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' REPLY IN SUPPORT OF MOTION TO COMPEL DISCOVERY

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INTRODUCTION

Defendants ask this Court to deprive Plaintiffs of discovery into their partisan intent, not allowing Plaintiffs even to look into what these politicians said to their co-partisans behind closed doors. Defendants assure this Court that it need not worry about hiding this evidence from Plaintiffs and this Court because Plaintiffs can still cite self-interested statements that these officials made for public consumption. While, of course, the Democratic Party politicians who run New Mexico's legislative and executive branches intended to gerrymander—as Plaintiffs' expert analysis and some of Defendants' unusually candid, public boasts reveal—Plaintiffs are entitled to discover what these gerrymanderers admitted about their unconstitutional designs to third-party consultants, to out-of-state co-partisans, and to each other, when they thought no one was looking. That is standard discovery in partisan-gerrymandering cases, including in the *Benisek v. Lamone* case that Justice Kagan would have affirmed in her dissenting opinion in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), which dissent is controlling under the New Mexico Supreme Court's Superintending Order. This Court should reject Defendants' cynical gambit to evade all discovery into their partisan intent and grant Plaintiffs' Motion To Compel.

ARGUMENT

I. As Defendants Begrudgingly Concede, Plaintiffs' Discovery Seeks Information Relevant To The Issue Of Defendants' Partisan Intent Under Justice Kagan's First Element

A. As Plaintiffs explained, Mot. To Compel 5–8 (Aug.14, 2023), 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 politicians who drafted, enacted, and signed Senate Bill 1 is highly relevant, direct evidence of partisan purpose, *id.* at 2517, and thus are discoverable under New Mexico law, Rule 1-026(B)(1); N.M. R. Evid. 11-401(A)–(B). Plaintiffs' discovery requests—which requests fall into two categories, (1) communications between legislators or executive-branch officials and outside third parties, and (2) communications among legislators and/or executive-branch officials—seek only this highly relevant evidence, thus all of these requests are within the bounds of permissible discovery. Mot. To Compel 6–7 & Exs.1–11. That is why courts considering partisan-gerrymandering claims frequently allow discovery like Plaintiffs' requests here. Mot. To Compel 5–6, 7–8 (collecting numerous cases).

B. Legislative Defendants, while begrudgingly admitting that Plaintiffs' requests seek "evidence of the purpose of the challenged legislation," Leg.Resp.2, and "information" that "could be relevant," *id.* at 7, still suggest that Plaintiffs do not need responses to their discovery requests because Plaintiffs have access to "video recordings of the entirety of the Legislative Session in which SB-1 was introduced, discussed, . . . and debated in both houses," *id.* at 12–13. That is, with all respect, unserious. Politicians know, or at least strongly suspect, that partisan gerrymandering is both unconstitutional and deeply unpopular, so they often keep the direct evidence of their illicit motives behind closed doors, such that those motives are most often revealed by just the type of discovery Plaintiffs have put forward here. For example, in *Rucho*, Justice Kagan discussed in her dissent statements that

Maryland Governor Martin O'Malley made in his deposition about Maryland Democrats' partisan intent. *Rucho,* 139 S. Ct. at 2510–11 (Kagan, J., dissenting); *see also Benisek v. Lamone*, 348 F. Supp. 3d 493, 502 (D. Md. 2018) (citing and quoting "O'Malley Dep."), *vacated and remanded sub nom. Rucho*, 139 S. Ct. 2484. And while some unusually candid officials at times admit their partisan intent in public, *see, e.g.*, *Rucho,* 139 S. Ct. at 2510–11 (Kagan, J., dissenting) (reproducing such a statement from Congressman Steny Hoyer, made in a press interview), including Defendant Mimi Stewart here, Pls.' Combined Reply in Supp. of Mot. for Prelim. Inj. 13 (Mar. 10, 2022) ("Our Redistricting session is offering a way out of [Representative Yvette Herrell's] chaotic and divisive politics." (citation omitted)), most partisans are too smart to say this out loud for public (as opposed to private) consumption. That is precisely why discovery directed at uncovering those hidden, partisan-intent statements is so important and common in this type of case.

Executive Defendants claim that Plaintiffs' requests do not seek relevant material in light of Justice Kagan's controlling partisan-gerrymandering test, which test, they claim, considers partisan intent only with reference to "the extreme nature of the challenged maps themselves and lawmakers' *open and public* statements of express [partisan] intent." Exec.Resp.10 (emphasis added); *compare id.* at 1 (calling requests "largely irrelevant"). But Justice Kagan's dissenting opinion in *Rucho* does *not* conclude that *only* "open and public statements," *id.* at 10—to the exclusion of nonpublic, behind-closed-doors statements—are relevant. On the contrary, as noted above, Justice Kagan's dissent concluded that partisan intent was present as to the

Maryland map after relying in part upon statements from Governor O'Malley (among others), which statements came from his deposition during the discovery phase, not from a public speech or public comment. *See supra* pp.2–3.[1]

Executive Defendants' efforts to distinguish the cases that Plaintiffs cited in the Motion To Compel are unpersuasive. Exec.Resp.10–11 & n.3. Executive Defendants claim that the discovery allowed in *Benisek v. Lamone*, 241 F. Supp. 3d 566 (D. Md. 2017), and *Common Cause v. Rucho,* 279 F. Supp. 3d 587 (M.D.N.C. 2018), does not support Plaintiffs "because the United States Supreme Court vacated th[ose] decision[s]." Exec.Resp.10–11 & n.3. But *Justice Kagan's dissenting opinion* in *Rucho* is the controlling standard here, *see* Order 3, *Grisham v. Van Soelen,* No.S-1SC-39481 (N.M. July 5, 2023), and her dissenting opinion would have *affirmed* the *Benisek* district-court decision (and the *Common Cause* decision), and relied explicitly on the discovery that the *Benisek* plaintiffs obtained, as noted above. Executive Defendants' attempt to distinguish *League of Women Voters of Florida v. Detzner,* 172 So. 3d 363 (Fla. 2015), and *League of Women Voters of Ohio v. Ohio Redistricting Commission*, 164 Ohio St. 3d 1457, 2021-Ohio-3607, 174 N.E.3d 805 (unpublished

[1] Executive Defendants also claim that legislators are incompetent to give testimony regarding legislative intent citing a dissenting opinion by Judge Hartz for the proposition that the Legislature "speaks solely through its concerted action as shown by its vote." Exec.Resp.10 (quoting *TBCH, Inc. v. City of Albuquerque,* 1994-NMCA-048, ¶ 20, 117 N.M. 569, 874 P.2d 30 (Hartz, J., dissenting), although without noting that the quoted material is from the dissent). To the extent that principle has any purchase in other contexts, it plainly does not apply to a partisan-gerrymandering cases like this one, given that "state officials' predominant purpose in drawing a district's lines" is an essential element of the claim, *see Rucho,* 139 S. Ct. at 2516 (Kagan, J., dissenting) (citations omitted), any more than it would apply to other cases where improper legislative intent is at issue, *see, e.g., Page v. Va. State Bd. of Elections*, No.3:13CV678, 2015 WL 3604029, at *8, *9–10, *14 (E.D. Va. June 5, 2015) (considering multiple "legislative statements" indicating that "race was the predominant factor" in a redistricting map, including testimony of a Delegate to the Virginia House of Delegates (citations omitted)).

table decision), on legislative-privilege grounds also misses the mark, as Plaintiffs cited those cases here simply to support their claim that their discovery seeks relevant information, *compare* Mot. To Compel 5–6 & 7–8, *with* Exec.Resp.10 n.3.

Finally, while Executive Defendants claim that Plaintiffs offered "no allegations nor evidence" that Executive Defendants "had any role in drawing the challenged map," Exec.Resp.11–12, Plaintiffs' Verified Complaint clearly alleged that Senate Bill 1 "is a hopelessly partisan map" and that ""the governor joined [the Legislature in] the gerrymandering circus and cemented these congressional boundaries [in Senate Bill 1] for the next decade,'" Verified Compl. ¶ 97 (quoting Editorial, *Gov.'s Legacy Just Got More Partisan with Redistricting Maps,* Albuquerque J. (Dec. 28, 2021)).[2] Further, it is undisputed that the Governor played a central role in making Senate Bill 1 the law of the land, given that she signed it into law, making her a "state official[ ]" whose "predominant purpose" is relevant to Plaintiffs' claim. *See Rucho*, 139 S. Ct. at 2516 (Kagan, J., dissenting) (citations omitted).[3]

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[2] Available at https://www.abqjournal.com/opinion/editorials/editorial-gov-s-legacy-just-got-more-partisan-with-redistricting-maps/article_15626b81-9445-5629-82bf-101249582c53.html (last visited Aug. 24, 2023).

[3] Executive Defendants also briefly argue that this Court should not compel their responses to Plaintiffs' discovery until it resolves their Motion To Dismiss. Exec.Resp.3–4. Plaintiffs respectfully submit that this Court should simply follow the deadlines in its Scheduling Order: that the Court would "endeavor to issue an order or other guidance to the parties on its resolution of the [discovery] dispute(s) by **09/06/23**" and that "[t]he parties should be prepared to provide any discovery or deposition testimony so compelled by the end of discovery [*i.e.* 09/13/23]." Scheduling Order 2.

II. Neither Legislative Privilege Nor Executive Privilege Bars Plaintiffs' Requests, Notwithstanding Legislative Defendants' And Executive Defendants' Arguments

A. In New Mexico, Legislative And Executive Privilege Do Not Protect Communications With Outside Third Parties

1. As Plaintiffs explained, legislative privilege and executive privilege do not extend to communications with outside third parties, such as independent consultants, outside interest groups, or members of the public who communicate with legislators or executive-branch officials. Mot. To Compel 10–12. Beginning with executive privilege, *Republican Party of New Mexico v. New Mexico Taxation & Revenue Department*, 2012-NMSC-026, 283 P.3d 853, unambiguously holds that this privilege does not extend to communications with "individuals outside of the executive department." *See id.* at ¶¶ 37, 42 (discussing and then affirming this holding from *State ex rel. Attorney General v. First Judicial District Court*, 1981-NMSC-053, 96 N.M. 254, 629 P.2d 330, *abrogated by Republican Party*, 2012-NMSC-026); *see also id.* ¶ 46. For legislative privilege, New Mexico's Speech or Debate Clause is textually limited to "*Members of the legislature*," N.M. Const. art. IV, § 13 (emphasis added), and it is "similar" to executive privilege, *First Jud.*, 1981-NMSC-053, ¶ 18, which privilege, as just noted, does not extend to communications with outside third parties. Not including outside third parties within these privileges makes sense because those parties lack "broad and significant responsibility for assisting [lawmakers] with [their] decisionmaking," *Republican Party*, 2012-NMSC-026, ¶ 46 (citations omitted), and including such parties would result in "no limit to the communications that could be protected," *id.* ¶ 37 (citation omitted). Here, many

of Plaintiffs' discovery requests seek (a) communications between outside third parties and legislators/legislative staffers and (b) communications between outside third parties and the Governor/her close aides, so neither legislative nor executive privilege applies to these requests as a categorical matter. Mot. To Compel 11–12.

2. Defendants' arguments regarding the applicability of legislative or executive privilege to communications with outside third parties all fail.

To begin, Executive Defendants claim that *Republican Party* does not exclude communications from outside third parties from executive privilege. Exec.Resp.5–7. But *Republican Party* explained that New Mexico had adopted "*a limited form* of executive privilege," 2012-NMSC-026, ¶ 43 (emphasis added), and it *affirmed First Judicial*'s conclusion that executive privilege does not extend to "individuals outside of the executive department," *id.* ¶ 37, even as it abrogated that opinion in other respects, *id.* ¶ 42 ("We disavow *First Judicial* to the extent that it could be read to support the adoption of the deliberative process privilege[.]"). So, while *Republican Party*'s three "clarif[ications]" of the privilege do not explicitly mention an outside-third-party limitation, *id.* ¶¶ 43–47, as Executive Defendants note, Exec.Resp.5–6, *Republican Party* "[f]ollow[ed] the principles established by *First Judicial*" to the extent not abrogated, 2012-NMSC-026, ¶ 43, including its exclusion of communications with outside third parties from the privilege, *id.* ¶ 37.

Next, Defendants criticize Plaintiffs' claim that, pursuant to *First Judicial*, legislative privilege is "similar," 1981-NMSC-053, ¶ 18, to executive privilege in New Mexico, Leg.Resp.3–4, 8–9; Exec.Resp.5–6. While that statement from *First Judicial*

is dicta, dicta from the New Mexico Supreme Court must be given "adequate deference and not disregard[ed] [ ] summarily." *State v. Johnson*, 2001-NMSC-001, ¶ 16, 130 N.M. 6, 15 P.3d 1233 (citing *Fields v. D & R Tank & Equip. Co.*, 1985-NMCA-061, ¶ 13, 103 N.M. 141, 703 P.2d 918); *Fields*, 1985-NMCA-061, ¶ 13 ("[W]e are not free to disregard that dicta."). Further, *First Judicial*'s statement is consistent with, and supported by, *Republican Party*, given the Court's invocation of the constitutional need for "[t]ransparency . . . between the people and their government" and Patrick Henry's condemnation of keeping "the common routine of business" in "*Congress* . . . in secret." 2012-NMSC-026, ¶¶ 51–52 (citations omitted; emphasis added). Legislative Defendants attempt to distinguish legislative privilege from executive privilege (notwithstanding *First Judicial*) on the grounds that the latter flows from the Speech or Debate Clause's explicit text, *see* Leg.Resp.8–9, but they have no coherent response to Plaintiffs' argument that, as a textual matter, the Speech or Debate Clause does not reach communications with outside third parties, *compare* Mot. To Compel 10, *with* Leg.Resp.8–9. While Executive Defendants criticize Plaintiffs' "plain language argument" as "simplistic," Exec.Resp.5 & n.2, that is no response at all and, in any event, ignores how Plaintiffs' text-based interpretation is consistent with *Republican Party*.[4]

[4] Legislative Defendants misrepresent Plaintiffs as arguing that legislative privilege applies solely to the legislators "named or described within the [Speech or Debate] Clause itself," to the exclusion of even their close aides. *See* Leg.Resp.4. Plaintiffs made clear that legislative privilege does extend to the close aides of legislators, Mot. To Compel 11, although, again, the privilege is subject to balancing, Mot. To Compel 12–13. That said, Research & Polling, Inc., obviously does not qualify as a close aide of the Legislature within the scope of the privilege, contrary to Legislative Defendants' claims. Leg.Resp.7–8. As seen in Legislative Defendants' August 14, 2023, Motion To Quash the discovery requests directed at their staff and consultants ("Leg.S&C.Mot."), Research & Polling only offered "technical consulting services" to the Legislature for the redistricting process, Leg.S&C.Mot.

Finally, Executive Defendants and Legislative Defendants cite a variety of out-of-jurisdiction cases that, they claim, take a different view of the inapplicability of legislative privilege to outside third parties. Exec.Resp.6–8; Leg.Resp.4–7. But this Court must follow the New Mexico Supreme Court's decisions in *Republic Party* and *First Judicial*, as explained above. *Supra* pp.6–7. In any event, much out-of-state authority supports Plaintiffs' approach. Mot. To Compel 11. To take just a few of many examples, *Committee for a Fair & Balanced Map v. Illinois State Board of Elections*, No. 11 C 5065, 2011 WL 4837508 (N.D. Ill. Oct. 12, 2011), concluded that "legislative privilege does not apply" to "[c]ommunications between Non-Parties [there, certain state legislators and legislative staffers] and outsiders to the legislative process"—"includ[ing] lobbyists, members of Congress and the Democratic Congressional Campaign Committee." *Id.* at *10; *compare* Leg.Resp.5 n.8 (mistakenly criticizing Plaintiffs' reliance on this decision). *Favors v. Cuomo*, No.1:11-cv-05632, 2013 WL 11319831 (E.D.N.Y. Feb. 8, 2013), held that legislative privilege does not extend to "communications made in the presence of third parties who are outsiders to the legislative process"—namely, individuals who are not themselves a legislator, "a legislator's staff member," or another "legislative alter ego." *Id.* at *10. *Baldus v. Brennan*, No. 11-CV-1011 JPS-DPW, 2011 WL 6122542 (E.D. Wis. Dec. 8, 2011), held that the legislature there "waived its legislative privilege to the extent that it relied on [ ] outside experts for consulting services" to "develop its [redistricting] plans." *Id.* at *2. And *Edwards v. Vesilind*, 292 Va. 510,

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Ex.D, at 1, such as providing "sophisticated software and statistical analys[e]s," Leg.S&C.Mot.9. Thus, Research & Polling is an outside third party, beyond the scope of the privilege.

790 S.E.2d 469 (2016), concluded that the privilege does not extend to communications with third parties who are *not* "alter egos of the legislators . . . functioning in a legislative capacity on behalf and at the direction of a Member." *Id.* at 532. While Defendants criticize Plaintiffs' citation of *Edwards*, the passage they quote holds only that a third party *could be* an "alter ego[ ]" of a legislator, and so are not excluded from the privilege "*as a matter of law*," *id.* at 483 (emphasis added); Leg.Resp.5 (quoting this passage); Exec.Def.7–8 (same).

B. Where Legislative Or Executive Privilege Do Apply, They Are Subject To Balancing And Do Not Prohibit Plaintiffs' Discovery Requests Into Defendants' Alleged Partisan Intent Here

1. As Plaintiffs explained in their Motion To Compel, where communications do implicate legislative or executive privilege, such privileges are "qualified," meaning that they may give way when "balanc[ed]" against competing constitutional considerations. Mot. To Compel 12–15 (quoting *Republican Party*, 2012-NMSC-026, ¶ 49, and citing *First Jud.*, 1981-NMSC-053, ¶ 18). That is why *Republican Party* explicitly recognized a balancing test for executive privilege in the face of a "public records request," 2012-NMSC-026, ¶ 49, given that the constitutional concern for the "people hav[ing] access to the information necessary to determine whether their elected officials are faithfully fulfilling their duties" may outweigh executive privilege in a given case, *id.* ¶ 52; *First Jud.*, 1981-NMSC-053, ¶ 18 (legislative privilege "similar"). And, for redistricting cases, in particular, courts frequently apply a five-factor balancing test for privilege claims. Mot. to Compel 13–15.[5] All of Plaintiffs'

[5] As Plaintiffs explained, the factors are as follows: "(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

discovery requests satisfy that five-factor balancing test, meaning that competing claims of legislative or executive privilege must give way to disclosure here. *Id.* 14–15. This holds true even if this Court concludes that communications with outside third parties also implicate the privilege, *but see supra* Part II.A: Plaintiffs' requests satisfy the five-factor balancing test as to those communications also, were that test to apply, *but see supra* Part II.A.

2. All of Defendants' counterarguments on this score are unpersuasive.

First, Defendants claim that, when it does apply, legislative privilege is "absolute," Leg.Resp.3–4, 8–10; Exec.Resp.8–9, but that claim fails in the face of *Republican Party* and *First Judicial*. As explained above, *Republican Party* expressly holds that executive privilege is "limited" and "qualified" and so subject to "balancing," 2012-NMSC-026, ¶¶ 43, 49, while *First Judicial* states that legislative privilege is "similar" to executive privilege, 1981-NMSC-053, ¶ 18. So, in the face of this clear, binding New Mexico authority, Defendants' various citations of out-of-jurisdiction cases must fail. *See* Exec.Resp.8–9; Leg.Resp.4, 9–10.[6] Legislative Defendants also invoke the general need to protect "the public good" in support of

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opposed to individual legislators, in the litigation, and (5) the extent to which the discovery would impede legislative action." *Benisek,* 241 F. Supp. 3d at 575.

[6] Many of the cases that Defendants cite are further distinguishable, in any event. For example, Executive Defendants' quote from *United States v. Gillock,* 445 U.S. 360, 372 (1980), refers to legislative *immunity*, which is broader than the doctrine of legislative *privilege*, Exec.Resp.8; *see also* Leg.Resp.4 (same, as to their quote from *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951)). *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 416 (D.C. Cir. 1995), Exec.Resp.8, involved the legislative privilege of Congress, which is broader than the legislative privilege of state legislators, *Benisek*, 241 F. Supp. 3d at 572–73. And *In re North Dakota Legislative Assembly*, 70 F.4th 460 (8th Cir. 2023), Leg.Resp.9, recognized that "the underlying case does not even turn on legislative intent," so it need not conclusively resolve whether "[a]ny exception to legislative privilege that might be available in a case that is based on a legislature's alleged intent" was viable there, 70 F.4th at 465.

their claims of absolute legislative immunity, Leg.Resp.4 (quoting *Tenney*, 341 U.S. at 377); *accord* Exec.Resp.8 ("minimizing the distraction" of lawmakers), but this too lacks support in *Republican Party*, which subjected executive privilege to balancing tests precisely because of the public's constitutional need to "have access to the information necessary to determine whether their elected officials are faithfully fulfilling their duties," 2012-NMSC-026, ¶ 52.

Second, Executive Defendants launch a grab bag of arguments against the five-factor balancing test applied in *Benisek*, but none of those arguments stick. Executive Defendants claim, Exec.Resp.7, that the Second Circuit's decision in *Almonte v. City of Long Beach*, 478 F.3d 100 (2d Cir. 2007), abrogated *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), which originally adopted the five-factor test. But that is an overreading of *Almonte*, since that decision focused on legislative *immunity* from suit, not legislative *privilege* from responding to discovery requests, and so had no occasion to consider the balancing test at issue in *Rodriquez*. 478 F.3d at 106–08; *see also ACORN v. Cnty. of Nassau*, No.2:05-cv-02301, 2009 WL 2923435, at *2–3, *6 (E.D.N.Y. Sept. 10, 2009) (applying *Rodriguez*, even while also citing *Almonte*, 478 F.3d at 107). In any event, *multiple* other courts have found this five-factor balancing test useful and appropriate—including *Benisek*, which preceded the U.S. Supreme Court's decision in *Rucho*, Mot. To Compel 13–14 (collecting cases). Executive Defendants also claim that this five-factor test is inappropriate because it rests upon "the vindication of *federal* rights," Exec.Resp.9, but the New Mexico Supreme Court has already decided that privilege

claims from government officials must be balanced by the public's state constitutional rights, *supra* pp.10–11. Finally, Executive Defendants "not[e] that no federal appellate court has yet to adopt this [five-factor] balancing approach." Exec.Resp.9. Yet, *many* federal district courts have endorsed this test, including courts convened as three-judge panels under 28 U.S.C. § 2284, *see* Mot. To Compel 13–14 (collecting cases), so Executive Defendants' observation about federal appellate courts is of no moment.

Third, Executive Defendants dispute Plaintiffs' application of the five-factor balancing test, Exec.Resp.9–15; *see also* Leg.Resp.14–15 (making these arguments largely perfunctorily), but Plaintiffs have the better of the argument here, too. For the first factor, Plaintiffs' discovery requests seek information highly relevant to Defendants' partisan intent, which is the first element of Justice Kagan's controlling test. *Supra* Part I; *contra* Exec.Resp.10–12. For the second factor, this information about partisan intent is not available elsewhere—Defendants' impossible-to-take-seriously claims to the contrary, Exec.Resp.12; *see also* Leg.Resp.10–13—since lawmakers are typically wary of publicly disclosing their partisan-gerrymandering plans for legal and public-relations reasons. *Supra* pp.2–3; *contra* Exec.Resp.9–15; *see also* Leg.Resp.14–15. And while Plaintiffs may *also* establish partisan intend indirectly or circumstantially, such as with expert evidence or evidence that the map-drawing process was partisan, Mot. To Compel 6 n.2, that does not make this direct evidence of partisan intent any less important to Plaintiffs' legal burden here, *see Rucho,* 139 S. Ct. at 2510–11 (Kagan, J., dissenting) (relying on such direct evidence).

For the third factor, Executive Defendants agree that Plaintiffs' partisan-gerrymandering claim is "serious as a general matter," but dispute their own involvement as to Senate Bill 1. Exec.Resp.12–13. But as noted above, the Verified Complaint alleges that the Governor "joined the gerrymandering circus." Verified Compl. ¶ 97 (citation omitted). For the fourth factor, Executive Defendants again dispute the Governor's "direct" role in Senate Bill 1, Exec.Resp.13 (citation omitted), but that again fails for the reasons just provided for the third factor. Finally, for the fifth factor, Executive Defendants claim that compelling their discovery responses will impair the "frank and candid deliberation[s]" of lawmakers, Exec.Resp.13–14 (citation omitted), ignoring Plaintiffs' point that the New Mexico Supreme Court has declared that egregious partisan gerrymandering violates the Constitution, Mot. To Compel 15. Accordingly, there is no public benefit to "frank and candid deliberation[s]" over how to partisan gerrymander redistricting maps.

Finally, Legislative Defendants argue that if legislative privilege is subject to balancing, the balancing test for executive privilege defined in *First Judicial* should apply and, under that test, Legislative Defendants' assertions of privilege should prevail. Leg.Resp.13–14. Although Plaintiffs continue to believe that the five-factor balancing test applied by *Benisek* and multiple other courts in redistricting cases is more appropriate here, they nevertheless would satisfy the *First Judicial* test as well. For all the reasons discussed above, Plaintiffs have "good cause for the production" of this information, this Court could conduct *in camera* review of the allegedly privileged materials, and Plaintiffs' need for this information outweighs any "public[ ] interest

in preserving confidentiality," *First Jud.*, 1981-NMSC-053, ¶ 23, especially in light of *Republican Party*'s subsequent recognition of the public's constitutional right to "[t]ransparency" in "government," 2012-NMSC-026, ¶ 51.

CONCLUSION

This Court should enter an Order compelling all recipients of Plaintiffs' subpoena and discovery requests to answer and respond fully to these requests.

Dated: August 24, 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 24, 2023

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