

**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,

vs.

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 MARTÍNEZ, in his official capacity as
Speaker of the New Mexico House of Representatives,**

Defendants.

**NON-PARTY SCOTT C. FORRESTER'S
MOTION FOR PROTECTIVE ORDER**

Pursuant to Rules 1-026(C) and 1-030(G)(3) NMRA, Scott C. Forrester, by and through counsel, Kate Ferlic and Ben Osborn of Egolf + Ferlic + Martinez + Harwood, LLC, hereby moves the Court for an Order quashing Plaintiffs' defective deposition subpoena and protecting him from Plaintiffs' continuing and improper attempts to compel his testimony and production of documents in this matter.

FACTUAL BACKGROUND

The parties and the Court face an expedited timeline to litigate Plaintiffs' newly recognized, potential partisan gerrymandering claim regarding the 2021 redistricting maps. As the Court is also aware, Plaintiffs have submitted extensive discovery requests to virtually all

Democratic state officials and their staff in aid of their attempt to prove their claim. Plaintiffs have directed the bulk of their voluminous discovery requests toward what appears to be an attempt to glean the subjective motivations of every Democratic state Representative who voted affirmatively for SB-1 and the map challenged in this case. On August 2, 2023, Plaintiffs extended this dragnet to New Mexico's Congressional delegation, issuing a subpoena duces tecum to Mr. Forrester, Chief of Staff to Representative Melanie Stansbury. That subpoena broadly and inscrutably demands from Representative Stansbury's off: (i) *all* communications between certain individuals regardless of subject matter; (ii) *any* communications with *any* person that "relate to the subject of congressional redistricting in New Mexico"; *and* (iii) any communications that contain six search terms. Mr. Forrester has moved to quash that subpoena and for a protective order against compelled discovery in this case under the absolute privilege derived from Speech and Debate Clause of Article I, Section 6, of the United States Constitution. *See* Non-Party Scott C. Forrester's Motion to Quash Subpoena Duces Tecum, filed herein August 16, 2023.

Plaintiffs, however, ignored Mr. Forrester's clear assertion of privilege, and his outstanding motion for a protective order, and have noticed his deposition. Around August 31, 2023, Plaintiffs attempted to serve a subpoena for Mr. Forrester's deposition. *See* Subpoena, attached hereto as **Exhibit 1**. However, Plaintiffs only taped a copy of the subpoena to Mr. Forrester's door, which he did not immediately see. Further, Plaintiffs did not receive Mr. Forrester's signature accepting service. Perhaps recognizing their lack of success in properly serving Mr. Forrester, Plaintiffs on September 6, 2023, emailed to Legislative Defendants' counsel a mere notice to take Mr. Forrester's deposition on September 11, 2023. Thus, Mr. Forrester's counsel of record received notice only on September 6, when Plaintiffs filed their

certificate of service attaching the notice of deposition, with just three business days' notice before the noticed deposition. *See* Certificate of Service, filed herein September 6, 2023. The Court should protect Mr. Forrester from Plaintiff's improper attempt to circumvent his and other officials' pending assertions of legislative privilege.

ARGUMENT

Discovery from non-parties must be conducted by subpoena pursuant to Rule 1-045. *See* Rule 1-030(G)(2) NMRA (excusing a non-party's failure to attend a deposition due to a party's failure to serve a subpoena); Rule 1-034(C) NMRA ("A person not a party to the action may be compelled to produce documents and things or to submit to an inspection as provided in Rule 1-045."); *Highland Tank & Mfg. Co. v. PS Int'l, Inc.*, 227 F.R.D. 374, 379 (W.D. Pa. 2005) ("Rule 45 is the only discovery method whereby information may be obtained from a nonparty to the suit."); *Blazek v. Capital Recovery Assocs., Inc.*, 222 F.R.D. 360, 361 (E.D. Wis. 2004) ("[A]ny person may be required to produce documents and any property may be inspected. . . . If the person is not a party to the litigation, the party seeking such discovery must utilize a subpoena to compel such discovery."). Rule 1-026(C) allows any *person* against whom discovery is sought to move for a protective order. Rule 1-026(C) NMRA. "[F]or good cause, the court 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). This Court has "broad discretion in determining whether good cause exists[.]" *Does I through III v. Roman Catholic Church of Archdiocese of Santa Fe, Inc.*, 1996-NMCA-094, ¶ 13, 122 N.M. 307, 924 P.2d 273. The Court should vacate Plaintiffs' attempts to depose Mr. Forrester and issue an Order protecting him from compelled discovery in this matter, for three reasons: i) Plaintiffs did not comply with the procedural rules governing compelled discovery from non-parties; ii) as stated more fully in Mr.

Forrester's August 16 Motion to Quash, the Speech and Debate Clause affords Mr. Forrester an absolute privilege against Plaintiffs' discovery and testimony demands, and Plaintiffs' deposition notice to Mr. Forrester improperly seeks to evade Mr. Forrester's privilege assertion; and iii) Mr. Forrester's testimony is not relevant to this matter, and therefore he is not a proper deponent.

I. Plaintiffs Did Not Comply With Rule 1-030(B)(1) and Did Not Effect Service.

Mr. Forrester is not a party to this action. Plaintiffs attempted to serve a subpoena to Mr. Forrester on August 31, 2023, for a September 11 deposition. However, Plaintiffs merely left the subpoena on Mr. Forrester's door, which he did not immediately see, and Plaintiffs did not procure Mr. Forrester's signature accepting service. Plaintiffs therefore have not effected valid service of a subpoena, which is necessary to compel Mr. Forrester's testimony in this case. *See* Rule 1-004(F)(1)(a) NMRA (allowing service by leaving a copy at the individual's address only where the individual refuses to accept service). Moreover, Plaintiffs did not afford Mr. Forrester sufficient notice under Rule 1-030(B)(1). Plaintiffs' Certificate of Service for Mr. Forrester's Notice of Deposition was filed on Wednesday, September 6, 2023, demanding his attendance at a deposition the following Monday, September 11. Rule 1-030(B)(1) provides: "A party desiring to take the deposition of any person upon oral examination shall give at least ten (10) days notice in writing to every other party to the action." Thus, Mr. Forrester is excused from attending his deposition for lack of reasonable notice. *See* Rule 1-037(D)(1) NMRA (allowing compelled discovery only for entities who fail to attend a deposition for which they were "served with proper notice"); *see also, e.g., In re Malyugin*, 310 F. Supp. 3d 3, 5 (D.D.C. 2018) ("Two days' notice is plainly unreasonable."); *In re Malyugin*, 310 F. Supp. 3d 3, 5 (D.D.C. 2018) *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 34 F.Supp.2d 47, 49-50 (D.D.C. 1998) (witness entitled to object to a subpoena served one or two days before the scheduled deposition).

II. Plaintiffs' Deposition Notice Should Be Vacated as an Improper Attempt to Evade Mr. Forrester's Assertion of Privilege.

Plaintiffs' attempts to compel Mr. Forrester's deposition suffer from more serious defects than failure of process. As detailed in Mr. Forrester's Motion to Quash, Plaintiffs' attempts to compel discovery and testimony invade Mr. Forrester's Constitutional privilege as a Congressional official. Though Mr. Forrester's Motion to Quash is directed at Plaintiffs' subpoena for documents, the Motion's arguments, and the Speech and Debate Clause it discusses, apply with equal force to Plaintiffs' attempts to compel Mr. Forrester's deposition testimony. *See, e.g., United States v. Rayburn House Office Bldg.*, 497 F.3d 654, 662 (D.C. Cir. 2007) ("If the testimonial privilege under the Clause is absolute and there is no distinction between oral and written materials within the legislative sphere, then the non-disclosure privilege for written materials . . . is also absolute, and thus admits of no balancing." (citations omitted)). Plaintiffs cannot distract and intimidate Members of Congress or their senior staff by compelling testimony regarding their legislative acts. *See Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503 (1975) ("[L]egislators acting within the sphere of legitimate legislative activity should be protected not only from the consequences of litigation's results but also from the burden of defending themselves. . . . [A private civil action] creates a distraction and forces Members to divert their time, energy, and attention from their legislative tasks[.]" (internal quotation marks omitted)).

Plaintiffs did not rebut Mr. Forrester's showing of absolute privilege in their Combined Opposition brief, instead directing their arguments largely to the privileges asserted by state officials under the New Mexico Constitution. Nonetheless, they have proceeded to ignore Mr. Forrester's assertion of privilege and pending request for protective order by noticing Mr. Forrester's deposition. Beyond invading Mr. Forrester's constitutionally guaranteed privilege,

Plaintiffs tactics here are abusive. When Mr. Forrester moved to quash Plaintiffs' subpoena, asserting absolute legislative privilege under the Speech and Debate Clause and seeking a protective order against compelled discovery, Plaintiffs were obliged to "cease" all "efforts at obtaining discovery" from Mr. Forrester until the Court resolved Mr. Forrester's assertion. *Wallis v. Smith*, 2001-NMCA-017, ¶ 19, 22 P.3d 682. As the *Wallis* court noted when a privilege is asserted in response to discovery, "counsel cannot unilaterally disregard the privilege" by "sidestep[ping]" the procedures outlined in Rules 1-033 and 1-045 NMRA for resolving the dispute. *Id.*, ¶ 20. Thus, until the Court resolves Mr. Forrester's Motion to Quash and assertion of privilege, Plaintiffs are obliged to cease their efforts at breaching Mr. Forrester's asserted privilege. *See id.* ("[A] party may not use Rule 1-045 to pursue discovery of material that is subject to an ongoing discovery dispute that has not been resolved by the parties or decided by the court."). "[S]uch a practice is fundamentally unfair and violates all sense of civility and decency." *Id.* (quotation marks and citation omitted). Because the Speech and Debate Clause protects Mr. Forrester from Plaintiffs' attempts to compel his testimony, and because Plaintiffs have attempted an impermissible end-run around pending discovery disputes, the Court should issue an Order protecting Mr. Forrester from Plaintiffs' discovery demands in this case.

III. Mr. Forrester Is Not a Proper Deponent in This Case

The noticed deposition is only tenuously connected to the underlying suit's merits, and the deposition's burdens—distracting the Congresswoman's Office with an unnecessary deposition—vastly outweigh its benefits. Mr. Forrester is a high-ranking *federal* official, while this case is about a redistricting map drawn and enacted by State officials. Plaintiffs further have not specifically challenged Representative Stansbury's district. Mr. Forrester thus has no unique personal knowledge of the facts pertinent to this case's resolution, and Plaintiffs presumably

have at their disposal multiple other witnesses with more personal knowledge of this case than the minimal familiarity Mr. Forrester possesses. Weighed against the miniscule utility of Mr. Forrester's deposition, sitting for a deposition in a case far removed from Mr. Forrester's personal knowledge would impose a significant hardship in light of Mr. Forrester's other duties, in contravention of the policies behind the Speech and Debate Clause. Courts across the country issue protective orders when faced, as the Court is here, with discovery and deposition demands on high-ranking officials with only tenuous connections to an underlying dispute. *See, e.g., Bogan v. Boston*, 489 F.3d 417, 423 (1st Cir. 2000); *DeLeon-Reyes v. Guevara*, 2021 WL 3109662, at *3 (N.D. Ill. 2021); *accord Westly v. Superior Ct.*, 125 Cal. App. 4th 907, 910, 23 Cal. Rptr. 3d 154, 156 (2004) ("The general rule in California and federal court is that agency heads and other top governmental executives are not subject to deposition absent compelling reasons."). Thus, beyond contravening Mr. Forrester's constitutionally-guaranteed legislative privileges, the procedure for resolving privilege assertions, and the reasonable notice necessary to compel non-parties' depositions, Plaintiffs' attempt to depose Mr. Forrester imposes significant hardship for minimal gain, if any, to their case. The Court should therefore issue an Order protecting Mr. Forrester from compelled discovery in this case.

CONCLUSION

For these reasons, Non-Party Scott C. Forrester respectfully requests that the Court issue an Order quashing Plaintiffs' defective deposition subpoena and protecting him from Plaintiffs' continuing and improper attempts to compel his testimony and production of documents in this matter.

Respectfully submitted,

EGOLF + FERLIC +
MARTINEZ + HARWOOD, LLC

/s/ Kate Ferlic

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CERTIFICATE OF SERVICE

I hereby certify that on September 11, 2023, I filed the foregoing Non-Party Scott C. Forrester's Motion for Protective Order through the Court's online filing system, which caused all parties entitled to notice to be served by electronic means, as more fully reflected on the notice of electronic filing.

/s/ Kate Ferlic
Kate Ferlic