STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT

BRIAN F. EGOLF, JR., HAKIM BELLAMY, MEL HOLGUIN, MAURILIO CASTRO, and ROXANE SPRUCE BLY, Plaintiffs, v. DIANNA J. DURAN, in her official capacity as New Mexico Secretary of State, SUSANA MARTINEZ, in her official capacity s New Mexico Governor, JOHN A. SANCHEZ, in his official capacity as New Mexico Lieutenant Governor and presiding officer of the New Mexico Senate, TIMOTHY Z. JENNINGS, in his official capacity as President Pro-Tempore of the New Mexico Senate, and BEN LUJAN, SR., in his official capacity as Speaker of the New Mexico House of Representatives, Defendants.	)	NO. D-101-CV-2011-02942 CONSOLIDATED WITH: D-101-CV-2011-02944 D-101-CV-2011-02945 D-101-CV-2011-03016 D-101-CV-2011-03099 D-101-CV-2011-03107 D-202-CV-2011-09600 D-506-CV-2011-00913

LEGISLATIVE DEFENDANTS' CONSOLIDATED REPLY IN SUPPORT OF THEIR MOTION FOR PROTECTIVE ORDER

COME NOW Ben Lujan, Sr., in his official capacity as Speaker of the House of Representatives of the State of New Mexico, and Timothy Z. Jennings, in his official capacity as President Pro-Tempore of the New Mexico Senate (together "Legislative Defendants"), by and through their counsel of record, and state the following in reply to the Responses to Legislative Defendants' Motion for Protective Order that were filed by the Secretary of State and the James Plaintiffs[1]:

[1] At the outset of their Response, the James Plaintiffs assert, among other things, that the Legislative Council Service is controlled by the Democratic majority, and that Legislative Defendants do not "represent or speak on behalf of the Legislature as a whole." Resp. at 1. While neither assertion is germane to the issue before the Court,

The Secretary of State and the James Plaintiffs seek to compel the disclosure of confidential, privileged communications which are irrelevant to this proceeding. As explained below, legislators' motivations or objectives in drafting, supporting or opposing redistricting legislation are exactly the type of sensitive communications that are entitled to the protection of the legislative privilege, the judicially-compelled disclosure of which would implicate serious separation of powers concerns. The only justification offered in the Responses for overcoming this constitutionally-rooted privilege is that a single federal district court case out of Georgia examined the motives of legislators to strike down a state redistricting law as unconstitutional. However, as explained below, the issue of legislative privilege was never raised in that case, which is inapposite here for numerous reasons. Moreover, there is no legal authority or compelling reason to find a waiver of the legislative privilege here, particularly given New Mexico's long-standing respect for separation of powers principles, the irrelevance of the communications to Mr. Sanderoff's opinions and the issues before the Court, and the significant diversion of time and resources that would result if such disclosures were compelled. For all these reasons, Legislative Defendants' Motion for Protective Order should be granted.

A. The *Larios* Case Is Inapposite to Legislative Defendants' and Brian Sanderoff's Claim of Privilege.

Both the Secretary of State and the James Plaintiffs rely heavily on a single federal district court opinion, *Larios v. Cox*, 300 F.Supp.2d 1320 (N.D. Ga. 2003), to argue that the

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they warrant correction. The Legislative Council Service is non-partisan and was created by statute to, among other things, "assist the legislature of the state of New Mexico in the proper performance of its constitutional functions by providing its members with impartial and accurate information and reports concerning the legislative problems which come before them." NMSA 1978, § 2-3-8. Mr. Sanderoff was hired to assist the Legislative Council Serive in doing exactly that. And, to assert that the Speaker of the House and President Pro Tempore do not represent or speak for the Legislature is absurd. Legislative Defendants are sued in their capacity as the duly elected presiding officers of each house of the Legislature. N.M. Const., Art. IV, § 8, As such, they alone are constitutionally empowered to sign legislation passed by their respective houses, regardless of whether they personally voted for or against the legislation, *id*., at § 20, and thus speak for the Legislature in advocating for legislation passed by that body. Individual legislators are certainly entitled to oppose such legislation, as several from both political parties have done so in this litigation.

motives and purposes of individual legislators in connection with supporting or opposing redistricting legislation are relevant to this litigation. The *Larios* case struck down Georgia's enacted state House and Senate redistricting plans in light of extremely egregious facts which demonstrated that the Georgia Legislature, in creating their plans, wholly ignored traditional redistricting principles for the express purpose of protecting Democratic incumbents, unseating Republican incumbents and favoring rural and inner-city residents. *Id.* at 1334. The *Larios* case is inapposite for several reasons.

First, to the extent that *Larios* can be read to make political motivations of legislators relevant for purposes of striking down duly enacted redistricting laws which contain minor population deviations (*i.e.* deviations within 10% of ideal population equality[2]), the case is of dubious precedential value. *See League of United Latin Am. Citizens v. Perry,* 548 U.S. 399, 423 (2006) ("[I]n addressing political motivation as a justification for an equal-population violation… *Larios* does not give clear guidance.").[3] Additionally, the United States Supreme Court has warned of the danger in relying on the motives of individual legislators in invalidating a statute, stating:

> Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is entirely a different matter when we are asked to void a statute

[2] According to the Supreme Court of the United States, overall deviations of less than ten percent are minor deviations which are presumptively constitutional and do not, by themselves, trigger a state's burden to show substantial and legitimate state concerns justifying the deviations. *Brown v. Thomson,* 462 U.S. 835, 842 (1983). Other than *Larios*, we have not found any case in which a one-person-one-vote violation is found where deviations are below ten percent.

[3] Additionally, the case was summarily affirmed by the Supreme Court without a majority opinion. *See Cox v. Larios*, 542 U.S. 947 (2004). A summary affirmance represents no more than a decision not to hear an appeal and has limited precedential value. *In re Mun. Reapportionment of Twp. of Haverford*, 873 A.2d 821, 835 (Pa. Commw. Ct. 2005). *See also Edelman v. Jordan*, 415 U.S. 651, 671 (1974) (noting that summary affirmances "are not of the same precedential value as would be an opinion of this Court treating the question on the merits").

> that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.

United States v. O'Brien, 391 U.S. 367, 383–84 (1968).

Importantly, New Mexico's rules of statutory interpretation do not go as far as *O'Brien*, our courts having determined that the motivation or intent of individual legislators is not probative of legislative intent:

> We do not attempt to divine what legislators read and heard and thought at the time they enacted a particular item of legislation. If the intentions of the Legislature cannot be determined from the actual language of a statute, then we resort to rules of statutory construction, not legislative history.

R*egents of the Univ. of New Mexico v. N.M. Federation of Teachers*, 125 N.M. 401, 411 (S. Ct. 1998). *See also United States Brewers Ass'n, Inc. v. Director of the N.M. Dep't of Alcoholic Beverage Control*, 100 N.M. 216, 219 (S. Ct. 1983) (stating the court's agreement with the following passage: "Testimony of individual legislators or others as to happenings in the Legislature is incompetent, since that body speaks solely through its concerted action as shown by its vote.") (quoting *Haynes v. Caporal*, 571 P.2d 430, 434 (Okl. 1977).

Finally, the Secretary of State's and James Plaintiffs' reliance on *Larios* is misplaced as that case does not involve a claim (or even any discussion) of privilege. In fact, we do not know whether the privilege was waived or even invoked in *Larios*. An examination of the procedural facts of *Larios* indicates that legislators in that case chose to testify in defense of the plans by sharing their motivations and objectives for the plans. *Larios*, 300 F.2d at 1342 (noting that "the defense has put forth two basic explanations for the population deviations"). The fact that Georgia legislators chose to testify about their motivations behind the plans has no bearing on the assertion of the legislative privilege by the Legislative Defendants and Mr. Sanderoff in this

case. And in fact, where claims of privilege have been asserted in the context of redistricting litigation, courts have upheld the privilege, even in the face of allegations that legislators were motivated by improper purposes.

For instance, in *Holmes v. Farmer*, 475 A.2d 976 (R.I. 1984), Plaintiff sought to introduce deposition testimony from legislators and a consultant taken in a related case concerning the following matters:

> who hired Dr. Coelho as consultant to the Reapportionment Commission, whether a targeting specialist addressed the political reasons for particular district lines, whether any consideration was given to aligning Jamestown with a city or town on the west shore of Narragansett Bay instead of with the city of Newport, whether there was an agreement that the House and the Senate would each apportion themselves, whether the Newport Democrats "bickered" at redistricting meetings, whether the legislators had agreed to Newport's maintaining control of four seats, *whether a ± 2.5 percent deviation target was used*, and whether the Reapportionment Commission participated in the formation of the House plan.

Id. at 983 (emphasis added).

The court denied the request and found that the substance of these matters fell "clearly within the most basic element of legislative privilege." *Id.* at 984. Importantly, the court stated, "The claim of an unworthy purpose does not destroy the privilege." *Id.* quoting *Tenney v. Brandhove*, 341 U.S. at 377, 71 S.Ct. at 788, 95 L.Ed. at 1027. Similarly, in *In re 1991 Pennsylvania Legislative Reapportionment Com'n*, 609 A.2d 132, the court held that the motives and purposes of Redistricting Commission members and their staff were irrelevant on the ground that the plan at issue did not violate the Voting Rights Act or the state or federal constitution on its face.

In sum, the *Larios* decision is inapplicable to the case at bar and does nothing to overcome the Legislative Defendants' assertion of privilege. Therefore, the Legislative Defendants' Motion for Protective Order should be granted.

B. The Secretary Of State and the James Plaintiffs Have Not Met Their Burden to Show That The Requested Material Should Be Compelled In This Case.

Despite suggestions to the contrary contained in the Responses, the Legislative Defendants do not seek to assert the substantive immunity of the Speech or Debate Clause, do not seek to claim an unqualified privilege, and do not seek to shield documents containing merely factually-based information, such as demographic data or maps. Rather, the Legislative Defendants seek the protection of the qualified evidentiary privilege which protects from disclosure material which would reveal a legislator's motivations with respect to particular legislation.[4] *See United States v. Johnson*, 383 U.S. 169, 185, 86 S.Ct. 749, 15 L.Ed.2d 681 (1966); *Holmes v. Farmer*, 475 A.2d 976, 984 (R.I. 1984). As explained in Legislative Defendants' Motion, this privilege is derived from separation of powers principles and is necessary to safeguard the quality of legislative debate and decision-making.

The legislative privilege is a qualified privilege, meaning that the party seeking the privileged information has the initial burden to show good cause for seeking the material. *See State ex rel. Atty. Gen. v. First Judicial Dist. Court of New Mexico*, 96 N.M. 254, 258, 629 P.2d 330, 334 (1981) (discussing the burden in the context of the related executive privilege). Only if good cause is shown, the court is then directed to engage in an *in camera* inspection of the requested material. *Id.* The court must then be satisfied that the material would be admissible and that it is not otherwise available by the exercise of reasonable diligence. *Id.* If these prerequisites can be met, the court finally must determine that the public interest in preserving confidentiality is not outweighed by the specific needs of the movant before the material will be made discoverable. *Id.*

[4] The Notice of Deposition Duces Tecum directed to Mr. Sanderoff expressly seeks, among other things, documents reflecting "requests from legislators . . . for specific kinds of redistricting plans, or requests for plans which accomplish specific objectives." Notice at Request #1a.

The Secretary of State and James Plaintiffs cannot meet even their initial burden to show good cause for the material sought. Again, the motivations or objectives of individual legislators in drafting, supporting or opposing any particular piece of redistricting legislation is irrelevant to the task before the Court in this litigation. Because the Court's task is to draw or adopt redistricting plans that comply with federal and state law, with thoughtful consideration given to the legislatively passed plans, the information relevant to the Court's inquiry is in the content of the maps presented and the data underlying them, not what any particular legislator may have intended in drafting or supporting a particular map. That the population deviations in Legislative Defendants' plans stay within presumptively constitutional limits and that the plans adhere to traditional redistricting principles are evidenced by the plans themselves and Mr. Sanderoff's expert testimony explaining what the plans do and the data underlying them. The motivation or purpose of any individual legislator in drafting or supporting the plans is simply not relevant to this showing. Moreover, the members of the houses of the Legislature that passed the plans may have had their own individual and different reasons for supporting those plans; hence, testimony regarding any one individual legislator's motivations or objectives would have little or no relevance to the Court's inquiry.

And, even if the Court were to determine that these discovery requests have some relevance, the Secretary of State and James Plaintiffs cannot meet their burden to show that discovery is warranted and proper in light of the important separation of powers principles and public concerns which counsel against such disclosure. As discussed in the Motion, compelling Mr. Sanderoff to disclose his confidential communications with legislators concerning the redistricting process would have a chilling effect on the ability of legislators and their staff to communicate freely and effectively about all the competing interests involved in the difficult

task of redistricting. Because the services of Mr. Sanderoff and his firm are necessary and critical for legislators to accomplish the highly technical task of drawing and revising maps, this chilling effect would be particularly harmful to future redistricting efforts in the Legislature.[5] Finally, even if statements from legislators to Mr. Sanderoff are determined to be marginally relevant, they are likely to be deemed inadmissible as hearsay. For all these reasons, the Legislative Defendants' Motion for Protective Order should be granted.

C. Legislative Defendants and Brian Sanderoff Are Entitled to the Immunity of NMSA 1978 § 2-3-13.

Legislative Defendants are also entitled to immunity under the state statute making communications between legislators and Legislative Council Service staff confidential. NMSA 1978 § 2-3-13. First, neither the Secretary of State nor the James Plaintiffs argue that this provision does not apply to Mr. Sanderoff's communications with legislators in the process of drafting redistricting legislation. Instead, the Secretary of State maintains that the Legislative Defendants' reliance on this provision is in conflict with other requirements imposed by that statute, specifically Section 2-3-3(F), which requires legislative council service staff to refrain from advocating or opposing *the introduction or passage of legislation*. Here, however, the plans advocated by the Legislative Defendants have already been introduced and passed by the Legislature. Nothing in the statute prohibits Mr. Sanderoff from explaining in litigation what legislation that has already been passed by both houses of the Legislature actually does and offering his opinion on whether the population deviations in the plans passed by the legislature are justified in light of traditional redistricting principles to which the plans adhere.

Second, as with legislative privilege, the immunity granted by Section 2-3-13 is a qualified one, such that the Court may be called to balance competing interests in determining

[5] Furthermore, if disclosure is required in this case, in addition to the chilling effect on future redistricting sessions, there may a general chilling effect on communications between legislators and staff.

the scope of what may be discovered in accordance with the process set forth in *Estate of Romero v. City of Santa Fe*, 2006-NMSC-028, 139 N.M. 671, 137 P.3d 611. However, as is made clear by that case, such a balancing need only occur where the party seeking the confidential material first demonstrates that the evidence is critical to the cause of action or defense. The Secretary of State and James Plaintiffs cannot meet such a burden in this case given the task before the Court in this litigation. As discussed above, the maps and data speak for themselves, and Mr. Sanderoff's communications with legislators in the redistricting process are not even relevant – much less "critical to the cause of action or defense" – and thus there is no basis for overcoming the qualified immunity afforded by Section 2-3-13.[6] Accordingly, the Legislative Defendants' Motion for Protective Order should be granted on this basis, as well.

D. Mr. Sanderoff Does Not Rely On His Communications With Legislators In Forming His Opinions In This Case.

Mr. Sanderoff does not rely on communications with individual legislators in connection with forming the opinions to which he will testify in this case. Consistent with the purpose of this litigation and the Legislature's role in it as described above, Mr. Sanderoff will testify that the plans passed by the Legislature contain only minor population deviations and that those deviations are justified in light of traditional redistricting principles to which the plans adhere. That the Legislature's passed plans comport with and accommodate traditional redistricting principles is demonstrated by the plans themselves. The individual motivations or desire of individual legislators is not relevant to this inquiry and do not form the basis of Mr. Sanderoff's opinions.

[6] Additionally, it is not clear what claims or defenses the Secretary of State is entitled to bring in this action, as she is joined in this action in her official capacity and therefore is presumably only a nominal party. *See Barnow v. Ryan*, 2001 WL 1104729 (N.D. Ill. Sept. 17, 2001).

E. The Stipulated Order Regarding Discovery Entered In This Case Does Not Compel the Discovery Of Privileged Materials And Protects Written Notes of Communications Between Mr. Sanderoff and Legislators.

The Secretary of State makes brief reference to the Stipulated Order Regarding Discovery in support of her Response. Nothing in the Stipulated Order can be read as a waiver of available privileges, and in fact Paragraph 1 of the Order makes clear that the Order is designed to limit the scope of expert-related discovery and testimony, not to broaden it. Moreover, the Stipulated Order provides expressly that "any notes or other writing taken or prepared by or for an expert witness in connection with this matter" need not be disclosed "unless the expert witness is relying upon those notes or other writings in connection with the expert witness' opinions in this matter." As explained above, Mr. Sanderoff does not rely on any written or other communications with legislators in connection with the opinions he will render in this case.

F. Legislative Defendants' Designation of Mr. Sanderoff as an Expert Witness Does Not Waive the Privilege.

The Secretary of State and James Plaintiffs assert that Legislative Defendants waived the legislative privilege when they identified Mr. Sanderoff as a testifying expert witness. For several reasons, the Court should not find any waiver here.

First, the single decision cited by the James Plaintiffs[7] in support of waiver, *Arizona Indep. Redistricting Comm'n v. Fields*, 75 P.3d 1088 (Ariz. App. 2003), is neither binding nor persuasive authority here. That case was decided on the basis of Arizona state law. *See id.* at 1101 (acknowledging that resolution of the waiver issue "turns on the breadth of this court's decision" in an earlier case about the work product privilege, and interpreting Arizona's state discovery rules to support waiver in the redistricting case). Other states faced with the issue of legislative privilege in the redistricting context have upheld it. *See, e.g., Holmes,* 475 A.2d at

[7] The Secretary of State's Response cites no authority for finding a waiver. *See* Resp. at 2.

984. And, of course, the Arizona Court of Appeals had no reason to consider the important separation of powers principles that New Mexico courts have long recognized and which counsel strongly against finding a waiver.

Second, as pointed out in Section D, *supra*, Mr. Sanderoff's opinions in this matter rely solely on the maps and underlying data presented to the Court, and not on any of his communications with legislators or legislative staff. By designating him as an expert witness, Legislative Defendants did not waive their legislative privilege or the privilege of any other legislators who may have spoken to Mr. Sanderoff. (Notably, the James Plaintiffs assert that the Legislative Defendants "do not speak on behalf of the Legislature as a whole," yet argue that somehow the Legislative Defendants' designation of Mr. Sanderoff as a testifying expert waived the legislative privilege of each and every legislator who may have communicated with him.)

Third, finding a waiver of all communications between Mr. Sanderoff and legislators would do violence to separation of powers principles and undermine the ability of legislators to rely on technical experts such as Mr. Sanderoff in carrying out their legislative duties. As is explained in *Montgomery County v. Schooley*, 97 Md. App. 107, 627 A.2d 69 (1993):

> Th[e] principle [that an individual legislator has the right to waive the privilege] . . . becomes … tenuous when the attack is not just on the conduct of an individual legislator but rather on the legislative body as a whole or on some committee of that body, for it then calls into question the legislative conduct of more than one member. The privilege is personal to *each* member of the legislative body, and it therefore protects *each* from being called upon to explain his legislative conduct in another official forum. It is, indeed, the cumulative effect of these individual privileges that serves the broader purpose of the privilege-protecting the independence and integrity of the Legislature as an institution of republican government. The problem is a very practical one, but one that raises quite clearly the underlying Constitutional concern.
>
> If the attack is on the legislative process itself or on the end product of that process, rather than on the conduct of an individual legislator, the motivation and legislative conduct of each member associated with the challenged process or product necessarily comes into question. If even one member is permitted to waive his individual privilege and testify in support of the attack, the other members will, perforce, be required either to respond or

> risk the consequence of an adverse judgment based, at least in part, on the unfavorable testimony of their colleague. When viewed in that context, the waiver by one legislator of his privilege may, in effect, dictate the waiver by other legislators of their privilege. One willing member could thus cripple the privilege of other members and be the instrument for dismantling the separation of powers pillar upon which the privilege is, in part, based.

Id. at 120-21, 627 A.2d 69, 76-77. *See also Holmes*, 475 A.2d at 985 ("To allow an individual legislator to waive the institution's privilege would be to allow one to act on behalf of the whole in waiving the protection of a significant bulwark of our constitutionally mandated system of government.")

Finally, the practical realities of this litigation recommend against finding a waiver. As the Court is well aware, this litigation involves four tightly scheduled evidentiary hearings which begin next week. In those hearings, the Court must take testimony concerning many different maps and all of the demographic data underlying those maps, in addition to argument concerning the multitude of legal requirements and concepts at play in a redistricting case. Allowing testimony about what any legislator might have said to Mr. Sanderoff about a particular redistricting plan would add unnecessary time and expense to this litigation.[8] Moreover, in addition to being irrelevant, distracting and time-consuming, the statements of legislators to Mr. Sanderoff would likely be deemed inadmissible hearsay.

WHEREFORE, for all the foregoing reasons and those stated in Legislative Defendants' Motion for Protective Order, Legislative Defendants respectfully request that the Motion be granted.

[8] Moreover, a decision compelling disclosure of legislators' privileged communications in this case would put the Legislature in a terrible bind for future redistricting efforts: either waive the privilege with its technical consultants, or incur the significant additional expense of retaining a new demographer for the sole purpose of testifying at trial if redistricting ends up in litigation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 28, 2011, I caused a true and correct copy of Legislative Defendants' Consolidated Reply in Support of Their Motion for Protective Order to be e-mailed to all parties or counsel of record as follows and caused a copy of Legislative Defendants' Consolidated Reply in Support of Their Motion for Protective Order and this Certificate of Service to be filed electronically through the Tyler Tech System, which caused all parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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