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.

MOTION FOR PROTECTIVE ORDER[1]

Defendant Governor Michelle Lujan Grisham, by and through her counsel of record in this matter, hereby moves for a protective order quashing or limiting Plaintiffs' August 4, 2023, notice of Rule 1-030(B)(6) NMRA deposition.

INTRODUCTION

In an attempt to muster weakly (at best) probative evidence supporting their partisan gerrymandering claim, Plaintiffs seek to depose a representative of the Office of the Governor

[1] Undersigned counsel confirmed Plaintiffs oppose this motion.

about internal and external communications between the Governor or her staff and various individuals that relate to the 2021 New Mexico congressional redistricting process, consideration of the proposed congressional maps (including consideration of the preferences of other politicians, the effects of the proposed maps, and the likely partisan composition of the State's congressional delegation), and this litigation, as well as to the Governor's opinion on the proposed congressional maps. The Court should not permit such an unjustified burden on high-ranking state officials absent extraordinary circumstances—which are not present here. Nor should the Court allow such blatant intrusion into matters protected by legislative immunity and executive privilege. Accordingly, the Court should issue an order of protection quashing the Rule 1-030(B)(6) notice entirely or, alternatively, limiting any deposition to topics that are not shielded by immunities and privileges belonging to the judiciary's coordinate branches.

BACKGROUND

I. The instant action

In early 2022, the Republican Party of New Mexico and several individuals residing in different parts of the State filed the instant action to challenge S.B. 1., 55th Leg., 2nd Spec. Sess. (N.M. 2021), which redrew the boundaries of New Mexico's congressional map. *See* Verified Complaint for Violation of New Mexico Constitution Article II, Section 18 (filed Jan 21, 2022) ("Complaint"). In addition to the Executive Defendants, the Complaint names the president pro tempore and the speaker of the house (collectively, "Legislative Defendants") and the Secretary of State. *Id.* at 1. Plaintiffs challenge SB 1 on the basis that it allegedly constitutes improper partisan gerrymandering, in violation of the State equal protection clause. *See generally* Complaint. Plaintiffs ultimately seek to have SB 1 declared unconstitutional and replaced with another map. *Id.* at 27.

The Executive and Legislative Defendants moved to dismiss the action on the basis that Plaintiffs' claims of partisan gerrymandering were nonjusticiable political questions. *See* Executive Defendants' Motion to Dismiss (filed Feb 18, 2022); Legislative Defendants' Motion to Dismiss (filed Feb 18, 2022). After the Court denied the motion to dismiss, Defendants filed a petition for writ of superintending control with the New Mexico Supreme Court for clarification on whether partisan gerrymandering presents a justiciable issue, and if so, what standards should apply. *See* Verified Petition for Writ of Superintending Control and Request for Stay, *Lujan Grisham v. Republican Party of N.M.*, S-1-SC-93481 (July 22, 2022). On July 5, 2023, the Supreme Court held that partisan gerrymandering claims are justiciable and adopted the test set forth in Justice Kagan's dissent in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). *See* Order at 3 ¶¶ 1-2, *Lujan Grisham v. Republican Party of N.M.*, S-1-SC-93481 (July 5, 2023). Accordingly, the Supreme Court remanded the case back to this Court to take all actions necessary to resolve the case no later than October 1, 2023. *Id.* at 2. The Governor and Lieutenant Governor subsequently moved to be dismissed as parties on the basis of standing and legislative immunity. *See* Motion to Dismiss Executive Defendants (filed July 28, 2023).[2]

II. Plaintiffs' efforts to depose the Office of the Governor

On August 3, Plaintiffs' counsel alerted undersigned counsel that Plaintiffs believed they were entitled to depose the Governor. *See* Exhibit A. However, Plaintiffs' counsel offered to "compromise" by serving a notice of deposition to the Governor's Office pursuant to Rule 1-030(B)(6) instead of the Governor herself. *See id.* Plaintiffs served the notice of Rule 1-030(B)(6) deposition (the "Notice") the following day, directing a representative of the Office of the Governor to testify about the following topics:

[2] Briefing on this motion was completed on August 7, 2023.

1. All communications (including emails, text messages, phone calls, and in-person conversations) that took place in the year 2021 between any official or employee of the Governor's Office (including the Governor herself) and any of the following persons —

a. Brian Egolf, Mimi Stewart, Peter Wirth, Joseph Cervantes, Georgene Louis, Teresa Leger Fernandez, Melanie Stansbury, or any employee or agent of any of the foregoing;

b. any other official or employee of the Governor's Office (i.e., this asks for internal communications within the Governor's Office); and/or

c. any official, employee, or agent of any non-New Mexico-based political organization, 501(c)(4) organization, law firm, or consultant or expert in the field of demography or mapping

— that relate to the 2021 New Mexico congressional-redistricting process; consideration of various proposed congressional maps (including specifically Congressional Concept H, S.B. 1 as originally introduced, and the S.B. 1 Senate Judiciary Committee substitute ultimately signed into law); the preferences of the individuals listed in ¶ 1(a), above, regarding the drawing of congressional districts; and/or effect of various proposed congressional maps on electoral outcomes and/or the likely partisan composition of the state's congressional delegation.

2. The Governor's position and/or opinions on various proposed congressional maps — including specifically Concept H, S.B. 1 as originally introduced, and the S.B. 1 Senate Judiciary Committee substitute that was eventually signed into law — and how those positions/opinions evolved over the course of 2021.

3. The Governor's communications (including both written and spoken) in 2021 and the first three months of 2022 with any person with whom the Governor does not have a claim of any privilege — including, at a minimum, members of the press, personal and political contacts, etc. — evincing the position and/or opinions referenced in ¶ 2, above.

4. All non-privileged communications from January 21, 2022 to the present day either within the Governor's Office, or between an official or employee of the Office and one of the individuals listed in ¶ 1(a), above, relating to this litigation.

Exhibit B.[3]

DISCUSSION

I. Standard of review

On motion by any party for good cause, a court may issue a protective order prohibiting discovery or barring or limiting inquiry into certain matters to save that party from annoyance, embarrassment, oppression, or undue burden or expense. *See* Rule 1-026(C) NMRA. Courts "ha[ve] broad discretion in determining whether good cause exists" to issue a protective order. *Does I through III v. Roman Catholic Church of Archdiocese of Santa Fe, Inc.*, 1996-NMCA-094, ¶ 13, 122 N.M. 307, 924 P.2d 273.

II. Plaintiffs are not entitled to depose the Governor or senior members of her Office

As an initial matter, Plaintiffs are not permitted to depose the Governor or senior members of her Office absent extraordinary circumstances—which are not present here. Under the "extraordinary circumstances test," a party seeking the deposition of high-ranking government officials must show: "(1) the official has first-hand knowledge related to the claim being litigated; (2) the testimony will likely lead to the discovery of admissible evidence; (3) the deposition is essential to the party's case; and (4) the information cannot be obtained from an alternative source or via less burdensome means." *In re Office of the Utah Attorney Gen.*, 56 F.4th 1254, 1264 (10th Cir. 2022) (alterations, internal quotation marks, and citation omitted); *see also In Re Bryant*, 745 Fed. Appx. 215 (5th Cir. 2018) (applying extraordinary circumstances test to governor's chief-of-staff). The imposition of these heightened requirements "is based on the notion that high ranking government officials have greater duties and time constraints than other witnesses and that, without

[3] Plaintiffs also seek to question the representative to testify as to invocations of privileges asserted by the Governor's Office and steps taken to prepare for the deposition. *See id.*

appropriate limitations, such officials 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)); *see also In Re Bryant*, 745 Fed. Appx. at 220-21 ("High-ranking government officials are the subject of or involved in unusually high numbers of lawsuits and therefore should be protected from undue burdens regarding the frequent litigation, which is why the "exceptional circumstances" analysis exists in the first place.").[4]

Plaintiffs fail to meet the extraordinary circumstances test on all fronts. First, Plaintiffs do not provide evidence (or even allege) that the Governor or her senior staff have first-hand knowledge relating to Plaintiffs' political gerrymandering claim other than the simple fact that the Governor signed legislation pursuant to her constitutional powers and obligations. Second, Plaintiffs cannot show that the testimony they seek will lead to admissible evidence. As explained below, the vast majority of the topics listed in the Notice are protected by legislative immunity and executive privilege, and are therefore, inadmissible. *See infra* Part IV.

Third, the sought-after testimony is not "essential" to Plaintiffs' case. Under the three-part test adopted by the New Mexico Supreme Court, Plaintiffs must show three things: (1) 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"; (2) "that the lines drawn in fact have the

[4] It does not appear any New Mexico court has yet to address the extraordinary circumstances test. Nonetheless, the Court should find the Tenth Circuit's reasoning persuasive. As that court noted, the extraordinary circumstances test "is applied almost universally by state and federal courts across the country." *Id.* at 1263 (citing Fern L. Kettler, *Deposition of High-Ranking Government Officials*, 15 A.L.R. 3d, Art. 5, § 1). And the logic behind the extraordinary circumstances test is equally applicable to high-ranking officials in New Mexico state government: allowing plaintiffs to depose these individuals absent meeting this heightened standard could cripple state government by forcing officials to spend inordinate amounts of time responding to litigation rather than governing. *See In re Office of the Utah Attorney Gen.*, 56 F.4th at 1259; *In Re Bryant*, 745 Fed. Appx. at 220-21.

intended effect by substantially diluting their votes"; and (3) that the map drawers do not have a "legitimate, non-partisan justification to save [their] map." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2516 (2019) (Kagan J., dissenting) (alterations, internal quotation marks, and citation omitted); *see* Order at 3 (adopting Justice Kagan's test). As suggested by the New Mexico Supreme Court's order, Plaintiffs' claims depend on public record and the challenged map itself—not the preferences and thought processes of individual legislators or the Governor. *See* Order at 3 (directing this Court to consider demographics and characteristics of challenged map in considering the degree of partisan gerrymandering); *TBCH, Inc. v. City of Albuquerque*, 1994-NMCA-048, ¶ 20, 117 N.M. 569 874 P.2d 30 ("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." (internal quotation marks and citation omitted); *Greater Birmingham Ministries v. Sec'y of State for Ala.*, 992 F.3d 1299, 1324-25 (11th Cir. 2021) ("It is . . . questionable whether the [bill] sponsor speaks for all legislators"); *accord Rucho*, 139 S. Ct. at 2516 (Kagan, J., dissenting) (looking at the "overwhelming direct evidence" of purpose in the form of the extreme nature of the challenged maps themselves and lawmakers' open and public statements of express intent to maximize political power for their own party).

Moreover, even if the individual map drawers' intent was relevant, there are no allegations or evidence that the Governor or her staff participated in drawing SB 1's lines or have any first-hand knowledge of the drawers' intent. Accordingly, Plaintiffs cannot show that the sought-after testimony is essential. *See In re Office of the Utah Attorney Gen.*, 56 F.4th at 1264; *see also In re U.S. Dep't of Educ.*, 25 F.4th 692, 703 (9th Cir. 2022) ("Were we to allow the taking of depositions of cabinet-level officials in which relevant, but unnecessary information, was sought, we would

risk distracting cabinet secretaries from their essential duties with an inundation of compulsory, unnecessary depositions and upsetting the proper balance of powers.").

Lastly, Plaintiffs do not, and cannot, show that the information necessary to their claims cannot be obtained from an alternative source. The only relevant, *non-privileged* information that Plaintiffs could seek from the Governor's Office is already publicly available or involve parties other than the Governor or her staff. Indeed, Plaintiffs have already subpoenaed the majority of the Legislature and a former senior member of the Governor's office, and others. It is hard to see why, then, Plaintiffs need to depose the Governor or her senior staff. *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 encouraging judge to consider the possible availability of legislators' testimony even though "they appear to be resisting discovery"); *In re U.S.*, 197 F.3d 310, 314 (8th Cir. 1999) ("If other persons can provide the information sought, discovery will not be permitted against [a high-ranking official]."); *In re McCarthy*, 636 F. App'x 142, 144 (4th Cir. 2015) (observing that plaintiffs failed to show "a need for [the public official's] testimony beyond what is already in the public record").

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 staff at this juncture. *See, e.g.*, *Lederman v. New York City Dept. of Parks & Recreation*, 731 F.3d 199, 203 (2d Cir. 2013) (holding that plaintiffs were not entitled to depose mayor or deputy mayor when plaintiffs did not contend that they had first-hand knowledge about the litigated claims or that the relevant information could not be obtained elsewhere).

III. Plaintiffs' Rule 1-030(B)(6) deposition should be subject to the extraordinary circumstances test given the scope of its topics

Plaintiffs—perhaps recognizing their inability to secure a deposition of the Governor or specific members of her senior staff—have instead elected to depose a representative of the Governor's Officer pursuant to Rule 1-030(B)(6). *See* Exhibit B. While this would ordinarily be a suitable alternative, the Court should not permit it here in light of the topics to which Plaintiffs seek to inquire.

Plaintiffs seek to have someone from the Office of the Governor testify as to the following broad topics: (1) all communications (written and oral, internal and external) between the Governor or her staff and various individuals that relate to the 2021 New Mexico congressional-redistricting process or consideration of the proposed congressional maps (including consideration of the preferences of other politicians, the effects of the proposed maps, and the likely partisan composition of the State's congressional delegation); (2) the Governor's opinion on the proposed congressional maps; (3) the Governor's non-privileged communications (written and oral) with anyone evincing her opinions on the proposed congressional maps; and (4) all non-privileged communications within the Governor's Office or between anyone within the Governor's Office and certain public figures relating to this litigation. *See* Exhibit B at 2-3.

Although Plaintiffs do not seek to have any specific individual within the Governor's Office attend the deposition, the broad scope of these topics effectively requires that the Office designate either the Governor herself or one or more senior staff members.

> Under Rule 30(b)(6), when a party seeking to depose a[n entity] announces the subject matter of the proposed deposition, the [entity] must produce someone familiar with that subject. To satisfy Rule 30(b)(6), the [entity's] deponent has an affirmative duty to make available such number of persons as will be able to give complete, knowledgeable and binding answers on its behalf.

S.E.C. v. Goldstone, 301 F.R.D. 593, 646-47 (D.N.M. 2014) (internal quotation marks and citation omitted). Here, the only persons who can give "complete, knowledgeable and binding answers" to Plaintiffs' questions about the Governor and her Office's communications and opinions relating to the Congressional redistricting process, the proposed maps, and the instant litigation are the Governor herself or her senior staff.

Furthermore, not only do Plaintiffs' proposed topics require the Governor or her senior staff "to take valuable time away from" their public duties to attend a deposition, *In re USA*, 624 F.3d 1368, 1372 (11th Cir. 2010), the Office's representative will also have to spend a substantial amount of time preparing in order to satisfy the requirements of Rule 1-030(B)(B).

> A deponent under Rule 30(b)(6) has an affirmative obligation to educate himself as to the matters regarding the corporation. This includes all matters that are known or reasonably available to the corporation. Even if the documents are voluminous and the review of the documents would be burdensome, the deponents are still required to review them in order to prepare themselves to be deposed.

S.E.C., 301 F.R.D. at 646-47 (citation omitted). This is no easy task. "The duty to prepare the designee imposed by the rule goes beyond matters personally known to the designee or to matters in which that designee was personally involved. Such preparation requires a good faith effort [by] the designate to find out the relevant facts—to collect information, review documents, and interview employees with personal knowledge." *Id.* (citation omitted). Hence, the broad topics listed in the Notice will require the representative to interview the Governor and every employee of her Office at a minimum. This is a significant burden on a high-ranking government official tasked with managing the entire executive branch. Plaintiffs' desired Rule 1-030(B)(6) deposition should, therefore, be treated as an attempt to depose the Governor or her senior staff and should only be permitted if Plaintiffs can satisfy the extraordinary circumstances test. *Cf. In re U.S.*, 985 F.2d 510, 512-13 & n.2 (11th Cir. 1993) (observing that even a 30-minute testimony by the FDA

Commissioner would be too burdensome considering the cumulative effect it would have on that official in all cases involving them and the amount of time it would take to prepare). As Plaintiffs have not yet satisfied this prerequisite, the Court should quash the Notice in its entirety.

IV. The vast majority of the Notice's topics seek information protected by legislative immunity and executive privilege

Even if Plaintiffs *could* satisfy the extraordinary circumstances test, the Court should still quash the Notice or, at the very least, limit the topics of testimony to those that are not protected by legislative immunity or executive privilege.

A. Legislative immunity

"The principle that legislators are absolutely immune from liability for their legislative activities has long been recognized in Anglo-American law." *Bogan v. Scott-Harris*, 523 U.S. 44, 48 (1998).[5] But this immunity does not only apply to legislators. "[O]fficials outside the legislative branch are entitled to legislative immunity when they perform legislative functions." *Id.* at 55. For example, "[a] governor who signs into law or vetoes legislation passed by the legislature is also entitled to absolute immunity for that act." *Kizzar v. Richardson*, 2009 WL 10706926, at *6 (D.N.M. Oct. 31, 2009) (quoting *Torres-Rivera v. Calderon-Serra*, 412 F.3d 205, 213 (1st Cir.

[5] The Court should find this federal case law applying legislative immunity persuasive—as the majority of other states have. *See, e.g., Mahler v. Judicial Council of California*, 67 Cal. App. 5th 82, 103 (2021); *Abuzahra v. City of Cambridge*, 101 Mass. App. Ct. 267, 273, 190 N.E.3d 553, 559 (2022); *Legislature of State v. Settelmeyer*, 137 Nev. 231, 239, 486 P.3d 1276, 1283 (2021); *Vereen v. Holden*, 121 N.C. App. 779, 782, 468 S.E.2d 471, 473 (1996); *Campaign for Fiscal Equity, Inc. v. State*, 265 A.D.2d 277, 278, 697 N.Y.S.2d 40, 41 (1999); *Maynard v. Beck*, 741 A.2d 866, 871 (R.I. 1999); *In re Perry*, 60 S.W.3d 857, 860 (Tex. 2001). And while this is a different basis for immunity than the speech and debate clause upon which the Legislative Defendants rely, *see* Motion to Quash Subpoenas to 74 Non-Party Legislators and for Protective Order, at 3 n.2 (filed August 8, 2023), it is similar in scope and no less important. *Cf. Supreme Court of Virginia v. Consumers Union of U. S., Inc.*, 446 U.S. 719, 732 (1980) (observing that common law legislative immunity "is similar in origin and rationale to that accorded Congressmen under the Speech or Debate Clause").

2005). When applicable, legislative immunity "prevents the Court from compelling [individuals] to testify about legislative acts[,]" *Jama Investments, L.L.C. v. Inc. Cnty. of Los Alamos*, 2006 WL 1304903, at *6 (D.N.M. Jan. 20, 2006), and extends to persons employed by the individual protected by legislative immunity. *See Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 298 (D. Md. 1992) ("The immunity enjoyed by legislative staff derives from the individual legislators themselves: to the extent a legislator is immunized, his staffers are likewise 'cloaked.'" (citing *Gravel v. U. S.*, 408 U.S. 606, 616 (1972)).

B. Executive privilege

In addition to legislative immunity, the Governor enjoys a "limited form of executive privilege derived from the constitution." *Republican Party of New Mexico v. New Mexico Tax'n & Revenue Dep't*, 2012-NMSC-026, ¶ 38, 283 P.3d 853. Documents and information are protected by executive privilege if they meet the following criteria: (1) they are "communicative in nature"; (2) they "concern the Governor's decisionmaking in the realm of his or her core duties"; and (3) they are "authored, or solicited and received, by either the Governor or an 'immediate adviser,' with 'broad and significant responsibility' for assisting the Governor with his or her decisionmaking." *Id.* ¶¶ 44-47 (quoting *Judicial Watch, Inc. v. Dept. of Justice*, 365 F.3d 1108, 1115 (D.C. Cir. 2004)). "The purposes of the executive privilege are to safeguard the decision-making process of the government by fostering candid expression of recommendations and advice and to protect this process from disclosure." *Id.* ¶ 35 (internal quotation marks and citation omitted).

C. The Governor and her staff's discussions and thoughts regarding the congressional redistricting process are protected by legislative immunity and executive privilege

Plaintiffs seek to have a representative of the Governor's Office testify as to internal and external communications between the Governor or her staff and various individuals that relate to the 2021 New Mexico congressional redistricting process and consideration of the proposed congressional maps (including consideration of the preferences of other politicians, the effects of the proposed maps, and the likely partisan composition of the State's congressional delegation). *See* Exhibit B at 2-3. Plaintiffs also want the representative to testify as to the Governor's opinion on the proposed congressional maps. *See id.* at 3. These topics clearly fall within the scope of legislative immunity, as they concern the proposal, formulation, and passage of legislation—quintessential legislative acts. *See, e.g.*, *Florida v. Byrd*, 2023 WL 3676796, at *3 (N.D. Fla. May 25, 2023) (quashing or limiting subpoenas seeking deposition of Florida governor's counsel and deputy chief of staff regarding efforts to pass the governor's proposed redistricting map, the map drafting process, recommendations to sign or veto legislation, and thoughts and internal discussions regarding the challenged map on the basis of legislative immunity because they concern "actions or thoughts 'in the proposal, formulation, and passage of legislation'" (quoting *In re Hubbard*, 803 F.3d 1298, 1307 (11th Cir. 2015)); *League of Women Voters of Florida, Inc. v. Lee*, 340 F.R.D. 446, 453-458 (N.D. Fla. 2021) (quashing Rule 30(b)(6) subpoena on Florida governor's office seeking to inquire about the role the office played in drafting, discussing, negotiating, and enacting the challenged map and the office's opinions and statements concerning the challenged map and its purpose and effects on the basis of legislative privilege); *cf. Baraka v. McGreevey*, 481 F.3d 187, 196-97 (3d Cir. 2007) (holding that a governor acts within the sphere of legislative activity when "advocating and promoting legislation"); *Almonte v. City of Long*

Beach, 478 F.3d 100, 107 (2d Cir. 2007) ("Meeting with persons outside the legislature—such as executive officers, partisans, political interest groups, or constituents—to discuss issues that bear on potential legislation" are "a routine and legitimate part of [the] modern-day legislative process.").

These topics also are protected executive privilege because they seek disclosure of communications that "concern the Governor's decisionmaking in the realm of . . . her core duties" (i.e., signing legislation) and are "authored, or solicited and received, by either the Governor or an 'immediate adviser,' with 'broad and significant responsibility' for assisting the Governor with . . . her decisionmaking." *Republican Party of New Mexico*, 2012-NMSC-026, ¶¶ 44-47; *see, e.g.*, *League of Women Voters v. Commonwealth*, 177 A.3d 1010, 1019 (Pa. Commw. Ct. 2017) (quashing subpoena directed to the Pennsylvania governor seeking his deposition regarding redistricting legislation and holding that executive privilege "protects a Governor . . . from state court compulsion to give testimony or produce records in legal proceedings challenging the constitutionality of legislation where the chief executive exercised his constitutional authority to act on legislation presented to him by the General Assembly"); *cf. Ctr. for Juvenile Mgmt., Inc. v. Williams*, 2016 WL 8904968, at *6 (W.D. Tex. Sept. 22, 2016) ("[T]estimony as to the reasons for taking official action is precisely the type of testimony that high-ranking government officials are generally not required to provide."). The Court should reject any attempt to invade this privilege, as allowing inquiry into these matters would significantly hinder the Governor's ability to participate in the legislative process. *See Republican Party of New Mexico*, 2012-NMSC-026, ¶ 35.

CONCLUSION

For the foregoing reasons, the Court should issue an order of protection quashing the Notice entirely or, alternatively, limiting any Rule 1-030(B)(6) NMRA deposition to topics that do not involve the 2021 New Mexico congressional-redistricting process, consideration of the proposed congressional maps (including consideration of the preferences of other politicians, the effects of the proposed maps, and the likely partisan composition of the State's congressional delegation), and the Governor's opinion on the proposed congressional maps.

Respectfully submitted,

/s/ Holly Agajanian
HOLLY AGAJANIAN
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KYLE P. DUFFY
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Counsel for Governor Michelle Lujan Grisham and Lieutenant Governor Howie Morales

CERTIFICATE OF SERVICE

I hereby certify that on August 11, 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

From: Carter B. Harrison IV
To: Agajanian, Holly, GOV; Duffy, Kyle, GOV
Cc: gorence@golaw.us; Amanda Bustamante
Subject: [EXTERNAL] Redistricting Litigation: Exec. Depo
Date: Thursday, August 3, 2023 10:37:26 PM
Attachments: 2023-08-03 30(b)(6) Ntc to the Governor"s Office.docx

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Holly and Kyle:

Hope you're doing well. As I presaged in our earlier communications, our position is that the Plaintiffs are entitled to a short deposition of the Governor in this action; your position, I'm confident, is that we're not. I would be willing to compromise by serving the Governor's *office* with a 30(b)(6) subpoena like the one attached, which would obviate the need for the Governor personally to testify. I'm obviously aware that this does not alleviate all the concerns you probably have, but I do think it eliminates several important ones, which I thought might make a compromise possible.

I'll likely formally serve this tomorrow regardless, but I'm happy to talk about modifying the topics if that will make a difference to your willingness to produce a designee. (The federal rule, at least, now explicitly recognizes that it's fine to serve and then discuss.)

Best,
Carter

Carter B. Harrison IV
HARRISON & HART, LLC
924 Park Avenue SW, Suite E
Albuquerque, New Mexico 87102
Tel: (505) 295-3261
Fax: (505) 341-9340

EXHIBIT A

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. Case 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.

PLAINTIFFS' NOTICE OF VIDEOTAPED RULE 1-030(B)(6) DEPOSITION OF THE GOVERNOR'S OFFICE

TO: The Office of the Governor of New Mexico
c/o Holly Agajanian & Kyle Duffy
490 Old Santa Fe Trail, Room 400
Santa Fe, NM 87501
Email: Holly.Agajanian@state.nm.us
Kyle.Duffy@state.nm.us

PLEASE TAKE NOTICE that beginning the hour of 9:00 a.m. MDT on August 21, 2023, at the offices of Harrison & Hart, LLC (924 Park Avenue SW, Ste. E, Albuquerque, NM 87102), and continuing from day to day thereafter until completed, the Plaintiffs will take the stenographic

EXHIBIT B

and video-recorded deposition of a person or persons designated by the Office of the Governor to testify, pursuant to Rule 1-030(B)(6) NMRA, on the Matters of Examination enumerated below. This deposition will be taken before Paul Baca Court Reporters, or another officer qualified under Rule 1-028 NMRA who will be present at the noticed location, and it may be taken by telephone or other remote means pursuant to Rule 1-030(B)(7). Notice is further given that this deposition may be used at trial and for any and all purposes permitted by the New Mexico Rules of Civil Procedure.

Pursuant to Rule 1-030(B)(6), the Governor's Office is required to designate and fully prepare one or more officers, directors, managing agents, or other persons who consent to testify on the Office's behalf, and whom the Office will fully prepare to testify regarding all information that is known or reasonably available to the Office regarding the following matters:

MATTERS OF EXAMINATION

1. All communications (including emails, text messages, phone calls, and in-person conversations) that took place in the year 2021 between any official or employee of the Governor's Office (including the Governor herself) and any of the following persons —

    a. Brian Egolf, Mimi Stewart, Peter Wirth, Joseph Cervantes, Georgene Louis, Teresa Leger Fernandez, Melanie Stansbury, or any employee or agent of any of the foregoing;

    b. any other official or employee of the Governor's Office (*i.e.*, this asks for internal communications within the Governor's Office); and/or

    c. any official, employee, or agent of any non-New Mexico-based political organization, 501(c)(4) organization, law firm, or consultant or expert in the field of demography or mapping

— that relate to the 2021 New Mexico congressional-redistricting process; consideration of various proposed congressional maps (including specifically Congressional Concept H, S.B. 1 as originally introduced, and the S.B. 1 Senate Judiciary Committee substitute ultimately signed into law); the preferences of the individuals listed in ¶ 1(a), above, regarding the drawing of

EXHIBIT B

congressional districts; and/or effect of various proposed congressional maps on electoral outcomes and/or the likely partisan composition of the state's congressional delegation.

2. The Governor's position and/or opinions on various proposed congressional maps — including specifically Concept H, S.B. 1 as originally introduced, and the S.B. 1 Senate Judiciary Committee substitute that was eventually signed into law — and how those positions/opinions evolved over the course of 2021.

3. The Governor's communications (including both written and spoken) in 2021 and the first three months of 2022 with any person with whom the Governor does not have a claim of any privilege — including, at a minimum, members of the press, personal and political contacts, etc. — evincing the position and/or opinions referenced in ¶ 2, above.

4. All non-privileged communications from January 21, 2022 to the present day either within the Governor's Office, or between an official or employee of the Office and one of the individuals listed in ¶ 1(a), above, relating to this litigation.

5. All invocations of any privilege asserted by the Governor's Office in this case, including information sufficient for the Plaintiffs to fully vet each of the Office's claims of privilege.

6. Details of the steps taken by the designee and any other person in the Governor's Office to prepare for this deposition, including but not limited to the individuals talked to, the substance of those communications, what documents were reviewed (including who was asked to search their emails and any search terms requested), and estimates of how much time was spent on each step.

Please remember that it is your responsibility to prepare a designee to testify fully on each and every one of these topics, unless you both move the Court for a protective order and serve and file a notice of non-appearance three days before the deposition, at the latest. *See* Rule 1-030(G)(3) NMRA. Since your ability to interpose objections based on the putative ambiguity or vagueness of this notice is limited — but, at the same time, we have a duty to designate the matters of examination "with reasonable particularity" — if you have any confusion regarding any of the topics, please contact us in advance of the deposition, and we will generally be willing to clarify (and even potentially narrow) any issues.

EXHIBIT B

Respectfully,

HARRISON & HART, LLC

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EXHIBIT B