

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 BRIAN EGOLF, in his official capacity as
Speaker of the New Mexico House of Representatives,

Defendants.

LEGISLATIVE DEFENDANTS' & NON-PARTY LEGISLATORS' COMBINED REPLY

In Plaintiffs' *Combined Opposition*, filed August 17, 2023. Plaintiffs again beat the drum of common law privilege in *Benisek* (federal common law privilege) and *First Judicial* (state executive privilege), while accusing Legislative Defendants and Non-Party Legislators of citing a "grab bag" of cases. *Id.* at 2, 4. Instead, in briefing the issue, Defendants and Non-Parties have followed the New Mexico Supreme Court's guidance in *Republican Party of New Mexico*, instructing courts to survey federal and state law in determining the proper scope of New Mexico's constitutional privileges. 2012-NMSC-026, ¶17. Application of that body of law to this matter compels the conclusion that the Court must quash Plaintiffs' document and deposition subpoenas issued to legislators, their staff and consultants.

Legislative Defendants and Non-Party Legislators submit the following, by and through undersigned counsel, as their *Combined Reply* in support of pending *Motions to Quash*¹ and for entry of associated protective orders.

A. SURVEY OF LEGISLATIVE PRIVILEGE DECISIONS

There are four scenarios in which legislative privilege arises, only the first two of which apply in this case:

SOURCE OF PRIVILEGE	PRIVILEGE-HOLDER	APPLICATION
1. U.S. Speech and Debate Clause, U.S. Const. Art. I, § 6	U.S. Congressman	Absolute.
2. State Speech and Debate Clauses in State Constitutions	State Legislator	Absolute.
3. Federal Common Law Legislative Privilege	State Legislator	Qualified in extraordinary circumstances involving important federal interest, like criminal prosecution.
4. State Common Law Legislative Privilege	State Legislator	Qualified or waived where state has adopted other constitutional or state law requirements. ²

Plaintiffs continue to assert that this Court, in deciding the scope and application of legislative privilege guaranteed by N.M. Const. art IV, § 13, should either borrow wholesale from an inferred executive privilege, *State ex rel. Att’y. Gen. v. First Jud. Dist. Ct. of N.M.*, 1981-NMSC-053, 96 N.M. 254, 629 P.2d 330, *abrogated by Republican Party of N.M. v. N.M. Tax’n &*

¹ 08/08/23 *Motion to Quash 74 Non-Party Legislator Subpoenas and for Protective Order*, 08/14/23 *Motion to Quash Subpoenas Served on Legislative Staff and Consultants*, and 08/16/23 *Motion to Quash Subpoenas for Depositions and for Protective Order*.

² An Appendix of cases cited by Plaintiffs and Legislative Defendants is attached hereto as Exhibit “A”.

Rev. Dep't., 2012-NMSC-026, 283 P.3d 853, or follow a federal district court's memorandum order in a matter later overturned by the U.S. Supreme Court as nonjusticiable.³

On the contrary, as Legislative Defendants and the Non-Party Legislators argue, this Court must rely on the clear, binding authority of New Mexico's Constitution and its mandate that "Members...shall not be questioned." N.M. Const. art. IV, §13. In support of this plain language, the Court may also look to the well-examined history of the privilege, its underlying principle and purpose in protecting free discourse and enlightened debate within the legislative body, both in New Mexico and in the decisions of other courts interpreting and applying mirror constitutional provisions. *See generally* Ex. A (Category 2 cases).

B. MATERIALS SOUGHT BY PLAINTIFFS' DISCOVERY ARE PRIVILEGED

Moreover, Plaintiffs' discovery requests sort themselves into two groups: First, documents or communications regarding individual Legislators "motive or intent in drafting, proposing, or considering legislation," which if allowed here, would strike directly at the heart of the absolutely protected constitutional legislative privilege; Second, Plaintiffs seek documents or communications which may fall outside the legislative sphere, but those are not relevant to Plaintiffs' sole obligation here to "prove that state officials' predominant purpose in drawing a

³ *See* cases in Appendix listed under Category 3, Ex. A; *see also Benisek v. Lamone*, 214 F. Supp. 3d 566 (D. Md. 2017) (discovery decision); *Cf. Benisek v. Lamone*, 348 F. Supp. 3d 493 (D. Md. 2018), *vacated and remanded sub nom. Rucho v. Common Cause*, 139 S. Ct. 2484, 204 L. Ed. 2d 931 (2019) (08/9/2019 Order, Doc. No. 236: "[T]his case is DISMISSED for lack of jurisdiction."); *see also In the Matter of 2022 Legislative Districting of State*, Nos. 21 & 24-27, Amended Order of Special Magistrate Regarding Discovery (Md. Ct. App. Mar. 11, 2022) (identifying plaintiffs' "major problem with reliance on *Benisek* is that the judgment in that case was vacated by the United States Supreme Court"); *see also League of Women Voters of Penn. v. Commonwealth*, 177 A.3d 1000, 1004 (Pa. 2017) ("Federal courts are not compelled to honor state constitutional protections afforded to state legislatures. This explains why the federal gerrymandering cases on which Petitioners rely are neither dispositive nor persuasive. The opinions in those cases invariably address only whether state legislators are entitled to 'state legislative immunity,' a qualified privilege sourced not in constitutional law, but in federal common law.").

district's lines was to entrench their party in power" by diluting the votes of citizens favoring its rival." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2516 (2019) (Kagan, J., dissenting) (internal quotations and changes omitted); *see also* at 2522–23 (warning that "purpose inquiries carry certain hazards" of unwarranted judicial intrusions into the legislative realm, and acknowledging that partisan redistricting plaintiffs would likely "have to prove the intent to entrench through circumstantial evidence").

Furthermore, myriad federal district courts and U.S. Circuit Courts of Appeals have recognized and commented on the manner in which discovery requests targeting legislative intent collapse. *See, e.g., In re N. Dakota Legislative Assembly*, 70 F.4th 460, 463–64 (8th Cir. 2023); *Am. Trucking Ass'ns v. Alviti*, 14 F.4th 76, 88 (1st Cir. 2021); *Lee v. City of Los Angeles*, 908 F.3d 1175, 1186–88 (9th Cir. 2018); *In re Hubbard*, 803 F.3d 1298, 1310–11 (11th Cir. 2015) (where "sole reason" of subpoenas to "probe the subjective motivations of the legislators...the factual heart of the retaliation claim and the scope of the legislative privilege were one and the same."); *Florida v. Byrd*, Case No. 4:22-cv-109-AW-MAF, --- F.Supp.3d ---- 2023 WL3676796 (N.D. Fla. May 25, 2023).

C. PREPARATION OF A PRIVILEGE LOG WOULD VIOLATE THE FUNDAMENTAL PURPOSE OF THE PRIVILEGE

Plaintiffs also complain that Legislative Defendants and Non-Party Legislators have yet to provide a detailed privilege log addressing all documents and communications by, between, or on behalf of legislators. The weight of the burden imposed by this is not "risible"???. *Pffs. Combined Opposition* at 15; rather it would be a backbreaking task: in some instances, stretching as far back as the date a responding Legislator assumed office, requiring searches among multiple communication platforms and accounts. Given the invasiveness of such an inquiry, for these same reasons courts evaluating privilege have held that production or compilation of a privilege log is

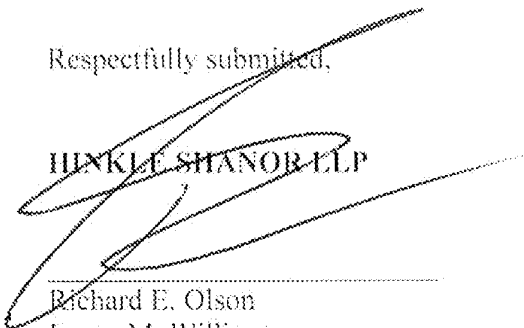
unnecessary, self-defeating, or constitutes undue judicial intrusion and distraction. *See Pincheira v. Allstate Ins. Co.*, 2008-NMSC-049, ¶ 35, 144 N.M. 601, 609, 190 P.3d 322, 330 (detailed privilege log unnecessary where good faith claim of privilege made and disclosure would not preserve privilege); *In re Hubbard*, 803 F.3d 1298, 1311 n.12 (11th Cir. 2015) (lawmakers need not personally review documents “where the subpoena necessarily trenches upon the interests protected by the legislative privilege”); *Pulte Home Corp. v. Montgomery Cnty., Maryland*, 2017 WL 2361167, at *12 (D. Md. May 31, 2017) (declining to order legislative defendants prepare privilege log where either document not relevant to claims or responsive documents relating to legislation “unquestionably protect[ed]” by legislative privilege and preparation of log would “undermine the fundamental purposes of the legislative privilege”); *La Union Del Pueblo Entero v. Abbott*, 68 F.4th 228, 233 (5th Cir. 2023) (“The public has a substantial interest in ensuring that elective office remains an invitation to draft legislation, not defend privilege logs.”) *Thompson v. Merrill*, 2020 WL 13469365, at *2 (M.D. Ala. July 20, 2020) (where subpoenas and briefing “go into great detail” lack of privilege log irrelevant to claim of privilege); *Pernell v. Lamb*, 2023 WL 2347487, at *7 (N.D. Fla. Feb. 22, 2023) (not requiring legislators to produce a privilege log); *N. Carolina State Conference of the NAACP v. McCrory*, 2014 WL 12526799, at *1 & *5 n.6 (M.D.N.C. Nov. 20, 2014), *sub nom. N. Carolina State Conference v. McCrory*, 2015 WL 12683665 (M.D.N.C. Feb. 4, 2015) (concluding that a detailed privilege log “would itself significantly intrude into the legislative sphere...plac[ing] a heavy burden on the legislators in contravention of one of the aims of the legislative privilege” which outweighed possible relevant, non-privileged communications).

It is for the foregoing reasons, that the Legislative Defendants and the Non-party Legislators maintain that they have properly invoked constitutional legislative privilege as to communications and documents related to legitimate activities within the legislative sphere

pursuant to NMRA 1-026(B)(7)(a), and the preparation of a privilege log would be an inappropriate and unnecessary step that would also , undermine the fundamental purpose of the privilege.

WHEREFORE, the Legislative Defendants and Non-Party Legislators respectfully urge the Court to grant the following: August 8, 2023 *Motion to Quash 74 Non-Party Legislator Subpoenas and for Protective Order*, August 14, 2023 *Motion to Quash Subpoenas Served on Legislative Staff and Consultants*, and the August 16, 2023 *Motion to Quash Subpoenas for Depositions and for Protective Order*.

Respectfully submitted,



HINKLE SHANOR LLP

Richard E. Olson
Lucas M. Williams
Ann Cox Tripp
P.O. Box 10
Roswell, NM 88202-0010
575-622-6510 / 575-623-9332 Fax
rolson@hinklelawfirm.com
lwilliams@hinklelawfirm.com
atripp@hinklelawfirm.com

PEIFER, HANSON, MULLINS & BAKER, P.A.
Sara N. Sanchez
Mark T. Baker
20 First Plaza, Suite 725
Albuquerque, NM 87102
505-247-4800
mbaker@peiferlaw.com
ssanchez@peiferlaw.com

STELZNER, LLC
Luis G. Stelzner, Esq.
3521 Campbell Ct. NW
Albuquerque NM 87104
505-263-2764
pstelzner@aol.com

Professor Michael B. Browde
751 Adobe Rd., NW
Albuquerque, NM 87107
505-266-8042
mbrowde@mc.com

*Attorneys for Legislative Defendants and Non-Party
Legislators under Limited Entry of Appearance*

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the following *Combined Reply* along with a copy of this Certificate of Service, were served via e-mail and/or the Court's electronic filing system, the Tyler Technologies Odyssey File & Serve electronic filing system, which caused all parties or counsel of record to be served by electronic means, on this 24 day of August, 2023.

HINKLE SHANOR LLP

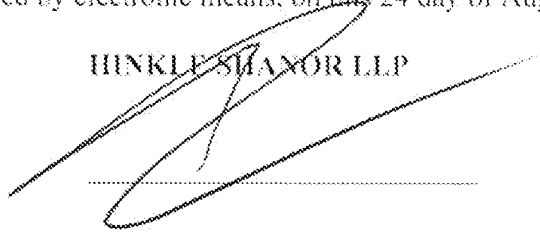


EXHIBIT A

APPENDIX OF LEGISLATIVE IMMUNITY & PRIVILEGE CASES

SOURCE OF PRIVILEGE	PRIVILEGE-HOLDER	APPLICATION
1. U.S. Constitutional Speech and Debate Clause, U.S. Const. Art. I, § 6	U.S. Congressman	Absolute
Dombrowski v. Eastland, 387 U.S. 82 (1967)		
Gravel v. United States, 408 U.S. 606 (1971)		
Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975)		
United States v. Helstoski, 442 U.S. 477 (1979)		
McSurely v. McClellan, 753 F.2d 88 (D.C. Cir. 1985)		
U.S. v. Swindall, 971 F.2d 1531 (11th Cir. 1992)		
Jewish War Veterans of USA, Inc. v. Gates, 506 F.Supp.2d 30 (D. D.C. 2007)		
2. State Constitutional Speech and Debate Clauses	State Legislator	Absolute
Edwards v. Vesilind, 790 S.E.2d 469 (Va. 2016)		
Fann v. Kemp in and for City of Maricopa, 515 P.3d 1275 (Ariz. 2022)		
Matter of 2022 Legislative Districting of State, 282 A.3d. 147 (Md. 2022)		
League of Women Voters of Pa. v. Commonwealth, 177 A.3d 1000 (Pa. Commw. Ct. 2017)		
Kniskern v. Amstutz, 760 N.E.2d 876, 877 (Ohio Ct. App. 2001)		
Holmes v. Farmer, 475 A.2d 976, 984 (R.I. 1984)		
Montgomery County v. Schooley, 627 A.2d 69 (Md. Ct. Spec. App.1993)		
In re 1991 Pennsylvania Legislative Reapportionment Com 'n, 609 A.2d 132 (____)		
Irons v. Rhode Island Ethics Com 'n,973 A.2d 1124(R.I 2009).		
3. Federal Common Law Legislative Privilege	State Legislator	Qualified
Tenney v. Brandhove, 341 U.S. 367 (1951)		
Government of the Virgin Islands v. Lee, 775 F.2d 514 (3d Cir. 1985).		
United States v. Gillock, 445 U.S. 360, 372—73 (1980)		
In re N. Dakota Legislative Assembly, 70 F.4th 460 (8th Cir. 2023)		
Am. Trucking Ass'ns v. Alviti, 14 F.4th 76 (1st Cir. 2021)		
Lee v. City of Los Angeles, 908 F.3d 1175 (9th Cir. 2018)		
In re Hubbard, 803 F.3d 1298 (11th Cir. 2015)		
La Union Del Pueblo Entero v. Abbott, 68 F.4th 228 (5th Cir. 2023)		
Jackson Mun. Airport Auth. v. Harkins, 67 F.4th 678, 687 (5th Cir. 2023)		
EEOC v. Washington Suburban Sanitary Comm'n, 631 F.3d 174 (4th Cir. 2011)		

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SOURCE OF PRIVILEGE	PRIVILEGE-HOLDER	APPLICATION
3. Federal Common Law Legislative Privilege (cont'd)	State Legislator	Qualified
Benisek v. Lamone, 241 F. Supp. 3d 566 (D. Md. 2017)		
Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections, No. 1:11-cv-5065, 2011 WL 4837508 (N.D. Ill. Oct. 12, 2011)		
Favors v. Cuomo, No. 1:11-cv-05632, 2013 WL 11319831 (E.D.N.Y. Feb. 8, 2013)		
Favors v. Cuomo, 285 F.R.D. 187 (E.D.N.Y. 2012)		
Baldus v. Brennan, No. 2:11-cv-00562, 2011 WL 6122542 (E.D. Wis. Dec. 8, 2011)		
Bethune-Hill v. Va. State Bd. of Elections, 114 F.Supp.3d 323 (E.D. Va. 2015)		
Page v. Va. State Bd. of Elections, 15 F. Supp. 3d 657 (E.D. Va. 2014)		
Rodriguez v. Pataki, 280 F. Supp. 2d 89 (S.D.N.Y. 2003), aff'd, 293 F. Supp. 2d 302 (S.D.N.Y. 2003)		
Lee v. Va. State Bd. of Elec., 2015 WL 9461505, *3-5 (E.D. Va. Dec. 23, 2015)		
Marylanders for Fair Representation v. Schaefer, 144 F.R.D. 292, 299 (D. Md. 1992)		
ACORN v. County of Nassau, 05CV2301, 2009 WL 2923435 (E.D.N.Y. Sept. 10, 2009)		
Reeder v. Madigan, 780 F.3d 799 (7th Cir. 2015)		
Almonte v. City of Long Beach, No.2:04-cv-04192, 2005 WL 1796118, at *3 (E.D.N.Y. July 27, 2005)		
Almonte v. City of Long Beach, 478 F.3d 100, 107 (2d Cir. 2007)		
Plain Local Sch. Dist. Bd. of Educ. v. DeWine, 464 F. Supp. 3d 915, 919 (S.D. Ohio 2020)		
Comm. for a Fair & Balanced Map v. Illinois State Bd. of Elections, 2011 WL 4837508, at *11 (N.D. Ill. Oct. 12, 2011)		
Comm. for a Fair & Balanced Map v. Illinois State Bd. of Elections, 2011 WL 4837508, at *3 & *4 (N.D. Ill. Oct. 12, 2011)		
League of Women Voters of Florida, Inc. v. Lee, 340 F.R.D. 446, 454 (N.D. Fla. 2021)		
League of Women Voters of Florida v. Florida House of Representatives, 132 So. 3d 135, 158 (Fla. 2013)		
In re Georgia Senate Bill 202, 2023 WL 3137982, at *2 (N.D. Ga. Apr. 27, 2023)		
Mi Familia Vota v. Hobbs, --- F.Supp.3d ---- 2023 WL 4595824 at *8 (D. Az. July 18, 2023)		
Florida v. Byrd, Case No. 4:22-cv-109-AW-MAF, --- F.Supp.3d ---- 2023 WL3676796 (N.D. Fla. May 25, 2023)		
Stuart v. City of Scottsdale, 2023 WL 5173781, at *5 (D. Ariz. May 12, 2023)		
Cuomo v. N.Y. State Assembly Jud. Comm., --- F.Supp.3d ---- 2023 WL 4714097 (E.D.N.Y. July 21, 2023)		
Thompson v. Merrill, No. 2:16-cv-783, 2020 WL 2545317, at *3 (M.D. Ala. May 19, 2020)		
Greater Birmingham Ministries v. Merrill, No. 2:15-cv-2193, slip op. at 22 (N.D. Ala. Mar. 13, 2017)		
Rodriguez v. Pataki, 293 F. Supp. 2d 302, 304-05 (S.D.N.Y. 2003)		

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	SOURCE OF PRIVILEGE	PRIVILEGE-HOLDER	APPLICATION
4.	State Common Law Legislative Privilege	State Legislator	Qualified/Waived
	Dickson v. Rucho, 366 N.C. 332, 737 S.E.2d 362 (2013)		
	League of Women Voters of Florida v. Florida House of Representatives, 132 So. 3d 135 (Fla. 2013)		
	LWV of Fla. v. Detzner, 172 So. 3d 363 (Fla. 2015)		
	LWV Ohio v. Ohio Redistricting Commission, 164 Ohio St. 1457; 2021-Ohio-3607, 174 N.E.3d 805 (Oct. 7, 2021)		
	Harkenrider v. Hochul, 197 N.E.3d 437 (N.Y. 2022)		