

CHAMBERS OF
HON. FRED T. VAN SOELEN
DISTRICT JUDGE
Division III



CURRY COUNTY COURTHOUSE
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STATE OF NEW MEXICO
Ninth Judicial District Court

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5th JUDICIAL DISTRICT COURT
Lea County
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NELDA CUELLAR
CLERK OF THE COURT
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September 26, 2023

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DECISION LETTER

RE: Republican Party of New Mexico, et. al., v. Maggie Talouse Oliver,
et.al.; No. D-506-CV-202200041 in the District Court of Lea County,
New Mexico

Counsel:

Regarding the issue of legislative privilege as enshrined in Article 4, Section 13 of the New Mexico Constitution, as it relates to the present matter, a short decision letter is appropriate as this applies to many of the pending discovery and evidentiary issues.

While generally a broad privilege, in this case, with the New Mexico Supreme Court's decision that claims of equal protection violations in partisan gerrymanders are justiciable, and that the intent of the Legislature in passing SB1 into law is an essential element of the test for deciding the issue, the Court finds that the legislative privilege can not be held as absolute. As in other states where similar issues have been decided, there must be limited ways in which a legislator's intent can be admitted to help in deciding cases before the courts.

To be sure, intent of the Legislature will be determined primarily by the legislation that is passed. The effect of the legislation has been identified by the New Mexico Supreme Court as the primary means of identifying intent. In *U.S. Brewers Ass'n, Inc. v. Director of the New Mexico Dept. of Alcoholic Beverage Control*, 1983-NMSC-059 ¶¶ 9-10, the Supreme Court ruled that contemporaneous statements of

legislators made while the legislation was in the process of enactment are competent evidence for determining intent. However, legislators' statements made after the legislation is passed are not competent evidence. This will affect the subpoenas issued to the various legislators. The Court finds that they can not be called to testify about their deliberative thoughts as the legislation was debated and enacted. But, any statements made by legislators during the legislative process can be admitted. How to lay proper foundation and present this evidence is left to the litigants.

As to which statements may be admitted, under the protections provided under legislative immunity, only some may be admitted, while most others are protected. Statements made by a legislator to other legislators or legislative staff are protected and are not subject to discovery and can not be admitted in court. Statements to other officials who have official roles in the legislative process are similarly protected. For our purposes, this includes the Governor based on the role a governor plays in signing or vetoing legislation, among other things. It also includes the Lieutenant Governor, based on the role a lieutenant governor plays in presiding over the Senate and voting in case of a tie. Statements made to consultants in furtherance of the legislative process, if the consultants are engaged and paid by the Legislature, are protected. Statements made to members of other government agencies, if the agencies are involved in the legislative process, are protected.

Statements made to the public, however, are not protected. This includes the news media, advocacy groups, the general public or another person or group of people who are not involved in the legislative process. While these groups may have an interest in how legislation is formed and in the outcome of the legislation, they have no official role or responsibility in its enactment. Therefore, statements by legislators to any of these persons or groups are not protected by legislative privilege. The issue of statements made by a legislator to a United States Congresswoman was raised at hearing. While a member of Congress does have an interest in the enactment of this legislation, and while such a member might have input that is relevant and informative to legislators as they proceed, the Court find this to be the same interest as any other citizen who may have an interest and desire to run for office. Any relevant information a member of Congress may have is similar to information an advocacy group may have. In this role, a member of Congress is on the same level as any other citizen. Because they have no official role in the enactment of the legislation, statements made to them are not protected by legislative privilege.

As stated above, any statement that may be admitted must be contemporaneous with the legislative process. While it may be hard to pinpoint when the legislative process begins, it does end when the legislation is enacted. Again, how to present this evidence, if it exists, is left to the litigants.

This decision affects several of the slew of motions submitted. Therefore, the Court will ask the parties to work together to apply this decision as it relates to their motions, and submit orders as they decide are necessary.

Very truly yours,

A handwritten signature in black ink that reads "Fred Van Soelen". The signature is written in a cursive style with a large, stylized initial "F".

Fred T. Van Soelen
District Judge, Division III

FVS/sb