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 JAVIER MARTINEZ, in his official capacity as Speaker of the New Mexico House of Representatives,

Defendants.

PLAINTIFFS' RESPONSE IN OPPOSITION TO EXECUTIVE DEFENDANTS' MOTION TO DISMISS[1]

Executive Defendants Governor Michelle Lujan Grisham and Lieutenant Governor and President of the New Mexico Senate Howie Morales have moved this Court for an order dismissing them from this lawsuit under Rule 1-012(C) of the New Mexico Rules of Civil Procedure for the District Courts. In that Motion, Executive Defendants claim that Plaintiffs lack standing to sue Executive Defendants and that Executive Defendants' asserted legislative immunity wholly bars Plaintiffs' partisan-

[1] At Executive Defendants' request, Plaintiffs agreed to file this Opposition on an expedited basis (in less than half the time allotted for responses by Rule 1-007.1(D) of the New Mexico Rules of Civil Procedure for the District Courts), given the extraordinarily truncated timeline of this case.

gerrymandering claim. *See* Mot. To Dismiss Exec. Defs. ("Mot.") 6–10. Plaintiffs the Republican Party of New Mexico and a bipartisan group of New Mexico voters (collectively, "Plaintiffs") file this short Opposition to Executive Defendants' Motion, raising only three brief points.

First, Executive Defendants' Motion is procedurally untimely under Rule 1-012(G), at least as to their legislative-immunity argument.

Under Rule 1-012(G), a party who makes a motion under Rule 1-012 "may join with it *any* other motions [ ] provided for [in Rule 1-012] and then available to him," Rule 1-012(G) (emphasis added)—including, as relevant here, motions to dismiss for failure to state a claim under Rule 1-012(B)(6) and motions for judgment on the pleadings under Rule 1-012(C). However, "[i]f a party makes a motion under [Rule 1-012] but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, *he shall not thereafter make a motion based on the defense or objection so omitted*[.]" *Id.* (emphasis added); *see, e.g.*, *Rupp v. Hurley*, 1999-NMCA-057, ¶¶ 26–27, 127 N.M. 222, 979 P.2d 733. Finally, Rule 1-012(G) recognizes an exception to this time-bar rule for motions described in Rule 1-012(H)(2), which exception covers motions that assert: "[1] A defense of failure to state a claim upon which relief can be granted, [2] a defense of failure to join a party indispensable under Rule 1-019 NMRA[,] and [3] an objection of failure to state a legal defense to a claim." Rule 1-012(H)(2).

Here, Executive Defendants' Motion is procedurally untimely under Rule 1-012(G), since they failed to combine their defenses or objections in this Motion with

their prior Motion To Dismiss in this case—a motion that the New Mexico Supreme Court itself ultimately reviewed. *See* Order, *Grisham v. Van Soelen*, No.S-1SC-39481 (N.M. July 5, 2023) (hereinafter "Superintending Order"). Executive Defendants' present Motion raises standing and legislative-immunity arguments that were "available" to them from the inception of this case. Rule 1-012(G); *see Rupp*, 1999-NMCA-057, ¶¶ 26–27. That is because those arguments depend solely upon facts established prior to Plaintiffs' filing their Complaint and within Executive Defendants' own knowledge—specifically, the Governor's and Lieutenant Governor's involvement in the passage of Senate Bill 1. Mot.7, 10. Yet, Executive Defendants did *not* assert these standing and legislative-immunity arguments in their previous Motion To Dismiss in this case, filed well over a year ago on February 18, 2022. *Compare* Exec. Defs.' Mot. To Dismiss 1, 6–9, *with* Mot.6–10. Nor does Executive Defendants' present Motion fall within the exception recognized in Rule 1-012(H)(2). Accordingly, Executive Defendant's Motion is procedurally untimely under Rule 1-012(G).

That said, this Court may be able to address Executive Defendants' apparent standing concerns as part of its consideration of any objections to standing already built into this Court's Scheduling Order. In remanding this case to this Court, the New Mexico Supreme Court ordered this Court to, "as a threshold mater, . . . conduct a standing analysis for all parties." Superintending Order 3. However, the Superintending Order does not make clear whether the Court should consider Executive Defendants' standing objections—which arguments, under New Mexico

law, do not rest on jurisdictional concerns, *ACLU of N.M. v. City of Albuquerque,* 2008-NMSC-045, ¶¶ 9–10, 144 N.M. 471, 188 P.3d 1222—despite Executive Defendants' failure to raise those objections consistent with Rule 1-012(G). Nevertheless, as explained immediately below, Executive Defendants' standing concerns are misplaced.

Second, Executive Defendants' standing and legislative-immunity arguments are incorrect. Executive Defendants claim that Plaintiffs cannot name them as Defendants here—either for standing reasons or for legislative-immunity reasons—because the Governor's only relevant action here was to sign Senate Bill 1 into law, while the Lieutenant Governor's only relevant action was to preside over the Senate while it passed Senate Bill 1. *See* Mot.6–9 (standing), 9–10 (legislative immunity). However, the Governor and Lieutenant Governor have historically participated as named parties in redistricting litigation in New Mexico, *see, e.g.*, *Maestas v. Hall*, 2012-NMSC-006, 274 P.3d 66 (Governor and Lieutenant Governor as "Real Parties in Interest" in redistricting case); Decision On Remand, *Egolf v. Duran*, No.D-101-CV-2011-02942 (Santa Fe Cnty. 1st Jud. Dist. Ct. Feb. 27, 2012) (Governor and Lieutenant Governor as defendants in redistricting case),[2] and Executive Defendants do not even attempt to distinguish this case from that longstanding precedent, *see generally* Mot.6–9. Further, with respect to Plaintiffs' standing to sue the Governor, in particular, if this Court agrees with Plaintiffs that Senate Bill 1 is an unconstitutional partisan gerrymander, *see* V. Compl. at 27, and it orders the

[2] Available at https://redistricting.lls.edu/wp-content/uploads/NM-egolf-20120227-house-decision.pdf (all websites last visited Aug. 4, 2023).

Legislature to adopt a new redistricting map as a remedy, the Governor may have to call a special session of the Legislature or issue a special message for the regular legislative session before the Legislature could adopt that new map, *see* N.M. Const. art. IV, §§ 5(B)(2), 6. Thus, the presence of the Governor here may be a necessary component to Plaintiffs' obtaining relief for their constitutional injuries in this case. *See Forest Guardians v. Powell,* 2001-NMCA-028, ¶ 25, 130 N.M. 368, 24 P.3d 803 (discussing traceability component of standing). Finally, while Executive Defendants cite various standing and legislative-immunity cases throughout their Motion (including cases from different jurisdictions), *see generally* Mot.6–10, the vast majority of those cases arise outside of the redistricting context, while the only two redistricting-related cases that Executive Defendants cite do not address dismissal of executive-branch defendants from redistricting challenges, *see* Mot.9, n.7 (citing *In re Perry*, 60 S.W.3d 857, 860 (Tex. 2001), in which the court ordered the quashing of a subpoena based on legislative privilege, without addressing dismissal of executive-branch defendants); Mot.8, n.6 (citing *Sanchez v. King,* 550 F. Supp. 13, 15 (D.N.M. 1982), *aff'd, King v. Sanchez,* 459 U.S. 801 (1982), in which the court noted that a state legislature must have an adequate opportunity to address reapportionment concerns, without addressing dismissal of executive-branch defendants). Thus, none of those authorities is helpful here.

Finally, and in all events, if this Court is inclined to dismiss Executive Defendants from this case, notwithstanding Plaintiffs' arguments above, the Court should impose two conditions on Executive Defendants prior to ordering that

dismissal. First, the Court should require Executive Defendants to agree to respond to discovery served upon them by Plaintiffs, notwithstanding issues of legislative privilege.[3] Second, the Court should require Executive Defendants to agree to be bound by any judgment from this Court in Plaintiffs' favor on Plaintiffs' partisan-gerrymandering claim, to the extent that Executive Defendants' participation is necessary for Plaintiffs to effectively obtain the relief awarded by any such judgment. Notably, these two conditions would ensure that a dismissal of Executive Defendants does not cause unexpected and unnecessary delays here, which is especially important given the "extraordinarily truncated timeline of this case." Scheduling Order 3.

* * *

This Court should deny Executive Defendants' Motion To Dismiss under Rule 1-012(C).

[3] *See, e.g.*, *Bennett v. Ohio Redistricting Comm'n*, 164 Ohio St. 3d 1457, 2021-Ohio-3607, 174 N.E.3d 806 (allowing discovery against the Ohio Governor, Senate President, and House Speaker, among other officials, in a partisan gerrymandering case before the Ohio Supreme Court, notwithstanding legislative immunity).

Dated: August 4, 2023

Respectfully Submitted,

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**Pro Hac Vice Forthcoming*

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing will be served on all counsel via the e-filing system.

Dated: August 4, 2023

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