

**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,**

**v.**

**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.**

**REPLY IN SUPPORT OF MOTION FOR PROTECTIVE ORDER**

Defendant Governor Michelle Lujan Grisham, by and through her counsel of record in this matter, hereby provides her reply in support of her Motion for Protective Order (“Motion”). As grounds for this reply, the Governor states as follows.

**INTRODUCTION**

As explained in the Motion, the Court should issue an order of protection quashing Plaintiffs’ Rule 1-030(B)(6) notice entirely due to Plaintiffs’ failure to meet the extraordinary circumstances test or, at the very least, limiting any deposition to topics that are not shielded by immunities and privileges belonging to the judiciary’s coordinate branches. Plaintiffs’ arguments

to the contrary are unpersuasive. First, Plaintiffs fail to cite any real authority to dissuade the Court from adopting a test almost *universally* applied by courts across the country to shield high level government officials from disruptive and unnecessary depositions. Second, Plaintiffs do not meet any of the elements of the extraordinary circumstances test. Finally, even if Plaintiffs were entitled to depose the Governor or her senior advisors, the vast majority of the deposition topics are protected by legislative and executive privilege.

## DISCUSSION

### **I. The Court should adopt the extraordinary circumstances test**

As an initial matter, the Court should reject Plaintiffs’ pleas to disregard the extraordinary circumstances test—a test that is used “almost universally by state and federal courts across the country.” *In re Office of the Utah Attorney Gen.*, 56 F.4th 1254, 1263 (10th Cir. 2022) (citing Fern L. Kettler, *Deposition of High-Ranking Government Officials*, 15 A.L.R. 3d, Art. 5, § 1), and applicable to the Governor herself and senior members of her Office. *See, e.g., In Re Bryant*, 745 Fed. Appx. 215 (5th Cir. 2018) (applying extraordinary circumstances test to attempt to depose the governor’s chief-of-staff). While it is true no New Mexico court has yet to adopt this test, no New Mexico court has had the opportunity to address it, and Plaintiffs give this Court no good reason not to join the legion of courts across the nation that apply the test.

It is worth noting that Plaintiffs fail to cite a *single* case declining to adopt the extraordinary circumstances test. *See Hall v. Hall*, 1992-NMCA-097, ¶ 28, 114 N.M. 378, 838 P.2d 995 (“When parties fail to cite authorities in support of their contentions, we are entitled to assume that they could not find support after diligent search.”). Further, Plaintiffs’ reliance on *Republican Party of New Mexico v. New Mexico Taxation & Revenue Dept.*, 2012-NMSC-026, 283 P.3d 853, is misplaced because the plaintiffs there were not seeking to depose the Governor or one of her senior

advisors. See *Piedra, Inc. v. N.M. Transp. Comm'n*, 2008-NMCA-089, ¶ 32, 144 N.M. 382, 188 P.3d 106 (“Cases are not authority for propositions not considered.” (cleaned up)). The same goes for *League of Women Voters of Ohio v. Ohio Redistricting Comm.*, 2021-Ohio-3607, 164 Ohio St. 3d 1457, which did not mention the extraordinary circumstances test. The summary Ohio decision is also distinguishable because their governor was a member of the commission in charge of drafting the challenged map—unlike the Governor here. See *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, 2022-Ohio-65, 192 N.E.3d 379, 384.

Rather than rely on cases that have no analysis or even relevance to the instant issue, this Court should find persuasive the many authorities cited in the Motion recognizing the importance of imposing heightened requirements on those seeking to depose high-ranking government officials. The Governor is the executive branch’s top official, constitutionally vested with the “supreme executive authority” and charged with “tak[ing] care that the laws be faithfully executed.” N.M. Const. art V, § 4, which includes overseeing twenty-five cabinet level departments and nearly 25,000 employees.<sup>1</sup> To effectively discharge her duties, the Governor requires her closest senior advisors to be available at nearly all times. Accordingly, these officials “have greater duties and time constraints than other witnesses[,]” and “without appropriate limitations, [they] will spend an inordinate amount of time tending to pending litigation.” *In re Office of the Utah Attorney Gen.*, 56 F.4th at 1259 (quoting *Bogan v. City of Boston*, 489 F.3d 417, 423 (1st Cir. 2007)). It follows that these “top executive department officials should not, absent extraordinary circumstances, be called to testify or deposed regarding their reasons for taking official action.” *Bogan*, 489 F.3d at 423. To hold otherwise “would risk distracting [the Governor

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<sup>1</sup> *New Mexico Sunshine Portal*, <https://ssp3.sunshineportalnm.com/#employees> (last visited Aug. 20, 2023).

and her senior advisors] from their essential duties with an inundation of compulsory, unnecessary depositions and upsetting the proper balance of powers.” *In re U.S. Dep’t of Educ.*, 25 F.4th 692, 703 (9th Cir. 2022). The Court should, therefore, adopt the test here.

## **II. Plaintiffs cannot satisfy the extraordinary circumstances test**

Applying the extraordinary circumstances test, the Court should quash the Rule 1-030(B)(6) notice. First, Plaintiffs have presented absolutely no evidence suggesting that the Governor or her senior staff have any first-hand knowledge relating to the Legislature’s intent behind passing SB 1 or that deposing those individuals “will likely lead to the discovery of admissible evidence.” *In re Office of the Utah Attorney Gen.*, 56 F.4th at 1264. Although this might otherwise be excusable given the truncated discovery deadlines in this case, Plaintiffs do not even *allege* that the Governor or her Office had anything to do with the underlying dispute other than the simple fact that the Governor signed legislation pursuant to her constitutional powers and obligations. *See generally* Verified Complaint for Violation of New Mexico Constitution Article II, Section 18 (filed Jan 21, 2022). This is wholly insufficient. *Cf. In re F.D.I.C.*, 58 F.3d 1055, 1062 (5th Cir. 1995) (requiring “strong showing of bad faith or improper behavior” before subjecting high-level officials to deposition relating to their official acts); *United States v. Sensient Colors, Inc.*, 649 F. Supp. 2d 309, 323 (D.N.J. 2009) (recognizing that “bald assertions of bad faith” are insufficient to require agency officials to submit to depositions relating to their official acts).

For example, in *Givens v. Newsom*, the plaintiffs sought to depose the California governor in their challenge of one of his pandemic-related executive orders limiting public gatherings. 2021 WL 65878, at \*1 (E.D. Cal. Jan. 7, 2021). In analyzing whether the plaintiffs met the extraordinary circumstances test, the court observed that “merely asserting personal involvement in a contested

decision is not sufficient, alone, to deny deposition protection.” *Id.* at \*5. The court found the plaintiffs’ general allegations that the governor signed the executive order and directed law enforcement to refuse all applications for permits to protest on capitol grounds were insufficient, concluding, “Although plaintiffs have recently raised arguments of generalized viewpoint discrimination based on the State’s post-filing enforcement of COVID-related assembly restrictions, that is insufficient as it remains uncertain whether plaintiffs attribute that discrimination to the Governor himself, or whether plaintiffs will actually assert such claims in an amended complaint.” *Id.* (citations omitted). Respectfully, this Court should reach the same conclusion here.

Second, the sought-after testimony is not “essential”—or even relevant—to Plaintiffs’ claims. True, Plaintiffs must demonstrate, *inter alia*, that the “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 v. Common Cause*, 139 S. Ct. 2484, 2516 (2019) (Kagan J., dissenting) (cleaned up). But, as explained in the Motion and Executive Defendants’ response to Plaintiffs’ motion to compel, *see* Motion at 11-14; Executive Defendants’ Response to Plaintiffs’ Motion to Compel Discovery at 10-13 (filed Aug. 21, 2023) (“Response to Motion to Compel”), this does not mean that the Governor or her senior staff’s testimony about the redistricting process or the Governor’s consideration and opinion of SB 1 or the other proposed maps is *necessary* to Plaintiffs’ case. *See In re Office of the Utah Attorney Gen.*, 56 F.4th at 1264 (“Something is ‘essential’ if it is not only relevant, but ‘necessary.’” (quoting *In re U.S.*, 197 F.3d 310, 314 (8th Cir. 1999))). Indeed, Plaintiffs admit that “indirect or circumstantial evidence of partisan intent [such as ‘evidence that the process of drawing the map was highly partisan; evidence that the Legislature replaced a fair, neutral map, with a map that was more favorable to one party; or expert

analysis showing that a map's egregious partisan effects are difficult (if not impossible) to explain without reference to partisan intent'] may also *independently* satisfy the first part of Justice Kagan's test." Response at 7 n.3 (emphasis in original).

For this same reason, Plaintiffs fail to show that they cannot obtain the information necessary to support their claims from alternative sources. And if the Court ultimately holds that legislative privilege does not protect Plaintiffs' sought-after evidence about the redistricting process and the Legislature's drafting and consideration of SB 1 and the other proposed maps, then it follows that Plaintiffs *can* obtain this evidence from the *dozens* of legislators and other non-parties Plaintiffs have already subpoenaed. *See In Re Bryant*, 745 Fed. Appx. at 222 (directing lower court to reconsider its decision to allow deposition of Texas governor's chief of staff and directing judge to consider the possible availability of legislators' testimony even though "they appear to be resisting discovery"). Either way, there is no need to depose the Governor or one of her senior advisors.

Given Plaintiffs' failure to meet any of the extraordinary circumstances test elements, let alone one of the elements, Plaintiffs should not be permitted to depose the Governor or her senior advisors at this juncture.

### **III. Executive and legislative privilege protect the vast majority of the information and documents sought by Plaintiffs**

As explained in the Motion and Executive Defendants' response to Plaintiffs' motion to compel, Plaintiffs' discovery requests are largely, if not entirely, barred by both executive and legislative privilege. *See* Motion at 10-14; Response to Motion to Compel at 14-15. These privileges apply to communications by the Governor and her staff with those outside the executive and legislative branches. *See* Response to Motion to Compel at 4-8. And Plaintiffs have failed to demonstrate that they can overcome the privileges in this case (or if they can *ever* be overcome, in

the case of legislative privilege). *See id.* at 8-15. Accordingly, even if Plaintiffs could satisfy the extraordinary circumstances test, the Court should still quash the Rule 1-030(B)(6) notice or, at the very least, limit the topics of testimony to those that are not protected by legislative immunity or executive privilege.

### **CONCLUSION**

For the foregoing reasons, the Court should grant the Motion.

Respectfully submitted,

/s/ Holly Agajanian

**HOLLY AGAJANIAN**

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 21, 2023, I filed the foregoing through the New Mexico Electronic Filing System, which caused all counsel of record to be served by electronic means. I have additionally emailed a copy of the foregoing to all counsel of record per this Court's scheduling order.

Respectfully submitted,

*/s/ Holly Agajanian*

Holly Agajanian