IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

JOHNSON & JOHNSON, ET AL.,

Petitioners,

v. **NO. S-1-SC-39284**

THE HON. MATTHEW JUSTIN WILSON,

Respondent,

and

STATE OF NEW MEXICO, *EX REL.*
HECTOR BALDERAS, ATTORNEY GENERAL, ET AL.

Real Parties in Interest.

GOVERNOR MICHELLE LUJAN GRISHAM'S AMICUS BRIEF[1]

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[1] No counsel for a party authored this brief in whole or part, nor has any individual made a monetary contribution intended to fund the preparation or submission of the brief. *See* Rule 12-320(A) NMRA.

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INTRODUCTION

This proceeding arises out of a discovery dispute in a case brought by the Office of the Attorney General on behalf of the State of New Mexico. Though the case may be complex, the issue before the Court is relatively straightforward: *can* and *should* the courts require state agencies falling under the "supreme executive power" of the Governor to participate in party discovery and produce agency documents in a case brought by the Attorney General on behalf of the State without their consent or the consent of the Governor? Emphatically, the answer is "no." The Governor has ultimate control over state agencies, and to permit (or require) the Attorney General to drag in state agencies as parties against their will would upset New Mexico's purposely divided Executive Branch. Any conclusion to the contrary would not only violate the separation of powers *within* the Executive Branch but potentially the separation of powers *between* the three branches of government. On the flip side, respecting the separation of powers between the Governor and the Attorney General will not unduly prejudice Petitioners or any other persons litigating against the State, as they can obtain all the documents and information they need from agencies through third-party discovery and other means. Accordingly, the Court should reject Petitioners' arguments to the contrary.

BACKGROUND

As Petitioners and the Attorney General's briefs sufficiently detail the

background and procedural history of this case, the Governor does not repeat it here except to the extent pertinent to this brief. In early 2020, the Attorney General filed the instant action on behalf of the State against Petitioners for their wrongful marketing, sale, and promotion of asbestos-containing talcum power products. *See* powder. *See* Verified Emergency Petition for Writ of Superintending Control and Request for Stay ("Petition"), Exhibit 1 at 2 (filed Nov. 25, 2020). While the underlying complaint mentions certain state agencies and seeks damages on behalf of the State, *see id.* at 2-3, no agency joined the lawsuit as a party, expressly authorized the action Attorney General to file the lawsuit or volunteered to be subject to subsequent discovery. *See id.*; *see also* Real Party in Interest the State of New Mexico's Response to [Petitioners'] Verified Emergency Petition for Writ of Superintending Control and Request for Stay at 2 (filed Apr. 5, 2022). Nor did the Governor direct the Attorney General to file the suit or give consent on behalf of any agency.

In the course of discovery, Petitioners never attempted to seek third-party discovery from any state agency. *See* Exhibit 6 to Petition. Petitioners did, however, serve the Attorney General with requests for production and interrogatories seeking documents and information in possession of various state agencies. *See* Petition at 1. After the Attorney General responded that it was not obligated to respond (because it could not respond) on behalf of non-party state agencies, Petitioners filed a motion

to compel. *See* Petition, Ex. 5-6. The district court recognized that the "dual structure within the executive branch" meant that the state agencies were not subject to the Attorney General's control, and therefore could not be "lumped together [with the State] for discovery purposes. Petition, Ex. 7 at 2 (citing *United States v. Am. Express Co.*, No. 10-CV-04496 (NGG) (RER), 2011 U.S. Dist. LEXIS 156580, at *6 (E.D.N.Y. July 29, 2011). To hold otherwise, the court observed, would either derogate the Governor's control over state agencies by allowing the Attorney General to unilaterally force their cooperation or, alternatively, "giv[e] the Governor and the agencies under her control a "virtual veto" over the policy decision to bring an enforcement action that rightfully lies with the Attorney General." *Id.* (citing *Am. Express Co.*, 2011 U.S. Dist. LEXIS 156580, at *6). Accordingly, the Court denied the motion to compel.

Petitioners subsequently filed a petition for a writ of superintending control vacating the district court order and redistributing power within the Executive Branch simply to make discovery more convenient for the defense. *See* Petition at 1. After hearing oral argument, the Court stayed proceedings below and requested supplemental briefing on the issues. *See* Order at 2 (filed Sept. 13, 2022).

DISCUSSION

I. The Governor's role in New Mexico's divided Executive Branch

In adopting our state constitution, the framers determined it was necessary and beneficial to have a divided Executive Branch—requiring the electorate to separately choose the governor (and lieutenant governor), secretary of state, state auditor, state treasurer, attorney general, and commissioner of public lands. *See* N.M. Const. art. V, § 1. In so doing, the framers diverged from the unitary executive approach of the U.S. Constitution and created separate offices within the Executive Branch, each ultimately responsible to the people themselves. *Compare* U.S. Const. Art. II, Sec. 1, *with* N.M. Const. art. V, § 1. The wisdom of such an approach is to insulate each official from the influence of the others, thereby creating an intra-branch system of checks and balances. *See* William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 Yale L.J. 2446, 2248 (2006) ("The divided executive holds the theoretical advantages of dispersing power and serving as a check against any particular officer's overreaching[.]").

Like many other state constitutions, the New Mexico constitution vests the Governor with the "supreme executive power of the state" and mandates that she "shall take care that the laws be faithfully executed." N.M. Const. art. V, § 4. Correspondingly, the Governor is given the authority to require each officer of the

Executive Branch to report to her, under oath, and account for all monies received by the officer. *See* N.M. Const. art. V, § 9. Additionally, the Governor has the plenary power to nominate, appoint (with the consent of the senate), and remove all officers whose appointment or election is not otherwise provided for in the constitution. *See* N.M. Const. art. V, § 5; *State ex rel. N.M. Judicial Standards Comm'n v. Espinosa*, 2003-NMSC-017, ¶ 26, 134 N.M. 59, 73 P.3d 197.

From these provisions, it is clear the Governor has the highest rank or authority in the Executive Branch, unmatched by any other official. *See Riley v. Cornerstone Cmty. Outreach, Inc.*, 57 So. 3d 704, 719 (Ala. 2010) (examining Alabama constitution with similar provisions and stating "these express constitutional provisions, all of which are of course unique to the office of governor, plainly vest the governor with an authority to act on behalf of the State and to ensure 'that the laws [are] faithfully executed' that is 'supreme' to the 'duties' given the other executive-branch officials created by the same constitution."); *Hous. Tap & B. R. Co. v. Randolph*, 24 Tex. 317, 343 (1859) ("[The Governor] is the head of the executive department of the State, and it is made his duty, by the Constitution, to 'take care that the laws be faithfully executed.' It is evidently contemplated, that he shall give direction to the management of affairs, in all the branches of the executive department. Otherwise he has very little to do. Where he has the power of removal, he can assume authoritative control absolutely, in all of the departments."); *State ex*

rel. Hartley v. Clausen, 146 Wash. 588, 592, 264 P. 403 (1928) ("While in many of the constitutions of the various states the governor is but a part of the executive department, in the state of Washington, as is indicated by the above quoted portions of our constitution, the governor is the supreme executive power. Black's Law Dictionary (7th ed.), defines supreme power as: 'The highest authority in the state, all other powers in it being inferior thereto.' Which, of course, when applied to the instant case, means that the governor, under our constitution, is the highest executive authority.").

It necessarily follows that the Governor has the "supreme" authority to control and direct the agencies coming within the Executive Branch—either directly or indirectly through her appointed officers. As the Supreme Court of Kansas put it:

> An executive department is created consisting of a governor and the other officers named, and he is designated as the one having the supreme executive power, that is, the highest in authority in that department. In the same connection it will be noticed that the other executive officers are required to furnish information upon subjects relating to their duties, and to make annual reports to him, and withal he is charged with the duty of seeing that the laws are faithfully executed. It is manifest from these various provisions that the term 'supreme executive power' is something more than a verbal adornment of the office, and implies such power as will secure an efficient execution of the laws, which is the peculiar province of that department, to be accomplished however in the manner and by the methods and within the limitations prescribed by the constitution and statutes enacted in harmony with that instrument.

State ex rel. Stubbs v. Dawson, 86 Kan. 180, 187-88, 119 P. 360 (1911); *see id.* at 188 ("When a constitution gives a general power, or enjoins a duty, it also gives, by

implication, every particular power necessary for the exercise of the one, or the performance of the other." (quoting *Field v. People*, 3 Ill. 79, 83 (1839)); *see also State ex rel. Otto v. Field*, 1925-NMSC-019, ¶ 64, 31 N.M. 120, 241 P. 1027 ("In the construction of Constitutions, as well as of statutes, it has often been held that the powers necessary to the exercise of a power clearly granted will be implied." (citation omitted)).

Indeed, this Court has previously recognized that "the Governor must have control over administration, as it is the Governor, the chief executive, who is held responsible to the sovereignty for errors in his executive and administrative policies." *Espinosa*, 2003-NMSC-017, ¶ 26 (internal quotation marks and citations omitted)); *see also* NMSA 1978, § 9-1-3 (1977) (creating cabinet and prescribing duties); NMSA 1978, § 9-1-5(A) (2022) ("The secretary is responsible to the governor for the operation of the department. It is the secretary's duty to manage all operations of the department and to administer and enforce the laws with which the secretary or the department is charged."). Thus, the Governor has the ultimate authority to determine whether a state agency may bring in civil litigation and be subject to party discovery. *Cf. Republican Party v. N.M. Taxation & Revenue Dep't*, 2012-NMSC-026, ¶¶ 43-47, 283 P.3d 853 (holding that the Governor may invoke executive privilege to withhold agency documents).

II. The Attorney General does not have the authority to bring actions on behalf of state agencies or compel them to participate in party discovery without their consent

Like the Governor, the Attorney General is an independently elected official within the Executive Branch. N.M. Const. art. V, § 1. However, in contrast to the Governor's "supreme executive power" and other explicit provisions contained in the constitution, the constitution is silent as to the Attorney General's powers. In passing on the authority of the Attorney General, this Court has held that "no common-law powers were confirmed in the office of Attorney General by our Constitution." *State v. Davidson*, 1929-NMSC-016, ¶ 9, 33 N.M. 664, 275 P. 373. Further, this Court has recognized that because "[t]he State Constitution does not prescribe the duties of the Attorney General, . . . the Legislature, unless limited by some direct constitutional provision, has the power to direct how, when, where, and by whom the state shall be represented in all matters, whether of litigation or otherwise." *State ex rel. Clancy v. Hall*, 1917-NMSC-070, ¶ 12, 23 N.M. 422, 168 P. 715.

Consistent with this Court's holdings, the Legislature created the Department of Justice, commonly known as the Office of the Attorney General, and bestowed upon it certain duties and authority. *See generally* NMSA 1978, §§ 8-5-1 to -18 (1933, as amended through 2019). Among other things, the Attorney General has the duty and authority to "prosecute and defend in any other court or tribunal all

actions and proceedings, civil or criminal, in which the state may be a party or interested when, in his judgment, the interest of the state requires such action or when requested to do so by the governor," Section 8-5-2(B), and to "prosecute and defend all actions and proceedings brought by or against any state officer or head of a state department, board or commission, or any employee of the state in his official capacity," Section 8-5-2(C). The Attorney General also has the authority to settle any civil proceedings in which the State is a party. *See* § 36-1-22; *see also* NMSA 1978, § 36-1-19(A) (1985) (providing that "no one shall represent the state . . . in any matter in which the state . . . is interested except the attorney general, his legally appointed and qualified assistants").

As fully explained by the Attorney General—and contrary to Petitioners' assertions—none of the above statutory provisions permits the Attorney General to file a lawsuit on behalf of a state agency or compel that agency to participate in party discovery without its consent. *See* Answer Brief of Real Party in Interest the State of New Mexico ("Answer Brief") at 15-18 (filed Oct. 24, 2022); Petitions' Supplemental Brief in Chief at 11-14, 22-23 (filed Oct. 3, 2022). And this makes sense, as any statute purporting to give the Attorney General such unilateral authority would flip the traditional attorney/client relationship on its head. When the Attorney General files an action on behalf of an agency, he does so as an attorney on behalf of his client. *See Santa Rita Mining Co. v. Dep't of Prop. Valuation*, 111

Ariz. 368, 371, 530 P.2d 360 (1975) ("The Attorney General is the attorney for the agency, no more."). Each agency has the right to authority to initiate lawsuits, and it should be up to them to make that decision—not their attorney. *Cf. Marchman v. NCNB Tex. Nat'l Bank*, 1995-NMSC-041, ¶ 56, 120 N.M. 74, 898 P.2d 709 (stating that an attorney is the client's agent); *Romero v. Mervyn's*, 1989-NMSC-081, ¶ 11, 109 N.M. 249, 784 P.2d 992 ("Authority is the power of the agent to affect the legal relations of the principal by acts done *in accordance with the principal's manifestations of consent to the agent*." (alterations, internal quotation marks, and citation omitted) (emphasis added)).

As the Supreme Court of North Dakota observed,

> [A]lthough it is perfectly obvious under the statute that the attorney general is the general and the legal adviser of the various departments and officers of the state government, . . . this does not mean that the attorney general, standing in the position of an attorney to a client, who happens to be an officer of the government, steps into the shoes of such client in wholly directing the defense and the legal steps to be taken in opposition or contrary to the wishes and demands of his client or the officer or department concerned.

State ex rel. Amerland v. Hagan, 44 N.D. 306, 311, 175 N.W. 372, 374 (1919), *overruled on other grounds by Benson v. North Dakota Workmen's Compensation Bureau*, 283 N.W. 2d 96 (N.D. 1979)); *see also Motor Club of Iowa v. Dep't of Transp.*, 251 N.W.2d 510, 514 (Iowa 1977) ("Far from imposing the will of the attorney general on a branch of government we believe [a statute stating that the Iowa attorney general has the duty to '[p]rosecute and defend all actions and

proceedings brought by or against any state officer in his official capacity'] merely enables state officers to utilize the services of the attorney general.").

More importantly, however, reading any of the above statutes to allow the Attorney General to unilaterally initiate lawsuits on behalf of agencies or compel their participation in discovery would violate separation of powers. "The executive department is independent within its own sphere and has the implied rights vested in it by the Constitution in order to maintain its independence." *State ex rel. Attorney Gen. v. First Judicial Dist. Court*, 1981-NMSC-053, ¶ 16, 96 N.M. 254, 629 P.2d 330, *overruled on other grounds by Republican Party v. N.M. Taxation & Revenue Dep't*, 2012-NMSC-026, 283 P.3d 853. The Legislature cannot grant the Attorney General authority over state agencies in derogation of the Governor's "supreme executive authority." *See Clancy*, 1917-NMSC-070, ¶ 12 ("[T]he Legislature, *unless limited by some direct constitutional provision*, has the power to direct how, when, where, and by whom the state shall be represented in all matters, whether of litigation or otherwise." (emphasis added)). It would also be improper for the judicial branch to redistribute the powers within the Executive Branch, jeopardizing its carefully calculated independence. *See State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 23, 125 N.M. 343, 961 P.2d 768 (stating that a violation of separation of powers occurs "when the action by one branch prevents another branch from accomplishing its constitutionally assigned functions").

Yet that is precisely what Petitioners ask this Court to do—all so it may obtain discovery more conveniently. The Court should not, and cannot, grant such a request. If the Attorney General can unilaterally initiate suit on behalf of a state agency, he could effectively make substantive policy decisions on behalf of those agencies that run contrary to the Governor's direction. Take, for example, the Attorney General filing a lawsuit on behalf of an agency to enjoin a course of action the agency and the Governor believes to be lawful and in the public interest. Either the agency must cooperate against its will (and the direction of the Governor) or face judicial sanctions for refusing to participate. The same goes for requiring agencies to participate in party discovery in suits brought without their consent. Although seemingly not as egregious as the previous example, the Attorney General could disrupt agency operations by filing lawsuits requiring substantial discovery and coerce them into assisting the prosecution of matters which the agency or the Governor believes need not or should not be prosecuted.

The foregoing scenarios are plainly incompatible with the New Mexico constitution and detrimental to the orderly administration of the Executive Branch. [2]

[2] The Governor does not dispute the Attorney General's duty and prerogative to initiate suits even when (or perhaps *especially* when) he disagrees with the Governor. *See* Marshall, *supra*, 115 Yale L.J. at 2248. However, this does not mean that agencies ultimately responsible to the Governor must cooperate in such suits unless otherwise compelled to do so such as through a third-party subpoena or other process.

Cf. Tice v. Dep't of Transp., 67 N.C. App. 48, 55, 312 S.E.2d 241 (1984) ("[The] power in the Attorney General to resolve, without their consent, controversies involving agencies or departments under the supervision of the Governor, could be abused by exercise in a manner effectively derogative of the Governor's constitutional duties to exercise executive power and to supervise the official conduct of all executive officers."); *Commonwealth v. Ortho-Mcneil-Janssen Pharm., Inc.*, 30 Mass. L. Rep. 377 (2012) ("If this Court were to conclude that state agencies, even those within the executive branch, necessarily become 'parties' for discovery purposes any time that the Attorney General exercises her exclusive authority to bring an enforcement action, that could upset the constitutional balance of power.").

Petitioners argue the Court should reach a contrary conclusion because the Attorney General initiated the instant suit—as it has countless others—in the name of "the State," which "includes its component parts." Brief in Chief at 2, 9, 11-21. Petitioners' argument may have some initial appeal, but it is nonetheless wrong. Although the State's interests often overlap with state agencies, they are distinct and should be treated as such. *Cf. Ortho-Mcneil-Janssen Pharm.*, 30 Mass. L. Rep. 377 (observing that "departments within the executive branch do not speak with a single voice" and "have different functions and spheres of responsibility"); *Commonwealth ex rel. Hancock v. Paxton*, 516 S.W.2d 865, 868 (Ky. 1974) ("[I]n case of a conflict

of duties the Attorney General's primary obligation is to the Commonwealth, the body politic, rather than to its officers, departments, commissions, or agencies."). Here, it is clear the Attorney General is not representing any agency and is only seeking relief on behalf of the State; any damages awarded will flow into the general fund (controlled by the Legislature)—not to any agency. *See* Petition Exhibit 1 at 1, 59-60; *see also* Brief in Chief at 4 (clarifying which causes of action remain).[3]

True, some state agencies may at times have information and evidence relevant to the State's claims. But this does not, *ipso facto*, transmute them into parties subject to discovery. Without some sort of special nexus to the litigation or express consent to be a party thereto, state agencies should not be haled into court and burdened with discovery every time the Attorney General brings suit. Such a conclusion is consistent with the New Mexico criminal case law Petitioners cite. Petitioners point to several civil[4] and criminal cases to show that the Attorney

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[3] None of the remaining causes of action, such as the New Mexico Unfair Practices Act or the New Mexico False Advertising Act, specify which fund the Attorney General must deposit any monetary award it recovers. *See* NMSA 1978, §§ 57-12-1 to -26 (1967, as amended through 2009); NMSA 1978, §§ 57-15-1 to -10 (1965, as amended through 1967). Consequently, the Attorney General must deposit any funds into the general fund—controlled exclusively by the Legislature. *See* NMSA 1978, § 6-10-3 (2011); NMSA 1978, § 6-4-2 (1957).

[4] The civil New Mexico case law Petitioners cite are factually distinguishable insofar as they did not involve the question of the Attorney General forcing the agencies' affirmative cooperation—just the preclusive effect of the Attorney General or district attorney's decisions to settle cases. *See State Collyer v. State Taxation & Revenue Dep't Motor Vehicle Div.*, 1996-NMCA-029, 121 N.M. 477, 913 P.2d 665;

General can bind agencies to judgments and discovery. *See* Brief in Chief at 15-16. But, as Petitioners acknowledge, the *Brady* rule in criminal discovery only applies to those agencies playing a role in investigating or prosecuting the defendant. *See* Brief in Chief at 15 (quoting *Case v. Hatch*, 2008-NMSC-0024, ¶ 46, 144 N.M. 20, 183 P.3d 905, and *Mathis v. State*, 1991-NMSC-091, ¶ 1, 112 N.M. 744, 819 P.2d 1302). Here, in contrast, there is no claim that any state agency other than the Attorney General's Office had any involvement in the prosecution or investigation of this action.

Moreover, the criminal cases Petitioners cite make it clear that the agencies could not be forced to participate in criminal discovery—only that the prosecution would be penalized if the agencies did not cooperate. *See* Brief in Chief at 16 (quoting *United States v. Osorio*, 929 F.2d 753, 762 (1st Cir. 1991)). But, as fully explained by the Attorney General, applying the same penalties in the *civil* discovery context are unwarranted. *See* Answer Brief at 31-34. It would also be unconstitutional and defeat the purpose of the divided Executive Branch. *See* Marshall, *supra*, 115 Yale L.J. at 2248. As the district court recognized, such a result would "giv[e] the Governor and the agencies under her control a 'virtual veto' over

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Lyle v. Luna, 1959-NMSC-042, 65 N.M. 429, 338 P.2d 1060. Nor did they consider the important separation of powers issue raised by the parties here. *See Dominguez v. State*, 2015-NMSC-014, ¶ 16, 348 P.3d 183 ("The general rule is that cases are not authority for propositions not considered[.]" (alteration, internal quotation marks, and citation omitted)).

the policy decision to bring an enforcement action that rightfully lies with the Attorney General." Petition, Ex. 6 at 2 (quoting *Am. Express Co.*, 2011 U.S. Dist. LEXIS 156580, at *6).

Given the foregoing, the Court should reject Petitioners' arguments and hold that state agencies need not, and cannot, be forced into discovery in the Attorney General's actions brought on behalf of the State simply because they may have information or documents relevant to the litigation. *See Am. Express Co.*, 2011 U.S. Dist. LEXIS 156580, at *12 (rejecting similar argument and observing that "the decision to bring this antitrust action was not an instance of compulsory representation, or done specifically on behalf or in protection of any state agencies[; r]ather, the decision to pursue an enforcement action against Amex was one of policy, made independently of the State Governors and state agencies"); *In re Gold King Mine Release*, No. 1:18-md-02824-WJ, 2021 U.S. Dist. LEXIS 41591, at *24 (D.N.M. Mar. 5, 2021) (rejecting similar argument on the basis that the Attorney General is a separately elected official and cannot compel agency cooperation in discovery); *Colorado v. Warner Chilcott Holdings Co. III, Ltd.*, Civil Action No. 05-2182 (CKK)(AK), 2007 U.S. Dist. LEXIS 102652, at *15 (D.D.C. May 8, 2007) (declining to treat state Medicaid agencies as parties for purposes of discovery in an action brought by state attorneys general on behalf of their respective states when

the agencies were subject to gubernatorial control but the attorneys general were not).

III. Petitioners' logic, should it be accepted, would impermissibly extend the Attorney General's authority to the other branches and entities within State government

The Governor would be remiss not to point out that the she is not the only official or entity that will be affected should this Court rule that a suit brought by the Attorney General on behalf of the State requires non-consenting state agencies to participate in party discovery. The Judicial and Legislative branches are also "constituent parts" of "the State" according to Petitioners' logic. *See* Brief in Chief at 14-21; N.M. Const. arts. IV, VI. So, too, is the Public Regulation Commission and the state universities. *See* N.M. Const. arts. XI, XII. Why, then, would these entities not also be subject to party discovery whenever the Attorney General that brings a suit on behalf of the State and those entities have relevant information or documents? While they may not be within the same branch as the Attorney General, any ruling by this Court contravening the internal separation of powers within the Executive Branch would seemingly extend to other entities and branches of state government according to Petitioners. *Cf. New York v. AMTRAK*, 233 F.R.D. 259, 263 (N.D.N.Y. 2006) ("The New York State Constitution in its infinite wisdom contemplated a separation of powers within the executive branch of government."); *see also State v. Gonzales*, 2002-NMCA-071, ¶ 22, 132 N.M. 420, 49 P.3d 681 ("Separation of

powers doctrine prevents one branch of government from unduly encroaching on or interfering with the authority of another branch of government.").

And even if the Court cabins its holding to agencies within the same branch as the Attorney General, it would necessarily subject other independent executive officers and entities—such as the State Auditor, the Secretary of State, and the State Ethics Commission—to the Attorney General's control (or alternatively, give them a "virtual veto" over the policy decision to bring an enforcement action that rightfully lies with the Attorney General should they not cooperate in discovery). *Am. Express Co.*, 2011 U.S. Dist. LEXIS 156580, at *6. The Court should, therefore, carefully consider the ramifications of adopting Petitioners' overly simplified view of the New Mexico Constitution.

IV. Petitioners can obtain all the discovery they need without violating the separation of powers between the Governor and Attorney General

In a last-ditch effort, Petitioners urge this Court to ignore the separation of powers doctrine and unconstitutionally expand the Attorney General's powers simply to "even the playing field" in discovery. Brief in Chief at 27-33. The Court should not be led astray by such an argument. As an initial matter, there is nothing inherently wrong with recognizing an advantage (even a significant advantage) benefiting the State and not its opposing party. The government has historically enjoyed substantial advantages in litigation by virtue of its special status. *See, e.g.*,

NMSA 41-4-1 to -27 (1978, as amended through 2020) (only permitting certain causes of action against the government, providing a shortened statute of limitations, capping liability, and prohibiting punitive damages); Rule 1-055(E) NMRA (allowing default judgments against the State only when the claimant affirmatively establishes his right to relief); Rule 1-062(E) NMRA (automatically granting a stay pending appeal in most instances when the government files an appeal). The real question, then, is whether requiring those defending against the Attorney General to obtain information and documents from other non-consenting state agencies via third-party discovery and other mechanisms is *too unfair*. It is not.

Petitioners are free to issue third-party subpoenas to state agencies for relevant and non-privileged documents or depositions. *See* Rule 1-045 NMRA. The Governor, as always, will ensure the agencies under her authority will comply with such subpoenas in good faith and only challenge them should they have valid, non-frivolous reasons to do so. While this may be more burdensome for Petitioners at times, they cannot claim they are totally foreclosed from gaining access to the information they believe is necessary to muster a defense. Petitioners counter that third-party discovery is inadequate because they cannot propound requests for admission and interrogatories, yet they fail to explain how that actually prejudices

them when they can *depose* third parties. *See* Brief in Chief at 32.[5] They also claim they "would be left guessing which agencies possess relevant information on which particular topics" but fail to acknowledge they can gather this information from the Attorney General through party discovery or perhaps simply reading the complaint and doing independent research. *See id.*

Petitioners are also free to utilize the Inspection of Public Records Act ("IPRA"), NMSA 1978, §§ 14-2-1 to -12 (1947, as amended through 2019), which provides Petitioners with greater access to documents in many ways because agencies cannot simply deny a request for being overly burdensome or irrelevant to the litigation. *Compare id.*, *with* Rule 1-026(B) NMRA. Additionally, in preparing for litigation, the Attorney General's Office itself will likely acquire substantial information and documentation to support its claims, which would be subject to party discovery. For all of these reasons, it is unnecessary to require non-consenting state agencies to be treated as parties in this suit.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for writ of

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[5] Petitioners do point out that the Attorney General has taken the position that deposition testimony from state agencies or their personnel would not be binding on the State as party admissions. Brief in Chief at 33. However, Petitioners do not explain how this will realistically jeopardize their defense. *See id.* Nor does it does appear the Attorney General's argument has been addressed by the court below, and it should not be considered for the first time on appeal. *See Paule v. Santa Fe Cty. Bd. of Cty. Comm'rs*, 2005-NMSC-021, ¶ 29, 138 N.M. 82, 117 P.3d 240.

superintending control.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that, according to Rule 12-318(F) NMRA, this brief complies with type-volume, font size, and word limitations of the New Mexico Rules of Appellate Procedure. The body of this brief employs 14-point Times New Roman font and contains 5,111 words, counted using Microsoft Office Word.

/s/ Holly Agajanian
Holly Agajanian

CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2022, I filed the foregoing through the New Mexico Electronic Filing system, which caused all counsel of record to be served by electronic means.

/s/ Holly Agajanian
Holly Agajanian