

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 TOULOUSE OLIVER, in her official
Capacity as New Mexico Secretary of State, et al.,

Defendants.

NON-PARTY DOMINIC P. GABELLO'S
MOTION TO QUASH SUBPOENA DUCES TECUM AND FOR PROTECTIVE ORDER

COMES NOW Dominic P. Gabello, by and through counsel, Park & Associates, LLC (Alfred A. Park), and pursuant to Rules 1-026(C) and 1-045(C), NMRA, hereby moves this Court to quash the subpoena issued by Plaintiffs and issue a protective order. A copy of the subpoena is attached as Exhibit A to this Motion. In support of the Motion, Mr. Gabello states as follows:

BACKGROUND

A. The Current Case

In this case, Plaintiffs challenge the constitutionality of New Mexico's congressional boundaries passed by the New Mexico Legislature in 2021. According to the Verified Complaint for Violation of New Mexico Constitution, Plaintiffs seek to have the boundaries passed by legislature declared unconstitutional and replaced by another map. See Verified Complaint, para. 27. During the course of this litigation, the New Mexico Supreme Court issued an Order concluding that claims of partisan gerrymandering were justiciable, and adopting a three-part test

articulated by Justice Kagan in her dissent in Rucho v. Common Cause, 139 S. Ct. 2484 (2019).

This three-part test requires:

1. Plaintiffs prove that the “predominant purpose” in drawing a district’s lines was to entrench the party in power by diluting the votes of citizens favoring its rival;
2. Plaintiffs establish the actual lines drawn have the intended effect of substantially diluting votes; and
3. Plaintiffs must prove that the map drawers do not have a legitimate, non-partisan justification to save their map.

Id., at 2516. The New Mexico Supreme Court then remanded the case to the District Court with instructions to resolve this matter by October 1, 2023.

B. Mr. Gabello

Mr. Gabello has a long-standing professional relationship with Governor Lujan Grisham, dating back to February 2012 when he began managing her congressional campaign. Upon her election to Congress, Mr. Gabello served on her congressional staff, including as Chief of Staff. In 2017, he left the congressional staff to begin managing her campaign for Governor. After the Governor’s election in 2018, he joined her administration as a Senior Advisor, leaving that position to manage her re-election campaign in 2022. Since that time, Mr. Gabello has continuously served as an advisor to Governor Lujan Grisham.

C. The Subpoena

On August 2, 2023, Plaintiffs issued a subpoena duces tecum upon Dominic P. Gabello.

The subpoena, attached as Exhibit A to this Motion, requested:

All emails and text messages (including those in your personal, work, and/or campaign email account(s) and/or cell phone (s)) and other written communications (including hardcopy letters and memos, and messages sent through Facebook, Microsoft Teams, WhatsApp, Kik, etc.) that were sent by you or to you in the year 2021 and that either:

- (1) were between you and any one or more of the following individual (regardless of whether other individuals were also on the distribution list): Joesph Cervantes, Brian Egolf, Kyra-Ellis-Moore, Daniel Ivey-Soto, Teresa Leger Fernandez, Leanner Lieth, Georgene Louis, Melanie Stansbury, Mimi Stewart, or Peter Wirth, or any person you know to have been specifically handling congressional-redistricting issues on behalf of any of the foregoing individual; and/or
- (2) relate to the subject of congressional redistricting in New Mexico and/or contain one or more of the following non-case-sensitive search terms: “Concept H”, “People’s Map”, “Concept E”, “S.B. 1”, “Senate Bill 1”, “Redistricting Committee”, “Yvette”, or “Herrell”.

ARGUMENT

The Court should grant Gabello’ s Motion because the subpoena is confusing, overbroad, and an undue burden. In addition, the documents sought are currently the subject of various motions to quash and for protective order from parties and non-parties to this litigation. To permit discovery at this time is premature and would potentially deprive the litigants of their rights and the Court of the ability to rule on said motions. And finally, the requests are not reasonably calculated to lead to the discovery of relevant evidence. For these reasons, the Court should grant the Motion and Quash Plaintiffs’ subpoena to Mr. Gabello.

A. Standard of Review

Under the New Mexico Rules of Civil Procedure, a court may prohibit or limit discovery, upon motion from a party or interested person, and “may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense.” Rule 1-026(C)(1) and Rule 1-026(C)(2). In addition, Rule 1-045(C)(3)(a)(iv) provides that a court may quash or modify a subpoena if it subjects a person to undue burden. Finally, it is well established that New Mexico courts “ha[ve] broad discretion in determining whether good

cause exists to issue a protective order.” Does I through III v. Roman Catholic Church of Archdiocese of Santa Fe, Inc., 1996-NMCA-094, ¶ 13, 122 N.M. 307.

B. The Subpoena is Confusing, Overbroad and an Undue Burden

On its face, the subpoena is overbroad and confusing. The subpoena begins by asking for the production of all emails, text messages and other written communications with specifically identified individuals. The exact language of the subpoena explicitly requests communications between Mr. Gabello and “any one or more of the following individuals (regardless of whether other individuals were also on the on the distribution list) . . .” See Exhibit A, ¶ 1. However, it is unclear what precisely the subpoena requests and can be read multiple ways. Does it mean only communications between Mr. Gabello and the identified individuals regardless of how many were on the communication or does it mean between Mr. Gabello and anyone whatsoever, whether they are specifically identified or not? These are two very different inquiries that can lead to very different results. Moreover, if the request “or more” is interpreted to mean anyone Mr. Gabello communicated with, that is wildly overbroad as that could encompass individuals not even associated with or part of the redistricting decision-making process.

The second paragraph of the subpoena is likewise overbroad. It asks for all of Mr. Gabello’s emails containing eight different enumerated search terms. See Exhibit A ¶ 2. Significantly, this request is not limited to specifically identified persons, or even members of the legislature, the executive or their staffs. Rather, this request is so broad as to encompass any friend or acquaintance, no matter whether that person has any involvement whatsoever with the redistricting process. The Supreme Court was clear that this Court’s inquiry is whether Plaintiffs’ could prove whether the “predominant purpose” of the congressional district lines was to entrench the party in power by diluting the votes of citizens favoring its rival. The production of

communications between Mr. Gabello and people not associated with the redistricting process has nothing to do with the task before the Court.

Given the confusing subpoena and its overbroad scope, it would be an undue burden to require Mr. Gabello to respond to the subpoena; particularly where he is not a party to this litigation or where there are not even any allegations that he drafted or participated in drafting the congressional maps. This is especially true given, if determined to be relevant, that Plaintiffs can easily obtain such communications from actual parties to the case and sitting members of the legislature.

Accordingly, the Court should grant Mr. Gabello's Motion to Quash because the subpoena is confusing, overbroad, and an undue burden. At a minimum, the court should enter a protective order and Order Plaintiff to submit narrowly tailored discovery that complies with the parameters of the inquiry established by the Supreme Court.

C. The Documents Sought are the Subject of Multiple Motions to Quash and for Protective Order and should not be produced prior to the Court Ruling on all the Pending Motions

As the Court is aware, numerous parties and non-parties have filed various motions to quash and/or for protective order regarding subpoenas issued by Plaintiffs seeking the same exact information sought from Mr. Gabello. Many of those motions assert legislative and executive privilege. Mr. Gabello's subpoena should be quashed because it seeks to circumvent the assertions of those privileges by other parties. The Court should be given time to consider and rule on those privileges prior to Mr. Gabello undertaking the time and expense of producing documents that may have no relevance to the inquiry of the Court or be protected by a recognized privilege.

WHEREFORE, non-party Dominic Gabello respectfully requests this Court Quash the subpoena issued by Plaintiffs and issue a protective order protecting Mr. Gabello from responding, and for all further relief the Court determines is appropriate.

STATE OF NEW MEXICO
COUNTY OF LEA
FIFTH JUDICIAL DISTRICT COURT

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

Plaintiffs,

vs.

Case No. D-506-CV-2022-00041

MAGGIE TOULOUSE 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.

SUBPOENA

SUBPOENA FOR APPEARANCE OF PERSON FOR [X] DEPOSITION [] TRIAL

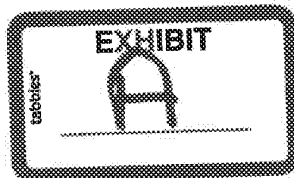
TO: Dominic P. Gabello
1401 Casa Roja Place NW
Albuquerque, NM 87120

YOU ARE HEREBY COMMANDED TO APPEAR as follows:

Place: Harrison & Hart, LLC
924 Park Avenue SW, Suite E
Albuquerque, NM 87102

Date: September 12, 2023

Time: 12:30 p.m. (Mountain Time)



to

[X] testify at the taking of a deposition in the above case.

[] testify at trial.

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):

The documents requested in the previous subpoena served on you should be produced at least 24 hours before this deposition.

IF YOU DO NOT COMPLY WITH THIS SUBPOENA you may be held in contempt of court and punished by fine or imprisonment. Pursuant to Rule 1-032(A)(3)(c) NMRA, the Plaintiffs intend to use this deposition at trial.

August 29, 2023
Date of Issuance



.....
Judge, Clerk or Attorney

Carter B. Harrison IV
HARRISON & HART, LLC
924 Park Avenue SW
Albuquerque, NM 87102
Tel: (505) 295-3261
Fax: (505) 341-9340
Email: carter@harrisonhartlaw.com

Attorneys for the Plaintiffs

INFORMATION FOR PERSONS RECEIVING SUBPOENA

1. This subpoena must be served on each party in the manner provided by Rule 1-005 NMRA. If service is by a party, an affidavit of service must be used instead of a certificate of service.
2. A command to produce evidence or to permit inspection may be joined with a command to appear for a deposition or trial.
3. If a person's attendance is commanded, one full day's per diem must be tendered with the subpoena, unless the subpoena is issued on behalf of the state or an officer or agency thereof. *See* Section 38-6-4 NMSA 1978 for per diem and mileage for witnesses. *See* Paragraph A of Section 10-8-4 NMSA 1978 for per diem and mileage rates for nonsalaried public officers. Mileage must also be tendered at the time of service of the subpoena as provided by the Per Diem and Mileage Act. Payment of per diem and mileage for subpoenas issued by the state is made pursuant to regulations of the Administrative Office of the Courts. *See* Section 34-9-11 NMSA 1978 for payments from the jury and witness fee fund.
4. A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose on the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and reasonable attorney fees.

PROTECTION OF PERSONS SUBJECT TO SUBPOENAS

Subject to Subparagraph (2) of Paragraph D below, a person commanded to produce and permit inspection and copying may, within fourteen (14) days after service of the subpoena or before the time specified for compliance if such time is less than fourteen (14) days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises or within fourteen (14) days after service of the subpoena may file a motion to quash the subpoena and serve the motion on all parties to the action. If an objection is served or a motion to quash is filed and served on the parties, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it:

- (1) fails to allow reasonable time for compliance,

- (2) requires a person who is not a party or an officer of a party to travel to a place more than one hundred miles from the place where that person resides, is employed or regularly transacts business in person, except as provided below, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or
- (3) requires disclosure of privileged or other protected matter and no exception or waiver applies, or
- (4) subjects a person to undue burden.

If a subpoena:

- (1) requires disclosure of a trade secret or other confidential research, development, or commercial information, or
- (2) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or
- (3) requires a person who is not a party or an officer of a party to incur substantial expense to travel,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

DUTIES IN RESPONDING TO SUBPOENA

- (1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.
- (2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

RETURN FOR COMPLETION BY PERSON MAKING SERVICE

I, being duly sworn, on oath say that I am over the age of eighteen (18) years and not a party to this lawsuit, and that on the ____ day of _____, 2023, in _____ County, I served this subpoena on Dominic Gabello by delivering to the person named a copy of the subpoena, the statutory witness fee of \$95.00 and mileage in the amount of \$20.00 (*\$0.655/mile x 30 miles*).

Person making service

SUBSCRIBED AND SWORN to before me this ____ day of _____, 2023 (date).

Judge, notary or other officer
authorized to administer oaths

My commission expires: _____
(if notarized)

THIS SUBPOENA issued by or at request of:

Carter B. Harrison IV
Name of attorney of party

924 Park Avenue SW
Albuquerque, NM 87102
Address

(505) 295 3261
Telephone