IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

REPUBLICAN PARTY OF NEW MEXICO; DAVID GALLEGOS; TIMOTHY JENNINGS; DINAH VARGAS; MANUEL GONZALES, JR.; BOBBY and DEE ANN KIMBRO; and PEARL GARCIA,

Plaintiffs-Appellees,

v.

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-Appellants,

and

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; and HOWIE MORALES, in his official capacity as New Mexico Lieutenant Governor and President of the New Mexico Senate,

Defendants.

S. Ct. No.: S-1-SC-40122

PLAINTIFFS' RESPONSE TO LEGISLATIVE DEFENDANTS' EMERGENCY PETITION FOR WRIT OF ERROR

(Counsel for Plaintiffs listed on following page)

MISHA TSEYTLIN*
MOLLY S. DIRAGO*
KEVIN M. LEROY*
TROUTMAN PEPPER
HAMILTON SANDERS LLP
227 W. Monroe Street
Suite 3900
Chicago, IL 60606
(608) 999-1240 (MT)
(312) 759-1926 (MD)
(312) 759-1938 (KL)
(312) 759-1939 (fax)
misha.tseytlin@troutman.com
molly.dirago@troutman.com
kevin.leroy@troutman.com

Attorneys for Plaintiffs Manuel Gonzales, Jr., Dinah Vargas, David Gallegos, and Timothy Jennings

**Admitted Pro Hac Vice*

HARRISON & HART, LLC

CARTER B. HARRISON, IV
924 Park Avenue SW, Suite E
Albuquerque, New Mexico 87102
(505) 312-4245
(505) 341-9340 (fax)
carter@harrisonhartlaw.com

Attorneys for Plaintiffs Republican Party Of New Mexico, David Gallegos, Dinah Vargas, Bobby and Dee Ann Kimbro, and Pearl Garcia

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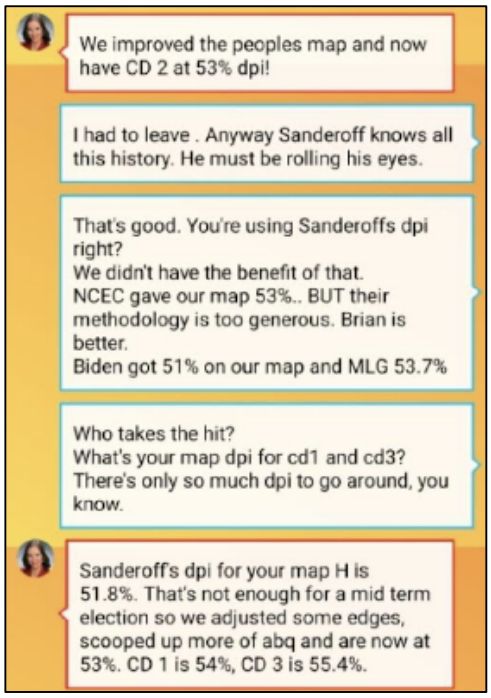
INTRODUCTION

As this Court held last Friday, Plaintiffs may rely upon the same "forms of evidence" that the challengers to the two congressional maps at issue in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), employed "to prove predominant intent." *Grisham v. Van Soelen*, No.S-1-SC-39481, ¶ 65 (N.M. Sept. 22, 2023). In *Benisek v. Lamone*, 241 F. Supp. 3d 566 (D. Md. 2017)—the companion case to *Rucho*—the district court awarded plaintiffs broad discovery, notwithstanding claims of legislative privilege, including ordering the deposition of the alleged gerrymanderers, *id.* at 575, such as the Maryland Governor, *see Benisek v. Lamone*, 348 F. Supp. 3d 493, 502 (D. Md. 2018), *vacated and remanded sub nom. Rucho*, 139 S. Ct. 2484. Justice Kagan relied upon that very evidence, including statements from those depositions, in reaching her conclusion as to partisan intent. *Rucho*, 139 S. Ct. at 2510–11 (Kagan, J., dissenting).

Yet, Legislative Defendants flatly refused in the District Court below to comply in any way with Plaintiffs' discovery requests and trial subpoenas, although those requests were like those at issue in *Benisek*. Thereafter, the District Court issued its Decision Letter at issue, giving Plaintiffs only a sliver of discovery, far less than they are entitled to

under law, limiting discovery to communications between legislators and outside third parties during the redistricting process.

This case helpfully contains a clear example of the type of powerful, probative evidence that Plaintiffs could obtain, if this Court directs the District Court's narrow order to go into effect immediately. The Center for Civic Policy ("Center")—the *only* party that meaningfully complied with Plaintiffs' discovery requests—produced remarkably candid text messages sent by Defendant President of the Senate Pro Tempore Mimi Stewart to the Center:



Ex.1 at 7. As Senator Stewart explained, the Legislature intended to egregiously gerrymander SB1 by transforming the "Concept H" Map (the

so-called "People's Map")—an already-Democrat leaning map proposed by New Mexico's Citizens Redistricting Committee—into a near-perfect Democratic gerrymander. *Id.* Senator Stewart bragged that SB1 "improved the peoples map [the Concept H Map]" by making District 2 more Democratic, as the Concept H Map was "not enough for a mid term election" to secure a Democratic victory. *Id.* So, to better ensure Democrats' success in District 2, while not jeopardizing Democrats' chances in Districts 1 and 3, SB1 "adjusted some edges" and "scooped up more of abq [Albuquerque]" for that district. *Id.* Legislative Defendants did not move to strike on legislative-privilege grounds Plaintiffs' repeated reliance on Senator Stewart's text messages below, meaning that they concede that those text messages are not privileged. ***Since those text messages are not protected by legislative privilege—and they obviously are not—then Legislative Defendants have no basis to quarrel with the District Court's exceedingly limited discovery order, which would simply allow Plaintiffs to seek more communications of the same character***.

So while Plaintiffs continue to believe that they are entitled to far more discovery than the District Court's Decision Letter allows—

consistent with the much broader discovery awarded by the district court in *Benisek*—Plaintiffs are at minimum entitled to immediate disclosure of the very limited information that the District Court ordered (legislators' communications with outside third parties during the redistricting process) and the right to question Plaintiffs' trial-subpoena recipients (Senator Joseph Cervantes, Senator Mimi Stewart, Senator Peter Wirth, former House Speaker Brian Egolf, Ms. Kyra Ellis-Moore, and Ms. Leanne Leith) about those communications. This discovery is far narrower than the discovery awarded by the district court in *Benisek*, 241 F. Supp. 3d at 570–72, 575, and also narrower than what the Ohio Supreme Court awarded to partisan-gerrymandering plaintiffs two years ago, on an emergency schedule, *League of Women Voters of Ohio v. Ohio Redistricting Comm'n (LVW of Ohio)*, 164 Ohio St. 3d 1457, 2021-Ohio-3607, 174 N.E.3d 805 (unpublished table decision).

Plaintiffs thus respectfully request that this Court summarily deny Legislative Defendants' Emergency Petition For Writ Of Error by **12:00 p.m., today**. And given that Legislative Defendants have chosen to avoid their discovery obligations by getting this Court involved, Plaintiffs respectfully request that this Court make clear that all parties must

produce responsive, non-privileged documents by **8:00 a.m., Thursday, September 28, 2023**, and that Senator Cervantes, Senator Stewart, Senator Wirth, former House Speaker Egolf, Ms. Ellis-Moore, and Ms. Leith must appear in the District Court to testify at trial (either in person or, if necessary, virtually) on **Thursday, September 28, 2023**.

COUNTERSTATEMENT OF THE NATURE OF THE CASE, SUMMARY OF THE PROCEEDINGS, AND RELEVANT FACTS

A. After this Court remanded this case to the District Court, Am. Order 3–4, *Grisham v. Van Soelen*, No.S-1-SC-39481 (N.M. Aug. 25, 2023), Plaintiffs served discovery requests on—as directly relevant here—Legislative Defendants (as well as former House Speaker Egolf, previously named as a party here in his official capacity); non-party legislator Senator Wirth; non-party Ms. Ellis-Moore, the campaign manager of Congresswoman Teresa Leger Fernández; non-party Ms. Leith, a political consultant to former House Speaker Egolf; and the Center for Civic Policy. Ex.2 (trial subpoenas, which are substantially identical to Plaintiffs' other discovery requests on these individuals and entities); Ex.1. Plaintiffs also ultimately served trial subpoenas on the six individuals just listed—Senator Cervantes, Senator Stewart, Senator

Wirth, former House Speaker Egolf, Ms. Ellis-Moore, and Ms. Leith. Ex.2.

Unfortunately, the discovery-request recipients—including Legislative Defendants—almost uniformly refused to produce any responsive documents, justifying their refusal mostly on legislative-privilege grounds. *See, e.g.*, Ex.3. Only the Center for Civic Policy meaningfully responded to Plaintiffs' discovery requests, producing the remarkably candid text messages from Senator Mimi Stewart discussed above. So, the one party that meaningfully cooperated with Plaintiffs' discovery requests turned over extremely powerful evidence that the Legislature enacted SB1 with egregious partisan intent.

B. Yesterday, the District Court issued its Decision Letter addressing the discovery disputes between Plaintiffs and their various discovery-request recipients. Pet.Ex.A at 1. The District Court held that "[s]tatements made by a legislator to other legislators," "legislative staff," "other officials who have official roles in the legislative process," and "consultants [ ] engaged and paid by the Legislature" "are protected and are not subject to discovery and can not be admitted in court." *Id.* at 1–2. "Statements made to the public" during the redistricting process "are

not protected," including statements to "the news media, advocacy groups, the general public or another person or group of people who are not involved in the legislative process," as well as to "a member of Congress." *Id.*

After the District Court issued its Decision Letter, Plaintiffs requested that their discovery recipients produce responsive documents not protected by legislative privilege, as understood by the District Court's Decision Letter, and produce a privilege log by the commencement of the trial in the District Court—that is, today, September 27, 2023. Ex.4. Plaintiffs explained that they intended to call as trial witnesses Senator Cervantes, Senator Stewart, Senator Wirth, former House Speaker Egolf, Ms. Ellis-Moore, and Ms. Leith to testify as to non-privileged matters. *Id.*

D. Legislative Defendants now challenge the District Court's Decision Letter before this Court with their Petition For Writ Of Error ("Pet."), ostensibly filed under Rule 12-503 NMRA. Further, Legislative Defendants claim that the filing of their Petition triggers the automatic-stay provision of NMSA 1978, Section 39-3-23 and/or Rule 1-062(E)

NMRA, such that they need not comply with Plaintiffs' discovery requests or trial subpoenas while their Petition is pending. Pet.7–8.

LEGAL STANDARD

Under Rule 12-503, NMRA, an appropriate appellate court of this State has the "discretion" to issue a writ of error remedying an order of a lower court where the party seeking the writ makes three showings with respect to that order: "(a) [the order] conclusively determines the disputed question; (b) [the order] resolves an important issue completely separate from the merits of the action; and (c) [the order] would be effectively unreviewable on appeal from a final judgment because the remedy by way of appeal would be inadequate." *Id.*; *Handmaker v. Henney*, 1999-NMSC-043, ¶ 9, 128 N.M. 328, 992 P.2d 879. Further, an appellate court will not issue a writ of error where the order is not "erroneous." *Carrillo v. Rostro*, 1992-NMSC-054, ¶ 31, 114 N.M. 607, 845 P.2d 130 (citation omitted).

ARGUMENT

I. In Light Of Legislative Defendants' Concession That The Stewart Texts To Third Parties Are Admissible, Legislative Defendants' Petition For A Writ Of Error And Their Claimed Invocation Of The Automatic Stay Can Only Be Fairly Understood As Attempts To Run Out The Clock On Discovery, Which This Court Should Summarily Reject

This Court should summarily deny Legislative Defendants' Petition and make clear that no stay of the District Court's Decision Letter applies (or dissolve at stay, as need), given that Legislative Defendants' Petition and invocation of the automatic stay are designed to run out the clock on complying with the narrow discovery the District Court permitted.

While Legislative Defendants claim in their Petition that legislative privilege and, perhaps, considerations of relevancy preclude Plaintiffs' discovery into legislators' statements with outside third parties, as the District Court ordered, *see* Pet.1, 5–6, 10–11, Legislative Defendants' concessions with respect to Senator Stewart's text messages reveal that their plan here is one of delay. That is, with respect to the damning text messages from Senator Stewart, Ex.1 at 7, Legislative Defendants have conceded their relevancy and admissibility, including because they declined to move to strike Plaintiffs' repeated reliance on these messages in the District Court below, even as they sought to

exclude other evidence submitted by Plaintiffs, Ex.5. So, given that Legislative Defendants cannot seriously claim that statements that legislators like Senator Stewart made to outside third parties, bragging about their partisan-gerrymandering efforts with SB1, are inadmissible on legislative-privilege and/or relevancy grounds, they have no basis to object to the discovery that the District Court ordered.

Further, Legislative Defendants' claimed invocation of the automatic-stay provision is exceedingly doubtful. For example, Rule 1-062(E)'s automatic-stay provision applies only to "appeal[s]" by government entities, *id.*, not Petitions For Writs Of Error, which are separately addressed under Subsection (G) of Rule 1-062. Further, Rule 12-503, which governs the procedures for writs of error, includes its own procedures for seeking stays in such proceedings, which stays are not automatic. *See* Rule 12-503(M) NMRA. Finally, Rule 12-503(H) directs parties like Legislative Defendants to file their Petitions For Writs Of Error—thereby triggering an automatic stay, in Legislative Defendants' view—"in the court that would have appellate jurisdiction over a final judgment in the case," *id.*, which here would be the Court of Appeals, not this Court, *see* Am. Order 4, *Grisham*, No.S-1-SC-39481

(directing parties to appeal any final judgment in this case to the Court of Appeals, while directing the Court of Appeals to thereafter certify the case to this Court).

But regardless of whether the automatic-stay provision applies, it is clear that, absent this Court's directive, Legislative Defendants will continue to refuse to comply completely with the District Court's exceedingly narrow discovery order, hoping to run out the clock. Accordingly, Plaintiffs respectfully request that this Court summarily deny Legislative Defendants' Emergency Petition by **12:00 p.m., today**. Further, this Court should make clear that Legislative Defendants must produce responsive, non-privileged documents by **8:00 a.m., Thursday, September 28, 2023**, and that Senator Cervantes, Senator Stewart, Senator Wirth, former House Speaker Egolf, Ms. Ellis-Moore, and Ms. Leith must appear in the District Court to testify at trial (either in person or, if necessary, virtually) on **Thursday, September 28, 2023.**

II. Legislative Defendants' Selective Assertion Of Privilege For Whatever Other Messages They Sent To Other Members Of The Public, Bragging About Their Partisan Gerrymandering, Is Utterly Meritless

Even if this Court looks beyond Legislative Defendants' fatal concession with regard to Senator Stewart's texts—which concession,

again, defeats any argument they could have against the discovery the District Court permitted—it is clear that legislative privilege does not bar the extremely limited discovery that the District Court allowed.

A. The New Mexico Constitution's Speech or Debate Clause provides that "Members of the legislature . . . shall not be questioned in any other place for any speech or debate or for any vote cast in either house." N.M. Const., art. IV, § 13. Although this Court has not specifically recognized the doctrine of legislative privilege, the Speech or Debate Clause likely creates some form of such privilege from answering discovery and testifying in court proceedings. *See id.*; *see generally State ex rel. Atty. Gen. v. First Jud. Dist. Ct. of N.M.*, 1981-NMSC-053, ¶ 18, 96 N.M. 254, 629 P.2d 330, *abrogated by Republican Party of N.M. v. N.M. Tax'n & Revenue Dep't*, 2012-NMSC-026, 283 P.3d 853 (stating, in dicta, that the Legislature has a legislative privilege).

This Court's privilege precedents support a measured approach to legislative privilege, recognizing that competing constitutional considerations can outweigh the privilege with respect to certain categories of communication or under certain circumstances. So, in *Republican Party*, 2012-NMSC-026, considering executive privilege, this

Court held that such privilege does not extend to communications with "individuals outside of the executive department." *See id.* at ¶¶ 37, 42, 46 (discussing and then affirming this holding from *First Jud.*, 1981-NMSC-053). Further, where communications did trigger executive privilege, the privilege was subject to a "balanc[ing of] the public's interest in preserving confidentiality to promote intra-governmental candor with the [ ] need for disclosure." *Id.* ¶ 49 (citations omitted). This measured approach recognizes other essential, often-competing constitutional values. As *Republican Party* explained, "[t]ransparency is an essential feature" of the government, so "executive privilege must be confined to the constitutional limits" to "protect the people's vital right to access information about the workings of government." *Id.* ¶¶ 51–52. The legislative privilege should reflect the same, measured approach, under this Court's caselaw, given this Court's explicit recognition that legislative privilege is "similar" to executive privilege. *First Jud.*, 1981-NMSC-053, ¶ 18; *see Republican Party*, 2012-NMSC-026, ¶ 51.

Under these principles, legislative privilege clearly does not apply to legislators' communications with the public, such as legislators bragging about their invidious reasons for drafting certain legislation.

The Speech or Debate Clause protects "Members of the legislature" in their "speech[es] or debate[s]" on the legislative floor, as well as in their "vote[s] cast in either house," giving legislators protection from "be[ing] questioned in any other place" for such quintessential legislative activities. N.M. Const., art. IV, § 13. Where legislators move beyond those core legislative functions, however, the public's interests in "preserving confidentiality to promote intra-governmental candor" furthered by legislative privilege, *Republican Party*, 2012-NMSC-026, ¶ 49, begins to give way to constitutional principles of "[t]ransparency" and "the people's vital right to access information about the workings of government," *id.* ¶ 51–52. So, as relevant to the issue here, where a legislator's communications comprise boasting about her gerrymandering efforts to the public at large or, more narrowly, to outside third parties like donors, political allies, or members of Congress or their staff, competing constitutional considerations of transparency and accountability outweigh any "candor" interest furthered by legislative privilege. *See id.* ¶ 49, ¶ 51–52.

B. Applying these legislative-privilege principles in this case, Plaintiffs respectfully submit that, at the very minimum, they are

entitled to the extremely narrow category of communications between legislators and outside third parties. *See Republican Party*, 2012-NMSC-026, ¶¶ 37, 42, 46; *First Jud.*, 1981-NMSC-053, ¶ 18.

C. Legislative Defendants counterarguments all fail.

First, Legislative Defendants continue to assert that legislative privilege under the New Mexico Constitution is always "absolute," Pet.1, 5–6, 10, but that claim fails in the face of this Court's decisions in *Republican Party* and *First Judicial*. As explained above, *Republican Party* expressly holds that executive privilege is "limited," at least as to communications with "individuals outside of the executive department." 2012-NMSC-026, ¶¶ 37, 43, 46, 49. *First Judicial*, in turn, states that legislative privilege is "similar" to executive privilege, 1981-NMSC-053, ¶ 18, thus its coverage too must end, at the very least, at communications with outside third parties.

Second, Legislative Defendants claim that legislative privilege furthers separation-of-powers principles. Pet.10. While that may be true in many instances, it cannot carry the day in partisan-gerrymandering litigation, like the case here. As Justice Kagan stated in *Rucho*, partisan gerrymandering "deprive[s] citizens of the most fundamental of their

constitutional rights: the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives." *Rucho*, 139 S. Ct. at 2509 (Kagan, J., dissenting). Given the gravity of that injury, it makes no constitutional sense to shield legislators' statements to members of the public boasting about their partisan-gerrymandering efforts—any more than it would shield statements to third parties about racially discriminatory intent in a racial gerrymander case—which explains why courts often reject privilege claims to permit discovery into partisan intent of just the type that Plaintiffs seek here in partisan-gerrymandering and racial-discrimination cases. *See, e.g.*, *Benisek*, 241 F. Supp. 3d at 575; *LWV of Fla. v. Detzner*, 172 So. 3d 363, 391–92 (Fla. 2015); *LWV of Ohio*, 174 N.E.3d at 805; *Easley v. Cromartie*, 532 U.S. 234, 254 (2001).

Third, Legislative Defendants appear to raise a relevancy argument, claiming that statements from legislators are "far too piece-meal to serve as a relevant indicator of predominant, specific intent of the body," Pet.10–11, but that is defeated by Justice Kagan's reliance on the statements of individual gerrymanderers, *Rucho*, 139 S. Ct. at 2510–11 (Kagan, J., dissenting), as well as the vast weight of partisan-

gerrymandering authority, *see, e.g., Detzner*, 172 So. 3d at 388; *Common Cause v. Rucho*, 284 F. Supp. 3d 780, 788 (M.D.N.C. 2018); *Texas v. United States*, 887 F. Supp. 2d 133, 165 (D.D.C. 2012), *vacated on other grounds*, 570 U.S. 928(2013).

Finally, Legislative Defendants' claim that Plaintiffs' discovery requests and trial subpoenas are overly burdensome, is an argument that they appear to have forgotten to remove once the District Court so drastically narrowed the permissible scope of discovery. *See* Pet.1. Plaintiffs served their discovery requests on Legislative Defendants and their other discovery-request recipients—upon which discovery requests their trial subpoenas are substantially based—well over a month ago, consistent with the District Court's Scheduling Order. *See* Ex.6, ¶ 4; Ex.3 at 4–7. The District Court's Decision Letter substantially narrows what these discovery recipients must produce—namely, communications between legislators and outside third parties, during the redistricting process only. Pet.Ex.A at 1–2. Therefore, Legislative Defendants can comply with these discovery requests and appear to give trial testimony (including, if necessary, virtually), by Thursday, September 28, 2023.

CONCLUSION

This Court should summarily deny Legislative Defendants' Emergency Petition For Writ Of Error.

Dated: September 27, 2023

Respectfully Submitted,

MISHA TSEYTLIN*
MOLLY S. DIRAGO*
KEVIN M. LEROY*
TROUTMAN PEPPER
HAMILTON SANDERS LLP
227 W. Monroe Street
Suite 3900
Chicago, IL 60606
(608) 999-1240 (MT)
(312) 759-1926 (MD)
(312) 759-1938 (KL)
(312) 759-1939 (fax)
misha.tseytlin@troutman.com
molly.dirago@troutman.com
kevin.leroy@troutman.com

Attorneys for Plaintiffs Manuel Gonzales, Jr., Dinah Vargas, David Gallegos, and Timothy Jennings

HARRISON & HART, LLC

/s/Carter B. Harrison, IV
CARTER B. HARRISON, IV
924 Park Avenue SW, Suite E
Albuquerque, New Mexico 87102
(505) 312-4245
(505) 341-9340 (fax)
carter@harrisonhartlaw.com

Attorneys for Plaintiffs Republican Party Of New Mexico, David Gallegos, Dinah Vargas, Bobby and Dee Ann Kimbro, and Pearl Garcia

**Admitted Pro Hac Vice*

CERTIFICATE OF COMPLIANCE

I certify, according to Rule 12-503(G) NMRA, that the foregoing complies with the type-volume, size, and word limitations of the New Mexico Rules of Appellate Procedure, including Rule 12-503(F)(3), because it contains no more than 3,150 words of substantive text and was prepared in size 14-point Century Schoolbook font, which is a proportionally-spaced type face, using Microsoft Word.

Dated: September 27, 2023

/s/Carter B. Harrison, IV
CARTER B. HARRISON, IV
924 Park Avenue SW, Suite E
Albuquerque, New Mexico 87102
(505) 312-4245
(505) 341-9340 (fax)
carter@harrisonhartlaw.com

CERTIFICATE OF SERVICE

I hereby certify that I caused to be electronically filed the foregoing with the Tyler/Odyssey New Mexico Court e-file and serve system. All counsel of record are registered as service contacts through that system, and will be served by the Tyler/Odyssey New Mexico Courts system

Dated: September 27, 2023

/s/Carter B. Harrison, IV
CARTER B. HARRISON, IV
924 Park Avenue SW, Suite E
Albuquerque, New Mexico 87102
(505) 312-4245
(505) 341-9340 (fax)
carter@harrisonhartlaw.com