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.

REPLY IN SUPPORT OF MOTION TO DISMISS EXECUTIVE DEFENDANTS

Come now Defendants Governor Michelle Lujan Grisham and Lieutenant Governor Howie Morales (collectively, "Executive Defendants"), by and through their counsel of record in this matter, and hereby provides their reply in support of their Motion to Dismiss Executive Defendants ("Motion"). As grounds for this reply, the Executive Defendants state as follows.

INTRODUCTION

As thoroughly explained in the Motion, Plaintiffs do not have standing to sue Executive Defendants, nor can they get around Executive Defendants' legislative immunity. Plaintiffs' arguments to the contrary are unpersuasive. First, the Court should reject Plaintiffs' attempts to

dodge the merits of the Motion. Second, the Court should not attribute any weight to the fact that the Executive Defendants' predecessors *voluntarily* participated in redistricting litigation when the political branches failed to enact new maps. Third, Executive Defendants' presence is not necessary for Plaintiffs to receive the relief to which they would be entitled to should the Court find SB 1 unconstitutional. And lastly, the Court need not, and should not, impose any conditions on Executive Defendants if it dismisses them.

DISCUSSION

I. The Court should address the merits of the Motion

Plaintiffs first argue the Motion is procedurally untimely under Rule 1-012(G) NMRA because Executive Defendants did not raise standing or legislative immunity in their initial motion to dismiss based on the political question doctrine. *See* Plaintiffs' Response in Opposition to Executive Defendants' Motion to Dismiss ("Response") at 2 (filed Aug. 4, 2023). The Court should reject this argument for several reasons.

First, Rule 1-012(G)'s requirement that a party raise certain defenses in its initial Rule 1-012 motion only applies to the defenses of lack of jurisdiction over the person, improper venue, insufficiency of process, and insufficiency of service of process. *See* Rule 1-012(G), (H)(1); *see also Rupp v. Hurley*, 1999-NMCA-057, ¶ 19, 127 N.M. 222, 979 P.2d 733 ("Thus, it now is clear that any time defendant makes a preanswer Rule 12 motion, he must include, on penalty of waiver, the defenses set forth in subdivisions (2) through (5) of Rule 12(b)." (quoting 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1391, at 741-44 (2d ed.1990)). As the instant motion is based on lack of standing and legislative immunity, it is not subject to the constraints of Rule 1-012(G). *See Deutsche Bank Nat. Tr. Co. v. Johnston*, 2016-NMSC-013, ¶ 18, 369 P.3d 1046 ("When standing is a prudential consideration, it can be raised for the first time at

any point in an active litigation, just like a defense of failure to state a claim, and unlike defenses relating to personal jurisdiction, venue, and insufficient service of process, all of which must be raised in an initial or amended responsive pleading."); *State Employees Bargaining Agent Coal. v. Rowland*, 494 F.3d 71, 77 (2d Cir. 2007) ("It is well-settled that legislative immunity is . . . a personal defense that may be asserted to challenge the sufficiency of a complaint [for failure to state a claim] under Rule 12(b)(6)."); *see generally* Rule 1-012(G)-(H) (recognizing exception for the defense of failure to state a claim).

Second, even if the Court determines that Rule 1-012(G) applies to the Motion, the Court should still address the Motion's merits. Generally, courts disfavor avoiding substantive issues based on procedural technicalities. *See Montoya v. Dep't of Fin. & Admin.*, 1982-NMCA-051, ¶ 27, 98 N.M. 408, 414, 649 P.2d 476 ("In interpreting the Rules of Civil Procedure, New Mexico courts favor the right of a party to a hearing on the merits over dismissal of actions on procedural technicalities."). This policy is even stronger in this case, as disregarding the Motion based on a procedural technicality will mean unconstitutionally forcing the head of this Court's coordinate branch to be a party to significantly expedited and complex litigation. And the Executive Defendants' failure to include these defenses in their initial motion to dismiss is excusable given the rushed nature of the initial stages of the litigation caused by Plaintiffs' failure to timely bring this action seeking to overturn SB 1 in the middle of election season.

Lastly, the Court should, at the very least, address Executive Defendants' standing argument. The Supreme Court has directed that this Court "*shall* conduct a standing analysis *for all parties*." *See* Order at 3, *Lujan Grisham v. Republican Party of N.M.*, S-1-SC-93481 (July 5, 2023) (emphases added). The plain language of this order makes clear that the Court should

address Executive Defendants' standing argument. Accordingly, the Court should, at a minimum, reject Plaintiffs' procedural argument to the extent it applies to standing.

II. The voluntary participation of previous governors and lieutenant governors in redistricting litigation is irrelevant

Plaintiffs next claim that the Executive Defendants' standing and legislative immunity arguments are incorrect because they "have historically participated as named parties in redistricting litigation in New Mexico." Response at 4. But this argument ignores that previous governors and lieutenant governors have never raised these arguments in previous redistricting litigation—probably because those cases involved an entirely different situation in which the political branches were unable to enact new maps. "Cases are not authority for propositions not considered." *Piedra, Inc. v. N.M. Transp. Comm'n*, 2008-NMCA-089, ¶ 32, 144 N.M. 382, 188 P.3d 106 (alteration, internal quotation marks, and citation omitted)). Thus, the fact that Executive Defendants' predecessors voluntarily participated in redistricting litigation involving the failure to reapportion districts is of no moment. Rather, the Court should find persuasive the significant authority cited in the Motion demonstrating that Plaintiffs do not have standing to sue Executive Defendants and that they are protected by legislative immunity.[1]

III. The Governor's presence is not necessary for Plaintiffs to receive the relief this Court may provide should it find SB 1 unconstitutional

Plaintiffs, in passing, argue that the Governor's presence may be necessary for them to obtain their requested relief because the Court may "order[] the Legislature to adopt a new

[1] Plaintiffs try to distinguish this authority on the basis that many of the cases do not involve redistricting litigation, yet they make no effort to explain why the nature of this action changes the result. *See* Response at 5. The answer is that it does not. *See, e.g.*, *Brown v. Jacobsen*, 590 F. Supp. 3d 1273, 1284 (D. Mont. 2022) (rejecting Montana secretary of state's argument that the proper defendants in a redistricting challenge are the State of Montana, the Montana legislature, or the governor and noting that "*those parties are either immune from suit or likewise would be unable to implement Plaintiffs' requested relief*" (emphasis added)).

redistricting map," and the Governor may need to call a special session or issue a special message for the upcoming regular session to facilitate this relief. *See* Response at 5. But this argument is based on a fundamental misunderstanding of the judiciary's authority.[2] The Court cannot order the Legislature to enact a new map, nor can it order the Governor to call a special session, issue a special message, or sign legislation enacting a new map. *See Serrano v. Priest*, 18 Cal. 3d 728, 751, 557 P.2d 929, 941 (1976) ("[T]he courts may not order the Legislature or its members to enact or not to enact, or the Governor to sign or not to sign, specific legislation[.]"); *In re Legislative Reapportionment*, 150 Colo. 380, 382, 374 P.2d 66, 67 (1962) ("[W]e wish to state at the outset that under the separation of powers doctrine we cannot and will not command the Governor to do anything, the doing of which lies within his sound discretion, and we deem his authority to call the Legislature into special session to be such prerogative."); *Maryland Comm. for Fair Representation v. Tawes*, 228 Md. 412, 440, 180 A.2d 656, 671 (1962) ("Of course, the courts cannot direct the Governor to call the General Assembly into extraordinary session; that is a power the exercise of which lies entirely within his discretion."); *Sweeney v. Notte*, 95 R.I. 68, 82, 183 A.2d 296, 303 (1962) ("In the absence of constitutional warrant to the contrary this court has no authority to require the general assembly to meet in special session, nor to require the governor to exercise his constitutional prerogative to call such a session.").

Rather, the proper remedy—should the Court ultimately find SB 1 unconstitutional—would be to simply enjoin the Secretary of State from using the map for the upcoming election and issue a court-drawn map if the political branches fail adopt a new map in a timely manner. *See Sanchez v. King*, 550 F. Supp. 13, 15 (D.N.M. 1982), *aff'd, King v. Sanchez*, 459 U.S. 801 (1982)

[2] This argument also ignores the fact that the Legislature can call itself into an extraordinary session at any time "for all purposes." *See* N.M. Const. art IV, § 6.

("[J]udicial relief becomes appropriate only when a State Legislature fails to reapportion according to federal constitutional standards, after having had an adequate opportunity to do so." (citing *Reynolds v. Sims*, 377 U.S. 533, 586 (1964)). Executive Defendants are not necessary for the Court to provide this relief. *See Larios v. Perdue*, 306 F. Supp. 2d 1190, 1199 (N.D. Ga. 2003) ("Put differently, because we can enjoin the holding of elections pursuant to the 2002 plan (assuming, of course, that the plan is in fact unconstitutional) and subsequently require elections to be conducted pursuant to a constitutional apportionment system, the Lieutenant Governor is not a necessary party to this action."). Accordingly, Plaintiffs' arguments to the contrary are misplaced.

IV. The Court need not, and should not, "conditionally" dismiss Executive Defendants

Finally, Plaintiffs argue that "if this Court is inclined to dismiss Executive Defendants from this case, . . . the Court should impose two conditions on Executive Defendants prior to ordering that dismissal." Response at 5-6. Specifically, Plaintiffs ask that the Court "require Executive Defendants to agree to respond to discovery served upon them by Plaintiffs, notwithstanding issues of legislative privilege" and "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." *Id.* at 6. Both requests are improper.

As a general matter, should the Court find that Plaintiffs lack standing to sue Executive Defendants or that Executive Defendants are entitled to legislative immunity, it should simply dismiss them. Plaintiffs cite no authority for the Court's authority to issue conditions on dismissed parties solely for Plaintiffs' convenience. *See generally* Response. "Where a party cites no authority to support an argument, [the Court] may assume no such authority exists" and decline to address that argument. *Curry v. Great Nw. Ins. Co.*, 2014-NMCA-031, ¶ 28, 320 P.3d 482.

Further, even if the Court did have the authority to "conditionally" dismiss Executive Defendants, Plaintiffs' requested conditions are either improper or unnecessary. With regard to Plaintiffs' first requested condition, it is clear the Court cannot order Executive Defendants to participate in party discovery once they are dismissed, *see* Rule 1-026 NMRA, nor can it force them to respond to third-party discovery under Rule 1-045 NMRA to the extent it would violate legislative immunity.[3] And Plaintiffs' second requested condition is unnecessary because, as explained in the Motion and above, Plaintiffs do not need Executive Defendants to obtain the relief this Court may provide should it find SB 1 unconstitutional. Because Executive Defendants have no real role in administering elections, it does not matter if they are "bound" by any order of this Court enjoining the Secretary of State from using SB 1 in the upcoming election. In other words, there is nothing Executive Defendants could do to prevent the Court from remedying Plaintiffs' purported injuries should it find SB 1 unconstitutional. Regardless, Executive Defendants have no intention of ignoring or disputing the Court's ultimate determination in this case. Therefore, the Court need not "conditionally" dismiss Executive Defendants.

CONCLUSION

For the foregoing reasons, the Court should dismiss the Executive Defendants as parties.

[3] Executive Defendants do not dispute that they would be subject to third-party discovery under Rule 1-045. However, such discovery is limited by both executive privilege and legislative immunity. Executive Defendants intend to file a motion for protective order later this week, in which they will explain in detail why Plaintiffs' requested discovery is largely barred by these privileges and immunities.

Respectfully submitted,

/s/ Holly Agajanian

HOLLY AGAJANIAN
Chief General Counsel to Governor Michelle Lujan Grisham
KYLE P. DUFFY
Deputy General Counsel to Governor Michelle Lujan Grisham
490 Old Santa Fe Trail, Suite 400
Santa Fe, New Mexico 87501
(505) 476-2200
holly.agajanian@exec.nm.gov
kyle.duffy@exec.nm.gov

Counsel for Governor Michelle Lujan Grisham and Lieutenant Governor Howie Morales

CERTIFICATE OF SERVICE

I hereby certify that on August 7, 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