Aug. 16, 2023) ("Leg.Mot."); Non-Party Scott C. Forrester's Mot. To Quash Subpoena Duces Tecum, Ex.1 (Aug. 16, 2023) ("Forrester Mot."). Consistent with Plaintiffs' Motion To Compel, this Court should reject all of these objections and require compliance with Plaintiffs' discovery requests immediately.

ARGUMENT

I. Legislative Privilege Does Not Bar Plaintiffs' Discovery Requests

A. As Plaintiffs explain more fully in their Motion To Compel, any legislative privilege grounded in New Mexico Speech or Debate Clause is limited in the context of this case, given two of its fundamental features. First, legislative privilege does not extend to communications of legislators and their close aides with outside third

parties. That is because New Mexico's Speech or Debate Clause provides that "*Members of the legislature* . . . shall not be questioned in any other place for any speech or debate or for any vote cast in either house," N.M. Const., art. IV, § 13 (emphasis added), with no reference to outside third parties. Further, legislative privilege is "similar" to executive privilege in New Mexico, *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, ¶¶ 37, 42, 46, 283 P.3d 853, and the Supreme Court has held in that case that executive privilege does not extend to outside third parties, as explained below, *infra* pp.3, 8–9. Second, for intrabranch communications that do implicate legislative privilege to some degree—that is, communications between legislators or between legislators and their close aides—the privilege is "qualified," in that it may yield in the face of competing constitutional considerations, after an appropriate "balancing" of such competing concerns. *Republican Party*, 2012-NMSC-026, ¶ 49; *First Jud.*, 1981-NMSC-053, ¶ 18. That is also why many courts considering claims of legislative privilege in redistricting cases apply a five-factor balancing test to analyze such claims, *see, e.g.*, *Benisek v. Lamone*, 241 F. Supp. 3d 566, 575 (D. Md. 2017), and Plaintiffs respectfully submit that this test is appropriate here.[1]

B. As a threshold matter, the Motions To Quash fail to establish that legislative privilege applies to communications between legislative officials and outside third

[1] "(1) [T]he 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." *Id.*

parties. Non-party Legislators only briefly assert that New Mexico's legislative privilege extends to outside third parties, but that is wrong. Non-Party Leg.Mot.6. In *Republican Party*, 2012-NMSC-026, the Supreme Court concluded that executive privilege extends *only* to communications between the Governor and her immediate advisors—to the exclusion of other Executive Branch officials—which by necessity means communications between the Governor and third parties outside of the Executive Branch are not protected. *See id.* ¶ 46. Since legislative privilege is "similar" to executive privilege, *First Jud.*, 1981-NMSC-053, ¶ 18, its boundaries also end before outside third parties. While non-party Legislators discuss *La Union Del Pueblo Entero v. Abbott*, 68 F.4th 228, 236 (5th Cir. 2023), that cannot trump the Supreme Court's binding decisions in *Republican Party*, 2012-NMSC-026, and *First Judicial*, 1981-NMSC-053. In any event, multiple other cases have held that legislative privilege in redistricting cases does not extend to communications with third parties. *See, e.g.*, *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, No. 1:11-cv-5065, 2011 WL 4837508, at *10 (N.D. Ill. Oct. 12, 2011); *Favors v. Cuomo*, No. 1:11-cv-05632, 2013 WL 11319831, at *10 (E.D.N.Y. Feb. 8, 2013); *Baldus v. Brennan*, No. 2:11-cv-00562, 2011 WL 6122542, at *2 (E.D. Wis. Dec. 8, 2011); *Edwards v. Vesilind*, 790 S.E.2d 469, 481–82 (Va. 2016).

Legislative Defendants, for their part, argue that legislative privilege covers Research & Polling, Inc., a third-party contractor that provides redistricting and demographic services to the Legislature. Leg.S&C.Mot.8–12. But while the intrabranch communications with "immediate adviser[s]" having "broad and

significant responsibility for assisting" a legislator with "his or her decisionmaking" are covered by qualified legislative privilege, *Republican Party*, 2012-NMSC-026, ¶ 46 (citations omitted); *First Jud.*, 1981-NMSC-053, ¶ 18, Research & Polling, Inc. is not an advisor with that degree of closeness. Far from serving in a "broad and significant" advisory role, *Republican Party*, 2012-NMSC-026, ¶ 46 (citation omitted), Research & Polling, Inc., only offered "technical consulting services" to the Legislature for the redistricting process, Leg.S&C.Mot. Ex.D, at 1, such as providing "sophisticated software and statistical analys[e]s," Leg.S&C.Mot.9.

C. Moving to the Motions' various arguments regarding intrabranch communications—which do implicate legislative privilege—those arguments fail under the balancing approach articulated in *Republican Party*.

First, Legislative Defendants and non-party Legislators claim that New Mexico's legislative privilege is "absolute," Leg.Mot.5–6; Leg.S&C.Mot.2–4; Non-Party Leg.Mot.3–4, 5–6, but that is wrong under *Republican Party* and the related cases, as Plaintiffs have explained. Mot. To Compel 13. So, while Legislative Defendants and non-party Legislators have little to say about *Republican Party*, 2012-NMSC-026, and *First Judicial*, 1981-NMSC-053, they cite a grab bag of out-of-jurisdiction cases purportedly holding that legislative privilege is absolute, but these cases are either distinguishable or not persuasive, Non-Party Leg.Mot.3–4; Leg.S&C.Mot.3–4; Leg.Mot.4–8. For example, *Doe v. McMillan*, 412 U.S. 306 (1973), discusses the legislative privilege of Congress, *id.* at 324, which is historically understood as broader than the legislative privilege of state legislators, *see Benisek*,

241 F. Supp. 3d at 572–73.[2] Further, while *Kniskern v. Amstutz*, 144 Ohio App. 3d 495, 760 N.E.2d 876 (8th Dist. 2001), recognized absolute legislative privilege outside of the redistricting context in Ohio, *id.* at 496–97, the Ohio Supreme Court more recently required state officials to respond to discovery in redistricting litigation despite their assertions of privilege, *LWV of Ohio v. Ohio Redistricting Comm'n*, 164 Ohio St. 3d 1457, 2021-Ohio-3607, 174 N.E.3d 805 (unpublished table decision).

Second, the Motions To Quash argue that New Mexico's legislative privilege covers "not only legislative actions but also the motivation for those acts," and that it extends to "development and consideration of legislative redistricting plans." Non-Party Leg.Mot.4–5; *see also* Leg.Mot.7–8; Leg.S&C.Mot.2–4; Gov.Mot.11–12, 13–14 ("proposal, formulation, and passage of legislation"). But these arguments fail to grapple with the fact that courts considering redistricting cases—including *Benisek*, one of the district courts preceding the *Rucho* decision—*balance* claims of legislative privilege against competing constitutional considerations, which is precisely how the New Mexico Supreme Court understands the similar doctrine of executive privilege. *Republican Party*, 2012-NMSC-026, ¶ 49; *First Jud.*, 1981-NMSC-053, ¶ 18. Under

[2] Ms. Ellis-Moore and Mr. Forrester, a political consultant and a congressional aide of Representatives from New Mexico, respectively, assert that Plaintiffs' requests are barred by the federal Speech or Debate Clause. Ellis-Moore Mot.5–6; Forrester Mot.4–5 (also citing U.S. Const. art. I, § 5, cl. 3, allowing secrecy for parts of the journal of congressional proceedings). The federal Speech or Debate Clause is inapplicable, since it applies only, if at all, to "the consideration and passage or rejection of proposed legislation or [some] other matters which the [U.S.] Constitution places within the jurisdiction of either House [of Congress]." *Gravel v. United States*, 408 U.S. 606, 625 (1972); *accord United States v. Brewster*, 408 U.S. 501, 512 (1972) (distinguishing between protected "legislative [activities]" and unprotected "political matters"). The drafting and enacting of Senate Bill 1 was a legislative process in New Mexico. And while Mr. Forrester claims that Senate Bill 1 did relate to certain pending federal legislation, such as the John R. Lewis Voting Rights Advancement Act of 2021 ("John Lewis Act"), H.R. 4, 117th Cong. (2021); Freedom to Vote Act, S. 2747, 117th Cong. (2021), Forrester Mot.7–8, Plaintiffs are more than willing to narrow their requests to exclude communication involving both Senate Bill 1 and any pending federal legislation, such as the John Lewis Act.

this balancing approach, courts frequently allow discovery designed to uncover the Legislature's and/or the Governor's motives in enacting redistricting legislation. *See, e.g.*, *Benisek*, 241 F. Supp. 3d at 577; *Bethune–Hill v. Va. State Bd. of Elections*, 114 F.Supp.3d 323, 337–38, 342–43 (E.D. Va. 2015); *Page v. Va. State Bd. of Elections*, 15 F. Supp. 3d 657, 666 (E.D. Va. 2014); *Favors v. Cuomo*, 285 F.R.D. 187, 217–21 (E.D.N.Y. 2012); *Baldus*, , 2011 WL 6122542, at *2; *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *7–10; *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 101–03 (S.D.N.Y. 2003), *aff'd*, 293 F. Supp. 2d 302 (S.D.N.Y. 2003).

Third, Legislative Defendants and non-party Legislators claim that legislative privilege furthers the separation of powers. Non-Party Leg.Mot.6–7; Leg.S&C.Mot.11; Leg.Mot.5. While legislative privilege certainly serves important ends, partisan gerrymandering deprives citizens of "the most fundamental of their constitutional rights: the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives." *Rucho*, 139 S. Ct. at 2509 (Kagan, J., dissenting). That is why courts often set aside privilege claims to permit discovery into partisan intent of just the type that Plaintiffs seek here in partisan-gerrymandering cases. *See, e.g.*, *Benisek*, 241 F. Supp. 3d at 575; *LWV of Fla. v. Detzner,* 172 So. 3d 363, 391–92 (Fla. 2015); *LWV of Ohio,* 174 N.E.3d at 805.

Fourth, non-party Legislators complain that enforcing Plaintiffs' subpoenas "would be unprecedented in New Mexico's redistricting jurisprudence." Non-Party Leg.Mot.9. As a threshold matter, New Mexico courts have allowed substantial

discovery in past redistricting cases. *See, e.g.*, *Egolf v. Duran*, No.D-101-CV-2011-02942 (Sante Fe Cnty. 1st Jud. Dist. Ct.) (over 20 deposition notices). In any event, New Mexico has not recognized partisan-gerrymandering claims until this case. *See* Superintending Order 3. In this case of first impression in this State, Plaintiffs seek only the standard type of discovery that courts permit in just such partisan-gerrymandering cases. *See supra* p.6 (collecting cases).

Fifth, Legislative Defendants, non-party Legislators, and Mr. Forrester claim that Plaintiffs' discovery may not "advanc[e] their claims," since Plaintiffs must still prove partisan effect under Justice Kagan's test, which is Justice Kagan's second element. Non-Party Leg.Mot.9; Leg.S&C.Mot.1; *see* Forrester Mot.13–15. Plaintiffs' 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, *see Rucho*, 139 S. Ct. at 2516 (Kagan, J., dissenting); Mot. To Compel 3–5, 5–8.[3]

Finally, non-party Legislators claim that Plaintiffs' discovery requests violate the Supreme Court's Superintending Order, since that order "said nothing to suggest

[3] While Plaintiffs' requests seek highly *relevant*, direct evidence of impermissible partisan intent, for avoidance of doubt, they note that indirect or circumstantial evidence of partisan intent may also *independently* satisfy the first part of Justice Kagan's test. *See Rucho*, 139 S. Ct. at 2520–21 (Kagan, J., dissenting); *Benisek*, 241 F. Supp. 3d at 575 ("direct evidence, as well as circumstantial evidence, may be used to prove the element of intent"); *Harkenrider v. Hochul*, 197 N.E.3d 437, 452 (N.Y. 2022) ("Such invidious intent could be demonstrated directly or circumstantially[.]"). Such indirect evidence may include, for example, evidence that the process of drawing the map was highly partisan; evidence that the Legislature replaced a fair, neutral map, with a map that was more favorable to one party; or expert analysis showing that a map's egregious partisan effects are difficult (if not impossible) to explain without reference to partisan intent. *See, e.g.*, *Harkenrider*, 197 N.E.3d at 452–53.

it was . . . eviscerating the Speech and Debate Clause." Non-Party Leg.Mot.10–11; *see also* Ellis-Moore.Mot.4–5 (asserting similar argument); Forrester Mot.15–16 (similar). Plaintiffs' discovery requests are *precisely* the kind of discovery that the Supreme Court's Superintending Order contemplated. In its Superintending Order, the Supreme Court instructed this Court to "consider any [ ] evidence relevant to" the "application of" Justice Kagan's test from her *Rucho* dissent to Plaintiffs' partisan-gerrymandering claim. Superintending Order 4. And the first element of that claim requires Plaintiffs to show the Legislature's predominant partisan purpose. *Rucho*, 139 S. Ct. at 2516 (Kagan, J., dissenting). While non-party Legislators argue that nothing in Justice Kagan's dissenting opinion in *Rucho* demonstrates that she relied upon evidence subject to a *prima facie* claim of legislative privilege, Non-Party Leg.Mot.11, Justice Kagan's opinion relied upon (as to the Maryland map) the record created in *Benisek*, *Rucho*, 139 S. Ct. at 2510–11 (Kagan, J., dissenting), where the district court had allowed for "extensive discovery," *Benisek*, 348 F. Supp. 3d at 497, 518, after overruling legislative-privilege objections, *Benisek*, 241 F. Supp. 3d at 575.

II. Similarly, Executive Privilege Does Not Bar Plaintiffs' Discovery Requests To The Governor

As discussed above, the New Mexico Supreme Court narrowly understands executive privilege, as the *Republican Party* decision illustrates. There, the Court held that the Governor had only a qualified executive privilege under the New Mexico Constitution, extending to communications or documents "authored, or solicited and received, by either the Governor or an immediate advisor," to the exclusion of all other executive-branch officials and, necessarily, outside third parties. 2012-NMSC-026,

¶ 46 (citation omitted). And even where this privilege did possibly apply, it was then subject to a "balanc[ing of] the public's interest in preserving confidentiality to promote intra-governmental candor with the individual's need for disclosure of the particular information sought" in litigation discovery. *Id.* ¶ 49 (citation omitted). The New Mexico Constitution, the Court explained, requires this narrow understanding of executive privilege because "[t]ransparency is an essential feature of the relationship between the people and their government," so "executive privilege must be confined to the constitutional limits" to "protect the people's vital right to access information about the workings of government." *Id.* ¶¶ 51–52.

Here, as with legislative privilege, executive privilege does not bar Plaintiffs' discovery requests of the Governor, seeking information highly relevant to Plaintiffs' claim. As Plaintiffs explain more fully in their Motion To Compel, to the extent their discovery requests of the Governor seek communications with outside third parties, they fall outside the scope of executive privilege. Mot. To Compel 10–12. Further, to the extent Plaintiffs' requests seek communications wholly within the Executive Branch, application of the five-factor balancing test discussed above weighs in favor of ordering the Governor to comply with Plaintiffs' requests. Mot. To Compel 12–15.

In her Motion to Quash, the Governor nevertheless argues that executive privilege bars Plaintiffs' deposition notice to the Governor's Office. Gov.Mot.14. But if the dependent from her Office would discuss communications between the Executive Branch and outside third parties, executive privilege would not apply at all. *See Republican Party*, 2012-NMSC-026, ¶¶ 37, 42, 46. Additionally, where a

dependent would discuss communications that do fall within the privilege—that is, "communications that 'concern the Governor's decisionmaking in the realm of . . . her core duties," Gov.Mot.14 (alteration in original) (quoting *Republican Party,* 2012-NMSC-026, ¶¶ 44–47)—the Governor again fails to rebut the point that executive privilege would give way to disclosure, after a proper application of the relevant balancing test. That is because these communications would be highly relevant to the intent prong of Justice Kagan's controlling standard; they are not readily available elsewhere; Plaintiffs' partisan-gerrymandering claim raises serious constitutional issues over the right to participate equally in the political process; the Governor is sued only in her official capacity, not personally; and providing these communications presents little risk of chilling legitimate government deliberations. *See Benisek*, 241 F. Supp. 3d at 575; *supra* p.2, n.1 (listing five factors).

III. The Court Should Order A Senior Member Of The Governor's Office To Sit For A Deposition, Despite The Governor's Objections

Plaintiffs' discovery requests include a notice of deposition under Rule 1-030(B)(6) for the deposition of a designee from the Office of the Governor. Mot. To Compel, Ex.7. As with Plaintiffs' other requests, this deposition notice of the Governor's Office is relevant to Plaintiffs' claim, related to partisan intent. *See Rucho*, 139 S. Ct. at 2516–17 (Kagan, J., dissenting). This explains why, for example, the Ohio Supreme Court recently allowed a deposition of the Ohio Governor, among other officials, in a partisan-gerrymandering case. *LWV of Ohio,* 174 N.E.3d at 805.

The Governor argues that the so-called "extraordinary circumstances" test bars Plaintiffs' deposition notice, even as to a designee of the Governor's Office, as

opposed to the Governor herself. Gov.Mot.5–11. But the "extraordinary circumstances" test should not apply here and, in any event, is satisfied.

To begin, the "extraordinary circumstances" test should not apply. No court in New Mexico appears to have applied this test, as the Governor admits, Gov.Mot.6 n.4, and the Supreme Court's narrow understanding of executive privilege in *Republican Party* counsels against applying this novel test in this case. There, as explained above, the Supreme Court emphasized the Governor's narrow power to shield communications in her Office from public scrutiny, 2012-NMSC-026, ¶¶ 38, 42–48, in recognition that "[o]ur constitution . . . is at its apex when the people have access to the information necessary to determine whether their elected officials are faithfully fulfilling their duties," *id.* ¶ 52. So, rather than recognizing the "extraordinary circumstances" test as an *additional* hurdle to Plaintiffs' obtaining information from an elected official that is highly relevant to their claim—contrary to the thrust of *Republican Party*—this Court should determine only whether legislative or executive privilege would bar the deposition notice to the Governor's Office, including after applying the five-factor balancing test discussed above. *Supra* p.2 & n.1.

In any event, Plaintiffs' deposition notice to the Governor's Office would satisfy the "extraordinary circumstances" test. The Governor has unique, "first-hand knowledge related to" Plaintiffs' claim, *In re Off. of the Utah Att'y Gen.,* 56 F.4th 1254, 1264 (10th Cir. 2022) (citations omitted), since her signature was a constitutionality necessary component of making Senate Bill 1 the law, *contra* Gov.Mot.6. The Governor's testimony would "likely lead to discovery of admissible evidence," *Off. of*

the Utah Att'y Gen., 56 F.4th at 1264 (citations omitted), for the same reason. And Plaintiffs cannot "obtain[ ]" this information "from an alternative source or via less burdensome means," *Off. of the Utah Att'y Gen.*, 56 F.4th at 1264 (citations omitted): only the Governor or her designee has this first-hand information of whether the Governor acted with partisan intent when signing (and, perhaps, drafting portions of) Senate Bill 1, *contra* Gov.Mot.7–8.

Finally, the Governor argues that the scope of Plaintiffs' deposition topics precludes her from designating a senior staffer to sit for a deposition on behalf of her Office. Gov.Mot.9–11. Although Plaintiffs believe that their requests are reasonable and tailored to the controlling standard here, *see infra* Part IV, Plaintiffs would be glad to confer with Counsel for the Governor to narrow the topics presented, if the Governor would commit in turn to responding to the deposition notice.

IV. While Plaintiffs' Discovery Requests Are Standard For Partisan Gerrymandering Cases, Plaintiffs Are Amenable To Narrowing Their Requests, As They Already Told Opposing Counsel

Non-party Legislators, Ms. Ellis-Moore, and Mr. Forrester claim that Plaintiffs' discovery requests are overly broad and unduly burdensome, contrary to Rules 1-045(C) and 1-026(C) of the New Mexico Rules of Civil Procedure for the District Courts. Non-Party Leg.Mot.11–14; Ellis-Moore Mot.2–4; Forrester Mot.1–3, 15–16. But as noted above and in the Motion to Compel, Plaintiffs' requests seek highly relevant testimony, communications, and documents establishing the purpose in drawing and enacting Senate Bill 1, which is standard fare in partisan gerrymandering cases. *See supra* p.6 (collecting cases).

Non-party Legislators' claims of overbreadth and undue burden from Plaintiffs' discovery requests are risible.

Plaintiffs' Boolean searches in their discovery requests—including the use of syntax like "and" or "*"—are not "sophisticated." Non-Party Leg.Mot.11. Rather, these kinds of request are commonplace in electronic discovery in modern litigation. Indeed, Plaintiffs' supplying of particular Boolean searches for non-party Legislators, syntax and all, makes the burden of these discovery requests *easier*, as non-party Legislators do not need to design their own search terms from scratch to fully comply with their discovery obligations. But if non-party Legislators believe that other search terms or fewer Boolean syntax inserts would be less burdensome, Plaintiffs are happy to consider those terms and amend their discovery requests as appropriate.

Non-party Legislators' claim that it would take 560 days to comply with Plaintiffs' discovery requests, even with the help of its Legislative Counsel Service, beggars belief. Non-Party Leg.Mot.3, 13–14. Again, Plaintiffs' discovery requests are substantively similar to the discovery sought in redistricting litigation in cases across the country, and they are technically similar to electronic discovery requests in ordinary commercial litigation more broadly. If the Legislature does not have the technical capabilities to comply with these standard requests in this vitally important case involving fundamental constitutional rights, then it should do what many other litigants do: hire an outside discovery vendor. Notably, while non-party Legislators complain at length that they lack the technical capability to comply with this discovery, they never explain why an outside vendor would not fully resolve these

concerns. *See generally* Non-Party Leg.Mot.11–14.[4] And Plaintiffs are more than willing to confer with non-party Legislators on this issue also, including with members of the parties' respective information technology staff.

Next, non-party Legislators' claim that they need not even complete a privilege log, notwithstanding Rules 1-026(B)(7)(a) and 1-045(D)(2)(a), is wrong. The only authority that non-party Legislators cite for this assertion is a case from Virginia, and even that case does not support them. Non-Party Leg.Mot.14 (citing *Edwards v. Vesilind*, 790 S.E.2d 469, 478–79 (Va. 2016)). *Edwards* held that "a legislator is generally not required to produce a *detailed* privilege log in order to invoke [legislative] privilege," but "must merely address, in describing the function of the evidence requested (and, in the case of a communication, with whom such communications would have occurred), why the privilege would apply." 790 S.E.2d at 478–79 (emphasis added). But here, non-party Legislators have refused to create a privilege log altogether, even a less-detailed log like in *Edwards*. *See* Non-Party Leg.Mot.14; *see also* Ellis-Moore Mot.4–5; Forrester Mot. 3, n.1

Finally, non-party Legislators request that this Court order Plaintiffs to "submit a discovery plan" for approval. Non-Party Leg.Mot.2, 15. Plaintiffs are amenable to that approach, so long as it includes a robust meet-and-confer requirement between Plaintiffs and the discovery recipients who may assert legislative privilege, including with their respective IT personnel, and so long as this can lead to discovery be completed within the timeframe provided by the New Mexico

[4] Plaintiffs have served notices of depositions on non-party Legislators' Legislative Counsel Services declarants.

Supreme Court. Plaintiffs *already* attempted to work in good faith with non-party Legislators on narrowing the scope of their requests to accommodate concerns of overbreadth and undue burden. Yet, non-party Legislators rebuffed Plaintiffs' overtures. So, Plaintiffs can only assume that non-party Legislators have no interest in resolving this supposed discovery dispute in a manner that requires their production of any responsive material—even if Plaintiffs submitted a "discovery plan," per non-party Legislators' demands—absent a direct order from this Court.

As for Ms. Ellis-Moore's and Mr. Forrester's undue burden claims, they fail too. These recipients complain with the particular wording of Plaintiffs' requests, asserting that it covers, for example, *all* of their communications regardless of the subject matter. *See* Ellis-Moore Mot.2–4; Forrester Mot.1–3. While Plaintiffs dispute that unnaturally broad reading of their requests, they are willing to narrow these requests too in order to allay these recipients' apparent frustrations, if that would lead Ms. Ellis-Moore and Mr. Forrester to respond to the discovery requests promptly.

CONCLUSION

This Court should deny the Motions To Quash.

Dated: August 17, 2023

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: August 17, 2023

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