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,

v. **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 BRIAN EGOLF, in his official capacity as Speaker of the New Mexico House of Representatives,

Defendants.

LEGISLATIVE DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO COMPEL

Rep. Javier Martinez, in his official capacity as Speaker of the House of Representatives of the State of New Mexico, and Senator Mimi Stewart, in her official capacity as President Pro-Tempore of the New Mexico Senate (together "Legislative Defendants"), request the Court deny Plaintiffs' *Motion to Compel* in accordance with the authorities and arguments previously raised by the Legislative Defendants[1] which are incorporated by reference herein, and for the further reasons addressed in this Response.

[1] *See* August 8, 2023 *Motion to Quash 74 Non-Party Legislator Subpoenas and for Protective Order* ("Non-Party Motion"), August 14, 2023 *Motion to Quash Subpoenas Served on Legislative Staff and Consultants* ("Staff Motion"), and their August 16, 2023 *Motion to Quash Subpoenas for Depositions and for Protective Order* ("Deposition Motion").

In their *Motion to Compel*, Plaintiffs attempt to lull this Court into laxness. By wrongly reassuring the Court that the legislative privilege expressly provided for in New Mexico's constitution, its core governing document, is "similar" to the limited, implied executive privilege in New Mexico, Plaintiffs invite the Court to mistakenly conclude that N.M. Const. art. IV, §13 is subject to the same exceptions as common law legislative privilege applied by federal courts in federal venues, suggesting that this Court engage in an unnecessary and needlessly complicated five-factor balancing test. Plaintiffs' approach cites the wrong body of law and misapprehends the scope of the privilege. The overwhelming weight of authority establishes that where legislative privilege under corresponding federal or state Speech and Debate Clause attaches, the privilege is absolute.[2] New Mexico's Constitution mandates the same absolute, unequivocal protection, even in the face of "highly relevant" direct-evidence arguments. Inquiry into individual legislators' motives and intent strikes at the very heart of the privilege. Nor are the protected communications Plaintiffs seek the only—or even the best—evidence of the purpose of the challenged legislation, as the legislature acts as a body and there are ample alternate sources of evidence of legislative intent.

I. SUMMARY OF PLAINTIFFS' MOTION TO COMPEL

Plaintiffs ask for an Order "compelling all recipients of Plaintiffs' subpoena discovery requests to answer and respond fully." *Compel* at 15. The vague simplicity of Plaintiffs' blanket request belies its enormity: (i) burdensome document production from 74 Non-Party Legislators,[3] (ii) depositions and/or documents from contracted legislative consultants, 2 staff, and 5 former and current elected representatives, and (iii) responses to 4 separate sets of written discovery

[2] Non-Party Motion at 2-3 (collecting decisions holding legislative privilege absolute).

[3] Non-Party Motion at 11–14.

encompassing a total of 39interrogatories, 20 requests for production, and 91 requests for admission.[4] Plaintiffs argue that the Court should ignore the constitutionally-enshrined legislative privilege because (a) the requested discovery is highly relevant, (b) legislative privilege is "similar" to executive privilege (based on dictum from an outdated, abrogated opinion), (c) all third parties are excluded from legislative privilege regardless of function, and (d) other federal courts applying a qualified, federal common law legislative privilege use a similarly inapplicable, inapposite five-factor test.

II. LEGISLATIVE DEFENDANTS' RESPONSE

A. Legislative Privilege in New Mexico is Distinct, Express and Absolute.

In *First Judicial*, the New Mexico Supreme Court relied upon N.M. Const. art. III, §1 to find grounds to first recognize an executive privilege in New Mexico.[5] The Court made passing reference to the presence of legislative and judicial privileges under the state constitution in a single sentence. *First Judicial*, 1981-NMSC-053, ¶ 18. No parallel analysis or cases interpreting legislative privilege were relied upon by the *First Judicial* Court in reaching its holding. The relevant guidance from New Mexico's executive privilege jurisprudence applicable to the instant

[4] This summary should sufficiently disabuse the Court of the notion that Plaintiffs' discovery is "tailored." *Compel* at 3-4. Mr. Forrester's characterization of this fishing expedition as a "dragnet" more accurately captures Plaintiffs' approach to discovery. *See .e.g., Non-Party Scott C. Forrester's Motion to Quash Subpoena Duces Tecum* filed August 16, 2023 at 2. The analogy further bears out, as many states and countries ban the use of dragnets due to the method's indiscriminate, permanent, and irrevocable destruction. *See*, e.g. Va. Code. Ann. § 28.2-314.

[5] *See State ex rel. Atty. Gen. v. First Judicial Dist. Court of New Mexico*, 1981-NMSC-053, ¶ 16, 96 N.M. 254, 257, 629 P.2d 330, 333, abrogated by *Republican Party of New Mexico v. New Mexico Taxation & Revenue Dept.*, 2012-NMSC-026, ¶ 16, 283 P.3d 853 (finding executive department to have "implied rights"); *see RPNM*, 2012-NMSC-026, ¶¶ 40 & 43 (summarizing *First Judicial* as "recogniz[ing] a form of executive privilege based on separation of powers principles enshrined in our state constitution").

question of legislative privilege are three-fold: (1) opinions applying different federal and state provisions are of "limited persuasion." *RPNM*, 2012-NMSC-026, ¶ 28, (2) privileges created by judicial interpretation or common law are distinguishable from explicit constitutional prohibitions, *id.*, ¶26, and (3) the process of determining the scope of privilege should consult federal decisions, opinions from other states addressing the privilege, and then reach a conclusion pursuant to New Mexico's own constitution. *Id.*, ¶ 17.

The argument that upholding legislative privilege protects "secrecy" has been rejected by courts, emphasizing underlying purposes of legislative privilege. *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) (purpose of absolute legislative immunity to protect legislators "not for their private indulgence but for the public good"). The Court must start from the premise that long-established legislative immunity and privilege under federal and state Speech and Debate Clauses more than "likely creates some form of such legislative privilege," *Compel* at 8, such that New Mexico's constitution commands absolute protection of legitimate legislative activity.

B. Communications Between Legislators, their Alter-Egos, and Third Parties are Protected.

No court has interpreted a Speech and Debate Clause as being limited by the parties named or described within the Clause itself. *Compare Compel* at 10 (arguing that "*Members of the legislature*" must exclude all others); *to Reeder v. Madigan*, 780 F.3d 799, 804 (7th Cir. 2015) ("the Supreme Court has never held that the Speech or Debate Clause is so limited....instead the Clause should receive a practical rather than a strictly literal reading.") (quotation and citation omitted). The U.S. Supreme Court dispensed with such a constrained, semantic reading in *Gravel v. United States*, 408 U.S. 606 (1971), and both state and federal courts have followed suit by looking to the function of the activity, not the actor, in determining whether legislative privilege

attaches.[6] In practical terms of the modern legislative sphere, Plaintiffs' narrow interpretation hamstrings the privilege into futility.[7] In *Edwards v. Vesilind*, 292 Va. 510, 790 S.E.2d 469 (2016), which inexplicably Plaintiffs cite for the proposition that "communications between legislators...and third parties are subject to discovery," *Compel* at 11, the trial court attempted to insert the very same categorical exclusions and found itself promptly reversed. There, the Virginia Supreme Court held:

> The circuit court further erred by holding that, as a matter of law, communications between legislators and constituents or other third parties cannot be protected by legislative privilege. Such individuals are equally capable of performing acts as alter egos, subject to the same requirements that the acts that they perform both fall within the sphere of legitimate legislative activity and are delegated by the legislator to be performed on his or her behalf. Any basis on which to differentiate a constituent or other third party from a legislator's personal legislative staffer, including unpaid interns, or consultants would be artificial.

Id. at 535, 483 (emphasis added).[8] Thus, where Plaintiffs claim that interest groups, constituents, and even contracted consultants hired by the Legislature constitute third-party "organizations

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[6] Non-Party Motion at 6;*see also* Gravel, 408 U.S. at 616–17 (rejecting premise that "Senators and Representatives" excludes staff, and instead holding that "for the purpose of construing the privilege a Member and his aide are to be treated as one," because "if they are not so recognized, the central role of the Speech or Debate Clause—to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary...will inevitably be diminished and frustrated.")(internal citations and quotations omitted).

[7] Staff Motion at 3–4, 7 & 9–10.

[8] The Court should not conflate Plaintiffs' use of "subject to discovery" to mean that discovery was obtained or ordered in the cited decisions. In that same string-cite, several decisions warrant closer inspection:

- *Almonte v. City of Long Beach*, No.2:04-cv-04192, 2005 WL 1796118, at *3 (E.D.N.Y. July 27, 2005) (allowing deposition of City Manager who did not invoke legislative privilege and also waived the privilege); *but see Almonte v. City of Long Beach*, 478 F.3d 100, 107 (2d Cir. 2007) (reversing district court in part and holding "legislative immunity ...covers all aspects of the legislative process, including the discussions held and alliances struck regarding a legislative matter in anticipation of a formal vote....Meeting with persons outside the legislature—such as executive officers, partisans, political interest groups, or constituents—to discuss issues that bear on potential legislation, and participating in party caucuses to form a united position on matters of

outside the Legislature." *Compel* at 11. mere labels neither control nor dispose of the privilege question. Even federal courts applying common law privilege to state legislators have abandoned categorical or formulaic exclusions in their analysis of legislative activity and third parties.[9] That

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legislative policy, assist legislators in the discharge of their legislative duty. These activities are also a routine and legitimate part of the modern-day legislative process.").

- *League of Women Voters of Ohio*. 164 Ohio St. 3d 1457, 2021-Ohio-3607 (Oct. 7, 2021): an unreported Ohio decision in a series of claims challenging Ohio's 2020 redistricting plan. After reviewing the order, briefing, and the actual deposition transcript, it is not discernible whether the legislators in the cited action asserted legislative privilege or the Ohio court considered the doctrine. The sum total of the order allows five depositions, not to exceed two hours. *Compare to Plain Local Sch. Dist. Bd. of Educ. v. DeWine*, 464 F. Supp. 3d 915, 919 (S.D. Ohio 2020) (Court declaring it was "loath to permit parties to conduct in-person depositions of State legislators, even in this extraordinary case" and allowing only limited, written discovery provided the information was not privileged, met certain factors, and was unobtainable from other source).
- *Comm. for a Fair & Balanced Map v. Illinois State Bd. of Elections*, 2011 WL 4837508, at *11 (N.D. Ill. Oct. 12, 2011) (finding legislative privilege shielded "information concerning the motives, objectives, plans, reports and/or procedures used by lawmakers" in drawing redistricting map, and all "information concerning the identities of persons who participated in decisions regarding the 2011 Map" and modifying the 30 subpoenas and 21 topics to exclude and prohibit disclosure of "(1) motives, objectives, plans, reports and/or procedures created, formulated or used by lawmakers to draw the 2011 Map prior to the passage of the Redistricting Act;11 or (2) identities of persons who participated in decisions regarding the 2011 Map").

See also Deposition Motion at 6–8 (citing state and federal examples where discovery denied on basis of legislative privilege).

[9] *See League of Women Voters of Florida, Inc. v. Lee*, 340 F.R.D. 446, 454 (N.D. Fla. 2021) (finding privilege extended to communications with third parties as the "better position" because modern-day legislative process entails meeting with persons and interests groups); *Jackson Mun. Airport Auth. v. Harkins*, 67 F.4th 678, 687 (5th Cir. 2023) (communications with advocacy groups "part and parcel" of legislative process and privilege not waived by sharing information or documents); *In re N. Dakota Legislative Assembly*, 70 F.4th 460, 464 (8th Cir. 2023) (mandamus action quashing depositions because district court's "mistaken conception of the legislative privilege" did not apply to communications between legislators and third parties: "Communications with constituents, advocacy groups, and others outside the legislature are a legitimate aspect of legislative activity. The use of compulsory evidentiary process against legislators and their aides to gather evidence about this legislative activity is thus barred by the legislative privilege."); *Mi Familia Vota v. Hobbs*, --- F.Supp.3d ---- 2023 WL 4595824 at *8 (D. Az. July 18, 2023) (addressing issue of communications between legislators and third parties and finding legislative privilege may apply and application of balancing test supports privilege even if communications "uniquely valuable in establishing discriminatory intent); *In re Georgia Senate Bill 202*, 2023 WL 3137982, at *2 (N.D. Ga. Apr. 27, 2023); *Florida v. Byrd*, Case No. 4:22-cv-109-AW-MAF, --- F.Supp.3d ---- 2023 WL3676796 (N.D. Fla. May 25, 2023) (quashing

this information could be relevant or valuable to Plaintiffs' claim puts the cart before the horse, presupposing a balancing test or judicial carveouts to a constitutional privilege drafted without exception or qualification. Instead, the Court must start from the threshold question of whether legislative privilege applies to the information sought given the nature and function of the activity.

Here, Plaintiffs' discovery targets all aspects of the development and consideration of SB-1, a legislatively-enacted redistricting plan which is undisputedly legitimate legislative activity.[10] Take first, for example, Plaintiffs' requests and subpoenas which seek to discover communications and correspondence between legislators or a legislator's internal thoughts and views, both with regard to redistricting legislation.[11] Here, even under Plaintiffs' interpretation of the Speech and Debate Clause, *Compel* at 10, privilege applies. Second, because the Legislature contracted with

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depositions that sought discovery of influences and motivation in redistricting plan and legislators knowledge and reasons for approving the map because "all proffered topics strike at the heart of legislative privilege" and plaintiffs had not shown extraordinary circumstances in which privilege must yield); *League of Women Voters*, 340 F.R.D. at 454 ("[T]his [c]ourt finds that communications with third parties are subject to legislative privilege so long as those communications were part of the formulation of legislation."); *Stuart v. City of Scottsdale*, 2023 WL 5173781, at *5 (D. Ariz. May 12, 2023) (where plaintiff's subpoenas unreasonably duplicative, unduly burdensome, and purport to elicit privileged and irrelevant matters. Court allowed written deposition of one councilmember); *Cuomo v. N.Y. State Assembly Jud. Comm.*, --- F.Supp.3d ---- 2023 WL 4714097 (E.D.N.Y. July 21, 2023) (motion to compel denied, motion to quash granted on legislative privilege grounds where factors weighed heavily in favor of judiciary committee); *Thompson v. Merrill*, No. 2:16-cv-783, 2020 WL 2545317, at *3 (M.D. Ala. May 19, 2020) (citing cases from the Eleventh Circuit and concluding that "the legislative privilege is not waived simply because a legislator has communicated with third parties, if the communication was part of the formulation of legislation"); *Greater Birmingham Ministries v. Merrill*, No. 2:15-cv-2193, slip op. at 22 (N.D. Ala. Mar. 13, 2017) (concluding that the legislative privilege should "protect legislators from having to produce documents shared with third parties or communications between themselves and third parties where they engaged in such sharing or communications for the purpose of exploring and formulating legislation" because "such discussions aid legislators in the discharge of their legislative duty" (emphasis omitted)).

[10] Non-Party Motion at 7–9 , Staff Motion at 5–6 & 9–10.

[11] Non-Party Motion at 3–5, 7–9.

Research and Polling, Inc. (RPI) to assist in session business and the drafting of redistricting plans. RPI is therefore entitled to assert legislative privilege over its communications with legislators, staff, and third parties. *Staff Motion* at 8–10. Other third parties that Legislators sought out for information, assistance, or discussion regarding redistricting are likewise protected. *Id.* Again, where privilege attaches, it is absolute in barring compulsory production or testimony absent waiver by the privilege-holder. *Non-Party Motion* at 3-4.

C. Plaintiffs' Asserted Equal Protection Claim Does Not Outweigh Legislative Privilege

Plaintiffs' second argument against privilege relies upon a false premise: that interpretation of New Mexico's Speech and Debate Clause requires the Court balance the allegedly competing interests at stake. The balancing approach followed by the New Mexico Supreme Court in *RPNM* arose because "Importantly, as we explained in *First Judicial*, **executive privilege** in New Mexico is a **qualified privilege.**" *RPNM*, 2012-NMSC-026, ¶ 49, 283 P.3d 853, 870 (emphasis added)[12]. There is no basis for concluding that New Mexico's constitutionally-provided legislative privilege should be treated the same way.

For the same reason, some federal courts—broadly applying *Gillock*[13]- -may use a five-factor balancing test in applying common law legislative privilege to state legislators in

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[12] *Compare Pacheco v. Hudson*, 2018-NMSC-022, ¶ 41, 415 P.3d 505, 513 (acknowledging that Court upheld executive privilege "despite the fact it is not spelled out in a statute or court rule."). *to* N.M. Const. art. IV, §13.

[13] *United States v. Gillock*, 445 U.S. 360, 372—73 (1980) (absolute immunity afforded to state and federal legislators in civil actions under *Tenney*, but immunity and privilege qualified where Tennessee state senator charged with federal crimes of bribes and racketeering such that documentary evidence not subject to suppression); *see also United States v. Gillock*, 587 F.2d 284, 286–87 (6th Cir. 1978) ("The problem of this case is not constitutional immunity. No constitutional protection applies to defendant Gillock....")(emphasis added); *see also League of Women Voters of Florida v. Florida House of Representatives*, 132 So. 3d 135, 158 (Fla. 2013) (Canady, J. dissenting) ("*Gillock* thus does not address the role that the legislative privilege plays in the separation of powers between the legislative and judicial branches. Instead, *Gillock* is a case about the scope of federal legislative power vis-à-vis state legislators."); *see also In re N. Dakota*

extraordinary circumstances where "important federal interests are at stake." *Id.* at 361; *Compel* at 13–15.[14] But such approach is far from uniform among the federal circuits and highly dependent on the facts of the case. *See In re N. Dakota Legislative Assembly*, 70 F.4th 460, 464–65 (8th Cir. 2023):

> The potential for "extraordinary instances" in which testimony might be compelled from a legislator about legitimate legislative acts does not justify enforcing a subpoena for testimony in this case. Dicta from *Village of Arlington Heights* does not support the use of a five-factor balancing test in lieu of the ordinary rule that inquiry into legislative conduct is strictly barred by the privilege. Even where "intent" is an element of a claim, statements by individual legislators are an insufficient basis from which to infer the intent of a legislative body as a whole.

Id. at 464 (concluding that district court's order "premised on a mistaken conclusion" regarding communications between a legislator and third parties as discoverable); *Lee v. City of Los Angeles*, 908 F.3d 1175, 1188 (9th Cir. 2018) (affirming denial of discovery where legislative privilege asserted in equal protection challenge).

Because no state or federal court, applying its corresponding Speech and Debate Clause, *i.e.* state-to-state, federal-to-federal,[15] has held a constitutional grant of absolute protection to

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Legislative Assembly, 70 F.4th 460, 463 (8th Cir. 2023) (distinguishing federal criminal prosecution interest in *Gillock* from federal interest in state civil litigation because "there is no reason to conclude that state legislators and their aides are entitled to lesser protection than their peers in Washington.") (quotation and citation omitted).

[14] (collecting federal cases and generally relying on *Benisek v. Lamone*, 241 F Supp. 3d. 566, 575 (D. Md. 2017) as support for implementation of *Pataki* factors). *Benisek*, however, involved a federal court applying common law privilege to state legislators. In contrast, here the Court should look to the parallel development of state Speech and Debate Clause/ absolute legislative privilege applied by state courts to state legislators. *See, e.g. Matter of 2022 Legislative Districting of State*, 481 Md. 507, 560–61, 282 A.3d 147, 178–79 (2022) (explaining that *Benisek* court did not rely upon Maryland law in evaluating privilege); *see also NonParty Motion* at 3–6 (reviewing Arizona, Virginia, Texas, and Pennsylvania applications of state constitutional protection to state legislators).

[15] Non-Party Motion at 3–4.

contain judicial carveouts, the qualified/balancing-of-factors approach advocated by Plaintiffs is flatly wrong.[16] Electing to judicially insert such exception to the privilege would be an "unreasonable and unprincipled limitation" in light of the clear, textual prohibition in New Mexico's Speech and Debate Clause and its examined history. *Pacheco v. Hudson*, 2018-NMSC-022, ¶ 49, 415 P.3d 505, 514; *Tenney v. Brandhove*, 341 U.S. 367, 372–77 (1951); *Chase v. Lujan*, 1944-NMSC-027, ¶ 14, 48 N.M. 261, 149 P.2d 1003, 1006 (interpreting constitutional phrase with a continuous "well defined and generally understood meaning," conforming construction by sister-courts, supported by common law rule and "immemorial usage" to hold that framers of state constitution "transplanted the meaning as well as the words and wrote that meaning into the constitution"). Further, to the extent that exceptions and qualifications would so weaken the privilege as to frustrate its purposes, judicial carveouts would be tantamount to "wholesale abolition of an established privilege." *State v. Gutierrez*, 2021-NMSC-008, ¶ 109, *on reh'g* (Nov. 5, 2020) (determining that modification or abolishing of spousal privilege "should be subject of comprehensive study and robust public discussion," rather than judicial fiat).

D. Plaintiffs May Obtain Evidence of Legislative Purpose from Multiple Other Non-Privileged Sources.

Moreover, a balancing of interests is unnecessary when the Court can equally enforce and honor both constitutional provisions, N.M. Const. art. II, §18 and art. IV, § 13, without doing

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[16] Plaintiffs references to discovery decisions arising out of Florida and North Carolina courts, those states remain outliers-of-outliers within the realm of legislative privilege. Neither state's constitution contains a Speech and Debate Clause, and each has adopted additional statutes and constitutional amendments altering the analysis. *See League of Women Voters of Florida v. Florida House of Representatives*, 132 So. 3d 135, 143 & 143 n.6 (Fla. 2013) (highlighting that the Florida Constitution in slim minority among states as without a Speech or Debate Clause or statutory provision protecting legislators from arrest, joined only by North Carolina); *Non-Party Motion* at 3; *Dickson v. Rucho*, 366 N.C. 332, 344, 737 S.E.2d 362, 371 (2013) (explaining North Carolina statute that makes all redistricting drafting, information, and communications within legislature public after introduction).

violence to the other. "In general, we interpret constitutional provisions as a harmonious whole and we avoid interpretations that would render language in the provision surplusage." *Block v. Vigil-Giron*, 2004-NMSC-003, ¶ 9, 135 N.M. 24, 28, 84 P.3d 72, 76 (citations and quotations omitted). Thus, Plaintiffs' assertion of "competing" constitutional clauses is a misnomer. On one hand, New Mexico's Speech and Debate Clause bars questioning of members of the legislature—which through the extensive briefing already before the Court, prohibits compelled document production, written discovery responses, and deposition testimony from legislators, their alter-egos, and third parties regarding legitimate legislative activities.[17] On the other, New Mexico's Equal Protection Clause guarantees that "nor shall any person be denied equal protection of the laws." While far from a complete embargo,[18] the New Mexico Supreme Court instructs that in the realm of partisan redistricting challenges, the Equal Protection Clause prohibits purposeful, egregious gerrymandering which substantially dilutes voting power unless the redistricting plan is substantially related to a legitimate, non-discriminatory, important government interest. NMSC Order July 5, 2023 at ¶4; *Breen v. Carlsbad Mun. Sch.*, 2005-NMSC-028, ¶ 13, 138 N.M. 331, 336, 120 P.3d 413, 418. Direct evidence of an individual legislator's intent may be one marginally relevant[19]—if privileged and unobtainable—category of evidence, but New Mexico's Equal

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[17] *See generally* Non-Party Motion, Staff Motion, and Deposition Motion.

[18] *Cf.* N.M. Const. art. II, § 17 ("[N]o law shall be passed"); *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 566 n.6 (1963) (Douglas, J., concurring) (in weighing rights, obvious and express effect of restraint in First Amendment that Congress "shall make no law" takes precedence on textual grounds); *Missouri v. Holland*, 252 U.S. 416, 433 (1920) (where power constrained by prohibitory words in Constitution, negative restrictions trump positive grants).

[19] *In re N. Dakota Legislative Assembly*, 70 F.4th 460, 465 (8th Cir. 2023) ("Even where 'intent' is an element of a claim, statements by individual legislators are an insufficient basis from which to infer the intent of a legislative body as a whole."); *see U. S. v. O'Brien*, 391 U.S. 367, 383–84 (1968) ("It is entirely a different matter when we are asked to void a statute 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

Protection Clause does not compel disclosure. Nor does the Supreme Court's July 5 Order (identifying evidence for trial court to consider) or Justice Kagan's dissent in *Rucho v. Common Cause* require such a reading as to nullify the Speech and Debate Clause. After all, "It cannot be presumed that any clause in the constitution is intended to be without effect." *See Marbury v. Madison*, 5 U.S. 137, 174 (1803); *see also Perpich v. Department of Defense*, 496 U.S. 334 (1990) (finding use of one constitutional power to nullify all practical effects of another impermissible); *Lichter v. United States*, 334 U.S. 742, 782 (1948) (court must read constitutional clauses with the realistic purposes of the entire instrument fully in mind).

Regardless of the instant discovery outcome, Plaintiffs' claim will proceed. Under Plaintiffs' own authority.[20] "Plaintiffs need not offer direct evidence of discriminatory intent.... [Statements by legislators] is but one factor among many that plaintiffs may use to prove their claims."[21] Even without compelled disclosure of privileged materials and testimony, Plaintiffs have unfettered access to hundreds of hours of public testimony through the Citizen Redistricting Committee hearings and CRC minutes and reports, in addition to video recordings of the entirety of the Legislative Session in which SB-1 was introduced, discussed and amended in committees, then discussed and debated in both houses. This evidence provides the same kind of circumstantial

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what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork."); *Fann v. Kemp in & for Cnty. of Maricopa*, 253 Ariz. 537, 547, 515 P.3d 1275, 1285 (2022) ([A]ny purported political motive for the legislature's action in pursuing the Audit is irrelevant...We consider actions, not motives.")

[20] *Compel* at 11, 12 & 13.

[21] *Comm. for a Fair & Balanced Map v. Illinois State Bd. of Elections*, 2011 WL 4837508, at *3 & *4 (N.D. Ill. Oct. 12, 2011) (citing *United States v. O'Brien*, *supra* note 21); *see also id.* at *4 ("Thus, the individual motivations and objectives of those who drafted the 2011 Map, although relevant, are not critical to the outcome of this case... . Lawmakers may have considered a lot of facts and drawn a discriminatory map, or considered no facts and drawn a perfectly constitutional map. The proof, so they say, is in the pudding; and the pudding is the 2011 Map.").

evidence equal protection plaintiffs in Voting Rights Act challenges have long relied upon. *Lee v. City of Los Angeles*, 908 F.3d 1175, 1188 (9th Cir. 2018) (refusing to recognize categorical exception to legislative privilege where intent made an element of claim); *Florida v. United States*, 886 F. Supp. 2d 1301, 1304 (N.D. Fla. 2012) (finding "nothing unique" with respect to privilege analysis in equal protection or Voting Rights Act challenges); *League of Women Voters of Florida, Inc. v. Lee*, 340 F.R.D. 446, 456 (N.D. Fla. 2021) (mere assertion of constitutional claim insufficient to overcome legislative privilege).

New Mexico's constitution safeguards its citizens and protects foundational principles of government. *RPNM*, 2012-NMSC-026, ¶ 53. Where those protections overlap, the judicial solution is not constraint or defeat, but practical interpretation that preserves both. *Albright v. Oliver*, 510 U.S. 266, 310 (1994) (Stevens, J. dissenting) ("We have never previously thought that the area of overlapping protection should constrain the independent protection provided by either."). Accordingly, this court should quash Plaintiffs' subpoenas to Non-Party Legislators, RPI, and Legislative Staff and enter a protective order.

D. Plaintiffs Have Not Demonstrated Extraordinary Circumstances Compelling Judicial Intrusion

Even if the Court were to consider and balance Plaintiffs' asserted interests in discovery, neither New Mexico's qualified executive privilege nor federal common law analysis produces different results. In *First Judicial*, the New Mexico Supreme Court instructed the court to follow "certain procedures": (1) first, the movant must show good cause for the production; (2) if good cause established, the court must perform an *in camera* review and satisfy itself that the privileged material is admissible and "otherwise unavailable by exercise of reasonable diligence." (3) the movant must clear a final hurdle by demonstrating that his or her "specific needs" outweigh the general public interest in confidentiality. *First Judicial*, 1981-NMSC-053, ¶ 23, 96 N.M. 254, 258,

629 P.2d 330, 334 (citing United States v. Nixon, 418 U.S. 683 (1974)); *Cf. RPNM*, 2012-NMSC-026, § 49 (distinguishing IPRA request from discovery dispute). The practical implications of requiring this Court to perform the above multi-step analysis in the expedited timeframe make an *in-camera* review of responses to Plaintiffs' 80+ subpoenas difficult if not impossible. *See United States v. Nixon*, 418 U.S. 683, 714-16, 94 S. Ct. 3090, 3111, 41 L. Ed. 2d 1039 (1974) (commenting on the important question and "very heavy responsibility" of trial court in performing review of privileged records and affording "high degree of deference" to executive). Nor have Plaintiffs set forth grounds establishing good cause or diligence. *Compare Compel* at 14 ("Plaintiffs cannot possibly know of all the third parties involved"), *to* Plaintiffs' Witness List (naming 122 discrete witnesses). Finally, the Court must weigh Plaintiffs' diminished need for the privileged material, in light of the replete public record and alternate forms of evidence, against the established public interest in a functioning, independent legislature.

Alternately, application of the *Rodriguez* factors applied by federal district courts in evaluating federal common law legislative privilege produce no different outcome. *Rodriguez v. Pataki*, 293 F. Supp. 2d 302, 304-05 (S.D.N.Y. 2003) (examining (i) relevance of the privileged materials; (ii) availability of other evidence; (iii) "seriousness" of issues; (iv) the role of the government in the litigation; and (v) adverse consequences of judicial interference). Dozens of federal courts have applied these same factors to no less "extraordinary circumstances" and more substantial factual records to find that, as in the originating case,[22] judicial intrusion is to be

[22] In *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977), the U.S. Supreme Court addressed proof of intent by direct evidence, noting that "The legislative or administrative history may be highly relevant...In some extraordinary instances the members might be called to the stand at trial to testify ...although even then such testimony frequently will be barred by privilege." In a footnote, the Court added:

> This Court has recognized, ever since *Fletcher v. Peck*, 6 Cranch 87, 130-131, 3 L.Ed. 162 (1810), that judicial inquiries into legislative or executive motivation

avoided. *See, e.g., In re N. Dakota Legislative Assembly*, 70 F.4th 460, 464–65 (8th Cir. 2023); *Lee v. City of Los Angeles*, 908 F.3d 1175, 1188 (9th Cir. 2018); *Florida v. Byrd*, Case No. 4:22-cv-109-AW-MAF, --- F.Supp.3d ---- 2023 WL3676796 (N.D. Fla. May 25, 2023). The facts of this case and arguments raised by Plaintiffs warrant the same conclusion.

III. CONCLUSION

In short, Plaintiffs ask this Court to read limitations into New Mexico's Constitution where none currently exist by adopting a view—unsupported by New Mexico or analogous federal precedent—that New Mexico's Speech and Debate Clause affords only a qualified, common-law legislative privilege. First, the plain language of Article IV, Section 13 instructs otherwise, ensuring absolute protection against judicial or executive inquiry into legislative activity. Second, even if the Court were to adopt Plaintiffs' proffered scheme, Plaintiffs have failed to allege sufficient or specific facts which tip the scales in favor of compelled disclosure of privileged materials or testimony.

WHEREFORE, the Legislative Defendants respectfully request the Court deny Plaintiffs' *Motion to Compel*, grant Legislative Defendants' Motions to Quash and for Protective Orders previously submitted herein, and award such other and further relief to Legislative Defendants as the Court deems just and proper.

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represent a substantial intrusion into the workings of other branches of government. Placing a decisionmaker on the stand is therefore usually to be avoided. (quotations omitted); *id.*, n. 20 (explaining that where underlying trial court forbade questioning about motivations of board members when casting votes, the Supreme Court "perceives no abuse of discretion" in this approach).

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2023, I caused the foregoing *Response* along with this Certificate of Service, to be served and filed electronically through the Tyler Technologies Odyssey File & Serve electronic filing system, which caused all parties or counsel of record to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

HINKLE SHANOR LLP