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 TO QUASH SUBPOENA DUCES TECUM

Pursuant to Rules 1-026(C) and 1-045(C)(2)(b)(i) NMRA, Scott C. Forrester, by and through counsel, Kate Ferlic and Ben Osborn of Egolf + Ferlic + Martinez + Harwood, LLC, hereby moves the Court to quash a subpoena issued by Plaintiffs and to issue a protective order protecting Mr. Forrester from discovery seeking privileged materials.

FACTUAL BACKGROUND

As the Court is aware, 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 every Democratic state official and their staff in aid of their attempt to prove their claim.

Perhaps recognizing that even this incredibly broad dragnet is not sufficient to catch their desired quarry, Plaintiffs have now resorted to fishing for evidence from Members of Congress and their staff. To wit, on August 2, 2023, Plaintiffs served a subpoena duces tecum to Scott C. Forrester, Chief of Staff to Representative Melanie Stansbury.

The subpoena demands:

> All emails and text messages (including those in your personal, work, and/or campaign emails 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 or to you in the year 2021 and that either:
>
> > (1) were between you and any one or more of the following individuals (regardless whether other individuals were also on the distribution list): Joseph Cervantes, Brian Egolf, Kyra Ellis-Moore, Dominic Gabello, Daniel Ivey-Soto, Terese Leger Fernandez, Leanne Leith, Georgene Louis, 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 individuals; 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", or "Redistricting Committee".

Subpoena Transmittal at 4, attached hereto as Exhibit 1 (the "subpoena"). Thus, far from being limited to the case before the Court, the subpoena broadly demands from the Chief of Staff to one of New Mexico's Members of Congress: (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.

Charitably construed, Plaintiffs' subpoena to the Office of a sitting Member of Congress, demanding *all* communications with dozens of individuals and *all* communications with anyone that in any way relate to redistricting or a sort of broad search terms, is aimed at attempting a

dragnet of discovery for evidence of state lawmakers' intent. However, the subpoena presents an unlawful incursion into matters absolutely shielded from discovery, imposes significant burdens, and seeks imprecisely defined and largely irrelevant materials. The subpoena therefore must be quashed.

ARGUMENT

Rule 1-045 NMRA governs the issuance of and challenge to subpoenas duces tecum. Rule 1-045(C)(a) provides that on timely motion, the court by which a subpoena was issued "*shall* quash or modify" a subpoena that "requires disclosure of privileged or other protected matter and no exception or waiver applies." (emphasis added). Subpoenas also must comply with Rule 1-026, because "[a]ll discovery, including discovery under Rule 1-045, is limited by Rule 1-026 to the acquisition of information 'regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action.'" *Wallis v. Smith*, 2001-NMCA-017, ¶ 20, 130 N.M. 214, 22 P.3d 682 (quoting Rule 1-026(B)(1)) (emphasis in *Wallis*). When a subpoena's proponent fails to comply with these rules, 1-045(C)(2)(b)(i) allows any "person who has a legal interest in or the legal right to possession of the designated material" to move to quash the subpoena. Because Mr. Forrester holds the privilege that the subpoena seeks to penetrate, he has standing to move for its quashing. The Court should quash the subpoena because it seeks materials protected by legislative privilege,[1] and the minimal relevance of any arguably nonprivileged information is insufficient to justify Plaintiffs' sweeping and imprecise demands.

[1] Litigants asserting privilege against abusive and facially overburdensome discovery typically need not produce privilege logs, especially where a detailed privilege log would inevitably reveal the information withheld as privileged. *See Edwards v. Vesilind,* 790 S.E.2d 469, 478-79 (Va. 2016).

I. The Subpoena Seeks Materials That Are Absolutely Privileged

By express constitutional design, Members of Congress and their senior aides are afforded broad immunity and privilege against involuntary disclosure and compelled discovery. The Speech or Debate Clause provides: "The Senators and Representatives . . . shall in all Cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their attendance at the Session of their Respective Houses, and in going to and from the same; and for any Speech or Debate in either House, *they shall not be questioned in any other Place*." U.S. Const. art. I, § 6 (emphasis added). The Secrecy Clause further enshrines legislative confidentiality: "Each House shall keep a Journal of its proceedings, and from time to time publish the same, excepting such Parts as may in their judgment require secrecy[.]" U.S. Const. art. I, § 5, cl. 3.

These Article I provisions encompass two broad themes. First, they ensure an independent, co-equal Congress by protecting legislators from intimidation by executive prosecutors, a hostile judiciary, or enterprising private litigants. *See, e.g.*, *Gravel v. United States*, 408 U.S. 606, 616 (1972) ("The Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch. It thus protects Members against prosecutions that directly impinge upon or threaten the legislative process."). Second, these clauses promote voters' interest in effective representation by protecting Members of Congress from the burden and distraction of testifying or producing evidence at trial. *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)). Together, these constitutional provisions afford both immunity from suit and privilege against compelled discovery. And because legislative immunity is construed to ensure both the independence and effectiveness of federal legislators, it is well-established that legislative and other immunities attach to congressional aides. *See, e.g.*, *Grave*, 408 U.S. at 616 ("[F]or the purpose of construing the privilege a Member and his aide are to be treated as one" (quotation marks and citation omitted)); *In re N. Dakota Legis. Assembly*, 70 F.4th 460, 463 (8th Cir. 2023) ("[A] privilege that protects legislators from suit or discovery extends to their aides."); *Reeder v. Madigan*, 780 F.3d 799, 804 (7th Cir. 2015) (same). Plaintiffs' subpoena directly encroaches on these interests by seeking privileged legislative material and, in demanding a broad and imprecisely defined swath of material, by distracting a Member of Congress and her Office from the Member's official duties.

A. The Subpoena relates to privileged legislative activity.

The subpoena demands all communications from Representative Stansbury's office with any person relating in any way to New Mexico's 2021 redistricting process. These materials relate directly to Representative Stansbury's legislative acts. The legislative privilege extends to communications that occurred within "the sphere of legitimate legislative activity," *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951), or within "the regular course of the legislative process," *United States v. Helstoski*, 442 U.S. 477, 489 (1979) (internal quotation marks omitted). The legislative privilege's cope, therefore, "is necessarily broad." *La Union Del Pueblo Entero v. Abbott*, 68 F.4th 228, 236 (5th Cir. 2023). It extends beyond the mere "casting of a vote on a resolution or bill" to "cover[] all aspects of the legislative process." *Jackson Mun. Airport Auth. v. Harkins*, 67 F.4th 678, 686-87 (5th Cir. May 10, 2023) (internal quotation marks omitted).

Courts recognize that the legislative process necessarily includes meetings and communications with outside entities, such as advocacy groups and state lawmakers. Thus, communications concerning "issues that bear on potential legislation" between the legislator or his or her aide and such outside groups are not discoverable. *Almonte v. City of Long Beach*, 478 F.3d 100, 107 (2d Cir. 2007). By serving a subpoena on the Chief of Staff to a sitting Member of Congress, vaguely demanding a host of materials relating to the Member's official duties, the Plaintiffs have encroached on the heart of the legislative privilege.

The subpoena demands communications directly related to Representative Stanbury's legislative acts. "Whether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it." *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998); *Eastland*, 421 U.S. at 508 ("Our cases make clear that in determining the legitimacy of a congressional act we do not look to the motives alleged to have prompted it."). As the Supreme Court has noted, material is "related to and in furtherance of a legitimate [legislative act]," and therefore privileged, if it pertains to a legislator's inquiry or investigation into any matter "on which 'legislation could be had.' " *Eastland*, 421 U.S. at 505-06. As the Supreme Court has observed, "[t]he wisdom of congressional approach or methodology is not open to judicial veto. Nor is the legitimacy of a congressional inquiry to be defined by what it produces." *Id.* at 509 (citation omitted); *see also Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 416 (D.C. Cir. 1995) (reiterating that the legislative privilege permits Congress "to conduct investigations and obtain information without interference from the courts"). Thus, "the privilege does not require pending legislation or affirmative evidence of legislative impairment. Instead, the privilege also applies to legislative communications concerning other matters placed within the jurisdiction of the legislature, . . . provided they are not administrative or political in nature."

Fann v. Kemp in & for Cty. of Maricopa, 253 Ariz. 537, 540, 515 P.3d 1275, 1278 (2022) (citing *Gravel*, 408 U.S. at 625).

The subpoenas seek materials directly related to Representative Stansbury's legislative acts, including on pending federal legislation, and therefore those materials are privileged from compelled discovery. For example and among other pertinent committee assignments, Representative Stansbury sits on the House Subcommittee for Indigenous Peoples of the United States. *Cf. United States v. Brewster*, 408 U.S. 501, 526 (1972) (acknowledging legislative acts as including those taken pursuant to committee membership). Redistricting naturally and inevitably affects the interests of members of federally recognized Indian tribes, who comprise a discrete minority group and are part of Representative Stansbury's constituency. Given the expense and difficulties of *post hoc* litigation to remedy voting restrictions, tribal members often must rely on their Congressional representative to advocate for and protect their democratic representation, including through acts of Congress. *Cf. Navajo Nation v. San Juan Cty.*, 162 F. Supp. 3d 1162, 1173 (D. Utah 2016). During the time period the subpoena covers, Congress, and Representative Stanbury in particular, were actively engaging several voting rights and voting reform bills that would affect all New Mexicans, and particularly Native Americans in New Mexico. *E.g.*, John R. Lewis Voting Rights Advancement Act of 2021, H.R. 4, 117th Cong. (2021); Freedom to Vote Act, S.B. 2747, 117th Cong. (2021); For the People Act of 2021, H.R. 1, 117th Cong. (2021). These bills pertained directly to the Office of Representative Stansbury, as Member of the Subcommittee on Indigenous Peoples of the United States, and as a Representative of a State with among the highest percentages of Native American citizens in the country. Representative Stansbury's work, advocacy, and underlying investigation regarding those bills, through her voting power generally and through her Committee membership,

required extensive investigation into multiple states' legislation, including New Mexico's, regarding voting, voting rights, and redistricting. Thus, the subpoena seeks materials directly relating to Representative Stansbury's legislative acts and therefore the legislative privilege applies to protect her Office against the burden of responding to the subpoena. *See, e.g.*, *Arizona v. Arpaio*, 314 F.R.D. 664 (D. Ariz. 2016) (holding that communications between state senator and various third-party attorneys, lobbyists, and constituents regarding anti-illegal immigration legislation that senator was sponsoring were created in connection with bona fide legislative activity, and thus were protected by legislative privilege).

B. Because the subpoena seeks materials related to bona fide legislative acts, Plaintiffs' subpoena seeks materials that are absolutely privileged.

While Plaintiffs have noted elsewhere that some courts have engaged in a balancing test in applying *state* legislative privilege, such cases are inapposite here as they construed federal common law or state constitutional provisions. Given the explicit breadth of the Speech or Debate Clause, Members of Congress are constitutionally afforded absolute immunity from suit as well as from compelled discovery or 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)). This is because "inquiry into the motivation" behind a legislative enactment "strikes at the heart of the legislative privilege." *Hubbard*, 803 F.3d at 1310. While the federal common law privilege for *state* legislators may be subject to balancing the legislator's interest against the litigant's need for the privileged material, such balancing does not apply to Congressional legislative privilege given the explicit constitutional text supporting Congressional confidentiality. *Compare United States v. Gillock*, 445 U.S. 360,

373 (1980) (concluding that, in contrast to the absolute protection afforded Members of Congress by the Speech or Debate Clause, the federal common-law doctrine of state legislative immunity may be subject to balancing) *with Gravel*, 408 U.S. at 616 (stating that Members of Congress "may not be made to answer—either in terms of questions or in terms of defending himself from prosecution" regarding legislative acts). The Speech or Debate Clause is absolute—*i.e.*, not subject to a balancing inquiry—where private parties assert personal claims and seek discovery that would "impede congressional action." *Eastland*, 421 U.S. at 509-10 n.16.

Accordingly, the Speech or Debate Clause affords an absolute privilege for Members of Congress against compelled discovery of evidence pertaining to legislative acts. *See, e.g.*, *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 528 (9th Cir. 1983); *Scott v. Office of Alexander*, 522 F. Supp. 2d 262, 269-71 (D.D.C. 2007); *see also Corporacion Insular de Seguros v. Garcia*, 709 F. Supp. 288, (D.P.R. 1989) ("In short, 'the Speech or Debate Clause is an absolute bar to interference.' . . . We read this mandate to include a bar against depositions in civil proceedings regardless of the third-party or 'non-party' status of the legislator in question." (quoting *Eastland*, 421 U.S. at 503)). An absolute privilege is unaffected by the fact that a plaintiff has asserted claims for which legislative intent is highly probative or even crucial. *See, e.g.*, *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 297 n.12 (D. Md. 1992) (three-judge court) ("Since *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 130-31 (1810), the general rule has been that inquiry into the motives of legislators was not in keeping with our scheme of government and, therefore, placing a decisionmaker on the stand is usually to be avoided." (internal quotation marks omitted)).

The legislative privilege guaranteed by the Speech or Debate Clause is broad by design. Its breadth operates to require outright dismissal of claims that cannot be proven without

penetrating the privilege. *E.g.*, *Fields v. Off. of Eddie Bernice Johnson*, 459 F.3d 1, 14 (D.C. Cir. 2006) (en banc) ("[T]he fact that Fields and Hanson are able to plead prima facie cases under the [Accountability Act] without violating the Speech or Debate Clause does not mean the Speech or Debate Clause in no way hinders their suits."); *Scott v. Off. of Alexander*, 522 F. Supp. 2d 262, 270 (D.D.C. 2007) (dismissing a discrimination suit against a Congressman because although the Congressmen was not immune against the claim, it could not be proven without evidence protected by legislative privilege). But that is the balance that the Framers struck, embodying in the Constitution the principle that any doubts as to the privilege's scope must be resolved against disclosure, despite the risk of burdens on private litigants that such a broad privilege may impose. *Eastland*, 421 U.S. at 510 (noting that the broad protection afforded by the Speech or Debate Clause, and the resulting lack of judicial oversight of congressional activities, presents "potential for abuse" but that "the risk of such abuse was 'the conscious choice of the Framers' buttressed and justified by history" (quoting *Brewster*, 408 U.S. at 516)). Because the subpoena seeks materials absolutely privileged from disclosure under the Speech or Debate Clause and operates only to distract Representative Stansbury and her office from their official duties, the subpoena must be quashed in its entirety.

C. The subpoena seeks to make an impermissible end-run around other legislators' privileges.

It is clear that the Plaintiffs have subpoenaed Members of Congress and their senior staff purely to attempt a backdoor into other legislators' communications. This gambit is improper, however, as litigants may not use discovery demands on one legislator to circumvent another's claim of privilege. *See, e.g.*, *U.S. Football League v. Nat'l Football League*, 842 F.2d 1335, 1374-75 (2d Cir. 1988) ("[T]he testimonial privilege that members of Congress enjoy under the Speech or Debate Clause of the Constitution, art. I, § 6, cannot be waived by another

member[.]"); 26A Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice & Procedure § 5675 (2001) ("The speech or debate privilege belongs to the legislator whose legislative act is involved in the evidence").

As the privilege is held by the individual legislators, Mr. Forrester has no authority to waive it, whether for Representative Stansbury or for the state legislators whose communications are sought by the subpoena. *See, e.g.*, *Favors v. Cuomo*, 285 F.R.D. 187, 211 (E.D.N.Y. 2012) ("[A] legislator cannot assert or waive the privilege on behalf of another legislator."). Mr. Forrester's privilege is derived from Representative Stansbury's office, so he has no authority to waive it on her behalf. *Gravel*, 408 U.S. at 618 ("[T]he Speech and Debate Clause applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself."). And as the subpoena demands communications with state legislators who have asserted their privilege in these proceedings, Mr. Forrester has no authority to waive any privilege on their behalf. *Cf. Cano v. Davis*, 193 F. Supp. 2d 1177, 1179 (C.D. Cal. 2002) (three-judge court) (concluding that legislative immunity prevents a legislator who waives the privilege from providing evidence regarding the motives and legislative acts of other members who have preserved their privilege). That the State officials' immunity stems from another source—the New Mexico Constitution and common law—does not affect this limitation. *See id.* at 1180 ("The fact that the legislators at issue here are protected by a federal common law privilege and not by the Speech or Debate Clause of the United States Constitution does not change the majority's view."). Accordingly, Mr. Forrester has no authority to waive any privilege on Representative Stansbury's behalf, and even if the subpoenas seek materials not protected by the Speech or Debate Clause, Mr. Forrester cannot

comply with the subpoena without violating the State Legislators' privilege, which is theirs alone to waive.

II. Even if the Subpoena Seeks Any Arguably Non-privileged Material, it Should Nonetheless Be Quashed Under Rule 1-026(B)(2).

To the extent that the subpoena seeks any arguably non-privileged materials, it should nonetheless be quashed under Rule 1-026(B)(2) as unduly burdensome and unlikely to lead to the discovery of relevant information. Like its federal counterpart, Rule 1-026(B)(2) "is broader in scope than the attorney work product rule, attorney-client privilege and other evidentiary privileges because it is designed to prevent discovery from causing annoyance, embarrassment, oppression, undue burden or expense not just to protect confidential communications." *Boughton v. Cotter Corp.*, 65 F.3d 823, 829-30 (10th Cir. 1995). As detailed above, the Speech or Debate Clause tolerates no balancing inquiry where a litigant seeks compelled discovery of legislative acts. Courts applying a balancing inquiry do so only for state officials, because that inquiry is governed either by the federal common law or state constitutional provisions. Against qualified legislative privilege, however, courts weigh: "(i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the seriousness of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable." *E.g.*, *In re Franklin Nat. Bank Sec. Litig.*, 478 F. Supp. 577, 583 (E.D.N.Y. 1979) (internal quotations marks and citations omitted). Even under this analysis, the subpoena nonetheless must be quashed because the subpoena's utility is significantly outweighed by "the intrusion of the discovery sought and its possible chilling effect on legislative action." *Benisek v. Lamone*, 241 F. Supp. 3d 566, 574 (D. Md. 2017) (three-judge court).

A. The subpoena seeks materials unnecessary for Plaintiffs' claim.

To meet their burden of showing impermissible partisan gerrymandering, Plaintiffs must prove that "state officials' 'predominant purpose' in drawing a district's lines was to 'entrench [their party] in power' by diluting the votes of citizens favoring its rival." *Rucho*, 139 S. Ct. at 2516 (Kagan, J., dissenting) (alteration in *Rucho*); Superintending Order, ¶ 2, *Grisham v. Van Soelen*, No. S-1-SC-39481 (N.M. July 4, 2023) (holding Plaintiffs' partisan gerrymandering claim is subject to the three-part test articulated by Justic Kagan in her *Rucho* dissent). This burden does not, however, grant Plaintiffs the right to search each and every individual legislator's intent. To the contrary, such evidence would not even be very helpful to Plaintiffs.

To demonstrate intentional discrimination, "plaintiffs need not offer direct evidence of discriminatory intent." *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, No. 11 C 5065, 2011 WL 4837508, at *3 (N.D. Ill. Oct. 12, 2011); *see also Thornburg v. Gingles*, 478 U.S. 30, 71 (1986) (direct evidence of discriminatory intent unnecessary to prove racial discrimination). Evidence of a specific legislator's individual intent is only marginally probative given the need to prove collective intent of the voting body to cause subsequent discriminatory effect. *See Greater Birmingham Ministries v. Sec'y of State for State of Ala.*, 992 F.3d 1299, 1324 (11th Cir. 2021) (holding that the intent of one legislator, even if they sponsored a bill, is of limited relevance). Courts frequently must parse legislative intent when construing a given law, yet it is not customary or even helpful to question an individual legislator for evidence of his or her intent. *Cf. Edwards v. Aguillard*, 482 U.S. 578, 636-37 (1987) (Scalia, J., dissenting) ("But the difficulty of knowing what vitiating purpose one is looking for is as nothing compared with the difficulty of knowing how or where to find it. For while it is possible to discern the objective 'purpose' of a statute, . . . discerning the subjective motivation of those enacting the statute is, to

be honest, almost always an impossible task. The number of possible motivations, to begin with, is not binary, or indeed even finite."). Moreover, the Plaintiffs' gerrymander claim expressly permits some degree of partisan intent by legislators, further reducing the probative value of evidence of individual legislators' subjective intent. Thus, even if no privilege stood in the way of Plaintiffs' voluminous discovery requests to individual legislators, the subpoena still would not be of much use in proving their claim.

B. The subpoena's minimal utility does not justify its intrusiveness.

Because the documents Plaintiffs seek from Mr. Forrester are not necessary for Plaintiffs' claim, Plaintiffs cannot meet the heightened showing required for compelling discovery from federal legislators. Because evidence of individual legislators' subjective intent is neither necessary nor helpful to prove a law's discriminatory intent, equal protection plaintiffs' needs often do not trump the policies supporting legislative immunity. *E.g.*, *Harding v. Cty. of Dallas, Tex.*, No. 3:15-CV-0131-D, 2016 WL 7426127, at *5 (N.D. Tex. Dec. 23, 2016) ("In other words, plaintiffs can prove their VRA claim without relying on the privileged information they seek."). This is so even racial discrimination claims, which receive heightened judicial scrutiny unlike claims of partisan gerrymandering. *Compare Gomillion v. Lightfoot*, 364 U.S. 339, (1960) (noting that racial gerrymanders go beyond marginalizing mere political preference and instead seek to denigrate and exclude an entire class of people—not just from a municipality, but from society itself) *with* Superintending Order ¶¶ 3-4, *Grisham v. Van Soelen*, No.S-1SC-39481 (N.M. July 5, 2023) (permitting some degree of partisan considerations and subjecting the Plaintiffs' claim to intermediate scrutiny).

For example, the Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), directed that, in cases where discriminatory motive

could not be proved by effect alone, courts should look to a given law's historical background of the decision, the sequence of events leading to the decision, and departures from procedural and substantive norms. *Id.* at 267. It then stated: "The legislative or administrative history may [also] be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports. In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege." *Id.* at 268. Later, the Court commented that "[p]lacing a decisionmaker on the stand is . . . 'usually to be avoided.'" *Id.* at 268, n.18. Thus, the Supreme Court specifically noted that legislative privilege will trump private litigants' needs, even as it articulated the standard for strict-scrutiny racial discrimination claims. In contrast to racial discrimination, Plaintiffs' partisan gerrymander claim specifically permits some degree of partisan intent by legislators. Superintending Order ¶¶ 3-7. It would be illogical for the presumption against discovery on individual legislators to be *weaker* for partisan gerrymander than against racial gerrymander, where racist intent is completely prohibited and therefore evidence of it far more probative. The Plaintiffs' subpoena should therefore be quashed under Rule 1-026(B)(2) as unduly burdensome even if Mr. Forrester's privilege is qualified, rather than absolute, and even if the subpoena seeks any arguably unprivileged materials.

III. The Plaintiffs' dragnet fishing expedition is inconsistent with the New Mexico Supreme Court's timeline and the Court's discovery order.

Beyond being unhelpful to the Court's inquiry, Plaintiffs' discovery requests are not possible on the Court's expedited timeline. It is not plausible that the New Mexico Supreme Court's remand order contemplated, much less required, Plaintiffs' broad and extensive discovery requests. The New Mexico Supreme Court remanded this case for resolution on "an

extraordinarily truncated timeline." Scheduling Order at 3, ¶ 4, filed July 24, 2023. The New Mexico Supreme Court's Superintending Order instructed ultra-expedited resolution of a claim that expressly permits some degree of partisan considerations. Superintending Order, ¶¶ 3-7, *Grisham v. Van Soelen*, No. S-1-SC-39481 (N.M. July 4, 2023). Given this truncated timeline and the reduced relevancy of individual lawmakers' subjective intent, the New Mexico Supreme Court expressly listed the evidence it deemed relevant: "evidence comparing the relevant congressional district's voter registration percentage/data, regarding the individual plaintiffs' party affiliation under the challenged congressional maps, as well as the same source of data under the prior maps." Superintending Order ¶ 7. Any additional evidence, the New Mexico Supreme Court instructed, must be relevant to Justice Kagan's three-part test, which permits some partisan considerations in redistricting. Order ¶ 7.

Thus, in addition to being unnecessary to support Plaintiffs' claim, the subpoena here—and the dozens of similarly broad subpoenas also sent to myriad other officials—is simply incompatible with the Court's mandate and the parties' obligation to expeditiously litigate that claim. The Plaintiffs' dragnet discovery practices are hindering, rather than promoting, the Court's resolution of their claims. Because Plaintiffs do not need the material that the subpoena demands, and because that material is only minimally relevant to their claim, the Court should not permit Plaintiffs' unusual, disfavored, and distracting fishing expedition into the Office of a sitting Member of Congress.

CONCLUSION

For these reasons, non-party Scott C. Forrester respectfully requests that the Court quash the subpoena issued to seeking privileged information and issue a protective order protecting Mr. Forrester from testifying in this matter. Mr. Forrester also requests all such further relief that is

just and proper under the circumstances, including an award of the attorney fees and costs he incurred in bringing this motion.

Respectfully submitted,

EGOLF + FERLIC +
MARTINEZ + HARWOOD, LLC

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CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2023, I filed the foregoing Motion to Quash through the Court's electronic filing system, which caused all parties entitled to notice to be served.

/s/ *Kate Ferlic*
Kate Ferlic

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.

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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 [**X**] DOCUMENTS OR OBJECTS [ ] INSPECTION OF PREMISES

TO: Scott C. Forrester
8720 Silvercrest Ct. NW
Albuquerque, NM 87114

or

8308 Sleeping Bear Drive NW
Albuquerque, NM 87120

YOU ARE HEREBY COMMANDED ON:

Date: By August 16, 2023
(Or 14 days from service, whichever is later.)

Time: By 12:00 p.m.

EXHIBIT 1

TO:

[X] permit inspection of the following described books, papers, documents or tangible things:

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 or to you in the year 2021 and that either:

(1) were between you and any one or more of the following individuals (regardless of whether other individuals were also on the distribution list): Joseph Cervantes, Brian Egolf, Kyra Ellis-Moore, Dominic Gabello, Daniel Ivey-Soto, Teresa Leger Fernandez, Leanne Leith, Georgene Louis, 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 individuals; 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", or "Redistricting Committee".

Please produce these documents either by emailing them (a Dropbox link is acceptable) to carter@harrisonhartlaw.com or by mailing or hand-delivering electronic copies on a USB storage device to an agent or employee of one of the following businesses during normal business hours:

Harrison & Hart, LLC
924 Park Avenue SW, Ste. E
Albuquerque, NM 87102

[ ] permit the inspection of the premises located at:

_____ *(address).*

ABSENT A COURT ORDER, DO NOT RESPOND TO THIS SUBPOENA UNTIL THE EXPIRATION OF FOURTEEN (14) DAYS AFTER THE DATE OF SERVICE OF THE SUBPOENA.

DO NOT RESPOND TO THIS SUBPOENA FOR PRODUCTION OR INSPECTION IF YOU ARE SERVED WITH WRITTEN OBJECTIONS OR A MOTION TO QUASH UNTIL YOU RECEIVE A COURT ORDER REQUIRING A RESPONSE.

You may comply with this subpoena for production or inspection by providing legible copies of the items requested to be produced by mail or delivery to the attorney whose name appears on this subpoena. You may condition the preparation of the copies upon the payment in advance of the reasonable cost of inspection and copying. You have the right to object to the production under this subpoena as provided below.

READ THE SECTION "DUTIES IN RESPONDING TO SUBPOENA."

IF YOU DO NOT COMPLY WITH THIS SUBPOENA you may be held in contempt of court and punished by fine or imprisonment.

August 2, 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 person commanded to produce and permit inspection and copying of designated books, papers, documents, or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing, 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.

A person commanded to produce and permit inspection and copying of designated books, papers, documents, or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing, or trial.

Subject to Rule 1-045(D)(2) NMRA, 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 that time is less than fourteen (14) days after service, serve upon the party or attorney designated in the subpoena and all parties to the lawsuit identified in the certificate of service by attorney 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 and serve on all parties a motion to quash the subpoena. An exception in this specific case is that assertions of legislative privilege must be made within ten (10) days. If an objection is served or a motion to quash is filed and served on the parties and the person responding to the subpoena, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except under 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. The 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. The court may award costs and attorney fees against a party or person for serving written objections or filing a motion to quash that lacks substantial merit.

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 (100) 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,

(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.

(3) A person commanded to produce documents or material or to permit the inspection of premises shall not produce the documents or materials or permit the inspection of the premises if a written objection is served or a motion to quash has been filed with the court until a court order requires their production or inspection.